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IN THE SUPREME COURT OF FLORIDA

LAWRENCE TAYLOR,

Petitioner,

v. CASE NO. 79,095

STATE OF FLORIDA,

Respondent.

_____/

MERIT BRIEF OF PETITIONER

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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ATTORNEY FOR PETITIONER

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Respondent.	:	

MERIT BRIEF OF PETITIONER

I. PRELIMINARY STATEMENT

The opinion under review is Taylor v. State, District Court of Appeal Case No. 90-2210, opinion filed November 15, 1991. Filed with this brief is a copy of the opinion. References to pages in the appendix will be designated by "A".

11. STATEMENT OF THE CASE

Petitioner was convicted at trial of two counts of armed robbery with a firearm. Petitioner was sentenced on each count as an habitual violent felony offender to 35 years with a fifteen year minimum mandatory as well as a three year minimum mandatory for possession of a firearm. The sentences were imposed to run consecutively (A 2-3).

The First District Court of Appeal reversed petitioner's conviction on Count II and remanded with directions that the trial court enter a judgment of conviction for aggravated assault with a deadly weapon and resentence petitioner accordingly (A 6-7). In so ruling, the appellate court stated, "Because aggravated assault with a deadly weapon is a Category II lesser included offense of robbery with a firearm, we apply section 924.34 and order the trial court to enter the judgment of conviction in accordance with the above directive".

The Court further found that petitioner's offenses arose from a single incident and reversed petitioner's consecutive minimum mandatory sentences imposed pursuant to Section 775.087(2), Florida Statutes (1989), providing for a three year minimum mandatory sentence for possession a firearm during the commission of certain enumerated offenses (A 6-7).

However, the Court also held that petitioner could be sentenced to consecutive minimum mandatory sentences under the habitual violent felony offender statute, Section 775.084, (1989) (A 6-7).

The appellate court also found the trial court "did not err in admitting the testimony complained of or in granting the state's motion in limine" (A 1). This ruling by the appellate court is addressed in Issues III, IV, and V of this brief.

This Court granted discretionary review in this case.

This appeal follows.

III. STATEMENT OF THE FACTS

Kimberly Smith testified that she was working at Baskin-Robbins Ice Cream Store with Chris Elrod on November 12, 1989 (T 87) when the store was robbed (T 87). She was cleaning the area and had wiped the doors which lead into the store with windex (T 104).

Smith observed the robber enter the store through a door facing Fort Caroline Road. The robber first asked what kind of ice cream they had. He then ordered a scoop of ice cream. Smith prepared it and handed it to the robber with a spoon. These spoons are kept behind the counter in an area not accessible to customers. The robber picked the spoon up off the counter and stuck it in the ice cream (T 90-94).

When Smith started to ring the purchase, the robber lifted the shirt he was wearing and showed her a gun tucked in the waistband of his jeans. Smith could see only the handle of the gun which was light brown wood. The robber told her to give him the money. He motioned to Chris Elrod. When he saw Elrod near same spatulas in the sink, the robber started yelling at Elrod to get away from the sink.

The robber then showed Elrod the gun and told Elrod to take the money out of the cash register drawer and put it on the countertop. Elrod complied.

The robber picked up the money and instructed Smith and Elrod to go into an adjacent storage room and shut the door. They did this. After a few minutes, they exited, observed the robber was gone, and called the police (T 94-98).

Smith identified petitioner as the person who robbed the store (T 89).

Smith was shown a gun by the prosecutor. She agreed it could have been the gun. On cross-examination she agreed that she had no idea if that was the same gun used in the robbery (T 105; T 108). Smith also agreed that the gun could have been a toy gun (T 110).

Smith further agreed that she never handed the robber anything but the ice cream and the spoon, Elrod gave the robber the money (T 110-111).

Smith agreed she had described the robber as a couple inches over six feet, very thin, between 120 and 130 pounds, and small build (T 112). She had described the robber's face as a very long face with a high forehead and a very flat nose (T 113).

Smith agreed that at deposition she had stated that she was not sure if she would be able to recognize the robber (T 114). She had been shown photographs subsequent to the robbery and had not picked out anyone. She stated she viewed several pages of photographs (T 115).

Smith stated that the spoon she gave the robber came from a package that had already been opened. She agreed that customers could walk back in the area where the spoons were kept even though they were not supposed to. While she stated there was always someone from the store behind the counter, she agreed that she did not know who might have been behind the counter before she came to work that evening. She did not know

of any instance where a customer had been back in that area (T 116-117).

Christopher Elrod testified that on the evening of the robbery both he and Smith had access to the money in the cash register (T 123-124). Elrod was called over by Smith and the robber. The robber told Elrod to put down what Elrod was doing and to come over. Elrod then saw that the robber's hand was on a gun in the front of the robber's pants.

Elrod described the gun as having a brown handle and chrome or silver.

Elrod complied with the robber's command to hand the robber the money from the cash register, giving the robber between $500 and $600 (T 125-127).

Elrod then went into the storage room with Smith (T 128).

Elrod examined a gun shown him by the prosecutor, State's Exhibit J, and opined that it was possibly the gun used in the robbery (T 130-131).

Elrod testified that he identified the robber's photograph from a set of photographs shown Elrod by law enforcement (T 131-132).

Elrod identified petitioner as the individual who robbed the store (T 132).

On cross-examination Elrod agreed he had described the robber as five-foot eleven, 175 to 185 pounds, medium build, not muscular, having no facial hair, and real big eyes, kind of bug-eyed (T 135).

Elrod agreed that he had previously stated that the gun used in the robbery was either a nine-millimeter or a .45 automatic (T 136). Elrod further agreed he had stated in deposition that the gun was not a revolver (T 136-137; T 140-141).

Charles Burke, a crime scene investigator, processed the Baskin-Robbins store for prints the night of the robbery. He lifted a latent print from a plastic spoon sitting in a dish of ice cream and a latent print from the inside door handle of the north door facing Fort Caroline Street (T 147-149).

Donald R. Tilley, a latent fingerprint examiner, testified that he had examined latents lifted at the scene of the robbery and concluded that the one from the spoon and the one from the door were petitioner's prints (T 168-169). Tilley agreed that he had not identified the print on the spoon as petitioner's the first time he made the comparison. He did obtain another set of Taylor's prints and in re-examining the latent lifted from the spoon, concluded it belonged to petitioner (T 173; T 176).

Michael Rutledge, a police officer, testified that he showed a six person photo spread to Chris Elrod and Ms. Smith (T 153). The photo spread contained a picture of petitioner taken in June 1989. Elrod identified petitioner's photograph. Smith did not make an identification (T 154-155; T 158).

On cross-examination, Rutledge agreed that Mr. Elrod had stated he was only ninety per cent sure of his identification.

He also stated he did not show Ms. Smith several pages of pictures, but only the six person photospread (T 161).

The testimony of Officers Huggins, McCallum, Lumpkin and Suber, Jr. were proffered outside the presence of the jury. The court ruled the testimony of the officers concerning statements made by petitioner were admissible. During the proffer, petitioner objected to the officers testifying that petitioner had stated he had used the proceeds of the robbery to buy crack cocaine (T 192; T 197; T 200; T 209; T 213). This objection was overruled (T 192-193; T 197; T 209; T 213). The trial judge allowed petitioner to make the objection a standing one (T 193).

Officer Huggins testified that he followed petitioner as petitioner drove from Pottsbury Creek Apartments to a Minit Market. Huggins arrested petitioner at the Minit Market (T 185-186).

At the time of his arrest, petitioner stated, "what took us so long", and "he was going to turn himself in anyway". After being Mirandized, Huggins asked petitioner where the gun was that was used in the robbery. Petitioner stated that the un he'd used was in the vehicle. Huggins recovered $4.23 from petitioner's pockets. Petitioner stated that Huggins might as well take the money because that was the money petitioner got in the robbery. When Huggins asked petitioner where the rest of the money was, petitioner stated he had got some more but had spent the rest of it on crack cocaine (T 217).

On cross-examination, Huggins stated that he arrested petitioner at the drink cooler in the Minit Market and to his knowledge, he and Officer Taylor were the only police officers inside the Minit Market at the time petitioner was arrested (T 226).

Huggins agreed that he did not make any written notation of the Statements he testified petitioner made (T 228) and further, that he was relying solely on his memory in relating the statements (T 230).

Huggins, in response to the prosecutor's question, stated that Officer Taylor was on vacation and not in Jacksonville for the trial (T 233).

John McCallum, a detective, testified he was in the Minit Market and observed Officers Huggins and Taylor arrest petitioner. He testified that he heard petitioner make statements to Huggins and Taylor. The statements testified to by McCallum were the same as previously testified to by Huggins (T 236). Over petitioner's objection, McCallum was allowed to testify that he made notes of the arrest including the statements made by the petitioner (T 235-240).

On cross-examination, McCallum agreed he had consulted with Sergeant Snow before testifying at a deposition in petitioner's case. McCallum agreed he had stated at deposition that the notes he took were made about what was said and "some of it is from the general briefing I got from Sergeant Snow " (T 243). McCallum then testified at trial that the information

from Snow concerned where the suspect vehicle was parked, the vehicle description, and how the suspect was dressed (T 243).

Lumpkin, a robbery detective, testified he interviewed petitioner after petitioner's arrest (T 248). Petitioner stated he had robbed the Baskin-Robbins store and that he had used the same gun now in police custody. Petitioner stated that he was going to rob an Amoco station, but had decided to rob the Baskin-Robbins because his girlfriend used to work at a Baskin-Robbins. Petitioner stated he "based up the money". Lumpkin explained that this meant petitioner smoked cocaine through a pipe (T 251-253).

On cross-examination, Lumpkin agreed that petitioner signed the form stating that petitioner understood his Miranda rights but that petitioner would not sign a written statement (T 261) nor was the conversation recorded (T 262).

J.L. Suber, a robbery detective, testified that he was present at the interview Lumpkin had with petitioner. Suber's testimony concerning statements made by petitioner was similar to Lumpkin's (T 265).

The state rested.

Petitioner moved for a directed judgment of acquittal arguing that, "specifically as to Count Two, Your Honor, that one involving Kimberly Smith, her testimony -- and actually Mr. Elrod's too -- especially Mr. Elrod's -- is that he was the one who had control of the money, and Mr. Elrod was the one that took the money from the register and put it down on the counter. And there was no money taken from Ms. Smith, so I move

for a judgment of acquittal on that count. And I would argue that there would be double jeopardy for him to be convicted on both counts, since there was just one sum of money (T 278-279). The motion was denied (T 279).

The defense rested. Petitioner renewed his motion for directed judgment of acquittal which was denied (T 281).

The jury returned a verdict of guilty on both counts of armed robbery (T 378-379).

IV. SUMMARY OF ARGUMENT

In Issue I petitioner submits the lower appellate court erred in ruling that Section 924.34, Florida Statutes, could be applied to allow the appellate court to reduce the armed robbery conviction, for which the appellate court found there was insufficient evidence, to a conviction for aggravated assault. The appellate court found that aggravated assault was a Category 2 lesser included offense of armed robbery. However, in Gould v. State, 577 So.2d 1302 (Fla. 1991) this Court ruled that Section 924.34, Florida Statutes, applies only to necessarily lesser included offenses and not permissive lesser included offenses.

In Issue II petitioner submits the appellate court erred in finding that petitioner could be sentenced to consecutive mandatory minimum sentences under the habitual violent felony offender statute where the offenses arose from a single transaction. The lower appellate court's ruling is in direct conflict with this Court's ruling in Daniels v. State, 17 F.L.W. S118 (Fla. February 20, 1992) wherein this Court held that minimum mandatory sentences imposed under the habitual violent felony offender statute, for crimes arising out of the same criminal episode, may only be imposed concurrently and not consecutively.

In Issue III petitioner contends the trial court erred in granting the state's motion in limine and thus precluding petitioner from arguing to the jury the absence of evidence occasioned by the state's failure to call a witness. While the

general rule is that where a witness is equally available to either party, no inference can be drawn from a party's failure to call that witness, this rule is subject to the exception that a party can comment on an opposing party's failure to call a witness who has a special relationship with the opposing party. In the case at bar, the witness the state did not call was one of the arresting officers. This witness had a special relationship with the prosecution and thus precluding the defense from commenting on his absence was error and requires reversal.

Petitioner argues in Issue IV that the trial court erred in allowing a state witness, Officer McCallum, to corroborate his own testimony with a prior consistent statement. While McCallum testified orally to the prior consistent statement, the jury was made aware from the testimony that McCallum was referring to a previous written statement. The testimony went to a disputed issue in the case and thus its admission constitutes reversible error.

Petitioner submits in Issue V that the trial court reversibly erred in admitting testimony that petitioner made statements that he bought drugs and used them. This evidence was irrelevant and highly prejudicial.

V. ARGUMENT

ISSUE I

THE APPELLATE COURT ERRED IN UTILIZING SECTION 924.34, FLORIDA STATUTES, TO REDUCE AN OFFENSE NOT PROVEN, TO A PERMISSIVE LESSER INCLUDED OFFENSE.

The Florida District Court of Appeal ruled in petitioner's case that his conviction on count II for armed robbery was not supported by the evidence. The lower appellate court went on to find however that "Because aggravated assault with a deadly weapon is a Category II lesser included offense of robbery with a firearm, we apply section 924.34 and order the trial court to enter the judgment of conviction in accordance with the above directive" (A-6).

