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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 RESPONDENT

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IN THE SUPREME COURT OF FLORIDA

LAWRENCE TAYLOR,

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PRELIMINARY STATEMENT

Petitioner Lawrence Taylor, appellant and defendant below, will be referred to herein as "petitioner." Respondent State of Florida, will be referred to herein as "the State." References to the record on appeal will be by the use of the symbol "R" followed by the appropriate page number(s). References to the transcript of proceedings will be by the use of the symbol "T" followed by the appropriate page number(s),

STATEMENT OF THE CASE AND FACTS

Respondent accepts petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

I. In Gould v State, infra, this court clarified that section 924.34 applies only to necessarily included lesser offenses. While the district court referred to aggravated assault with a deadly weapon as a permissive lesser included offense of the charged armed robbery with a firearm, this court in Royal v. State, infra, held that aggravated assault with a deadly weapon is a necessarily included lesser offense of armed robbery with a firearm. Thus, the district court's directive to the trial court to enter a judgment of conviction against petitioner for aggravated assault with a deadly weapon was proper under section 924.34.

II. This court in Daniels v. State, infra, prohibited the stacking of consecutive minimum mandatory sentences imposed pursuant to the habitual violent felony offender statute for multiple offenses arising from the same criminal transaction. While Daniels would preclude the consecutive minimum mandatory sentences imposed in petitioner's case, respondent urges the court to reassess its holding in Daniels, and to fallow the plain meaning of sections 775.021(2) and (4) to hold that trial courts have unfettered discretion to impose sentences consecutively or concurrently unless some provision of the criminal code otherwise provides.

III. This issue is not encompassed within the conflict questions, and this court therefore need not reach it. The

challenged evidence did not constitute a prior consistent statement, and therefore it was properly admitted. If the ruling was in error, the error was harmless beyond a reasonable doubt.

IV. This issue is not encompassed within the conflict questions, and this court therefore need not reach it. The trial court properly granted the motion in limine to preclude the defense from commenting upon the state's failure to call a witness who was equally available to the defense. If the ruling was in error, the error was harmless beyond a reasonable doubt.

V. This issue is not encompassed within the conflict questions, and this court need not reach it. The trial court properly admitted evidence of petitioner's cocaine use because the evidence was relevant to his motive to commit the armed robbery. If admission of the evidence was error, the error was harmless beyond a reasonable doubt.

ARGUMENT

ISSUE I

WHETHER THE DISTRICT COURT PROPERLY REDUCED THE ARMED ROBBERY CONVICTION TO AGGRAVATED **ASSAULT PURSUANT TO SECTION 924.34.** (Restated)

Respondent acknowledges that this court in Gould **v.** State, **577** So.2d 1302 (Fla. 1991) held that section **924.34,** Florida Statutes (1985) applies only to necessarily included offenses of the charged offense, The district court in this case, acting pursuant to section **924.34,** directed the trial court to enter a judgment of conviction for aggravated assault with a deadly weapon as a permissive lesser included offense of armed robbery with a firearm. This court in Royal v. State, **490** So.2d 44 (Fla. 1986) found aggravated assault with a deadly weapon to be is a necessarily included lesser offense of armed robbery with a firearm. The Fifth District Court of Appeal in Wright v. State, **519** So.2d **1157** (Fla. 5th DCA 1988) followed Royal in finding that the defendant could not be convicted of both armed robbery with a firearm and aggravated assault with a deadly weapon.[1] Thus, while the district court erroneously characterized aggravated assault with a deadly weapon as a permissive

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[1] Prior to issuance of Royal, the First District in Larkins v. State, 476 So.2d 1383 (Fla. 1st DCA 1985) held that aggravated assault with a deadly weapon is not a necessarily included lesser offense of armed robbery with a firearm, reasoning that armed robbery requires only the carrying of a firearm, while aggravated assault requires the use of a deadly weapon to threaten, and one may threaten with a weapon without taking money.

lesser included offense of armed robbery with a firearm, the court properly directed entry of a judgment of conviction for aggravated assault pursuant to section 924.34.

