IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

DAVID GREGORY JACKSON,

Respondent.

CASE NO. 66,728

FILED
SID J. WHITE
OCT 17 1985
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

PETITIONER'S REPLY BRIEF ON THE MERITS

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AUTHORITIES CITED

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SUMMARY OF ARGUMENT

Petitioner submits the respondent failed to apprize the trial court that the defense desired the instruction pursuant to Ivester v. State, 398 So.2d 926 (Fla. 1st DCA 1981), in lieu of an instruction pursuant to sections 776.051 or 776.012, Florida Statutes (1983). The trial court was never given any guidance on how the defense planned to interject the instruction pursuant to Ivester, supra, with the other standard jury instructions.

The defense did not present any evidence of self-defense. The state's case, likewise, did not contain any evidence of self-defense; rather, the testimony elicited in the state's case in chief was that the respondent initiated the violence and the police responded with appropriate force. There was no evidence presented at either phase of the trial to support the contention that respondent's resistance was pursuant to excessive force.

ARGUMENT

JACKSON V. STATE, 463 So.2d 372 (Fla. 5th DCA 1985), SHOULD BE REVERSED BECAUSE THE APPELLANT FAILED TO PRESENT ARGUMENT AT THE TRIAL COURT LEVEL, THERE WAS NO EVIDENCE TO SUPPORT THE JURY CHARGE, AND, UNDER THE CIRCUMSTANCES OF THE FACTS IN THE CASE AT BAR, THE JURY INSTRUCTIONS WERE ADEQUATE.

Respondents submit that defense counsel below objected to the giving of instructions based on the standard jury instructions (criminal) 3.04(d), i.e. the defendant was not justified in the use of any force to resist an arrest and therefore, the defendant could not be acquitted on the grounds of self-defense if he was being arrested (RBM 2).[1] Presumably respondent is referring to the instructions predicated upon section 776.051(1), Florida Statutes (1983).[2] Respondent also maintains: "... No where in the transcript of the charge does the defendant request the objectionable portion of the given instructions" (RBM 10).[3] No where in the pages cited by respondent (R 293-326), does it reveal that the defense counsel requested an instruction pursuant to Ivester v. State, 398 So.2d 926 (Fla. 1st DCA 1981), in lieu of section 776.051(1). The defense counsel argued that the holding of Ivester,

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[1] The abbreviation "RBM" will be used to denote specific portions of respondent's brief on the merits.

[2] (1) A person is not justified in the use of force to resist an arrest by a law enforcement officer who is known, or reasonably appears to be a law enforcement officer.

[3] Respondent's counsel did check a form requesting the trial court to give Florida Standard Jury Instructions (criminal) 3.04 (464).

stood for the proposition that section 776.051(1) and 776.012, Florida Statutes (1983),[4] were not inconsistent (R 300). Defense counsel argued that section 776.012 did apply (R 323). Of course, the trial court did give the self-defense instruction pursuant to section 776.012 and instruction 3.04(d) (R 359-360). In order to preserve the issue for review, however, the defense counsel must have affirmatively requested the instructions pursuant to Ivester, in lieu of the objectionable portion of the given instruction. The trial court should not have to guess or presume how the defense wants to tender an instruction.

Respondent asserts that the preservation issue was not argued to the Fifth District Court of Appeal, and therefore cannot be argued in front of this court. Excerpts from petitioner's answer brief filed with the Fifth District Court of Appeal would belie this contention (App. 1-4). Petitioner's submits this issue was raised at the district court level, especially when one considers the initial brief filed by respondent (App. 5-8).

Respondent cites the cases of Trushin v. State, 425 So. 2d 1126, 1130 (1983), and State v. Hegstrom, 401 So.2d 1343, 1344 (Fla. 1981), to support his argument that this court cannot review a district court opinion where an issue was not argued to that lower court. Asumming for the sake of argument that petitioner

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[4] A person is justified in the use of force, except deadly force, against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's immanent use of unlawful force. However, he is justified in the use of deadly force only if he reasonably believes that such force is necessary to prevent immanent death or great bodily harm to himself or another or to prevent the immanent commission of forcible felony.

did not argue the procedural issue below, respondent's argument would still be to no avail. Trushin, was predicated not only on a failure to make an argument at the appellate court level but the failure to preserve the issue at the trial level. A trial court's order or holding should be sustained if there is any theory revealed by the record that would uphold that ruling, even though the ruling may have been entered for the wrong reason. See, Robinson v. State, 393 So.2d 33 (Fla. 1st DCA 1981); Owens v. State, 354 So.2d 119 (Fla. 3d DCA 1978); and Postell v. State, 383 So.2d 1159 (Fla. 3d DCA 1980). Hegstrom, does not stand for the proposition that this court is without jurisdiction to hear an argument which was not presented to the lower appellate court. The latter proposition was recently stated by this court in the case of Jacobson v. State, 10 F.L.W. 542 (Fla. October 3, 1985), which reviewed conflict between opinions of two different district court of appeals. This court explained: "Having jurisdiction, we have jurisdiction over all issues. Savoie v. State, 422 So.2d 308 (Fla. 1982), and dispose of the case on a ground other than the conflict ground. Our decision moots the conflict issue ..."

Petitioner also claims that respondent has abandoned the cases used to establish conflict in the jurisdictional brief. At no time has respondent conceded or even impliedly admit that the case of Ivester, supra, does not conflict with the standard jury instructions promulgated by this court pursuant to In the Matter of the Use by the Trial Courts of the Standard Jury Instructions in Criminal Cases, 431 So.2d 594 (Fla. 1981). Additionally, petitioner would note that the jurisdictional brief alleged conflict

between Jackson, supra, and the case of Griffin v. State, 377 So. 2d 860 (Fla. 1st DCA 1979). Griffin, held there must be some evidence to support a requested jury instruction. Petitioner has submitted and still submits that there was no evidence to support the requested jury instruction and hence the issue of self-defense vis-a-vis such instructions would be moot.

Respondent suggest that self-defense was established by the police officer's testimony in the state's case in chief. Yet the testimony of Officers Borges and Brewster establish that their use of force was only used to counteract respondent's violence. The officer's testimony was that respondent initiated the violence and that they only responded with appropriate and necessary force (R 137-145,156-171,175-176,182-187,193-206,208-210). As such, any self-defense instructions would be superfluous at least for the case at bar, notwithstanding any conflict between the standard jury instruction and the instruction promulgated pursuant to Ivester, supra.

CONCLUSION

Based on the arguments and authorities presented herein, petitioner respectfully prays this honorable court affirm the judgment and sentence of the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing reply brief on the merits has been furnished, by delivery, to James R. Wulchak, Assistant Public Defender for respondent, this 15th day of October, 1985.

W. Brian Bayly

W. BRIAN BAYLY
ASSISTANT PUBLIC DEFENDER

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