However, in Gould v. State, 577 So.2d 1302 (Fla. 1991) this Court held that Section 924.34, Florida Statutes, (1985) cannot be utilized to reduce an offense to a permissive lesser-included offense.

The First District Court of Appeal's ruling in the case at bar, ordering entry of a verdict and judgment of guilt for aggravated assault, should be reversed and remanded with directions that a directed judgment of acquittal be entered.

ISSUE II

THE APPELLATE COURT ERRED IN RULING THAT PETITIONER COULD BE SENTENCED TO CONSECUTIVE MINIMUM MANDATORY TERMS UNDER THE VIOLENT HABITUAL FELONY OFFENDER STATUTE WHERE THE OFFENSES AROSE FROM A SINGLE INCIDENT.

The offenses for which petitioner was sentenced arose out of a single incident. The First District Court of Appeal relied on this in holding that it was error for the trial judge to sentence petitioner to consecutive three year minimum mandatory sentences under Section 775.087(2), Florida Statutes (1989). However, the First District Court of Appeal went on to hold that consecutive minimum mandatory sentences could be imposed under the habitual violent felony offender sentencing statute, Section 775.084, Florida Statutes (1989).

Petitioner submits the appellate court erred in ruling that minimum mandatory sentences could be imposed consecutively under the habitual violent felony offender statute. In Daniels v. State, 17 F.L.W. S118 (Fla. February 20, 1992) this Court held that minimum mandatory sentences imposed under the habitual violent felony offender statute, for crimes arising out of the same criminal episode, may only be imposed concurrently and not consecutively.

Based on the foregoing, this Court should reverse the appellate court's decision authorizing the imposition of consecutive minimum mandatory sentences under the habitual violent felony offender statute.

ISSUE III

THE TRIAL COURT ERRED IN OVERRULING PETITIONER'S HEARSAY OBJECTION AND ADMITTING INTO EVIDENCE PRIOR CONSISTENT STATEMENTS OF A WITNESS.

At issue in the case at bar was whether or not petitioner, at the time of his arrest, had made inculpatory statements to Officer Huggins. These statements included, "what took us so long, he was going to turn himself in anyway" (T 214); "that the gun he'd used was in his vehicle" (T 216): "I [Officer Huggins] might as well go ahead and take that money because that was the money he got in the robbery" (T 216); "that he got some more [money] but he had spent the rest of it on crack cocaine" (T 217). Huggins testified that to his knowledge he and Officer Taylor (who did not testify at trial), were the only officers inside the Minit Market at the time of petitioner's arrest (T 226). During cross-examination, Huggins agreed that these statements could be considered critical evidence and that he had not prepared any written notation of these statements (T 229-230).

Officer McCallum was then called as a witness for the state. McCallum testified that he heard the petitioner make the above quoted statements.

On further direct examination of McCallum by the prosecutor, there was the following colloquy:

> Q. Detective McCallum, did you take any notes about those statements that the defendant made?
>
> A. Yes, I did.

Q. Let me show you a one-page exhibit and ask you to examine that?

A. Yes.

Q. And what are those?

A. These are --

Mr. Higbee: Judge, I'm going to object.

A. My notes that I made at the time.

Mr. Higbee: There is an objection for the record. May we approach?

The Court: Well, he's not testifying as to the content at this time, It's notes that he made.

Mr. Higbee: I think the State is trying to bolster his credibility, his memory, even before it's been attacked.

The Court: Is that what you're doing counsel?

Mr. Toomey: Your Honor, Mr. Higbee just asked Detective Huggins if he had made any notes at the time and implied that he should have made notes. I'm now asking this detective if he made notes. And if he did, that obviously goes to what Mr. Higbee was just getting at a moment ago. I don't understand the objection.

Mr. Higbee: Two different witnesses, Judge.

The Court: Overrule the objection. Proceed.

By Mr. Toomey:

Q. Can you identify what that is?

A. Yes, I can. These are notes that I made pursuant to the arrest of Lawrence Taylor.

Q. And when did you make these notes?

A. I made the notes between the time that he was actually physically accosted and taken into custody -- I returned to my vehicle and started making the notes, and then I came out and made some of the rest of the notes after hearing him talk to Detective Huggins in front of the convenience store there.

Q. Did you write down in those notes the statements that he made?

A. Yes, sir, I did.

Q. And are those the same statements you just related?

A. Yes, sir, they are.

Mr. Toomey: Your Honor, at this time I would--

Mr. Higbee: Same abjection, Your Honor.

The Court: I don't know. He just offered it to you. Are you offering that in evidence?

