O/a 11-8-88

IN THE SUPREME COURT
STATE OF FLORIDA
CASE NO. 72,402
DCA CASE NO. 87-926

CITY OF ORLANDO,

Petitioner,

V.

ALAN BIRMINGHAM,

Respondent.
_____/

PETITIONER, CITY OF ORLANDO'S REPLY BRIEF

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SUMMARY OF ARGUMENT

The lower court opinion in Birmingham v. City of Orlando, 523 So. 2d 647 (Fla. 5th DCA 1988) represents a radical departure from a well established body of law interpreting the fundamental error rule. The fundamental error rule should remain an extremely limited exception to the contemporaneous objection rule. It is of paramount importance that the contemporaneous objection rule remain the law of Florida; otherwise, Appellate Courts will be dealing with an endless stream of untimely objections raised for the first time on appeal which should have been considered by the trial court and raised at the charge conference.

A review of the record shows that the Respondent failed to timely and adequately object to certain jury instructions and even failed to object to the modification of a jury instruction made by the court during the actual charge to the jury. If proper objection was made, these matters would have been resolved by the lower court and fundamental error simply did not occur. When the instructions are considered in their entirety, the jury was properly charged on the law.

We believe application of the two issue rule is a condition precedent to determination of fundamental error. It obviously cannot be said that the result would have been different if the judgment is independently sustainable on alternative grounds. Here, the jury could well have determined that there was no causal relationship between the Plaintiff's claimed injuries and his arrest. This Court should reverse and reinstate the judgment in favor of the City of Orlando.

ARGUMENT

ISSUE I

IN ERRONEOUSLY APPLYING THE FUNDAMENTAL ERROR RULE THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH A PRIOR DECISION OF THE FLORIDA SUPREME COURT AND THE THIRD DISTRICT COURT OF APPEAL

This Court unquestionably has conflict jurisdiction over the instant case pursuant to Fla. R. App. P. 9.030(2)(A)(iv). This jurisdictional grant has been viewed broadly by the Supreme Court and authorizes jurisdiction even in those instances where there is some statement or citation in the opinion that hypothetically could create conflict if there were another opinion reaching a contrary result. See The Florida Star v. B. J. F., 13 FLW 518 (Fla. Sept. 1, 1988) at page 519. When examined in light of this broad interpretation and in accordance with traditional authorities, the Fifth District Court of Appeal in Birmingham v. City of Orlando, 523 So.2d 647 (Fla. 5th DCA 1988) created conflict with prior decisions and this Court properly accepted jurisdiction.

Respondent baldly asserts that "probable cause is a fiction in this case" (Respondent's Merits Brief, page 15). Respondent further erroneously contends that "an officer does not need probable cause to arrest a misdemeanant without a warrant--an officer must see the misdemeanor occur. It is as simple as that ... no probable cause" (Respondent's "Reply" (sic) Brief on the Merits page 15). Respondent's contentions are ill founded and are completely incorrect. These contentions are patently erroneous since probable cause has

traditionally been, and should continue to be, a valid defense in false arrest/false imprisonment cases. See City of Hialeah v. Rehm, 455 So.2d 458 (Fla. 3rd DCA 1984) at page 461, Pet. for Rev. Den. 462 So.2d 1107; Toomey v. Tolin, 311 So.2d 678 (Fla. 4th DCA 1975) at page 681, Cert. Dism. 336 So.2d 604; City of Miami v. Albro, 120 So.2d 23 (Fla. 3rd DCA 1960) at page 26.

City of Hialeah held that a police officer making a warrantless arrest for an alleged commission of a misdemeanor in his presence is not liable for false arrest or false imprisonment if he has probable cause or substantial reason to believe that the arrested person was committing a misdemeanor in his presence. Accordingly, probable cause is a proper legal defense and anything but a fiction. We believe any contention to the contrary is simply wishful thinking on the part of the Respondent. See also Toomey v. Tolin, supra at page 681. In fact, Toomey, a case cited by the Respondent on page 15 of his brief, is diametrically contrary to Respondent's position on this issue. In determining the legality of a warrantless arrest, the decisive factor is not whether the person charged is actually guilty, but rather whether or not the officer had a substantial reason to believe that the plaintiff was comitting a misdemeanor. If substantial reason exists, the court cannot second guess the officer in the performance of his duty. City of Miami v. Albro, 120 So.2d 23 (Fla. 3rd DCA 1960) at page 26. Here the jury concluded that the arresting officers reasonably believed a misdemeanor had been committed in their

presence and an arrest was justified. Probable cause was clearly a proper issue upon which to charge this jury and the trial court certainly was sailing on the right course with no fundamental misdirection.

