IN THE SUPREME COURT OF FLORIDA

CASE No. 83,009

STATE OF FLORIDA,

Petitioner,

vs.

JOHNNIE ANDERSON,

Respondent.

****

ON DISCRETIONARY REVIEW FROM DISTRICT COURT OPINION

****

PETITIONER'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, will be referred to herein as "the State." Respondent, Johnnie Anderson, was the defendant in the trial court and the Appellant in the district court of appeal, he will be referred to herein as "Respondent."

The following symbols will be used in this brief:

"R" = Record on Appeal

STATEMENT OF THE CASE AND FACTS

Respondent was initially charged with trafficking in cocaine over 28 grams but less than 300 grams, and resisting an officer without violence (R 688).

The case began when the police set up a sting to catch Bobby Joe Owens. Robert Jones, a confidential informant had named Owens as a suspect to the police. Jones met several times with Owens while wearing a body bug, and arranged to buy two ounces of cocaine from Owens for $1,700. The money was supplied to Jones by law enforcement. Respondent's name was never mentioned in any of the negotiations preceding the actual deal (R 195-197, 211-213, 224-230).

On the day of the arrest, Owens showed up in a car driven by Respondent. Jones entered and exited the car, and went back to his truck and informed the police that they had the cocaine. Owens then reentered the car, and gave the signal that the deal had taken place (R 201-202, 237).

After the signal was given, the police approached Respondent's car. The police approached on foot and in police cars. The officers testified that they were wearing raid jackets, and the cars had their blue lights and sirens on. When the police were almost on top of Respondent's vehicle, Respondent sped off. The car struck a tree, and Owens and Jones jumped out. Then the car backed off the tree and sped southwest down a dead end street, turned around and was trapped by police. The car then stopped and Respondent surrendered peacefully. (R 237-240, 301, 344-347, 357, 379-381, 387,390).

The $1,700 was found on and under the driver's seat, where Respondent had been sitting. The cocaine was found in two bags, next to tire tracks on the driver's of the car, near where the car had originally been parked (R 234-247, 310, 345-346, 358, 380-383).

After his arrest, Owens admitted his guilt, and agreed to provide substantial assistance by testifying at trial (R 258-259).

Owens testified that Respondent had offered to get him the cocaine for Jones. Owens got in Respondent's car and they rode to a house where Respondent weighed out two ounces of cocaine and handed it to Owens. (R 402-405).

Respondent drove Owens to a dirt road where they met Jones. Jones got into Respondent's car and held and examined the cocaine. Then he got out to get the money. While Jones was gone, Respondent said that something was not right. Respondent opened the door and set the cocaine outside on the ground. Jones then got back into the car with the money, the police moved in, and Respondent took off. Owens testified that the police did not have their blue lights or sirens on (R 405-406, 412, 419-420).

After the State rested, Respondent moved for a directed verdict, and argued that the evidence was insufficient to prove that Respondent trafficked in cocaine. The court denied the motion. Then, Respondent moved for a directed verdict on Count II:

> MR. ORR [defense counsel]: Your Honor, as to Count II we move for a directed verdict of acquittal on the grounds that, uh, my client having failed to

> complete the first felony thereby cannot be guilty of resisting arrest without violence since he was not arrested for a lawful felony--for Count II.
>
> THE COURT: Okay, having found that there is a prima facie case on, uh, Count I, I believe, uh logically, uh, the motion should also be denied based upon the arguments that are made here for a judgment of acquittal as to Count II. So the motion for judgment of acquittal as to Count II is likewise denied then.

(R 548).

During closing arguments, defense counsel admitted that Respondent had made a "mistake" by trying to leave after he saw the police (R 592). Counsel also admitted that Respondent had been "at a crime scene, proven beyond and to the exclusion of every reasonable doubt" (R 625).

The Jury was instructed on the elements of Resisting without Violence:

> Before you can find the Defendant guilty of resisting an officer without violence, the State must prove the following elements beyond a reasonable doubt: First, Johnnie Anderson obstructed or opposed members of the SIU unit of the St. Lucie County Sheriff's Department. Second, at the time, the members of the SIU unit of the St. Lucie County Sheriff's Department were engaged in the lawful execution of a legal duty. Third, at the time members of the SIU unit of the St. Lucie Sheriff's Department were officers.
>
> The Court now instructs you that every deputy sheriff is an officer within the meaning of this law.
>
> The Court further instructs you that effecting a lawful arrest constitutes lawful execution of a legal duty.