ISSUE II

WHETHER THE DISTRICT COURT PROPERLY UPHELD PETITIONER'S CONSECUTIVE MINIMUM MANDATORY SENTENCES UNDER THE HABITUAL VIOLENT FELONY OFFENDER STATUTE. (Restated)

The trial court imposed consecutive minimum mandatory sentences under the habitual violent felony offender statute. This court in Daniels v. State, 17 FLW S118 (Fla. Feb. 20, 1992) held that a judge does not have discretion under sections 775.021(4) and 775.084, Florida Statutes to impose consecutive minimum mandatory sentences for felonies arising from a single criminal episode. While the state recognizes the applicability of Daniels, it urges the court to reassess its decision in that case in light of the following argument.[2]

Section 775.021 provides rules of construction for determining whether offenses are separate, whether separate offenses are separately sentenced, and whether separate sentences are imposed concurrently or consecutively, as follows:

> **775.021 Rules of construction.--**
>
> (1) The provisions of this code and offenses defined by other statutes shall be strictly construed when the language is

[2] This argument was presented by the State in its merits brief in Downs v. State, Case No. 79,322.

> susceptible of differing constructions, it shall be construed most favorably to the accused.
>
> (2) The provisions of this chapter are applicable to offenses defined by other statutes, unless the code otherwise provides.
>
> (3) This section does not affect the power of a court to punish for contempt or to employ any sanction authorized by law for the enforcement of an order or a civil judgment or decree.
>
> (4)(a) Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitutes one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense; and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.
>
> (b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent. Exceptions to this rule of construction are:
>
> 1. Offenses which require identical elements of proof.
>
> 2. Offenses which are degrees of the same offense as provided by statute.
>
> 3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.

It is clear from the plain meaning of subsection (4)(a) that separate offenses, as defined therein, shall be separately sentenced. It is also clear that the trial court is given

unfettered discretion to impose separate sentences either concurrently or consecutively.[3]

The district court below did not have Daniels v. State, 17 F.L.W. S118 (Fla. February 20, 1992) before it. In Daniels, the issue was:

> DOES A TRIAL JUDGE HAVE THE DISCRETION UNDER SECTIONS 775.021(4) AND 775.084, FLORIDA STATUTES (1988), TO IMPOSE CONSECUTIVE FIFTEEN-YEAR MINIMUM MANDATORY SENTENCES FOR FIRST-DEGREE FELONIES COMMITTED BY AN HABITUAL VIOLENT FELONY OFFENDER ARISING FROM A SINGLE CRIMINAL EPISODE?

Daniels argued that the answer was no, relying primarily on Palmer where a sharply divided court held that a trial court did not have the discretion to impose consecutive minimum mandatory sentences on an armed robber who robbed the mourners at a funeral even though separate consecutive sentences were permitted for each of the robberies. The Palmer majority reasoned that section 775.087, Florida Statutes (1981) did not specifically authorize consecutive minimum mandatories and that section 775.021(4) Florida Statutes (1981) was not applicable. The dissenters in Palmer relied on section 775.021(4) as it existed in 1981 and reasoned there was no reason why thirteen robberies committed in a single criminal transaction should be

[3] Section 921.16, Florida Statutes also leaves it to the discretion of the trial court as to whether sentences are concurrent or consecutive.

treated differently than thirteen robberies committed at separate times.

Relying on Palmer, the Daniels Court rejected the state's argument that section 775.021(4), Florida Statutes (1988) controlled. Acknowledging that the legislature had made substantial changes to section 775.021(4) in 1988,[4] the Court held that the changes were only "designed to overrule this Court's decision in Carawan v. State, 515 So.2d 161 (Fla. 1987), pertaining to consecutive sentences for separate offenses committed at the same time, and had nothing to do with minimum mandatory sentences." Id.

