IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

JOHNNIE ANDERSON,

Respondent.

Case No. 83,009

ANSWER BRIEF OF RESPONDENT

On Appeal from the Circuit Court of the
17th Judicial Circuit of Florida,
In and For Broward County (Criminal Division)

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PRELIMINARY STATEMENT

Respondent was the defendant and petitioner was the prosecution in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, In and For St. Lucie County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbol will be used:

R = Record on Appeal

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of case and facts in the state's initial brief, with the following additions:

The information charged in Count II, the count relevant here, that Respondent "did unlawfully obstruct or oppose members of the SIU unit of the St. Lucie County Sheriff's Department, duly authorized law enforcement officers in the lawful execution of their legal duties, to-wit: effecting a lawful arrest" (R 688).

The defense, in its motion for judgment of acquittal, argued, among other things, that Respondent's arrest was not legal and that he was merely present at the scene of the crime (R 545, 547).

During closing argument, defense counsel did admit that the evidence showed that Respondent was present in the car with Bobby Joe Owens, the state's witness, when there was also cocaine in the car (R 583) and that Respondent had been present at the scene of the drug crime (R 625). However, defense counsel argued that it had not been proved that Respondent intended to participate in the drug crime, that he possessed the cocaine, or that he knew it was cocaine (R 582-583). Defense counsel also argued that even if Respondent had been involved, he abandoned any attempt to commit the crime when he put the cocaine out of the car and started to drive off (R 590-592). Defense counsel stated that Respondent made a mistake in continuing to try to leave after he saw the police vehicles, but argued that even on this point there was conflicting testimony (R 592).

SUMMARY OF ARGUMENT

A.

This Court need not exercise its discretionary jurisdiction in this case. (1) The weight of present authority supports the Fourth District's decision. (2) The Third District case cited for conflict in distinguishable. (3) Since the Third District's case followed another Fourth District case, any conflict is actually intra-district and therefore beyond this Court's jurisdiction. (4) Peripheral arguments raised by the state should not be addressed because they are beyond the scope of the certified conflict.

B.

The Fourth District's decision should be affirmed. The weight of authority is that the trial court improperly invades the province of the jury when it instructs that an arrest constitutes lawful execution of a legal duty. This Court should defer to the Fourth District's determinations that the issue was preserved and that the error was prejudicial and reversible.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL CORRECTLY REVERSED RESPONDENT'S CONVICTION FOR RESISTING ARREST WITHOUT VIOLENCE BECAUSE THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY THAT EFFECTING A LAWFUL ARREST CONSTITUTES EXECUTION OF A LEGAL DUTY.

A. JURISDICTION

This Court's jurisdiction over district court of appeal decisions certifying conflict is discretionary. Article V, Section 3(b)(4) of the Florida Constitution and Rule 9.030(a)(2)(A)(vi), Florida Rules of Appellate Procedure, provide that this Court "may" review, and that discretionary jurisdiction "may" be sought to review, such cases. This Court is not required to exercise its jurisdiction in every case where conflict is certified.

In the instant case, exercise of this Court's discretionary jurisdiction is not required because the weight of authority from the district courts of appeal supports the decision here from the Fourth District. (See subsection B of the argument in this brief.) McBride v. State, 604 So. 2d 1291 (Fla. 3d DCA 1992), the case cited by the Fourth District for conflict, is an apparent anomaly. At most, it is in the distinct minority.

McBride is, moreover, distinguishable from the instant case by the wording of the respective jury instructions at issue: the instruction in McBride stated that "an" arrest and detention constitutes lawful execution of a legal duty, whereas the instruction in the instant case was that "effecting a lawful arrest" constitutes lawful execution of a legal duty (R 652).

Where jurisdiction is accepted because of apparent conflict but the supposedly conflicting cases are distinguishable, this Court may discharge jurisdiction. See Department of Revenue v. Johnston, 442 So. 2d 950 (Fla. 1983).