The instructions as to probable cause when read as a whole do not demonstrate reversible fundamental error. In order to determine the propriety of a challenged instruction, all jury instructions must be considered in their entirety and not in isolated portions. Chambers v. Nottebaum, 96 So.2d 716 (Fla. 3rd DCA 1957) at page 722. If anything, the instructions actually impose a higher standard upon Petitioner, City of Orlando than the law requires. The jury was instructed that a police officer "... must be certain that beyond a reasonable doubt there is no questions (sic) that a crime has been committed." Contrary to the Respondent's unsupported assertions, timely objection would have clearly cured this misread instruction.[1] Furthermore, error, if any at all, favored the Respondent and was clearly harmless.

Respondent further alleges that the instruction on civil disobedience was an additional example of fundamental error. Contrary to Respondent's assertion, trial counsel did not make

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1. This instruction was not read as submitted to the trial court (compare R544 with R623). However, no objection to the misreading of this instruction was made at trial (R550-551). Timely objection would certainly have corrected this instruction.

any specific, sufficient legal objection regarding the definition of civil disobedience. (R-474) ["All I see, it say's Webster's"]. Respondent offered no other definition and civil disobedience is a proper legal defense authorized by Fla. Stat. §768.28(12).[2] To date neither Respondent nor the Fifth DCA has proposed a better definition of this legal defense. With no Florida civil case law to use for guidance, it was perfectly appropriate to rely on a dictionary's definition.[3] What else was the trial court to do unless it made its own ad hoc definition? No fundamental error occurred regarding this issue especially since the jury was instructed that a citizen must obey reasonable requests of a police officer (R-544).[4]

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2. No action may be brought against the State or any of its agencies or subdivisions by anyone who unlawfully participates in a riot, unlawful assembly, public demonstration, mob violence, or civil disobedience if the claim arises out of such riot, unlawful assembly, public demonstration, mob violence or civil disobedience.

3. Other Florida Courts including the Fifth DCA have relied on definitions provided by Webster's Dictionary. See Collins v. State, 496 So.2d 997 (Fla. 5th DCA 1986) at page 999, Rev. Den. 506 So.2d 1040.

4. Since the jury was instructed on obeying reasonable police requests Respondent's far fetched example of a request to stand on one's head and sing on page 17 of the "Reply" (sic) Brief on the Merits is inapplicable.

The remainder of the arguments contained in Respondent's Brief under the heading Argument, Issue I should not be considered because the issues raised therein were not ruled on by the Fifth DCA. The Fifth DCA overturned the jury verdict and remanded the case for a new trial due to alleged errors in the instructions regarding probable cause and civil disobedience only. Respondent's contentions regarding resisting arrest instructions are untimely and have not properly been preserved. The jury was properly instructed that a person is not justified in resisting an arrest by a law enforcement officer who he knows or reasonably appears to be a law enforcement officer. This instruction is an accurate statement of the law. See Fla. Stat. §776.051(1).

Ivestor v. State, 398 So.2d 926 (Fla. 1st DCA 1981), Pet. for Rev. Den., 412 So.2d 470 and its progeny Holley v. State, 464 So.2d 578 (Fla. 1st DCA 1984) Aff'd 480 So.2d 94 (Fla. 1985) dealt with situations where the accused had attempted to use the affirmative defense of self defense in response to a charge of resisting arrest with violence. Respondent was not charged with resisting arrest with violence; rather, he was charged with resisting arrest without violence (R-545). Respondent never requested the trial judge to read additional statutory provisions. The jury properly determined that the police officers in this case did not use excessive force. Birmingham himself admitted that he was not thrown to the ground, cut, scraped or bruised (R-314). He did not receive any fractures and was not hospitalized as a result of his

arrest (R-314). As in Holley supra, on affirmance, 480 So.2d at page 96, (the unlawful assault claim) the portion of the case unaffected by the challenged instructions should be affirmed. The jury was properly instructed in the amount of force that the police officers were able to employ in this case (R-544). There was simply no factual basis to support an unlawful assault claim.

Respondent's assertion that the standard jury instruction on false imprisonment was not read as written over objection by counsel for Birmingham is a gross misstatement (R-460,461). In fact, the court used this standard instruction as the basis of the questioned charge (R-458,540,541). Respondent agreed to the use of words intentional restraint and false imprisonment (R-460). The failure of the trial court to give standard jury instructions verbatum, without objection is not fundamental or reversible error. See Frankowitz v. Beck, 257 So.2d 918 (Fla. 3rd DCA 1972).