Daniels and Palmer rest on the proposition that the language in section 775.021(4) which mandates that separate sentences shall be imposed for separate offenses is applicable to all statutory offenses but the language granting unfettered discretion to the trial court, "the sentencing judge may order the sentences to be served concurrently or consecutively," is applicable to section 775.082 (penalties), but not to, e.g., section 775.084 (habitual offender) (Daniels or section 775.087 (use of weapons (Palmer).

The Caurt in Daniels acknowledged that it was a close call but concluded that Daniels fell closer to Palmer than Enmund [5] or Boatwright. It is noteworthy that section (4)(a)

Chapter 88-131, §7, Laws of Florida.

State v. Enmund, 476 So.2d 165 (Fla. 1985).

begins with the words: "[w]hoever, in the course of one criminal transaction or episode commits an act or acts . . . ." That is a very precise, inflexible mandate which is on all-fours here.[6] The state suggests that the plain language of section **775.**021 4)(a) granting the trial court unfettered discretion to sentence either concurrently or consecutively is equally applicable to sentences imposed pursuant to sections **775.084** and **775,087.**

The state's position, which the Court acknowledged as a close call in Daniels, is irrefutable if another, heretofore overlooked, provision of section **775.021** is brought into play. Section **775.021** is titled Rules of Construction, suggesting that the rules therein should be applied to all criminal statutes. This implied suggestion is transformed into an explicit command by section 775.021(2):

> The provisions of this chapter are applicable to offenses defined by other statutes, unless the code otherwise provides. (e.s.)

Clearly, then, all of the rules of construction in section 775.021 are applicable to all other sections of the criminal code unless specifically exempted by the particular section. The basis on which Daniels rests, that the statutes, 775.084 and 775.087, do not expressly address consecutive minimum mandatories, actually proves the opposite proposition. Pursuant

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[6] Offenses in separate incidents are governed by section **921.16,** Florida Statutes which also gives the trial court unfettered discretion on concurrent or consecutive.

to section 775.021(2), the trial court has unfettered discretion to impose minimum mandatory sentences either concurrently or consecutively pursuant to section 775.021(4), unless the statute at issue explicitly provides otherwise.

The state acknowledges that it did not recognize the relevance of section 775.021(2) to the (close) certified question in Daniels and thus did not raise the point with the Court. This oversight by the state may be partially explained by the terms of the question itself which focused narrowly on section 775.021(4). If so, this would illustrate an adage of Justice Frankfurter: "[i]n law also the right answer usually depends on putting the right question."[7] In the same vein, and from the same source, "[w]isdom too often never comes, and so one ought not to reject it merely because it comes late." Accordingly, despite the recency of Daniels, the state urges the Court to follow the plain meaning of sections 775.021(2) and (4) and hold that trial courts have unfettered discretion to impose sentences, including minimum mandatories, either concurrently or consecutively unless some provision of the code otherwise provides. There is simply no rational basis, in view of section 775.021(2), for holding that section 775.021(4) applies to some sentencing statutes of the criminal code but not to others.

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[7] Estate v. Rogers v. Helvering, 320 U.S. 410, **413** (1943). The following "wisdom" quote is from Henslee v. Union Planters National Bank & Trust Company, 335 U.S. ***595***, 600 (1949). Both were recently quoted in The Florida Bar Journal, March 1992, Legal Wit & Wisdom, Raymond T. Elligett, Jr., **p.** 19, 20.

ISSUE III

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

Petitioner contends the trial court erred in overruling his hearsay objection to evidence that an officer made written notes of his statements at the time of arrest. This issue is not encompassed within the asserted conflict, and this court therefore need not address it. Gould v. State, 577 So.2d 1302, 1303 n. 2 (Fla. 1991)(declining to reach issues not encompassed within the certified conflict.); Stephens v. State, 572 So.2d 1387 (Fla. 1991)(declining to reach an issue not encompassed within the certified question.).