If this Court is concerned with any conflict between the instant case and Stayer v. State, 590 So. 2d 25 (Fla. 4th DCA 1991), the Fourth District case followed by the Third District in McBride, this concern must be left for the Fourth District to resolve in a future case, since the conflict would be intra-district and beyond this Court's conflict jurisdiction, which covers only inter-district conflicts. Art. V, §§ 3(b)(3) and (4), Fla. Const.; Fla. R. App. P. 9.030(a)(2)(A)(iv) and (vi); In re Rule 9.331, Determination of Causes by a District Court of Appeal en Banc, Florida Rules of Appellate Procedure, 416 So. 2d 1127 (Fla. 1982).

Several peripheral arguments made by the state in its brief need not be addressed by this Court if it does decide to exercise its discretionary jurisdiction over the certified conflict. These peripheral arguments are specific to the instant case and for this Court to address them would add nothing to the jurisprudence of the state. The arguments are more fully addressed on pages 8-9 in subsection B of the argument in this brief. Although once this Court accepts jurisdiction it has jurisdiction over the entire decision, Reed v. State, 470 So. 2d 1382, 1383 (Fla. 1982), this Court may decline to address other issues beyond the scope of the conflict. See State v. Gibson, 585 So. 2d 285 (Fla. 1991).

B. THIS COURT MUST AFFIRM THE DECISION OF THE FOURTH DISTRICT BELOW.

If this Court does exercise its jurisdiction, it must affirm the decision in the instant case and disapprove any other decisions which may be in conflict. The weight of authority from this Court and from the district courts of appeal support the instant decision.

Here, the trial court instructed the jury that "effecting a lawful arrest constitutes lawful execution of a legal duty" (R 652). The defect in this instruction, as stated by the Fourth District in Scott v. State, 594 So. 2d 832 (Fla. 4th DCA 1992), the previous decision given as authority for the instant decision, is that it amounts to a directed verdict because it effectively removed the issue of the legality of the arrest from the jury's consideration. The information here charged that Respondent obstructed or opposed law enforcement officers "in the lawful execution of their legal duties, to-wit: effecting a lawful arrest" (R 688). The legality of the officers' actions was thereby made an essential element of the charged crime to be proved by the state beyond a reasonable doubt. See also § 843.02, Fla. Stat. (1993), making it a crime to resist, obstruct, or oppose without violence any officer "in the lawful execution of any legal duty."

The guiding principles were set forth by this Court in Wright v. State, 586 So. 2d 1024 (Fla. 1991), which addressed a jury instruction on another essential element, the status of the victim as a law enforcement officer. (Wright was a case of battery on a law enforcement officer, but the officer's status is also an element of resisting arrest without violence, the crime in the

instant case. §§ 843.02 and 943.10, Fla. Stat. (1993). See also Starks v. State, 18 Fla. L. Weekly D2513 (Fla. 3d DCA Dec. 10, 1993).)

In Wright the trial court instructed the jury that the named victims were law enforcement officers. This Court stated:

> Whether these particular persons were law enforcement officers at the time the offense occurred was a matter of fact, and that fact constituted an essential element of the offense. In a jury trial it is the sole province of the jury to determine whether the state has proved each essential element beyond a reasonable doubt. The instruction here invaded the fact finding province of the jury.

586 So. 2d at 1030-1031.

This statement by this Court is consistent with the general principle that the judge should not invade the province of the jury by giving instructions which comment on the evidence. See Fenelon v. State, 594 So. 2d 292, 294-295 (Fla. 1992). Constitutional due process prohibits jury instructions relieving the state of its burden of proof. Francis v. Franklin, 471 U.S. 311, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (Fla. 1985).

The great majority of district court decisions concerning instructions on lawful execution of a legal duty in cases of resisting arrest without violence are in accord with these general principles and with the Fourth District's decision in the instant case. See Scott v. State, supra (instruction that "an arrest constitutes a lawful execution of a legal duty"); Dion v. State, 564 So. 2d 618 (Fla. 4th DCA 1990) (instructing jury as a matter of law that the police officer was acting lawfully when he arrested the defendant); Wimbley v. State, 567 So. 2d 560 (Fla. 4th DCA 1990) (instruction that the police were in lawful execution of a