(R 651-652).

At the jury instructions conference the following discussion had taken place:

> THE COURT: Okay, resisting then--let's see, the State has charged, uh, okay the State has only charged resisting, is that correct? Oh, you have unlawfully obstruct or oppose. Okay, the --statute provides resisting, obstruction or opposition. So you are charging obstruct or oppose. Any objection to giving paragraph--the first unnumbered paragraph in paragraph one with the alternatives obstructed or opposed?
> ..
> MISS CRAFT [prosecutor]: No sir.
>
> MR. ORR [defense counsel]: No.
>
> THE COURT: Members of the SIU of the St. Lucie County Sheriff's Department--okay. Two, at the time members, etc., were engaged in lawful execution of a legal duty. Any objection to that?
>
> MR. ORR: No.
>
> MISS CRAFT: No.
>
> THE COURT: Three, at the time members, etc., were officers, alter that a little bit. The Court now instructs you that--this is the next to the last unnumbered paragraph. The Court now instructs you that every--
>
> MR. ORR: SIU member?
>
> THE COURT: Would it be deputy Sheriff?
>
> MR. ORR: Deputy Sheriff.
>
> MISS CRAFT: Uh-huh.
>
> THE COURT: I think that would be appropriate. Okay, any objection to that?
>
> MISS CRAFT: No sir.

MR. ORR: No.

THE COURT: Okay, and then the last unnumbered paragraph, the Court further instructs you that--it says, read the duty being performed from the charge, which is the--

MISS CRAFT: Effecting lawful arrest.

THE COURT: Yea, effecting a lawful arrest.

MR. ORR: I move that it just be effecting an arrest, Judge.

THE COURT: It had to be a lawful arrest.

MISS CRAFT: For resisting without.

THE COURT: If it is not a lawful arrest, then it is not a crime.

MR. ORR: Of course my position hasn't changed since the motion to directed verdict that this count should be thrown out because he wasn't being lawfully arrested in the first place.

THE COURT: Certainly--

MR. ORR: Other than that, yea.

THE COURT: Because you are entirely correct, the State must prove to the jury's satisfaction that it was a lawful arrest.

MR. ORR: Uh-huh.

THE COURT: I determined that legally there is sufficient evidence to make that a jury question. Because sir you may argue that it isn't proven. So I think that is correct, it should be effecting a lawful arrest constitutes execution of a legal duty. Any objection to--

MR. ORR: None other than what I've said.

MISS CRAFT: That's fine.

> THE COURT: Okay, that is noted and overruled. Again, I indicated or I feel that that is something you can and should argue to the jury if you are so advised. Okay, now I think that then takes the uh, substantive--

(R 562-565).

Respondent was convicted of Resisting Without Violence, and the lesser included offense of possession of cocaine.

Respondent appealed his conviction to the Fourth District Court of Appeal. The appellate court concluded that Respondent had preserved an objection to the jury instructions, and that the case was indistinguishable from Scott v. State, 594 So. 2d 832 (Fla. 4th DCA 1992), where the court had overturned a similar jury instruction. The court also certified conflict with the decision of the Third District Court of Appeal in McBride v. State, 604 So. 2d 1291 (Fla. 3d DCA 1992).

The instant appeal follows.

SUMMARY OF ARGUMENT

This Court has jurisdiction because the Fourth District Court of Appeal certified direct and express conflict with the Third District Court of Appeal. In McBride v. State, 604 So. 2d 1291 (Fla. 3d DCA 1992), the Third District Court of Appeal held that the standard jury instruction that, "an arrest and detention constitutes [the] lawful execution of a legal duty," was a perfectly correct generic statement of the law that did not interfere with the province of the jury. In the instant case, the Fourth District Court of Appeal stated that McBride was wrong and it is reversible error to instruct a jury that "a lawful arrest constitutes a lawful execution of a legal duty."

The standard jury instruction is a perfectly proper and correct statement of the law that does not invade the province of the jury. The jury must still determine that the particular victims were law enforcement officers and they were effecting an arrest when the defendant resisted, obstructed, or opposed. If a defendant wants to argue that the police were not acting lawfully, the defendant can request a special instruction in conformance with his particular defense. Respondent did not request a special instruction.

Moreover, in this case, the jury was specifically instructed that they must find that the police were acting lawfully: The jury was told that an arrest constitutes a lawful execution of a legal duty, but the arrest must be lawful. Therefore, the instruction did not affect Respondent's ability to argue that the arrest in this case was unlawful.