Should the court reach this issue, however, it is clear that the trial court's evidentiary ruling was correct because the challenged testimony did not constitute a prior consistent statement, as petitioner contends.

Petitioner's argument requires as a starting point that this court find Officer McCallum's testimony that he recorded petitioner's statements at the time of arrest in written note form to be a prior statement consistent with McCallum's trial testimony as to the actual substance of petitioner's statements to police at the time of arrest. This required premise presents an insurmountable obstacle. The challenged testimony merely related the fact that McCallum engaged in the act of writing down notes of

petitioner's statements. McCallum did not testify regarding the actual substance of his written notes. Thus, the state did not elicit from McCallum any testimony which reasonably can be interpreted as a prior statement consistent with his testimony as to the substance of petitioner's statements. Evidence that written notes were made of the statements cannot be equated with evidence of the actual substance of the statements.

Case law cited by petitioner invariably involves the impermissible admission of evidence of the substance of a witness's prior statements when the witness also testified at trial as to the substance of the same statements. See Jackson v. State, 498 So.2d 906 (Fla. 1986) (Detective's trial testimony relating statements made by another state witness not admissible when the state witness's trial testimony was consistent with or identical to the prior statements made to the detective.); Adams v. State, 559 So.2d 436 (Fla. 1st DCA 1989). As explained by Professor Ehrhardt, "[W]hen a witness testifies at a trial, neither that witness nor any other person may testify to prior statements by the witness which are consistent with his in court testimony. Ehrhardt, Florida Evidence, Sec. 801.1 (2d Ed. 1984). Here, the state did not elicit from Officer McCallum testimony of prior statements which were consistent with his trial testimony.

Admission of the challenged testimony was entirely correct. Immediately prior to McCallum's testimony on

direct examination, defense counsel cross-examined Officer Huggins and attacked his credibility by showing that he failed to make written notes of appellant's statements. Counsel asked Huggins such questions as "Wouldn't you think it would be prudent or important to write those statements down if the defendant makes a statement basically admitting to a robbery?" and "Better practice to write them down; correct?" and "Would you term it critical evidence?'' (T 229). The inferences raised were that police were derelict in their duty in failing to record the statements were fabrications of the police. Had the state been precluded from eliciting testimony from McCallum that he had written notes of petitioner's statements, and had defense counsel chosen, as he likely would have, not to cross-examine McCallum about the written notes, the jury would have been left with the erroneous notion that the officers' testimony regarding petitioner's statements was based only on unrecorded recollections, the accuracy of which were highly suspect. The fact that McCallum recorded petitioner's statements contemporaneously, or nearly contemporaneously, with the Statements being made was relevant and material evidence properly brought before the jury. This evidence did not, as petitioner argues, merely improperly "[bolster] the state's contention that petitioner confessed to the crime.'' Merits Brief at 19. Rather, it was germane to the jury's determination of the credibility of Officers Huggins and McCallum and the accuracy of their recollections of petitioner's statements to them.

If admission of the challenged testimony could, under any analysis, be viewed as improper, the error was harmless. The challenged testimony was germane only to the issue of the credibility of Officers Huggins and McCallum. However, both officers testified to petitioner's statements at the time of arrest, and each officer's testimony corroborated that of the other. In addition, Officers Lumpkin and Suber testified as to inculpatory statements made to them at the station, Four officers therefore testified to petitioner's two statements admitting to commission of the armed robberies. Thus, even if Officer McCallum's testimony that he made notes of petitioner's statements at the time of arrest somehow improperly corroborated trial testimony regarding those statements, two other officers testified to petitioner's inculpatory statements at the police station. In addition, the state presented very strong eyewitness identification evidence, and evidence that petitioner's fingerprints were found on the ice cream store spoon handed to him at the time of the crime, as well as on the door to the ice cream store. Under these circumstances, it is clear beyond a reasonable doubt that admission of the challenged testimony did not affect the jury verdict. Ciccarelli **v.** State, 531 So.2d 129 **(Fla. 1988).**

