IN THE FLORIDA SUPREME COURT

JACK WILSON MERCHANT,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 67857

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

BRIEF OF PETITIONER ON JURISDICTION

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BRIEF OF PETITIONER ON JURISDICTION

I PRELIMINARY STATEMENT

Petitioner was the appellant in the lower tribunal and the defendant in the trial court. The parties will be referred to as they appear before this Court. Attached hereto as Appendix A is the opinion of the lower tribunal. Appendix B contains exhibits from the record on appeal.

II STATEMENT OF THE CASE AND FACTS

Guy Arthur, the victim in this case, testified that he went to visit his girlfriend, Linda Cowen, and upon entering her house noticed smoke inside. He looked out the window and saw grass burning along the fence which separated the yards of Ms. Cowen and Merchant. He then proceeded to extinguish the fire with a garden hose, at which point Merchant appeared from his house yelling at him to leave the fire alone. Merchant then went into his house, returned with a gun and shot him in the chest without warning at a distance of ten feet.

In his defense, Merchant testified that he returned to his house for matches and when he knelt to rekindle the fire Arthur came towards him, attempting to swing the hose in his direction.

Through proffer, Merchant stated he was afraid of the victim because he had earlier learned Arthur had spit towards two of his female neighbors three to four weeks prior to the shooting. This statement was offered to prove his state of mind and as evidence of a prior violent act on the part of Arthur. The trial court ruled against the proffered testimony holding that it would not show the violent nature of the victim.

At the charge conference, Merchant requested the jury be instructed that he was justified in using deadly force to prevent an aggravated assault or aggravated battery upon him with a garden hose. The court denied the request. Merchant also requested an instruction on defense of home and no duty to retreat which was denied. (Appendix A at 1-2).

The First District held that since the victim's garden hose could not be a deadly weapon as a matter of law, there was

no error in refusing to allow evidence of a prior violent act by the victim and also no error in denying appellant's requested instruction on self defense to repel an aggravated assault or aggravated battery. (Appendix A at 3).

Petitioner also challenged the assessment of 50 points on his sentencing guidelines scoresheet for a prior second degree murder conviction from Bay County (Appendix B at 1-5). This conviction was scored as a life felony (Appendix B at 6). Petitioner argued the second degree murder conviction should have been scored as a first degree felony punishable by life (40 points) which would reduce his point total to 223, calling for a 5 1/2 to 7 year sentence. The First District refused to reach the issue (Appendix A at 4).

On November 4, 1985, a timely notice of discretionary review was filed.

III SUMMARY OF ARGUMENT

Petitioner will present two separate bases for conflict jurisdiction. First, petitioner will argue that the First District had no right to determine the victim's garden hose was not a deadly weapon as a matter of law so as to justify the exclusion of testimony about prior violent acts by the victim and to justify the refusal to give an instruction on self defense to repel an aggravated battery or aggravated assault. This holding is conflict with several other cases which hold that the nature of a weapon as a deadly weapon is a question for the jury.

The second claim of conflict arises because the First District refused to address a scoring error on the sentencing guidelines scoresheet, which was apparent from the face of the record.

IV ARGUMENT

ISSUE I

THE FIRST DISTRICT'S DECISION IS IN EXPRESS AND DIRECT CONFLICT WITH PRIOR CASES WHICH HOLD THAT THE CHARACTER OF A WEAPON AS A DEADLY WEAPON IS A QUESTION OF FACT FOR THE JURY AND NOT A QUESTION OF LAW FOR THE COURT.

The First District found the victim's garden hose, which petitioner believed was going to be used as a weapon against him, was not a deadly weapon as a matter of law. Petitioner sought to introduce prior violent acts of the victim as part of his belief that he acted in self defense in shooting the victim. The First District found the exclusion of this evidence was proper since petitioner could not have acted in self defense by using deadly force to repel an assault or battery by a victim who wheeled a nondeadly garden hose. Likewise, the First District approved the refusal of the lower court to instruct the jury on petitioner's right to repel an anticipated aggravated battery or aggravated assault, as provided in the second part of Florida Standard Jury Instruction 3.04(d) at 41, which is derived from Section 776.08, Florida Statutes (1983).

The First District's determination that a garden hose can never be a deadly weapon is in conflict with the following decisions, which collectively hold that the character of an object as a deadly weapon is a question of fact for the jury: Lindsay v. State, 67 Fla. 111, 64 So. 501 (1914); Goswick v. State, 143 So.2d 817 (Fla. 1962)(steel rod); Rogan v. State, 203 So.2d 24

(Fla. 3d DCA 1967)(flower pot); Forchion v. State, 214 So.2d 751 (Fla. 3d DCA 1968)(stick); Colainni v. State, 245 So.2d 893 (Fla. 2d DCA 1971)(hammer); Johnson v. State, 249 So.2d 452 (Fla. 4th DCA 1971)(shoe); and J.M.C. v. State, 331 So.2d 366 (Fla. 3d DCA 1976)(stick).

This Court must grant discretionary review to resolve this conflict.

ISSUE II

THE FIRST DISTRICT'S DECISION TO REFUSE TO REVIEW A SCORESHEET ERROR IS IN DIRECT AND EXPRESS CONFLICT WITH OTHER CASES AND SHOULD BE REVIEWED WITH TWO OTHER FIRST DCA CASES CURRENTLY PENDING REVIEW.

The First District in the instant case, citing Dailey v. State, 471 So.2d 1349 (Fla. 1st DCA 1985), review pending, No. 67,381, held that the error in scoring a prior second degree murder as a life felony, instead of a first degree felony punishable by life (Section 782.04(2), Florida Statutes (1973)) could not be addressed for the first time on appeal. This decision is in conflict with Tucker v. State, 464 So.2d 211 (Fla. 3d DCA 1985), in which the court held that scoresheet errors may be raised for the first time on appeal. It is also in conflict with State v. Rhoden, 448 So.2d 1013 (Fla. 1984)(juvenile sentenced as an adult); Walker v. State, 462 So.2d 452 (Fla. 1985)(habitual offender); and State v. Snow, 462 So.2d 455 (Fla. 1985)(retention of jurisdiction), which collectively hold that sentencing errors, which violate a specified statutory scheme, may be raised for the first time on appeal.

Dailey held that unpreserved scoresheet errors which are not apparent from the face of the record could not be reviewed. Here, even under the Dailey view, the prior judgment and sentence (Appendix B at 1-5) was in the record and could have been reviewed. Curiously, the First District held in Whitfield v. State, 471 So.2d 633 (Fla. 1st DCA 1985), review pending, No. 67,320, oral argument set for February 11, 1986 and Brown v. State, 474 So.2d 346 (Fla. 1st DCA 1985), review pending, No. 67,718, that the erroneous assessment of points for victim injury on the scoresheet could be raised for the first time on appeal since the error was apparent from the face of the record. This Court should accept review because of conflict with Tucker. This Court should also accept review because the same issue is currently pending review before this Court in Whitfield and Dailey. See also, Jollie v. State, 405 So.2d 418 (Fla. 1981).

V CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, Petitioner requests that this Court accept review of both issues and proceed to decide both on the merits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above Brief of Petitioner on Jurisdiction has been furnished by hand to Assistant Attorney General John M. Koenig, Jr., The Capitol, Tallahassee, Florida 32301; and by U.S. Mail to Petitioner, JACK WILSON MERCHANT, #044211-E-99, Post Office Box 500, Olustee, Florida 32072 on this 5 day of November, 1985.

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER