IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No.: 81,119

VINNIE TRIPP,

Respondent.

_____/

PETITIONER'S BRIEF ON THE MERITS

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PETITIONER'S BRIEF ON THE MERITS

Preliminary Statement

Petitioner, the State of Florida, respondent in the case below and the prosecuting authority in the trial court, will be referred to in this brief as the state. Respondent, VINNIE TRIPP, petitioner in the case below and defendant in the trial court, will be referred to in this brief as respondent. References to the opinion of the First District contained in the attached appendix will be noted by the symbol "A," and references to the record on appeal will be noted by the symbol "R." All references will be followed by the appropriate volume and page number(s) in parentheses.

STATEMENT OF THE CASE AND FACTS

The state seeks review of the decision of the First District in which that court certified the following question of great public importance to this Court:

> DOES THE ABSENCE OF A SPECIFIC FINDING BY THE JURY ON THE VERDICT FORM THAT THE DEFENDANT EITHER CARRIED, DISPLAYED, USED, ETC. ANY WEAPON OR FIREARM OR THAT HE COMMITTED AN AGGRAVATED BATTERY DURING THE COMMISSION OF THE FELONY SUBJECT TO BEING RECLASSIFIED PRECLUDE EXECUTION OF THE MANDATORY LANGUAGE OF 775.087(1) WHICH REQUIRES THE RECLASSIFICATION OF OFFENSES UNDER CERTAIN CIRCUMSTANCES?

(A 6).

The state charged respondent by second amended information with attempted first degree murder during the commission of robbery and during the course of which he "did carry, display, use, threaten, or attempt to use a weapon, to-wit: a claw hammer or did commit an aggravated battery," aggravated battery during the course of which a deadly weapon was used, and attempted robbery during the course of which a deadly weapon was used (R 603). The jury found respondent guilty of attempted first degree murder, aggravated battery with a deadly weapon, and attempted robbery with a deadly weapon (R 839). The trial court adjudicated respondent guilty of attempted first degree murder, aggravated battery, and attempted robbery, and

imposed an upward departure sentence of concurrent terms of life imprisonment, 15 years, and 5 years, respectively (R 896-904). In so sentencing, the trial court reclassified the attempted first degree murder count, a first degree felony, to a life felony pursuant to **Fla. Stat. §** 775.087(1)(a) (1987), based on respondent's use of a deadly weapon (R 904).

Respondent direct appealed to the First District Court of Appeal, raising as one of ten issues the reclassification of the attempted first degree murder count. The First District Court of Appeal issued its opinion on December 22, 1992, affirming respondent's convictions, but reversing his sentences (A 1). The First District reversed respondent's sentence for attempted first degree murder because, although charging document and evidence adduced at trial supported a determination that both a weapon was used and an aggravated battery was committed during the commission of attempted first degree murder, the verdict form contained no specific jury finding that respondent used a deadly weapon or committed an aggravated battery during the commission of attempted first degree murder, thereby precluding reclassification under section 775.087 (A 3-5).

In reversing respondent's sentence for attempted first degree murder, the First District reviewed this Court's decision in State v. Overfelt, 457 So.2d 1385 (Fla. 1984),

and decisions from other district courts of appeal, all of which held that the jury must make a specific finding for reclassification (A 4-5). However, because the First District found that the instant case presented a different factual scenario, i.e., the charging document and evidence supported a determination that a weapon was used and an aggravated battery was committed during the commission of attempted first degree murder, it certified a question of great public importance to this Court (A 6).

The First District issued mandate on January 7, 1993, and the state filed its notice to invoke this Court's jurisdiction on January 21, 1993. On January 29, 1993, this Court postponed its decision on jurisdiction and ordered the state's brief on the merits to be served by February 23, 1993. The state moved this Court to recall the mandate issued in this case. This Court granted this motion on February 3, 1993. This brief on the merits follows.

SUMMARY OF THE ARGUMENT

The certified question as rephrased by the state must be answered negatively. Based on the different factual scenario of the instant case -- the information clearly charged respondent with a crime during which he used a weapon, and the evidence led to the inescapable conclusion that respondent in fact used a weapon during the commission of this crime -- Overfelt should be reexamined and limited to its facts.