Further, there was no real issue regarding the lawfulness of the police conduct in this case. Respondent conceded that a drug deal had taken place, and it was uncontested that Respondent fled with the participants and the drug money, in his car, while the police were in proper pursuit. Because Respondent was charged with obstructing and opposing, as well as resisting, the State was not even required to prove that there was probable cause to arrest Respondent to sustain a conviction of resisting an officer without violence.

Even though the alleged unlawfulness of Respondent's arrest for trafficking in cocaine was not a defense to this crime, Respondent was still able to try to convince the jury that it was a defense. Moreover, the jury actually made a finding that Respondent's arrest was lawful, because the jury convicted Respondent of possession of cocaine. Thus, the jury concluded that Respondent was guilty of an underlying crime, and the police had probable cause to arrest him. Therefore, Respondent could not possibly have been prejudiced by the jury instruction.

Finally, Respondent's objection to the jury instruction was not even preserved for appellate review.

ARGUMENT

JURISDICTION

This case is before this Honorable Court because the Fourth District Court of Appeal certified conflict with McBride v. State, 604 So. 2d 1291 (Fla. 3d DCA 1992).

In McBride, the Third District Court of Appeal held that it was proper for the trial court, in accordance with Florida Standard Jury Instruction (Criminal) Resisting Officer Without Violence, and Section 901.15, Florida Statutes (1991), to instruct the jury that "an arrest and detention constitutes [the] lawful execution of a legal duty." The court reasoned that the instruction was a generic and perfectly correct statement of the law, which did not invade the province of the jury to determine whether the police were acting lawfully in the particular circumstances where the defendant resisted. The court explicitly disagreed with the decision of the Fourth District Court of Appeals in Scott v. State, 594 So. 2d 832 (Fla. 4th DCA 1992).

In Scott the Fourth District Court of Appeal had held that the identical Standard Jury Instruction, "amounts to a directed verdict because it effectively removed the issue of the legality of the arrest from the jury's consideration." Id. at 832. The Scott court stated that it was following Dion v. State, 564 So. 2d 618 (Fla. 4th DCA 1990) and Wimbley v. State, 567 So. 2d 560 (Fla. 4th DCA 1990), which the court stated were virtually indistinguishable from Scott. However, in both Dion and Wimbley the trial court had instructed the jury that the police were in the lawful execution of a legal duty, or acting lawfully, at the

time that the actual offense took place. In McBride, the Third District Court of Appeal pointed out the distinction between the improper case-specific instructions in Dion and Wimbley and the generic instruction in Scott and McBride.

In the instant case, the trial court modified the instruction which the Fourth District had overturned in Scott. The instant instruction stated that "a **lawful** arrest constitutes a lawful execution of a legal duty." The Fourth District Court of Appeals ruled that the modified instruction was indistinguishable from the instruction it had overturned in Scott, and certified conflict.

Direct and express conflict exists between the instant case and the decision of the Third District Court of Appeals in Scott. The Scott court ruled that it was permissible to give the generic instruction that "an arrest constitutes a lawful execution of a legal duty." In the instant case the court determined that the Scott court was wrong, and it is not even permissible to instruct a jury that "a lawful arrest constitutes a lawful execution of a legal duty."

ARGUMENT

THE TRIAL COURT DID NOT INVADE THE PROVINCE OF THE JURY BY GIVING THE GENERIC INSTRUCTION THAT "A LAWFUL ARREST CONSTITUTES A LAWFUL EXECUTION OF A LEGAL DUTY."

Appellant's conviction for resisting an officer without violence was overturned by the Fourth District Court of Appeal in conformance with its holding in Scott v. State, 594 So. 2d 832 (Fla. 4th DCA 1992). In Scott the court had determined that the

standard jury instruction on resisting without violence "amounts to a directed verdict because it effectively removed the issue of the legality of the arrest from the jury's consideration." Id at 832. This holding was incorrect, and was improperly implied to the instant case.

