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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner/Cross-Respondent,

v.

Case No.: 81,119

VINNEY TRIPP,

Respondent/Cross-Petitioner.

REPLY BRIEF OF PETITIONER
ANSWER BRIEF OF RESPONDENT/CROSS-PETITIONER

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

✓ JAMES W. ROGERS
BUREAU CHIEF, CRIMINAL APPEALS
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR #0325791

✓ GYPSY BAILEY
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR #0797200

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904)488-0600

COUNSEL FOR PETITIONER/CROSS-
RESPONDENT

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Preliminary Statement

Petitioner/Cross-Respondent, the State of Florida, the prosecuting authority in the trial court and appellee below, will be referred to in this brief as the state. Respondent/Cross-Petitioner, VINNEY TRIPP, the defendant in the trial court and appellant below, will be referred to in this brief as respondent/cross-petitioner.

STATEMENT OF THE CASE AND FACTS

In response to the state's initial brief, respondent/cross-petitioner filed a notice of cross appeal, seeking to raise all issues presented to the First District. The state moved to strike this notice. Subsequently, respondent/cross-petitioner filed a 64 page brief and a motion to accept a brief in excess of the 50 page limit. The state moved to strike this brief, and alternatively to deny the motion, but this Court granted respondent/cross-petitioner's motion to accept.

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/cross-petitioner with a crime during which he used a weapon, and the evidence led to the inescapable conclusion that respondent/cross-petitioner in fact used a weapon during the commission of this crime -- Overfelt should be reexamined and limited to its facts.

ARGUMENT

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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 answer to the certified question as rephrased above must be unequivocally negative. State v. Overfelt, 457 So. 2d 1385 (Fla. 1984), is circumscribed by its facts, which do not involve a situation where, as here, the evidence inescapably showed that a weapon was used during the commission of a felony.

Respondent/cross-petitioner claims that Tindall v. State, 443 So. 2d 362 (Fla. 5th DCA 1983), "was officially declared dead in 1986." Respondent/cross-petitioner's Brief on the Merits at 18. This contention is not supported by Overfelt, or the cases cited by respondent/cross-petitioner. As noted in the state's initial brief on the merits, this Court has never expressly overruled Tindall. If Overfelt

were not limited to its own peculiar factual scenario, this Court presumably would have disapproved Tindall explicitly.

Respondent/cross-petitioner also claims that Overfelt established a "bright line" rule, which always requires the jury to make a specific finding about the use of a weapon. The district courts of appeal have not interpreted Overfelt as establishing such a hardfast rule, as they have held that references to the charging document or use of the phrase "as charged" in the verdict form is sufficient for enhancement purposes, where the charging document charges the defendant with an offense involving the use of a weapon. See Small v. State, 556 So. 2d 780 (Fla. 1st DCA 1990); State v. Jones, 536 So. 2d 1161 (Fla. 5th DCA 1988); Luttrell v. State, 513 So. 2d 1298 (Fla. 2d DCA 1987); Rios v. State, 510 So. 2d 1025 (Fla. 3d DCA 1987).

Further, the Overfelt Court grounded its decision on its expressed concern that a defendant might receive an enhanced sentence when the evidence did not support the conclusion that a weapon was used. Such a concern is unwarranted under the instant facts, where it cannot be disputed that respondent/cross-petitioner used a deadly weapon in the commission of the charged offenses. See Jones, 536 So. 2d at 1162 ("The instant case is distinguishable from Hough v. State, 448 So. 2d 628 (Fla. 5th DCA 1984) because here the evidence was unrebutted that

defendant had actual possession of the firearms and that he carried the firearms from the home.") (emphasis supplied).

Finally, and most significantly, the Overfelt Court had before it only the situation where the jury convicted the defendant of a lesser included offense which did not involve the use of a firearm. In such a situation, it may not be as clear, without the special verdict interrogatory, whether the jury found that a weapon was used. See Marshall v. State, 529 So. 2d 797, 797-98 n.2 (Fla. 3d DCA 1988). However, in a scenario like the instant one, where the information charged respondent/cross-petitioner with an offense involving the use of a weapon, and the evidence indisputably showed that respondent/cross-petitioner in fact used a weapon, there is no logical reason to preclude enhancement.