ARGUMENT

Issue

DOES THE ABSENCE OF A SPECIFIC FINDING BY THE JURY ON THE VERDICT FORM THAT THE DEFENDANT EITHER CARRIED, DISPLAYED, USED, ETC. ANY WEAPON OR FIREARM OR THAT HE COMMITTED AN AGGRAVATED BATTERY DURING THE COMMISSION OF THE FELONY SUBJECT TO BEING RECLASSIFIED PRECLUDE EXECUTION OF THE MANDATORY LANGUAGE OF 775.087(1) WHICH REQUIRES THE RECLASSIFICATION OF OFFENSES UNDER CERTAIN CIRCUMSTANCES, WHERE THE INFORMATION CLEARLY CHARGED THE DEFENDANT WITH A CRIME DURING WHICH HE USED A WEAPON AND THE EVIDENCE LED TO THE INESCAPABLE CONCLUSION THAT HE USED A WEAPON DURING THE COMMISSION OF THE CRIME?

The state respectfully submits that the question as certified by the First District is somewhat broad, and that the answer to the certified question as rephrased above must be unequivocally negative.

In State v. Overfelt, 457 So.2d 1385 (Fla. 1984), Overfelt was charged with, among other crimes, two counts of attempted first degree murder. The jury found Overfelt guilty of the lesser included offense of attempted third degree murder on one count and aggravated assault on the other. The trial court reclassified the crime of attempted third degree murder as a third degree felony, pursuant to section 775.087(1), and applied the three year minimum mandatory sentencing provision of section 775.087(2). On those facts, this Court held that the trial court could not

enhance the sentence or impose mandatory sentencing unless the jury made a specific finding that Overfelt committed the crime while using a firearm, either by finding Overfelt guilty of a crime which involves the use of a firearm or by answering a specific question of a special verdict form so indicating. This Court reasoned:

> The question of whether an accused actually possessed a firearm while committing a felony is a factual matter properly decided by the jury. Although a trial judge may make certain findings on matters not associated with the criminal episode when rendering a sentence, it is the jury's function to be the finder of fact with regard to matters concerning the criminal episode. To allow a judge to find that an accused actually possessed a firearm while committing a felony in order to apply the enhancement or mandatory sentencing provisions of section 775.087 would be an invasion of the jury's historical function and could lead to a miscarriage of justice in cases where the defendant was charged with but not convicted of a crime involving a firearm.

Id. at 1387 (emphasis supplied).

In Overfelt, this Court had before it only the specific situation where the defendant was convicted of a lesser included offense, one which did not involve the use of a weapon. Thus, Overfelt did not address the instant factual scenario, where respondent was found guilty as charged of attempted first degree murder, the information clearly charged that this offense was committed with a deadly

weapon, and the evidence showed that this offense was committed with the use of a deadly weapon.

Further, as shown in the above underlined portion of Overfelt, this Court was obviously concerned with the possibility that a defendant might receive an enhanced sentence or mandatory sentencing when the evidence did not support the conclusion that a weapon was used. Here, however, this concern is unwarranted, as there is no question that respondent used a deadly weapon -- a claw hammer -- to commit the charged offense.

Similarly, in Tindall v. State, 443 So.2d 362 (Fla. 5th DCA 1983), Tindall was charged with first degree murder, the facts unequivocally showing that he killed the victim with a rifle. The jury found Tindall guilty of second degree murder, but made no specific finding in its verdict that a firearm was used. The Fifth District concluded that, where a defendant is charged with a crime which requires the possession of a firearm to commit the crime, or the proof leads to the inescapable conclusion that the defendant possessed a firearm during the commission of the crime, the jury need only find the defendant guilty of the charged crime, or of a lesser included offense which also has the requisite allegations and proof to substantiate it, in order for the trial court to impose the mandatory sentencing provisions of section 775.087(2). Although the Overfelt

Court cited to Tindall, it did not disapprove it. Thus, Overfelt appears to have left unanswered the question of whether a trial court may avail itself of section 775.087, despite no special jury finding, when the evidence indisputably shows that a weapon was used.

Nevertheless, decisions after Overfelt have applied its holding routinely, even where the evidence is undisputed that a weapon was used during the commission of charged crimes. See Chapman v. State, 597 So.2d 431 (Fla. 2d DCA 1992). Such decisions seem contrary to both common sense logic and Overfelt. If the evidence is undisputed that a weapon was used, it is clear that a jury verdict, with or without a special finding, will be based on the fact that a weapon was used. To preclude a trial court from utilizing the provisions of section 775.087 in such a case, simply because the jury did not write out that a defendant was guilty of the charged offense and used a weapon, would constitute the ultimate placing of form over substance.

Thus, it appears the time has come to review Overfelt. Does it apply as routinely as Chapman would have us believe, or is Overfelt properly limited to the situation where a defendant is convicted of a lesser included offense which does not involve the use of a weapon? The answer must be that Overfelt is limited to its facts. Otherwise, the Court would have soundly disapproved Tillman in text.