Mr, Toomey: Yes, Your Honor.

The Court: I will sustain as offered in evidence. You putting on evidence about what he **just** testified to, all it does is bolster. He's already testified he made notes about it and it's rebuttal of those matters previously brought out by Mr. Higbee of another witness. But you can't put on evidence to support evidence of your own witness (T 238-240).

Absent allegations of recent fabrication or other well-delineated exceptions, a witness' testimony may not be corroborated by evidence of prior consistent statements. Adams v. State, 559 So.2d 436 (Fla. 1st DCA 1990); Jenkins v. State, **547 So.2d** 1017 **(Fla.** 1st **DCA** 1989); Jackson v. **State**, 498 So.2d **906** (Fla. **1986);** Van Gallon v. State, 50 **So.2d 882** (Fla. **1951);** Custer v. State, 159 Fla. 574, 34 So.2d 100 (1947); Quiles **v.**

State, 523 So.2d 1261 (Fla. 2d DCA 1988); McRae v. State, 383 So.2d 289 (Fla. 2d DCA 1980); Perez v. State, 371 So.2d 714 (Fla. 2d DCA 1979); Roti v. State, 334 So.2d 146 (Fla. 2d DCA 1976).

In the case at bar the state was able to introduce, over defense objection, Officer McCallum's testimony that he had made prior statements, consistent with his testimony on the stand, in writing. While the trial court drew the line at actually introducing the writings, the damage was done with the officer's testimony -- that is, his testimony that he had made prior, consistent statements and his obvious reference to his written notes during this testimony.

The erroneous admission of McCallum's testimony impermissibly bolstered the state's contention that petitioner confessed to the crime. The defense disputed this contention (T 320). Reason defies that the jury did not consider these statements in arriving at their verdict.

Petitioner agrees that there was evidence in the record which would support a finding that petitioner made the challenged statements. But the determination was for the jury to make.

Under the foregoing circumstances, petitioner suggests it is impossible to conclude that the state can meet their burden under harmless error analysis of showing beyond a reasonable doubt that the result would have been the same absent the error. Harmless error analysis is not an "overwhelming evidence of guilt" test. As stated in State v. DiGuilio, 491

So.2d 1129 (Fla. 1986) and subsequently quoted with approval in Ciccarelli **v.** State, 531 So.2d 129 (Fla. 1988):

> [H]armless error analysis must not become **a** device whereby the appellate court substitutes itself for the jury, examines the permissible evidence, excludes the impermissible evidence, and determines that the evidence of guilt is sufficient or even overwhelming based on the permissible evidence. In a pertinent passage, Chief Justice Traynor points out: "Overwhelming evidence of guilt does not negate the fact that an error that constituted a substantial part of the prosecution's **case** may have played a substantial part in the jury's deliberation and thus contributed to the actual verdict reached, for the jury may have reached its verdict because of the error without considering other reasons untainted by error that would have supported the same result." Ross, 60 Cal.Rptr. at 269, 429 P.2d at 621.

DiGuilio, 491 So.2d at 1136.

Based on the foregoing argument and citation of authority, petitioner submits the trial court erred in allowing Officer McCallum to corroborate his own testimony by a prior consistent statement an **a** critical issue. The result was to deny petitioner **a** fair trial and due process of law as guaranteed by Article I, Section 9 of the Florida Constitution and Amendment XIV of the United States Constitution.

Petitioner's conviction should be reversed and the case remanded for a new trial.

ISSUE IV

THE TRIAL COURT ERRED IN GRANTING THE STATE'S MOTION IN LIMINE THUS PRECLUDING PETITIONER FROM COMMENTING ON THE FAILURE OF THE STATE TO CALL A WITNESS.

As discussed in Issue III of this brief, the defense contested that petitioner made incriminating statements to Officer Huggins at the time of petitioner's arrest. While Officer McCallum testified he was within earshot, Huggins testified that the only other officer he saw when petitioner was arrested was Officer Taylor. The state did not call Officer Taylor as a witness.

The state filed a motion in limine seeking to preclude the defense from commenting in closing argument on the state's failure to call Officer Taylor. This motion was granted.

Petitioner submits the trial court erred in prohibiting petitioner from arguing the lack of evidence in this case occasioned by the state's failure to call Officer Taylor.

Petitioner recognizes that when a witness is equally available to both parties, comment on that witness' absence is precluded. Haliburton v. State, 561 So.2d 248 (Fla. 1990). However, this Court in Haliburton recognized certain instances where comment was permissible, quoting from Martinez v. State, 478 So.2d 871 (Fla. 3d DCA 1985) rev. denied 488 So.2d 830 (Fla. 1986) as follows:

> an inference adverse to a party based on the party's failure to call a witness is permissible when it is shown that the witness is peculiarly within the party's power to produce and the testimony of the witness would elucidate the transaction.