The Third District Court of Appeal reached a correct decision in McBride, because the standard jury instruction is a generic and perfectly correct statement of the law which does not invade the province of the jury, to determine whether the victims were law enforcement officers, and whether they were in fact effecting an arrest when the defendant resisted, obstructed, or opposed them. As the Fourth District Court of Appeals reasoned in an earlier case, "a statement that an officer is in the lawful execution of duty when an arrest is made requires the jury to determine whether the officer had probable cause to believe the underlying charge had been committed." Stayer v. State, 590 So. 2d 25 (Fla. 4th DCA 1991). In other words since the jury must still determine that the victims were law enforcement officers who were effecting an arrest, a defendant could still argue that there was no probable cause to arrest, or that the police were acting otherwise improperly. The standard jury instruction is a perfectly correct statement of the law which can be supplemented by a special instruction, when required by the specific facts of the case. For example in McPhee v. State, 616 So. 2d 483 (Fla. 4th DCA 1993), the court concluded that, where the defense was that the officer used excessive force, justifying the defendant's resistance, there was no error in giving the standard instruction

that "arrest and detention constitutes a lawful execution of a legal duty," because the court also instructed the jury that "if an officer uses excessive force to make an arrest, then a person is justified in the use of reasonable force to defend himself...." In this case, Respondent's ability to argue that the attempted arrest was unlawful was not inhibited by the jury instruction.

The trial court specifically instructed the jury that although an arrest constitutes the lawful execution of a legal duty, the arrest must be lawful. Thus, Respondent was able to argue that, in this case, the arrest was not lawful, because there was no probable cause to believe that Respondent had committed a crime.

In fact, the alleged unlawfulness of Respondent's arrest was not really even an issue in this case. Respondent was charged with resisting an officer without violence in violation of §843.02 Fla. Stat. (1991), which provides:

> Whoever shall resist, obstruct, or oppose any officer as defined in s. 943.10(1),(2),(3),(6),(7),(8), or (9); member of the Parole Commission or any administrative aide or supervisor employed by the commission; county probation officer; parole and probation supervisor; personnel or representative of the Department of Law Enforcement; or other person legally authorized to execute process in the execution of legal process or in the lawful execution of any legal duty, without offering or doing the violence to the person of the officer, shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

In this case, Respondent effectively conceded that he was guilty of violating §843.02: Defense counsel conceded that a drug deal had taken place, and that Respondent had tried to leave after seeing the police (R 592,625). The police were obviously entitled to attempt to arrest Bobby Joe Owens, and, Respondent obstructed their ability to do so, by driving off with Owens and the drug money, in his car. The mere fact that Respondent fled with the suspect in his car, was sufficient to sustain a conviction of resisting without violence. See Porter v. State, 582 So. 2d 41 (Fla. 4th DCA 1991)(Defendant, was properly arrested for obstructing and interfering with police officers in contravention of §843.02, where he shouting out a coded warning that allowed dealers to escape police during a drug sweep).

Even though the alleged lack of probable cause for Respondent's arrest, was not really a defense to his crime, Respondent was still able to make that argument in front of the jury. Moreover, the jury actually made a finding that Respondent was lawfully arrested, because the jury concluded that respondent was in fact guilty of the underlying crime of possession of cocaine.

Respondent could not possibly have been prejudiced by the jury instruction where he was able to argue a mistaken defense (that he was not guilty of an underlying crime) and the jury made a specific finding that the defense was invalid.

Finally, the objection which Respondent raised on appeal was not even preserved for review. At trial, Respondent made two objections to the relevant instruction. First, Respondent

requested the standard instruction, which the Fourth District Court of Appeal had rejected in Scott. When the trial court explained that the addition of the word "lawful" was beneficial to Respondent, defense counsel appeared to agree with the court's judgment. Then, Respondent raised his second objection, which appeared to be a renewed request for a directed verdict:

> THE COURT: Okay, and then the last unnumbered paragraph, the Court further instructs you that--it says, read the duty being performed from the charge, which is the--
>
> MISS CRAFT: Effecting lawful arrest.
>
> THE COURT: Yea, effecting a lawful arrest.
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> MR. ORR: **I move that it just be effecting an arrest, Judge.**
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> THE COURT: It had to be a lawful arrest.
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> MISS CRAFT: For resisting without.
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> THE COURT: If it is not a lawful arrest, then it is not a crime.
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> MR. ORR: **Of course my position hasn't changed since the motion to directed verdict that this count should be thrown out because he wasn't being lawfully arrested in the first place.**
>
> THE COURT: Certainly--
>
> MR. ORR: **Other than that, yea.**
>
> THE COURT: Because you are entirely correct, the State must prove to the jury's satisfaction that it was a lawful arrest.
>
> MR. ORR: Uh-huh.
>
> THE COURT: I determined that legally there is sufficient evidence to make that a jury question. Because sir you

> may argue that it isn't proven. So I think that is correct, it should be effecting a lawful arrest constitutes execution of a legal duty. Any objection to--
>
> MR. ORR: None other than what I've said.