legal duty at the time the offenses took place); Kirschenbaum v. State, 592 So. 2d 1272 (Fla. 3d DCA 1992); Adams v. State, 19 Fla. L. Weekly D105 (Fla. 3d DCA Jan. 11, 1994); Starks v. State, supra (instruction that "attempt to stop" defendant "constitutes a lawful execution of a legal duty"); Hierro v. State, 608 So. 2d 912, 914-915 (Fla. 3d DCA 1992) ("arrest and/or a detention of the defendant constitutes a lawful execution of a legal duty"); Tillman v. State, 600 So. 2d 37 (Fla. 3d DCA 1992) ("the police officer was acting lawfully when he arrested" the defendant); Smith v. State, 399 So. 2d 70 (Fla. 5th DCA 1981); Jones v. State, 584 So. 2d 190 (Fla. 5th DCA 1991) ("arresting Jesse Jones for a crime constitutes a legal execution of a legal duty").

The few district court decisions appearing to go against this current of authority are apparent anomalies which this Court, if it addresses them at all, must overrule. McBride v. State, 604 So. 2d 1291 (Fla. 3d DCA 1992); Stayer v. State, 590 So. 2d 25 (Fla. 4th DCA 1991); McPhee v. State, 616 So. 2d 483 (Fla. 4th DCA 1993).[1]

The jury instruction given in the instant case clearly invaded the province of the jury on a factual issue which constituted an essential element of the crime. After being told by the court that effecting a lawful arrest constituted lawful execution of a legal duty, the jury would have found itself with no choice but to follow this authoritatively-stated ruling by the court on the issue. The effect of jury instructions must be determined by the way in which

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[1] Any conflict between the instant case and Stayer and McPhee, also Fourth District cases, is not for this Court to resolve. See subsection A of the argument in this brief.

a reasonable juror could have interpreted them. Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979). Any reasonable juror would interpret an instruction such as that here to be determinative of the element of the crime addressed. The instruction in the instant case was therefore a violation of due process and a fair trial under the Florida and United States Constitutions.

The several peripheral and case-specific arguments made by the state and mentioned above in subsection A of the argument in this brief are beyond the scope of the district court's certification, were determined adversely to the state by the Fourth District, and need not be addressed by this Court. Respondent will comment briefly, however.

First, the state contends that the lawfulness of Respondent's arrest was not really an issue in this case. Respondent will certainly acknowledge that the misdemeanor of resisting arrest without violence was not of paramount concern during the trial because Respondent was also on trial for trafficking in cocaine between 28 and 200 grams, a first degree felony. § 893.135(1)(b)1.a., Fla. Stat. (1993). Nonetheless, defense counsel did argue to the court that the arrest was not lawful (R 547) and also argued to the jury that Respondent's fleeing from the scene was part of an effort to abandon the drug deal (R 590-592). The fact that defense counsel had to place his major emphasis on the by far more serious trafficking charge cannot be taken as a waiver of the issue now before this Court. It is only now that the case has come before this Court that the resisting arrest without violence charge has taken on major importance.

Second, defense counsel's argument at trial did not concede Respondent's guilt on this charge. Counsel conceded only that Respondent was present at the scene of a crime (R 583, 625), but, as noted, went on to argue that Respondent's driving off was a part of his effort to abandon any involvement in the crime: it was in this context that counsel stated that Respondent's only mistake was continuing to attempt to leave after the police cars appeared (R 590-592). Within the context of the greater trafficking charge, defense counsel still did his best to argue against the resisting arrest charge.

Third, essentially encompassing the above arguments, the state contends that Respondent was not prejudiced. Again, the misdemeanor was not the major focus of the trial. Nonetheless, Respondent was plainly prejudiced because he was convicted as charged of the misdemeanor as well as of the lesser included felony offense of possession of cocaine. The improper jury instruction contributed significantly to the misdemeanor conviction.

Finally, the state contends that Respondent's objection was not properly preserved for review. At the jury charge conference defense counsel objected to the wording of the instruction given, opposing the judge's stated intention to instruct that effecting a lawful arrest constitutes execution of a legal duty. The judge clearly understood that the defense was objecting, because his final word on the matter was, "Okay, that is noted and overruled" (R 565).

This Court should defer to the Fourth District on these peripheral arguments and affirm that court's decision that the jury instruction constituted reversible error in this case.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court to affirm the decision of the Fourth District Court of Appeal.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Michelle A. Konig, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this 24th day of February, 1994.

ALLEN J. DeWEESE
Assistant Public Defender