In any event, section 775.087(1) applies in two separate contexts -- when a person is charged with a felony and during the commission of this felony either (1) carries, displays, uses, threatens, or attempts to use any weapon, OR (2) commits an aggravated battery. In this case, the information clearly charged respondent with

> unlawfully f[orming] a premeditated design to effect the death of a human being, . . . or while engaged in the perpetration of or in an attempt to perpetrate a . . . robbery[,] did attempt to kill and murder said Mary Harrell by hitting the victim in the head with a claw hammer, and in the course of said crime did carry, display, use, threaten, or attempt to use a weapon . . . or did commit an aggravated battery . . . .

(R 603). The information clearly invoked both parts of the statute. Thus, even if this Court were to hold that the jury had to make a specific finding regarding a weapon for reclassification under that statutory provision, the trial court still could have reclassified the offense pursuant to the aggravated battery provision,[1] which case law does not

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[1] In the First District, respondent made much of the fact that the prosecutor appeared to rely on the deadly weapon provision of section 775.087, based on his notation on the scoresheet next the charge of attempted first degree murder -- "(deadly weap.)" (R 904). Such a notation makes no difference in the analysis of this issue, however, because (1) sentencing was within the trial court's discretion, and (2) the information properly charged respondent under both statutory provisions, and the evidence supported both.

construe to require a special finding. If this Court, however, were to hold that a special finding is required for aggravated battery as well, here, where the jury convicted respondent under count two for aggravated battery with a deadly weapon, such a finding appears to exist.

CONCLUSION

Based on the above cited legal authorities and arguments, the state respectfully requests this Honorable Court to answer the certified question as rephrased by the state in the negative.

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 PETER WILLIAMS, Assistant State Attorney, Post Office Box 12726, Pensacola, Florida 32575; and GLEN P. GIFFORD, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 23rd day of February, 1993.

GYPSY BAILEY
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

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_____/

APPENDIX

Tripp v. State,

Case No. 91-1540 (Fla. 1st DCA Dec. 22, 1992)

91-111132 TR

IN THE DISTRICT COURT OF APPEAL,

FIRST DISTRICT, STATE OF FLORIDA

VINNEY TRIPP,

Appellant,

V.

STATE OF FLORIDA,

Appellee.

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

CASE NO. 91-1540

Opinion filed December 22, 1992.

An appeal from the Circuit Court for Escambia County. Joseph Q. Tarbuck, Judge.

Nancy A. Daniels, Public Defender; Glen P. Gifford, Assistant Public Defender, for appellant.

Robert A. Butterworth, Attorney General; Gypsy Bailey, Assistant Attorney General, Tallahassee, for appellee.

WIGGINTON, J.

Appellant appeals his convictions of and sentences for attempted first-degree murder, aggravated battery and attempted robbery. After considering all of appellant's arguments on appeal, we affirm his convictions but reverse his sentences and remand for resentencing.

After jury trial, appellant was found guilty of the above three offenses based upon evidence produced at trial that he entered a convenience store and repeatedly struck the store clerk with a claw hammer, rendering her incapacitated. He then unsuccessfully attempted to open the cash register drawer, after which he again beat the clerk with the claw hammer. The victim sustained severe physical injuries.

The charging document alleged that appellant unlawfully, from a premeditated design to effect the death of the victim or while engaged in a felony, a robbery, did attempt to murder the victim by hitting her "in the head with a claw hammer and in the course of said crime he did carry, display, use, threaten or attempt to use a weapon, to wit: a claw hammer or did commit an aggravated battery . . . ." He was also charged with aggravated battery with a deadly weapon and robbery with a deadly weapon. The jury found him guilty of the greatest crimes listed on the verdict form: "attempted murder in the first degree"; "aggravated battery with a deadly weapon causing great bodily harm, permanent disability, or permanent disfigurement"; and "attempted robbery with a deadly weapon."

The judgment classifies the attempted first degree murder conviction as a first degree felony, pursuant to sections 782.04 and 777.04, Florida Statutes, and the attempted armed robbery conviction as a second degree felony, pursuant to sections 812.13 and 777.04, Florida Statutes. However, citing "deadly weapon" as the reason, the scoresheet reflects that the attempted first-

degree murder conviction was reclassified as a life felony, presumably pursuant to section 775.087(1), Florida Statutes. The scoresheet also reflects that the attempted armed robbery count was reclassified as a first-degree felony with "aggravated battery" cited as the reason.

Section 775.087(1) provides:

> Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and during the commission of such felony the defendant carries, displays, uses, threatens, or attempts to use any weapon or firearm, or during the commission of such felony the defendant commits an aggravated battery, the felony for which the person is charged shall be reclassified. . . . (Emphasis supplied.)