Haliburton, 561 So.2d at 250.

In Martinez, the appellate court ruled that the state's listing of a co-defendant as a state witness did not render the co-defendant more available to the state and thus comment by the accused on the failure of the state to call the codefendant as a witness was properly precluded. However, in its decision, the appellate court summarized case law on availability of a witness to a party, stating:

> "'Availability' of a witness to a party must take into account both practical and physical considerations. [cite omitted]. Thus whether a person is to be regarded as peculiarly within the control of one party may depend as much on his relationship to that party as on his physical availability." United States v. Blakemore, 489 F.2d 193, 195 (6th Cir. 1973).
>
> Such special relationships have been found where (1) the witness was the defendant's daughter, State v. Michaels, 454 So.2d 560 (Fla. 1984), (2) there was a friendship between the party and the witness, Simmons v. State, 463 So.2d 423 (Fla. 3d DCA 1985), (3) the witness was the employer of the defendant, Milton v. United States, 110 F.2d 556 (D.C.Cir. 1940), (4) the witness was a police officer closely associated with the government in developing its case and had an interest in seeing his police work vindicated by defendant's conviction, United States v. Mahone, 537 So.2d 922 (7th Cir.) cert. denied. 429 U.S. 1025, 97 S.Ct. 646, 50 L.Ed.2d 627 (1976), (5) the witnesses were state employees who were present at alleged suggestive pretrial line-up and were still in state's employ at time of trial, United States ex rel. Cannon v. Smith, 527 So.2d 702 (2d Cir. 1975), and (6) the witness was an informer associated with government in development of case against defendant and there was no indication at trial of any break in association, Burgess v. United States, 440 F.2d 226 (D.C. Cir. 1970).

Martinez, 478 So.2d at 872.

Petitioner suggests it strains credibility to accept the notion that the arresting officer in a case is not, practically speaking, peculiarly available to the state.

In Arango v. State, 467 So.2d 692 (Fla. 1985), reversed and remanded for reconsideration, Florida v. Arango, 457 U.S. 1140, original decision adhered to, Arango v. State, 497 So.2d 1161 (Fla. 1986) this Court determined that favorable evidence had been withheld by the state even though it was the police and not the prosecutor who had knowledge of the evidence. In so ruling, the Court stated, "although the prosecutor did not personally suppress the evidence, the state may not withhold favorable evidence in the hands of the police, who work closely with the prosecutor". Id. at 693.

The error in refusing to allow petitioner to argue the failure of the state to call Taylor is not harmless. The testimony of Huggins established that if the statements were made, Taylor would have heard them. Thus, the state's failure to call Taylor was probative of whether or not petitioner made the incriminating statements. The error was heightened by the fact that the state was allowed to impermissibly bolster the testimony of Officer McCallum (See Issue 111) on the same disputed issue.

The result was to deny petitioner his right to present a defense, effective assistance of counsel, and due process of law as guaranteed by Article I, Sections 9 and 16 of the

Florida Constitution and Amendments V, VI, and XIV of the United States Constitution.

Petitioner's conviction should be reversed and the case remanded for a new trial.

ISSUE V

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE REGARDING THE PETITIONER'S COCAINE USE AS SUCH EVIDENCE WAS IRRELEVANT AND THE PREJUDICIAL VALUE FAR OUTWEIGHED ANY PROBATIVE VALUE.

Four state witnesses were each allowed to testify that petitioner stated he had used the proceeds from the robbery to buy and use crack cocaine (T 217; T 238; T 253; T 266). One officer testified that petitioner stated he "based up the money" (T 253).

Petitioner objected to this testimony arguing it was irrelevant and any probative value was outweighed by its prejudicial value.

The admission of this testimony was error. Florida Statutes, Section 90.403 (1989) provides that relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice..."

In White v. State, 547 So.2d 308 (Fla. 4th DCA 1989) the appellate court reversed White's armed robbery conviction due to the admission of irrelevant and prejudicial evidence attributing drug usage to White. The co-perpetrator testified that he met the defendant one week prior to the commission of the charged armed robbery at a "base house", a place where people smoked cocaine, and that the defendant offered someone cocaine. The court held that this testimony had no relevance to the charge of armed robbery occurring some time later.

The admission of the irrelevant and prejudicial testimony in petitioner's trial deprived him of a fair trial in contravention of Article I, Section 9 of the Florida Constitution and Amendment XIV of the United States Constitution,

Petitioner's convictions should be reversed and the case remanded for a new trial.