(R 562-565)(Emphasis added).

Respondent's ambiguous objections were not sufficient to preserve this issue for appellate review. As this Court has stated:

> [T]he objectives of the contemporaneous objection rule are to 'apprise the trial judge of the putative error and to preserve the issue for intelligent review on appeal." 419 So. 2d 636 (quoting Castor v. State, 365 So. 2d 701, 703 (Fla. 1978)). These objectives are accomplished when the record shows clearly and unambiguously that a request was made for a specific instruction and that the trial court clearly understood the request and just as clearly denied the request.
>
> In Hubbard v. State, 411 So. 2d 1312 (Fla. 1st DCA 1981), appeal dismissed, 424 So. 2d 761 (Fla. 1982), the First District Court of Appeal correctly observed that
> "[t]he primary thrust of the rule is to insure that the trial judge is made aware that an objection is being made and that the grounds therefore are enunciated. ... so long as it is clear that the trial judge was fully aware that an objection had been made, that the specific grounds for the objection were presented to the judge, and that the judge was given a clear opportunity to rule upon the objection." Id at 1314

State v. Heathcoat, 442 So. 2d 955 at 956-957 (Fla. 1983). In this case, defense counsel's objections were not sufficient to preserve the objection, because the trial court may well have

assumed that counsel had agreed with the court's suggestion that the addition of the word "lawful" was in Respondent's best interest, and that having agreed to the instruction, counsel was merely renewing his request for a directed verdict.

Moreover, the addition of the word "lawful' could only have benefitted Respondent, and Respondent would be hardpressed to object to that addition on appeal. More importantly, that objection was not the basis for the Fourth District Court of Appeal's decision. The appellate court actually concluded that the given instruction was improper, because it was indistinguishable from the instruction requested by Respondent, which was also improper. Thus, Respondent's objection did not preserve the issue that the Fourth District court of Appeal ruled upon.

CONCLUSION

Based upon the foregoing reasons and citations of authority it is respectfully requested that this Honorable Court REVERSE the decision of the Fourth District Court of Appeal, filed December 22, 1993, REVERSING the conviction and REMANDING for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief has been furnished by courier to: ALLEN J. DeWEESE, Assistant Public Defender, Criminal Justice Building, 421 3rd Street/6th Floor, West Palm Beach, Florida 33401, this 7th day of February, 1994.

Of Counsel

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IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
JULY TERM 1993

JOHNNIE ANDERSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 92-2000
L.T. Case No. 91-1347-CF

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DISPOSED OF.

Opinion filed December 22, 1993

Appeal from the Circuit Court for St. Lucie County, Dwight L. Geiger, Judge.

Richard L. Jorandby, Public Defender, and Allen J. DeWeese, Assistant Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Dawn S. Wynn, Assistant Attorney General, West Palm Beach, for appellee.

FARMER, J.

Defendant was convicted of possession of cocaine and resisting arrest without violence. As to the resisting arrest charge the trial court instructed the jury merely that "effecting a lawful arrest constitutes lawful execution of a legal duty." We reverse.

In Scott v. State, 594 So. 2d 832 (Fla. 4th DCA 1992), we reversed a conviction for resisting without violence where the precise instruction given was "an arrest constitutes a lawful execution of a legal duty." Here the same instruction was given but with the simple addition of the word "lawful" before the word

"arrest." Without an instruction defining "lawful," the instruction in this case cannot be fairly distinguished from that given in Scott.

In any event the state makes no attempt to distinguish Scott on that basis, but instead merely argues that defendant failed to object to the proposed instruction at the charge conference and thereby preserve any error. We find from the record that defendant did indeed object to this very instruction, and thus the error was preserved.[1]

While we affirm on all other issues raised, we reverse the conviction for resisting arrest without violence and remand for a new trial on that charge.

REVERSED AND REMANDED WITH DIRECTIONS.

DELL, C.J., and GUNTHER, J., concur.

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[1] In reversing on this ground, we note that in McBride v. State, 604 So. 2d 1291 (Fla. 3d DCA 1992), the court expressed conflict with our decision in Scott. In McBride, the instruction given was "an arrest and detention constitutes [the] lawful execution of a legal duty." We could not distinguish the Scott instruction from McBride either. To the extent that the instruction in the case we review today is indistinguishable from Scott, we certify conflict with McBride.