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app ref.

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JUN 26 1992
CLERK, SUPREME COURT
By ____
Chief Deputy Clerk

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 79,630

JAMES VON DECK,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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TA CONTENTS

PAGES:

TABLE OF AUTHORITIES.............................. ii

STATEMENT OF THE CASE....... 1

STATEMENT OF THE FACTS.................................... 2

SUMMARY OF ARGUMENT...3

ARGUMENT:

THE TRIAL COURT DID NOT ERR IN INSTRUCTING THE JURY ON AGGRAVATED ASSAULT ON A LAW ENFORCEMENT OFFICER WITH A FIREARM AS A LESSER INCLUDED OFFENSE OF ATTEMPTED PREMEDITATED MURDER OF A LAW ENFORCEMENT OFFICER, WHERE THE DEFENSE DID NOT OBJECT BASED UPON THE CONTENTION THAT THE CHARGING DOCUMENT DID NOT ALLEGE A WELL-FOUNDED FEAR OF IMMINENT VIOLENCE AND EVEN REQUESTED AND RECEIVED AN ADDITIONAL LESSER OFFENSE INSTRUCTION ON SIMPLE ASSAULT..................4

CONCLUSION..13

CERTIFICATE OF SERVICE..................................13

TABLE OF AUTHORITIES

CASES: PAGES:

Alvarado v. State,
521 So.2d 180, 181 (Fla. 3d DCA 1988) 10

Armstrong v. State,
579 So.2d 734 (Fla. 1991) 9

Blow v. State,
386 So.2d 872 (Fla. 1st DCA 1980),
pet. for rev. den. 392 So.2d 1372 (1981) 9

Brown v. State,
206 So.2d 377, 383 (Fla. 1968) 5

Carter v. State,
380 So.2d 541 (Fla. 5th DCA 1980), cert. denied,
388 So.2d 1110 (Fla. 1980) 10

Castor v. State,
365 So.2d 701 (Fla. 1978) 10,11

Courson v. State,
414 So.2d 207, 209 (Fla. 3d DCA 1982) 11

Henry v. State,
564 So.2d 212 (Fla. 1DCA 1990) 10

Kimbrough v. State,
356 So.2d 1294 (Fla. 4th DCA 1978) 5

Lee v. State,
526 So.2d 777, 778 (Fla. 2d DCA 1988) 10

Lumia v. State,
372 So.2d 525 (Fla. 4th DCA 1979), cert. denied,
381 So.2d 767 (Fla. 1980) 10

Odum v. State,
375 So.2d 1079 (Fla. 1st DCA 1979) 10

Ray v. State,
403 So.2d 956, 961 (Fla. 1981) 8,10

State v. Daophin,
533 So.2d 761, 762 (Fla. 1988) 5

State v. Delva,
575 So.2d 643. 644-645 (Fla. 1991)...................... 9

State v. Johnson. Fla. S.Ct. Case No. 77.239.
Opinion filed May 2 1992............................ 6.11

OTHER AUTHORITIES:

§ 784.07(2), Fla. Stat. (1989)............................... 4
§ 784.011, Fla. Stat. (1989)................................. 4
§ 784.021, Fla. Stat. (1989)................................. 4
§ 790.15, Fla. Stat. (1989).................................. 7

Fla.R.Crim.P. 3.390(d)....................................... 8

STATEMENT OF THE CASE

On November **16,** 1990, Respondent was charged by Information in Circuit Court Case No. 90-19190 CF with the Attempted Murder of a Law Enforcement Officer. (R1401). On March 4-8, 1991, Respondent was tried by jury and convicted of the lesser included offense of Aggravated Assault on a Law Enforcement Officer with a Firearm. (R1160). On April 4, 1992, Respondent was sentenced to the mandatory minimum sentence of three years imprisonment. **(R1552-1555).**

Respondent appealed his conviction and sentence to the Fifth District Court of Appeal of the State of Florida. In its opinion filed February 7, 1992, that Court reversed Respondent's conviction and sentence, holding that, although the evidence supported an instruction on Aggravated Assault, the charging document did not allege all the elements of Aggravated Assault and, therefore, it was error for the trial court to instruct an that charge over defense objection. The State's Petition for Rehearing was filed February **20, 1992,** pointing out, among other things, that there was no such objection. It was denied by order dated March 6, 1992. The State's Notice invoking this Court's discretionary jurisdiction was timely filed March 30, 1992.