As the state concedes, reclassification of the attempted armed robbery offense under section 775.087(1) was improper since that offense is a felony in which the use of a weapon is an essential element. See Gonzalez v. State, 585 So.2d 932 (Fla. 1991).

Attempted first degree murder is not an offense in which use of a weapon is an essential element. Thus, that offense is subject to reclassification pursuant to section 775.087(1) under appropriate circumstances. In examining the circumstances of the instant case, we find that both the charging document and the proof adduced at trial not only support a determination that both a weapon was used and an aggravated battery was committed during the commission of the offense of attempted first degree murder, but also establish that, in this particular case, all three offenses involved those acts and were necessarily integrally

related. However, the verdict form contained no specific jury finding that appellant used a deadly weapon or committed an aggravated battery during the commission of attempted first-degree murder. The pivotal question to be determined is whether the application of the reclassification mandate of section 775.087(1) is precluded due to the absence of that particular jury finding.

In State v. Overfelt, 457 So.2d 1385 (Fla. 1984), the court agreed with the Fourth District Court of Appeal's holding:

> 'that before a trial court may enhance a defendant's sentence or apply the mandatory minimum sentence for use of a firearm [pursuant to section 775.087, Florida Statutes], the jury must make a finding that the defendant committed the crime while using a firearm either by finding him guilty of a crime which involves a firearm or by answering a specific question of a special verdict form so indicating.'

The court also cited Hough v. State, 448 So.2d 628 (Fla. 5th DCA 1984) Smith v. State, 445 So.2d 1050 (Fla. 1st DCA 1984), Streeter v. State, 416 So.2d 1203 (Fla. 3d DCA 1982), and Bell v. State, 394 So.2d 570 (Fla. 5th DCA 1981) and further declared:

> The question of whether an accused actually possessed a firearm while committing a felony is a factual matter properly decided by the jury. Although a trial judge may make certain findings on matters not associated with the criminal episode when rendering a sentence, it is the jury's function to be the finder of fact with regard to matters concerning the criminal episode. To allow a judge to find that an accused actually possessed a firearm when committing a felony in order to apply the enhancement or mandatory sentencing provisions of section 775.087 would be an invasion of the jury's historical function and could lead to a

> miscarriage of justice in cases such as this where the defendant was charged with but not convicted of a crime involving a firearm.

See also Chapman v. State, 597 So.2d 431 (Fla. 2nd DCA 1992) and Alejo v. State, 483 So.2d 117 (Fla. 2nd DCA 1986), in which the court found error in the reclassification of offenses under section 775.087(1) in the absence of the requisite specific jury finding.

In Streeter, the court concluded that the fact that the jury had found, in regard to other counts, that the defendant possessed a weapon during the commission of the felonies being reclassified did not supply the trial court with a basis to reclassify those felonies since the jury did not make findings specifically in regard to the reclassified felonies that the defendant had used a weapon during the commission of those crimes. In light of Overfelt, Chapman, Alejo and Streeter, it appears that, although in this case the charging documents alleged, the evidence showed, and the jury specifically found that appellant committed an aggravated battery and used a weapon in the course of his criminal episode, which included the offense of attempted first-degree murder, those circumstances are insufficient to support reclassification of the attempted first-degree murder offense in this case in the absence of the necessary jury finding specifically as to that offense.

Therefore, we reverse the reclassification of the attempted first-degree murder and attempted armed robbery counts and remand for resentencing without reclassification. However, we certify the following question to the supreme court:

DOES THE ABSENCE OF A SPECIFIC FINDING BY THE JURY ON THE VERDICT FORM THAT THE DEFENDANT EITHER CARRIED, DISPLAYED, USED, ETC. ANY WEAPON OR FIREARM OR THAT HE COMMITTED AN AGGRAVATED BATTERY DURING THE COMMISSION OF THE FELONY SUBJECT TO BEING RECLASSIFIED PRECLUDE EXECUTION OF THE MANDATORY LANGUAGE OF 775.087(1) WHICH REQUIRES THE RECLASSIFICATION OF OFFENSES UNDER CERTAIN CIRCUMSTANCES?

SMITH, J., CONCUR; WOLF, J., CONCURRING IN PART AND DISSENTING IN PART WITH WRITTEN OPINION.

WOLF, J., concurring in part and dissenting in part.

I concur in the result, but do not agree that it is necessary or appropriate to certify a question to the supreme court. As indicated in the court's opinion, the jury made no finding that the appellant used a deadly weapon or committed an aggravated battery during the commission of the attempted first-degree murder. The judgment classified the attempted first-degree murder as a first-degree felony. There was absolutely no basis for classifying the attempted first-degree murder as a life felony on the guidelines scoresheet.