Respondent/cross-petitioner is wrong in his contention that State v. McKinnon, 540 So. 2d 111 (Fla. 1991), "directly controls" this case. Respondent/cross-petitioner's Brief on the Merits at 19. The state does not contend that enhancement may be based on findings as to other counts that a weapon was used.

Further, respondent/cross-petitioner incorrectly alleges that the state cannot rely upon the aggravated battery portion of section 775.087(1), because "the jury did

not find that Tripp committed an aggravated battery within the attempted murder count." Respondent/cross-petitioner's Brief on the Merits at 19. As pointed out by the state in its merits brief, neither the statute nor case law require a specific verdict finding that an aggravated battery was committed.

Finally, respondent/cross-petitioner erroneously argues that the state cannot obtain a conviction for aggravated battery and enhance an attempted murder charge based on this aggravated battery. This is a double jeopardy argument never presented at any point to any court below, and as such, should be disregarded. In any event, although the Fifth District in Foster v. State, 596 So. 2d 1099, 1102 (Fla. 5th DCA 1992) wished to concluded that section 775.087 "eliminate[d] a separate charge of aggravated battery when it has been proven that a defendant committed that offense during the commission of a felony in which the use of a weapon or firearm was not an essential element," it could not because the McKinnon Court had "concluded that the enactment of section 775.087 was not evidence of an intent to prohibit two felony convictions for one act of manslaughter in which a firearm was used during the commission of the primary felony." Respondent/cross-petitioner's citation to Foster is affirmatively mischievous.

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Respondent/cross-petitioner makes clear that, in raising the eight other issues he presented to the First District, he is using the First District's certification of a question of great public importance as a mere vehicle to receive a second plenary review of those issues on which he was unsuccessful. Such a practice is abominable, given the rules of appellate procedure and limited financial resources of the Court and both parties. Further, this Court's acceptance of a 64 page brief, only three pages of which address the certified question, is enigmatic, in light of its recent refusals to address issues which were outside the scope of conflict or a certified question.¹ See State v. Hodges, Case No. 79,728, slip op. at 2 n.1 (Fla. Apr. 15, 1993); Burks v. State, 18 Fla. L. Weekly S71, S72 (Fla. Jan. 21, 1993); Gibson v. State, 585 So. 2d 285 (Fla. 1991); Stephens v. State, 572 So. 2d 1387 (Fla. 1991).

Nevertheless, in the event this Court wishes to review the merits of these claims, the state files an accompanying appendix which contains copies of its answer brief and

¹ For all of these reasons, the state moved to strike respondent's notice of cross appeal and merits brief in excess of 50 pages.

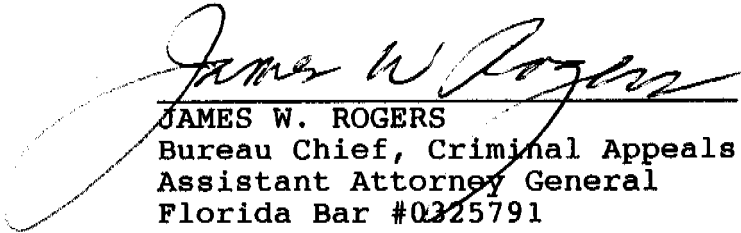
notices of supplemental authority filed in the First District, which comprehensively address all issues raised by respondent/cross-petitioner. In his merits brief, respondent/cross-petitioner has done nothing more than to copy the arguments he made to the First District. Thus, because the state's answer brief and notices filed below are completely responsive to those claims, the state adopts the arguments made therein.

CONCLUSION


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

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



JAMES W. ROGERS
Bureau Chief, Criminal Appeals
Assistant Attorney General
Florida Bar #0325791




GYPSY BAILEY
Assistant Attorney General
Florida Bar #0797200

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to GLEN P. GIFFORD, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida 32301, this 19th day of April, 1993.



GYPSY BAILEY
Assistant Attorney General