STATEMENT OF THE FACTS

On October 24, 1990, at approximately 4:00 P.M., Respondent phoned his wife at the Jiffy Food Mart where she worked and told her he was going to come over there and kill her. (R515, 517-519, 693). She called 911. (R515). After calling his wife, Respondent drove away from his house in his car. Officer Pollack and his partner, Officer Greene, were dispatched to Respondent's residence. Respondent eluded these officers by driving off the road onto the grass and going around them. (R535-541, 694-695). Corporal Huss was dispatched as a backup. His marked police vehicle was travelling at approximately 10 to 15 MPH when Respondent's vehicle approached him. Respondent placed a nickel-plated short-barreled revolver out the driver's side window, aimed it in Huss's direction and fired a shot. Huss said he thought Respondent was going to shoot him and was scared to death. (R562-567, 571, 587). After a one-half mile chase, Respondent stopped his vehicle and threw two handguns out of the window. One of those guns, a Smith and Wesson .357 magnum revolver, matched the description of the weapon fired at Corporal Huss. (R543-545, 571-572). Respondent was placed under arrest and gave a taped statement during which he admitted firing his revolver "...over the police cruiser..." with the intention of stopping the "...police officers in their tracks...". (R691, 696-697).

SUMMARY OF ARGUMENT

Regardless of whether the charging document sufficiently alleged well-founded fear of imminent violence, the District Court of Appeal should not have reversed Respondent's conviction and sentence for Aggravated Assault on a Law Enforcement Officer with a Firearm where the defense never specifically objected to the instruction on that ground and where the defense acquiesced in the instruction and even sought and received an additional lesser offense instruction on Simple Assault on a Law Enforcement Officer.

ARGUMENT

THE TRIAL COURT DID NOT **ERR** IN INSTRUCTING THE JURY ON AGGRAVATED ASSAULT ON **A** LAW ENFORCEMENT OFFICER WITH A FIREARM AS **A** LESSER INCLUDED OFFENSE OF ATTEMPTED PREMEDITATED MURDER OF **A** LAW ENFORCEMENT OFFICER, WHERE THE DEFENSE DID NOT OBJECT BASED UPON THE CONTENTION THAT THE CHARGING DOCUMENT DID NOT ALLEGE **A** WELL-FOUNDED FEAR OF IMMINENT VIOLENCE AND EVEN REQUESTED AND RECEIVED AN ADDITIONAL LESSER OFFENSE INSTRUCTION ON SIMPLE ASSAULT.

In his recorded statement to the police after his arrest, Respondent said that he fired his revolver over the police car to stop the police "in their tracks." (R691, 696-697). During closing argument, defense counsel argued that this crime was not premeditated, but that Respondent "tried to scare **someone** to get them to stop." (R999, 1014-1018). Respondent's defense to the charge of **Attempted** Premeditated Murder **of** a LEO was that he had no **premeditated** design to kill. By shooting **over the** police car, **he** was attempting to create in that police officer a well-founded fear of imminent violence sufficient to stop him in his tracks. Respondent's defense was, in effect, that **he** had committed **Aggravated** Assault on a Law Enforcement Officer with a Firearm, exactly the offense of which he was convicted by the jury. Sections 784.021, 784.011 and 784.07(2), Florida Statutes (1989).

The District Court ruled that **Aggravated Assault** did not qualify as a category two lesser offense of **Attempted** Premeditated Murder, because the charging **document** did not specifically state that Respondent's shooting at Corporal Huss

while in the performance of his duties caused him to have a well-founded fear of imminent violence. The District Court reached this conclusion based upon this Court's decision in State v. Daophin, 533 So.2d 761, 762 (Fla. 1988). In that case, this Court cited its decision in Brown v. State, 206 So.2d 377, 383 (Fla. 1968) and said:

> In order to be entitled to instructions on category two offenses, both the accusatory pleadings and the evidence must support the commission of the permissive lesser included offense. (Emphasis added).

The State relied on Kimbrough v. State, 356 So.2d 1294 (Fla. 4th DCA 1978), in which the District Court, citing Brown, Supra, ruled that the element of well-founded fear of imminent violence was "supported" by the allegation that the defendant actually shot and wounded the victim with a firearm. In the case subjudice, it could also be inferred that shooting at a police officer who is engaged in the performance of his legal duties would create in that officer a well-founded fear that violence was imminent. In fact, Corporal Huss testified that he thought Respondent was going to shoot him and was scared to death. (R587). The Fifth District Court of Appeal attempted to distinguish the decision of the Fourth District in Kimbrough, stating that:

> ...a reading in a criminal case in favor of the defendant, or made at the defendant's special informal request, cannot be said to violate his constitutional right as to notice and due process.