ISSUE IV

WHETHER THE TRIAL COURT PROPERLY GRANTED THE STATE'S MOTION **IN LIMINE.**

Petitioner argues that the trial court improperly precluded him from commenting upon the absence of Officer Taylor, and raising an inference that Taylor's testimony would have been unfavorable to the state. This issue is not encompassed within the asserted conflict, and this court therefore need not address it. Gould. However, should this court decide to reach this issue, the state argues as follows:

As stated by the court in Martinez v. State, 478 So.2d 871 (Fla. **3d** DCA 1985), "[T]he general rule is that 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.'' The availability of a witness "must take into account both practical and physical consideration." Martinez at 872, quoting United States v. Blakemore, 489 F. 2d 193, 195 (6th Cir. 1973). "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." Id. "When such witnesses are equally available to both parties, no inference should be drawn or comments made on the failure of **either** party to **call** the witness." State v. Michaels, 454 So.2d 560, 562 (Fla. 1984).

In addressing "availability", the court in Halls v. State, 470 So.2d 796 (Fla. 4th DCA 1985) stated:

> The term "available" as used in the context of the permissibility of a comment on one party's failure to call a witness does not refer either to geographical proximity or to the physical or mental capacity of the witness to testify. It has the reference, rather, to one party's superior knowledge of the existence and identity and the expected testimony of the witness. A confidential informant whose identity has not been revealed thus is not a witness "available" to the accused.

Id., 470 So.2d at 798. In United States v. Mahone, 537 F. 2d 922 (7th Cir. 1976), a case cited by the court in Martinez, the federal court stated that unavailability to a party is shown when the witness is physically available only to the apposing party, and when the witness has a relationship with the opposing party "that would in a pragmatic sense make his testimony unavailable to the opposing party regardless of physical availability." Mahone, 537 F. 2d at 926. In Mahone, the court held that the officer's physical presence outside the courtroom at the time of trial did not establish his availability to the defendant, reasoning that the officer worked closely with the prosecutor and had an interest in seeing his police work vindicated by a conviction. Mahone must be read in light of Rule 16, Federal Rules of Criminal Procedure, which provides for only very limited pretrial discovery by a defendant. Rule 3.220, Florida Rules of Criminal

Procedures, which provides for only very limited pretrial discovery by a defendant. Rule 3.220, Florida Rules of Criminal Procedures, by contrast, requires the state, once the discovery process is triggered, to furnish the names and addresses of all persons known to have information relevant to the offense. Under Florida's rules, the defendant is provided with information to facilitate physical access to state witnesses prior to trial, and the defendant is provided with subpoena power to guarantee that access. The defense in this case availed itself of just such powers to obtain access to state eyewitness Christopher Elrod. (R 55-58). Under the federal rules, a defendant may not have physical access to government witnesses prior to trial because the government has no obligation to provide the names and addresses of its witnesses. If, in addition, the government witness, by virtue of occupation or other factors, has an inherent bias against the defendant, then the defendant clearly does not have equal access to that witness, as the Mahone court explained.

The state listed Officer Taylor as one of several Jacksonville Sheriff's Office Officers in its December 12, 1989 Response to Demand for Discovery, and identified Taylor as "involved in arrest.'' (R 16). Petitioner therefore had physical access to Taylor for the nearly six months between December 12, 1989 and May 23, 1990, the first day of trial. When Florida's procedural rules

guaranteed petitioner physical access to Taylor for six months prior to trial, the fact that Taylor, as a law enforcement officer, might have worked closely with the prosecution, OF might have had an inherent interest in the state obtaining a conviction in the case, cannot reasonably be viewed as rendering Taylor "unavailable" to the defense for purposes of this issue.