Clearly, the fundamental error doctrine does not apply to a situation where a timely objection would cure the alleged errors. See Wagner v. Nottingham Associates, 464 So.2d 166 (Fla. 3rd DCA 1985) at page 170 Pet. for Rev. Den. 475 So.2d 696. All of the authorities cited by Respondent in fact echoed the sentiments articulated by Petitioner. See Ashley v. Ocean Roc Motel, Inc., 518 So.2d 943 (Fla. 3rd DCA 1987) at page 945 (To preserve error on appeal, all objections to charges must be made at the conference.); North Miami General Hospital v.

Goldberg, 520 So.2d 650 (Fla. 3rd DCA 1988) at page 651 (Objection made to special jury interrogatories and instructions preserved error where plaintiff was attempting to create a strict liability claim although none existed as a matter of law.).

Fundamental error arises only when it affirmatively appears that the error could not have been cured if met with a timely objection. Wagner, supra at page 170. Fundamental error occurs when, no matter what was or could have been said by the other side at trial, the error which goes to the heart or foundation of the case so infects the verdict that it can be said the result would have been different if the error had not occurred. Marks v. Delcastillo, 386 So.2d 1259, 1267 (Fla. 3rd DCA 1980) Rev. Den. 397 So.2d 778 (Fla. 1981). This is certainly not true of Birmingham's claim against the City of Orlando. It is not enough that the result might be different. See Marks, supra at page 1267, footnote 15. Compare Marks, supra, at 1267-68 (fundamental error to enter a judgment for damages unrecoverable as a matter of law); Yoder v. Adriatico, 459 So.2d 449 (Fla. 5th DCA 1984), (verdict on counterclaim reversed where erroneously based on wrong tort theory and elements of cause of action not proven). It cannot be said that the instant outcome would certainly have been different since correct tort theories were presented to the jury and the judgment is supportable on independent grounds (See Argument Issue IIB). Furthermore, any alleged error certainly could have been cured through appropriate and timely objection in the instant case.

ARGUMENT
ISSUE II (A)

IN FAILING TO CONSIDER ALL OF THE JURY INSTRUCTIONS AS A WHOLE THE INSTANT OPINION DIRECTLY AND EXPRESSLY CONFLICTS WITH PRIOR DECISIONS OF THE SUPREME COURT AND OTHER DISTRICT COURTS OF APPEAL

We believe Respondent's hyperbole and bravado[5] fail to assist this Court in applying the fundamental policy issues raised by the instant case. Invective and ad hominem arguments simply are no substitute for logical evaluation and analytical application of decided precedent. Such criticisms are leveled by those whose positions fail to find adequate support in decided cases. Portions of instructions singled out for attack by Respondent avail him nothing since all instructions must be considered in their entirety. See Chambers, supra at page 722 and Grimm v. Prudence Mutual Casualty Co., 243 So.2d 140 (Fla. 1971) at page 143.

Petitioner's assertion the jury was never informed that in the case of a misdemeanor the officer must see the crime being committed is totally incorrect. They were informed that resisting without violence was a misdemeanor (R-545). They were informed that they must view the facts through the eyes of a reasonable and prudent police officer at the scene (R-543). One of the defensive instructions referred to violation of law in the presence of the officers (R-541). The record establishes that Respondent interfered with Officer Sims and the jury could determine Respondent acted disorderly in Sims presence (R-311,404-406,434-435,437-439).

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5. Such statements as "shallow and insulting".

Respondent concedes the fact that Officer Sims had sufficient probable cause to arrest ALAN BIRMINGHAM.[6] The assistance that Officer Hackney provided Officer Sims by arresting Respondent was thus lawful pursuant to Fla. Stat. §901.18 which states:

> "A peace officer making a lawful arrest may command the aid of persons he deems necessary to make the arrest. A person commanded to aid shall render assistance as directed by the officer. A person commanded to aid a peace officer shall have the same authority to arrest as the peace officer and shall not be civilly liable for any reasonable conduct in rendering assistance to that officer." (emphasis added)

As an assisting officer, Hackney had the same authority to arrest Respondent that Sims admittedly possessed. Sims advised Hackney that Respondent was interfering with Sims' completion of the investigation regarding Respondent's son, Todd, who had consumed alcohol and was the driver in a hit and run accident (R-435-437). Hackney was obviously assisting Sims who was continuing an investigation.