The Court apparently meant that, if the defendant requested the instruction, it would come as no surprise to him and, therefore, would not violate his due process rights. This Court recently addressed the distinction between requests for instructions on category two lesser offenses made by the State and those made by the defendant and made no such distinction. In State v. Johnson, Florida Supreme Court Case No. 77,239, Opinion filed May 28, 1992, this Court concluded that the State has the right to insist on the giving of instructions on permissive lesser included offenses over the defendant's objection.

However, even assuming arguendo that the Information did not include all the essential elements of Aggravated Assault as a lesser offense of the crime charged, the real issue is whether Respondent objected to the instruction on Aggravated Assault based upon the asserted deficiency in the charging document or whether he acquiesced in it. At the charge conference in the instant case, the trial judge discussed the instructions he felt would be appropriate. There was no clear request by either party for the lesser offense of Aggravated Assault on a LEO. During a general discussion of what lesser offenses should be given, Aggravated Assault was mentioned, (R816, 852, 859-861). The District Court of Appeal found that Respondent had objected to an instruction on Aggravated Assault "arguing that aggravated assault was not a lesser included offense of the crime of attempted murder as charged in the charging document." The transcript of the charge conference clearly shows that there was no specific objection to an instruction on Aggravated Assault

based upon a failure to allege a well-founded fear of imminent violence. Respondent wanted the jury instructed on Discharge of a Firearm in Public under Section 790.15, Florida Statutes (1989) as a lesser included offense of Aggravated Assault. Defense counsel stated that: "If that is not given, Judge, we object to an Aggravated Assault charge." (R859-861, 1224-1226). Then, later in the charge conference, defense counsel objected to the placement of the Aggravated Assault instruction in the hierarchy of the lesser included offense instructions. Once that was ironed out, defense counsel objected that giving an instruction on Aggravated Assault on a Law Enforcement Officer with a Firearm constituted a "shotgun approach". It was agreed that the jury would be given an election as to each charge whether or not to find that a firearm was used in the commission of the lesser offenses. Defense counsel said: "Subject to that, we have no other objection on that one, Judge." Then, defense counsel proposed that Simple Assault on a LEO should be given as a lesser included offense of Aggravated Assault on a LEO. That request was granted and the jury 'was instructed as to that lesser. (R929-933, 1115, 1134-1135, 1146). Prior to reading the instructions, the trial court went through all of the proposed lesser offenses with counsel once again:

> THE COURT: The next one is Aggravated Assault, LEO.
> MR. TRETTIS: That is okay with the defense.
> THE COURT: The next one is 784.021, Ag Assault.
> MR. TRETTIS: That is okay with the defense. (R1099).

At the end of the jury instructions, there were no objections to the instructions on the Aggravated Assault charges as given. (R1147-1158). Clearly, there was no objection to the Aggravated Assault instructions based upon any defect in the charging document and Respondent acquiesced in the instruction by requesting and obtaining instructions on Simple Assault as a lesser included offense of Aggravated Assault. Certainly, it cannot be said that his objections meet the requirements of Florida Rule of Criminal Procedure 3.390(d).

In Ray v. State, 403 So.2d 956, 961 (Fla. 1981), this Court ruled that defense counsel's failure to object to erroneous instructions on permissive lesser included offenses can properly constitute a waiver of any defects. The Court went on to hold that such an erroneous instruction does not constitute fundamental error and failure to timely object precludes relief from such a conviction. The Court concluded that erroneous instructions on lesser offenses do not constitute fundamental error where defense counsel had an opportunity to object and did not do so if: 1) the improperly charged offense is lesser in degree and penalty than the main offense or 2) defense counsel requested the improper charge or relied on that charge in his argument to the jury. Aggravated Assault is lesser in degree and penalty than Attempted first degree Murder and, as stated previously, defense counsel in the case subjudice offered no specific objection to the Aggravated Assault instruction based upon a failure to allege well-founded fear of imminent violence. He even requested an instruction on Simple Assault as a lesser of

Aggravated Assault. He then relied on these lesser offense instructions by arguing to the jury that the Respondent had merely intended to scare the police into abandoning pursuit by shooting at them. **(R999, 1014-1018).** Under Ray, this conviction should never have been reversed. Defense's objection were not specific. He acquiesced in the Aggravated Assault instruction by requesting and receiving instructions on a lesser included offense of it and he relied on the instruction given by arguing, in effect, that his client had committed an Aggravated Assault, not an Attempted Murder.