VI. CONCLUSION

This Court should reverse petitioner's convictions and remand for a new trial. If this relief is denied, petitioner's conviction on count II for aggravated assault should be reversed with directions that a judgment of acquittal be entered. If the foregoing relief is denied, petitioner's sentence should be reversed with directions that the minimum mandatory portions of the sentence imposed under the habitual violent felony offender statute be reversed.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC **DEFENDER**
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Merit Brief of Petitioner has been furnished by hand-delivery to Mr. James Rogers, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302; and a copy has been mailed to petitioner, Mr. Lawrence Taylor, #856125, Tomoka Correctional Inst., 3950 Tiger Bay Road, Daytona Beach, Florida, 32124, on this 30th day of April, 1992.

Lynn A Williams
LYNN A. WILLIAMS

IN THE SUPREME COURT OF FLORIDA

LAWRENCE TAYLOR,

Petitioner,

v. CASE NO. 79,095

STATE OF FLORIDA,

Respondent.

_____/

A P P E N D I X

TO

MERIT BRIEF OF PETITIONER

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

LAWRENCE TAYLOR,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED,

CASE NO. 90-2210

Opinion filed November 15, 1991.

An appeal from the Duval County Circuit Court, R. Hudson Olliff, Judge.

Nancy Daniels, Public Defender; Lynn A. Williams, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General; Laura Rush, Assistant Attorney General, Tallahassee, for Appellee.

MINER, J.

Urging several grounds for reversal, appellant challenges his conviction and sentences for two counts of armed robbery with a firearm. However, finding that the trial court did not err in admitting the testimony complained of or in granting the state's motion in limine, we address only two of appellant's points on appeal.

Appellant was charged by information with two counts of armed robbery with a firearm. Both offenses were alleged to have been committed on November 12, 1989, at a Baskin-Robbins Ice Cream Store in Jacksonville. Count I charged appellant with taking currency from Christopher Elrod, a custodian of the store, and Count II charged him with taking currency from another employee, Kimberly Smith.

At trial, Kimberly Smith testified that she and her manager, Christopher Elrod, were working at Baskin-Robbins on the evening in question. Prior to the closing of the store, a man whom she identified as appellant entered and ordered a scoop of ice cream. Kimberly Smith filled his order and as she began to ring up the purchase, appellant lifted his shirt to reveal a light brown wooden handle of a gun with the barrel tucked into the waistband of his jeans. He told Smith that nobody would be hurt if she gave him the money. Appellant then told Christopher Elrod to step forward and to move away from the sink where he was working. When Elrod joined Smith, appellant showed Elrod the gun and told him to take the money from the register and place it on the counter top, with which order Elrod complied. After picking up the money appellant departed and the police were called. Appellant was subsequently apprehended, identified, charged as aforesaid and convicted. At sentencing, appellant was sentenced as an habitual violent felony offender to 35 years on Count I with the applicable 15 year minimum mandatory as well as a 3 year minimum mandatory for possession of a firearm. An identical

sentence was imposed for Count II which was to be served consecutively with that imposed on Count I. This appeal followed.

Citing to Brown v. State, 430 So.2d 446 (Fla. 1983) and Hill v. State, 293 So.2d 79 (Fla. 3d DCA 1974), appellant first argues that he cannot be convicted of two robberies in connection with the above described incident because there was only one forceful taking. We agree and reverse his conviction for armed robbery of Kimberly Smith.

But for the supreme court's disapproval in Brown v. State, supra, there would be no doubt that the instant case was controlled by Hill v. State, suora, which case is factually similar. In Hill, the armed robber entered an office area of a Publix grocery store and ordered the cashier and her manager to give him money from a cash drawer and a safe. The defendant was convicted of two counts of armed robbery, but the Third DCA reversed one of the convictions. Although the court did not offer a lengthy explanation of its reasoning it held that there was only a single robbery committed.

In Brown, the armed robber entered a store and ordered a cashier to put the money from her register into a paper bag. He then ordered the cashier to open a second register, but she informed him that she did not have the key to the second register. When she summoned a fellow employee who had a key, the robber ordered the second employee to place the money from the register into the paper bag. The supreme court affirmed dual

convictions for armed robbery, and offered the following explanation:

> [T]he taking was from separate cash registers, over the second of which the first employee had no control. The two events were separated in time and each required separate criminal intent. Actual ownership of the money obtained is not dispositive of the question of whether multiple robberies have been committed. What is dispositive is whether there have been successive and distinct forceful takings with a separate and independent intent for each transaction.