Respondent should be prohibited from now challenging the sufficiency of the evidence at this late date. Respondent's failure to make or renew a motion for a directed verdict at the close of all the evidence constitutes both a waiver of the right to have the trial court consider motions for judgment notwithstanding the verdict and also precludes an Appellate

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6. See page 21 of Respondent's 5th DCA Initial Brief ["Sims may have had probable cause to arrest BIRMINGHAM, but he did not"].

argument that a judgment is inappropriate due to the insufficiency of the evidence. Honda Motor Co., Ltd. v. Marcus, 440 So.2d 373 (Fla. 3rd DCA 1983) at page 375, Pet. for Rev. Dism., 447 So.2d 886. Cases cited by the Plaintiff, Fee, Parker, and Lloyd, P.A. v. Sullivan, 379 So.2d 412 (Fla. 4th DCA 1980), Cert. Den. 388 So.2d 1119, and Pickard v. Maritime Holdings Corporation, 161 So.2d 239 (Fla. 3rd DCA 1964), involve cases where the defendant at least moved for a directed verdict at the close of the plaintiff's case, but not at the close of all the evidence. Here Respondent made no motion whatsoever. Respondent has clearly failed to establish that appellate review absent appropriate motion is warranted, since the instant record fully supports the judgment in favor of Petitioner.

ARGUMENT
ISSUE II (B)

IN FAILING TO APPLY THE TWO ISSUE RULE TO THE INSTANT CASE, THE OPINION UNDER REVIEW EXPRESSLY AND DIRECTLY CONFLICTS WITH THE GONZALES V. LEON, 511 So.2d 606 (FLA. 3rd DCA 1987) Rev. Den. 523 So.2d 577 AND OTHER CASES

It is rather ironic that the Respondent complains of failure to raise an Appellate issue while asserting fundamental error as a reason for reversal. Reversible fundamental error was unquestionably made by the Fifth DCA when it failed to apply the two issue rule in the instant case. If the Fifth DCA had applied the two issue rule the result would have been different since the record supports the judgment on alternative grounds such as no legal causation. Furthermore, the case of Middelveen v. Sibson Realty, Inc., 417 So.2d 275 (Fla. 5th DCA 1982), Pet. for Rev. Den. 424 So.2d 762 which also discusses application of the two issue rule, at page 276, was in fact argued and cited in Petitioner's Answer Brief in the Fifth DCA. Athough this issue could certainly have been raised much more directly below, two issue considerations are inherent in determining whether fundamental error occurred. It obviously cannot be said that the result would have been different if the judgment is sustainable on independent alternative grounds.[7] We also believe that the existence of a clear claim based on the two issue rule did not become fully evident until the Fifth DCA's surprising decision was rendered.

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7. Here either that there was no legal causal relationship or that the arrest itself was lawful because of considerations other than the existence of probable cause.

Even if the Court were to find that the citation of the Middelveen case was insufficient to raise the two issue rule, it is our opinion that this is a matter which substantially effects public interest. Matters substantially effecting the public interest, even though not raised in the court below, may be considered on appeal. See Northwest Florida Home Health Agency v. Merrill, 469 So.2d 893 (Fla. 1st DCA 1985) at page 900. Definition of the proper interplay between the interrelated concepts of the fundamental error rule and the two issue rule is certainly necessary in light of the instant opinion. This Court should mandate application of the two issue rule as a condition precedent to the determination of fundamental error.

The very heart of the two issue rule as stated by the Florida Supreme Court in Colonial Stores, Inc. v. Scarbrough, 355 So.2d 1181 (Fla. 1978) at pages 1185-1186 is that reversal is improper where no error is found as to one of the issues since the appellant is unable to establish prejudice. As in Gonzales v. Leon, 511 So.2d 606 (Fla. 3rd DCA 1987) Rev. Den. 523 So.2d 577, Respondent in the present case could have removed any question about what the jury decided by requesting that the jury first answer 1) whether Respondent was falsely imprisoned or arrested, and if so, separately answer 2) whether probable cause existed and 3) whether Petitioner's actions were a legal cause of damage to Respondent. Had the answers to the first two questions been yes and no respectively, the

Respondent would have been able to argue that he was harmed by the court's instruction. No such request was made and harmful error cannot be shown.

There is also ample evidence in the record for the jury to have found that either no legal causation existed or that BIRMINGHAM suffered no compensable injury (R-384,685,687,249). The video of Respondent shortly after this incident shows him moving freely (City's Exhibit No. 3, included but not numbered in the record). Respondent has not even contended any error exists regarding the causation issue. The judgment in favor of Petitioner could be fully supported on the issue of causation alone. The jury could rightfully disregard disputed medical testimony in light of evidence showing Respondents true motivation was to profit from litigation (R-384,684-687) and for that reason continued with complaints of physical injury.

CONCLUSION

This Honorable Court should reverse the opinion of the Fifth District Court of Appeal and reinstate the judgment in favor of the City of Orlando.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 26th day of September, 1988 by U.S. mail to JAMES FREELAND, DEBORAH C. EDENS, 126 E. Jefferson St., Orlando, FL 32801.

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