IN THE SUPREME COURT OF FLORIDA

LAWRENCE TAYLOR,

Petitioner,

v. CASE NO. 79,095

STATE OF FLORIDA,

Respondent.

_____/

REPLY BRIEF OF PETITIONER ON THE MERITS

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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 state contends that aggravated assault is a necessarily lesser included offense of armed robbery based on this Court's decision in Royal v. State, 490 So.2d 44 (Fla. 1986).

In Royal this Court was mainly concerned with whether force used after a robbery could be utilized to convict an individual of armed robbery. This Court held that force used after a robbery was committed could not, under the then existing robbery statute, be used to prove robbery; only force employed prior to or while taking the merchandise would suffice.

This Court in Royal went on to rule:

> Because this record clearly establishes the petitioners' guilt of aggravated assault with a deadly weapon, which is a necessarily lesser included offense of robbery with a firearm, we find that, pursuant to section 924.34, Florida Statutes (1983), they may be convicted of aggravated assault with a deadly weapon. [Emphasis added].

Appellant submits this Court's reference in Royal to "this record" would have been unnecessary if aggravated assault were truly a necessarily lesser included offense. This is because under the appropriate analysis an offense falls under Category I only if, "on the face of the statutes themselves, a defendant cannot possibly avoid committing the offense when the other crime in question is perpetrated", State v. Weller, 590 So.2d 923, 925 (Fla. 1992). On the other hand,

> [a] permissive lesser included offense differs in that it cannot be determined to fall within Category 2 unless both the statutory elements and the facts alleged in the accusatory pleadings are consulted. In other words, on the face of the statutes, the two offenses appear to be separate, but the facts alleged in the accusatory pleadings are such that the lesser offense cannot help but be perpetrated once the grater offense has been. See in re the Use by the Trial Courts of the Standard Jury Instructions in Criminal **Cases**, 431 So.2d **594, 596 (Fla. 1981),** modified, **431 So.2d** 599.

Weller, supra, 590 **So.2d** at **925**, footnote 2.

Given that this Court in Royal found it necessary to consult the record to determine if Royal's offense could be reduced to aggravated assault with a deadly weapon, this Court clearly used a Category 11, or permissive lesser included offense, analysis.

Thus, petitioner would submit that this Court's earlier opinion in State **v.** Baker, 452 So.2d 927 (Fla. 1984) controls the issue in this case and that Royal did not overrule Baker. (It is noteworthy that Royal did not even mention Baker, a case decided just two years previous to the decision in Royal).

In Baker, this Court found that armed robbery and aggravated assault could be separate crimes because by looking at the statutory definition of the crimes, each contained an element not contained in the other.

In Larkins v. State, **476** So.2d **1383** (Fla. **DCA 1985),** the First District Court of Appeal, utilizing Baker, found that the offenses of armed robbery and aggravated assault were separate stating:

> An armed robbery is 1) the taking of money or property 2) by force, violence, assault or putting in fear 3) while carrying a firearm. Section 812.13. An aggravated assault is 1) an intentional 2) threat by word or act to do violence to the person of another, 3) an apparent ability to do so, 4) the doing of some act creating a well-founded fear of imminent violence 5) with a deadly weapon. Sections 784.011 and 784.021, Florida Statutes (1983). One may take money by force while carrying a concealed weapon and be guilty of armed robbery without committing an aggravated assault, which requires use of that weapon to threaten. Alternatively, one might threaten imminent violence with a weapon without taking money or property. These offenses are clearly separate.

Larkins, 476 So.2d at 1384-1385.

Both Baker and Larkins appropriately used the test enunciated in Blockburger v. United States, 284 U.S. 299 (1932).

This Court recently approved such an analysis in determining if crimes were separate in Weller, supra. In Weller this Court, quoting from previous cases, summed up the Blockburger test as follows:

> [T]wo statutory offenses are essentially independent and distinct if each offense can possibly be committed without necessarily committing the other offense. This is just a poor way of saying that the test is an abstract test and that two statutory offenses are not 'the same offense' if each statutory offense has at least one constituent element that the other does not.

Weller at 925. [Quoting Rotenberry, 468 So.2d at 976 (quoting Baker v. State, 425 So.2d 36, 50 (Fla. 5th DCA 1982) (Cowart, J., dissenting), approved in part, quashed in part, 456 So.2d 419 (Fla. 1984)].

Petitioner would further note that this Court has denoted aggravated assault as a Category II lesser included offense of armed robbery. See generally Fla.Std.Jury Instr.(Crim).

Based on the foregoing argument and citation of authority, petitioner submits that aggravated assault is not a necessarily lesser included offense of armed robbery. Therefore, the appellate court reversibly erred in reducing the armed robbery conviction, for which there was insufficient evidence, to a conviction for aggravated assault.

ISSUE III

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

The state argues in its answer brief that, "The challenged testimony merely related the fact that McCallum engaged in the act of writing down petitioner's statements. McCallum did not testify regarding the actual substance of the written notes" (State's AB pp. 13-14).

This mischaracterizes the evidence at trial where McCallum testified as follows:

> Q: (prosecutor): Did you write down in those notes the statements that he made?
>
> A: (McCallum): Yes, sir, I did.
>
> Q: And are those the same statements you just related?
>
> A: Yes, sir, they are. (T 239).

The state further argues that it was entitled to bring out the fact that Officer McCallum had made a written record of the statement because of the petitioner's cross-examination of another officer, Officer Huggins, pointing out that Huggins had not made written notes of the statement. Assuming for the sake of argument this was true, the state did more than bring out the fact that McCallum made written notes, The state presented to the jury the contents of the notes as a prior consistent statement when McCallum agreed the notes were "the same statements" he had just related.

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.

The state seeks to distinguish a federal case, United States v. Mahone, 537 F.2d 922 (7th Cir.) cert. denied, 429 U.S. 1025 (1976) on the grounds that the federal system does not have the broad discovery available in Florida (AB p. 12-13).

However, despite the fact that broad discovery is available in all cases in Florida, the Florida courts have consistently held the relationship between the witness and a party are to be considered in determining whether or not the opposing party can comment on the party's failure to call a witness. See Halliburton v. State, 561 So.2d 248 (Fla. 1990); Martinez v. State, 478 So.2d 871 (Fla. 3d DCA 1985) rev. denied 488 So.2d 830 (Fla. 1986). Thus, the Florida discovery rules have no relationship to the rule as it has been interpreted in Florida.

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

CONCLUSION

Based on the argument and citation of authority herein, and the argument presented in petitioner's initial brief as to all issues, petitioner submits he is entitled to the relief requested in the initial brief,

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Petitioner on the Merits has been furnished by hand-delivery to Ms. Laura Rush, 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, 32091, on this 15th day of June, 1992.

LYNN A. WILLIAMS