Brown, 430 So.2d at 447 (emphasis added). Although the court found Hill factually distinguishable because Hill only involved one transaction, the court saw the need to disapprove of Hill to the extent that the case suggested that there cannot be two robberies where the stolen property belongs to a single entity. Apparently, the court read Hill as holding that there was only one robbery in that case because all the stolen property belonged to Publix.

Aside and apart from Hill, it is clear from the quoted language in Brown that there was but one armed robbery in the instant case. Appellant's only forceful taking was from Christopher Elrod and his single intent was to obtain the cash contained in the register. This is not similar to Brown, where two individuals were robbed of two sums of money. Compare Ponder v. State, 530 So.2d 1057 (Fla. 1st DCA 1988) (evidence would have supported dual armed robbery convictions where the defendant entered a fast food restaurant, ordered one employee to put money in a bag, and then ordered a second employee to put money in the

bag) and Holmes v. State, 453 So.2d 533 (Fla. 5th DCA 1984) (two armed robbery convictions were proper where the defendant entered a grocery store and ordered a cashier to empty her register while he robbbed the store supervisor in the office) with Pettigrew v. State, 552 So.2d 1126 (Fla. 3d DCA 1989) (where the defendant took the victim's purse at gunpoint and the purse contained a bracelet belonging to a second person, the evidence would not support dual armed robbery cdnvictions because nothing was taken from the person of the bracelet owner), rev. den., 563 So.2d 633 (Fla. 1990).

Although appellant's conviction for armed robbery of Kimberly Smith must be reversed, we direct the trial court, pursuant to section 924.34, Florida Statutes (1989), to enter a judgment of conviction against appellant for the crime of aggravated assault with a deadly weapon committed against Kimberly Smith. Section 924.34 provides as follows:

> When the appellate court determines that the evidence does not prove the offense for which the defendant was found guilty but does establish his guilt of a lesser statutory degree of the offense or a lesser offense necessarily included in the offense charged, the appellate court shall reverse the judgment and direct the trial court to enter judgment for the lesser degree of the offense or for the lesser included offense.

(Emphasis added). In Royal v. State, 490 So.2d 44 (Fla. 1986), the supreme court employed section 924.34 to do precisely what we now do. The court in Royal reversed an armed robbery conviction and remanded for entry of a judgment of conviction "of aggravated assault with a deadly weapon, which is a necessarily lesser

included offense of robbery with a firearm." Id. at 46. Although not discussed in Roval, the Schedule of Lesser Included Offenses does not include aggravated assault with a deadly weapon as a category I necessarily lesser included offense of robbery with a firearm. In fact, the court's holding in Roval prompted the Fifth DCA in Wright v. State, 519 So.2d 1157 (Fla. 5th DCA 1988), to conclude that aggravated assault with a deadly weapon was, on the authority of Roval, a necessarily lesser included offense of robbery with a firearm. This confusion was dispelled, however, by G.C. v. State, 560 So.2d 1186, 1189-90 (Fla. 3d DCA 1990), aff'd on other grounds, 572 So.2d 1380 (Fla. 1991), where the court held that the emphasized language in section 924.34 referred to both category I and and category II lesser included offenses. Because aggravated assault with a deadly weapon is *a* category II lesser included offense of robbery with a firearm, we apply section 924.34 and order the trial court to enter the judgment of conviction in accordance with the above directive.

With respect to appellant's other meritorious point on appeal, we find that resentencing will also be necessary. He argues and we agree that the trial court erred in imposing consecutive minimum mandatory sentences pursuant to the firearm possession statute. Where the offenses are committed in a single incident Palmer v. State, 438 So.2d 1 (Fla. 1983), and cases decided subject to its mandate indicate that it is improper to stack 3 year minimum mandatory sentences for possession of a firearm. However, we must disagree with appellant's assertion

that the minimum mandatory sentences imposed upon habitual violent felony offenders cannot be stacked in this manner. In Daniels v. State, 570 So.2d 725 (Fla. 1st DCA 1991), this court held that habitual mandatories may be imposed consecutively for offenses arising from the same incident.

Accordingly, we REVERSE appellant's conviction on Count II and REMAND the case for the trial court to enter a judgment of conviction for aggravated assault with a deadly weapon. The case must also be remanded for resentencing, and the trial court is herewith instructed to impose concurrent 3 year minimum mandatories. Otherwise, the sentence imposed is proper under Daniels. We likewise affirm as to all other issues.

SMITH, J., and WENTWORTH, SENIOR JUDGE, CONCURS.