Furthermore, regardless of whether Taylor would have testified that he heard petitioner's statements, or saw McCallum in the store with Huggins, his testimony could not have contradicted or otherwise discredited the testimony of the other two officers, and could not have supported petitioner's impossible defense of misidentification. Huggins stated he was focused on petition and was simply not aware of any other officers following him and McCallum into the store. McCallum stated that he followed Huggins and McCallum into the store. Huggins and McCallum precisely corroborated each other with regard to their testimony about petitioner's statements at the time of arrest. Thus, not only was Taylor equally available to petition but Taylor's testimony would have been cumulative to that of the Huggins and McCallum, and would not have elucidated the issue of whether petitioner in fact made inculpatory statements to police when he was arrested. Finally even if Huggins and McCallum had been completely discredited in their assertion that petitioner confessed to the armed robberies at the time of arrest, petitioner made

a second confession to two other officers at the police station. Thus, under the facts of this case, Taylor's presence or absence from trial can only be viewed as a nullity with no possible evidentiary value. The trial court therefore properly granted the motion in limine.

If the preclusion of comment on the state's failure to call Taylor was error, the error was harmless under the above analysis. In view of the testimony of the other two arresting officers, the absence of Taylor's testimony was not of critical importance either to the state's case or to the defense. In view of the eyewitness identifications, conclusive and unassailable fingerprint evidence, and petitioner's additional stationhouse confession, all of which rendered the misidentification defense unavailing, it is clear beyond a reasonable doubt that the asserted error could not have affected the jury verdict. Ciccarelli v. State, 531 So.2d 129 (Fla. 1988).

ISSUE V

WHETHER THE TRIAL COURT ERRED IN ADMITTING EVIDENCE REGARDING PETITIONER'S USE OF COCAINE.

Petitioner argues that admission of evidence that he used money taken during the charged offenses to purchase cocaine was violative of section 90.403, Florida Statutes. This issue is not encompassed within the asserted conflict, and this court therefore need not reach it. Gould. However, should this court decide to reach this issue, the state argues as follows:

In White v. State, 547 So.2d 308 (Fla. 4th DCA 1989), the court found the admission of evidence that a coperpetrator had met the defendant a week before the crime at a base house to have been erroneous because the evidence of the prior bad conduct and criminal activity was irrelevant to the issues at trial. In this case, evidence that petitioner told the arresting and interrogating officers that he used the money to purchase cocaine was not evidence of a prior bad act, as in White. The evidence was relevant to the issue of petitioner's motive to commit the armed robberies, and to explain why the $500 he took from the ice cream store, evidence of the commission of the crimes, was gone when police arrested him two weeks later. The challenged evidence was one of many inculpatory statements made to police by petitioner, and, in view of the defense of misidentification, was relevant to establish that petitioner was the individual who committed the armed

robberies. Courts in a variety of contexts have approved the admission of evidence of a defendant's drug use for the purpose of establishing motive. See Cohen v. State, 16 F.L.W. D1547 (Fla. 3d DCA June 11, 1991) (evidence of motive, while not necessary to obtain a conviction for first-degree murder, is admissible when available to help the jury understand the other evidence presented) and cases cited therein at D1548.

If admission of the evidence was error, the error was harmless. Evidence that petitioner told police he used the proceeds from the robberies to buy cocaine did not itself diminish petitioner's defense of misidentification, in view of his other admissions. The challenged evidence, while relevant, was not critical to the state's case, when compared with other overwhelming and conclusive evidence of guilt presented, as discussed under Issues II and 111. Thus, it is clear beyond a reasonable doubt that admission of the challenged evidence would not have affected the jury verdict. Ciccarelli.

CONCLUSION

Based on the foregoing argument and citations of authority, respondent requests this court to approve the decision of the district court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief has been furnished by U.S. Mail to Lynn A. Williams, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, FL 32301, this 20th day of May, 1992.

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