In Armstrong v. State, *579* So.2d 734 (Fla. 1991), this Court recently reaffirmed its decision in Ray in holding that trial counsel can waive fundamental error by failing to object to erroneous jury instructions. See State v. Delva, 575 So.2d **643,** 644-645 (Fla. 1991).

In Blow v. State, **386** So.2d 872 (Fla. 1st DCA **1980),** petition for **review** denied 392 So.2d 1372 (Fla. 1981), the **defendant asserted that it was fundamental error to instruct on** Aggravated Assault because it was not a lesser included offense of Armed **Robbery.** The trial court announced that it would instruct on Aggravated Assault, There was no objection to that instruction or to the verdict forms. The First District concluded that the failure to object to the instruction was dispositive.

> The defendant should not be permitted to stand mute and have the benefit of the lesser charge and grounds to attack his conviction as well...Under these circumstances, we

> think the appellant had the duty to raise objection, if any, at the time the court announced it would instruct as to aggravated assault and to inform the court that he had no notice he could be convicted of that offense. Id. at 874-875.

The appellate courts of this State have repeatedly held that, even when the instruction on a lesser included offense is erroneous, an appropriate objection is required. Henry v. State, 564 So.2d 212 (Fla. 1DCA 1990); Lumia v. State, 372 So.2d 525 (Fla. 4th DCA 1979), cert. denied 381 So.2d 767 (Fla. 1980); Carter v. State, 380 So.2d 541 (Fla. 5th DCA 1980), cert. denied 388 So.2d 1110 (Fla. 1980), citing Castor v. State, 365 So.2d 701 (Fla. 1978). See Alvarado v. State, 521 So.2d 180, 181 (Fla. 3d DCA 1988).

In Lee v. State, 526 So.2d 777, 778 (Fla. 2d DCA 1988), the Court held that where defense counsel does not request instruction on a lesser included offense and does not object to the failure to give it, the issue has not been preserved for appellate review. Fundamental error occurs when a misinstruction has the effect of negating the defense. In the instant case, Respondent's defense was that he was committing an Aggravated Assault on the police officer when he fired his gun toward the police car. Respondent contended that he never intended to kill Corporal Huss. Respondent's defense was certainly not negated by an instruction on Aggravated Assault.

In Odum v. State, 375 So.2d 1079 (Fla. 1st DCA 1979), the Court, citing Ray, supra, found that the defendant waived or was estopped from complaining of asserted inaccurate instructions,

where defense counsel's participated and acquiesced in the charges as given. In Courson v. State, 414 So.2d 207, 209 (Fla. 3d DCA 1982), cited with approval by this Court in Johnson, supra, the defendant was charged with Attempted First Degree Murder. There was no specific allegation that the victim was in fear. That Court concluded that, whether or not an instruction on Aggravated Assault was proper, the error was not preserved by appropriate objection.

> It is quite clear that to preserve for appellate review an objection to the giving or the failure to give an instruction, a defendant must state distinctly the matter to which he objects and the grounds of his objection. (Emphasis added).

That case is virtually "on all fours" with the case subjudice. Respondent's objections were not specific and were subsequently waived.

In Castor, Supra, this Court said that the purpose of requiring a proper objection is to put the trial judge on notice that an error may have been committed and to give the trial judge the chance to correct such an error at that time. A proper objection also alerts the opposing party to what steps may be taken to alleviate the problem. In the instant case, Respondent's counsel vacillated between requesting lesser included offenses of Aggravated Assault and objecting to any instruction on Aggravated Assault at all. He finally acquiesced in the instructions given, including his requested lesser offense of Simple Assault. This is a far cry from a clear, specific objection based upon an asserted deficiency in the charging

document as to the element of the victim's well-founded fear of imminent violence. Petitioner challenges Respondent to show any such specific objection in the record before this Court. There is none. The District Court of Appeal should not have reversed the conviction and sentence of the Respondent.

CONCLUSION

Based on the arguments and authorities presented herein, Petitioner respectfully requests that the decision of the District Court in the case subjudice be reversed and Respondent's conviction and sentence be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I **HEREBY** CERTIFY that a true and correct copy of the above and foregoing Petitioner's Brief on the Merits has been mailed **to** James G. Kontos, Esquire, Law Firm of **Daniel** Ciener, Counsel for Respondent, 255 North Grove Street, Suite **A**, Merritt Island, Florida 32953, this 24th **day** of June, 1992.

Anthony J. Golden
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