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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

JOHN EDWARD HOUCK, JR.,

Respondent.
_____///

SUPREME COURT CASE NO.: 83,502
5DCA CASE NO.: 92-2842
CIRCUIT COURT CASE NO.: CR91-13094

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT
OF APPEAL, FIFTH DISTRICT AND THE
NINTH JUDICIAL CIRCUIT IN AND FOR
ORANGE COUNTY, FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Throughout this brief, the Defendant/Appellant/Respondent, JOHN EDWARD HOUCK, JR., will be referred to as the Defendant or HOUCK. The Plaintiff/Appellee/Petitioner, THE STATE OF FLORIDA, will be referred to as the State. The following symbols will be used to refer to portions of the record on appeal:

R - Record on Appeal;

S - Transcript of sentencing hearing dated November 2, 1992.

STATEMENT OF THE CASE

The Defendant, JOHN EDWARD HOUCK, JR., was tried in Orange County, Florida based upon an amended information charging him with committing second degree murder in connection with the death of a George Tommie Carter (R. 3, 66). The amended information alleged that the Defendant had used a weapon -- pavement or a hard surface -- to inflict trauma to the victim's head, causing death. Reclassification was sought via §775.087(1), Fla. Stat. (1991) regarding the "use" of a weapon.

The trial court instructed the jury as to the offenses of second degree murder with a weapon, second degree murder without a weapon, manslaughter with a weapon, and manslaughter without a weapon (R. 532). The Defendant objected to standard instruction 3.05(b), which required the jury to factually determine whether a weapon was used in the commission of the offense. However, the trial court ultimately gave said instruction (R. 526, 527). Additionally, the trial court refused to give an aggravated battery instruction which was requested by the Defendant (R. 402, 487).

Defendant was found guilty of manslaughter with a weapon and sentenced pursuant to the aforementioned reclassification for the use of a weapon. A timely appeal was filed. After oral argument, the three judge panel unanimously ruled to uphold the conviction. A motion for rehearing was filed by the Defendant and, in an en banc proceeding, the remaining four judges formed a 4-3 majority which reversed the earlier opinion. Both decisions certified the "asphalt as a weapon" issue as one of great public importance. The State timely sought the discretionary review of this Court.

STATEMENT OF THE FACTS

George Tommie Carter, age 51, died from blunt forced trauma causing head injuries incurred in a brawl involving a number of persons outside an Orlando bar (R. 100, 126, 154, 210, 380, 381). There was testimonial evidence from State witnesses, Alex Hiller and Duey Lee, indicating that the Defendant may have caused the death of George Carter by banging Carter's head several times against a paved surface (R. 197-198, 234-235). Four other State witnesses, who were either eyewitnesses and/or participants in the chaotic brawl, did not see the Defendant commit the acts testified to by Hiller and Lee. While the Defendant admitted to being at the lounge, and to being swept up in the brawl as a result of being physically attacked by Jerry Carter -- he denied ever fighting with the decedent, much less pounding the decedent's head on the asphalt (R. 449, 457, 469, 475).

Sharon Carter, the decedent's sister-in-law, worked as a bartender at Anthony's Lounge back in November of 1991. According to her, the Defendant spent the late afternoon and evening of November 15, 1991, in the pool room adjacent to the bar area where she was working (R. 114-116). At approximately 1:30 a.m. on November 16, 1991, she heard a sound like a pool stick breaking and thereafter noticed the Defendant had a broken cue stick in his hand (R. 96, 115). Her husband, Jerry Carter (who was the decedent's brother) and Ronny Carter (also the decedent's brother) went to the pool room to investigate the matter. Jerry Carter declined the

Defendant's offer to pay for the cue stick, and had physically escorted the Defendant to an exit door (being held open by Ron Carter) when the Defendant cursed and swung at Jerry (R. 100). Immediately, a group of people followed Jerry and the Defendant as they spilled out of the doorway punching each other and a multiple-person fight erupted outside (R. 100). Sharon Carter went outside long enough to look at the chaotic scene and then returned inside the lounge to initiate a call to the police (R. 100). She then went back outside where she noticed the decedent was lying on the ground hurt (R. 106, 107). She never actually saw the decedent exit the bar at the time the fracas erupted, nor did she see any physical contact between the Defendant and the decedent (R. 106, 107, 124, 126). When she realized "Tommie" was hurt, she went back inside to request an ambulance (R. 127). According to Mrs. Carter, the decedent was taken to Orlando Regional Medical Center where he lost consciousness about 5:00 a.m. on November 16, 1991 (R. 109, 110). Following emergency surgery, he never regained consciousness and ultimately died on December 9, 1991 (R. 111).

Likewise, Jerry Carter, who was involved in the fracas, never saw the Defendant fighting with the decedent (R. 163, 164-166). He described the decedent as being 51 years of age and weighing about 120 pounds (R. 154). It was his testimony that even though the Defendant swung the first punch and struck him in the chest -- he (Jerry Carter) spent most of his time fighting with Jason Shuster (R. 149, 150). The first time Jerry noticed the decedent had been

injured was when Jerry saw Tammy Anderson trying to wipe Tommie's face with a towel (R. 152, 163-164). State witness, Terry Howell (the son of Sharon Carter (R. 119) and the stepson of Jerry Carter (R. 181), testified that the decedent was his uncle (R. 178, 179). He testified to observing the Defendant standing over the decedent, and kneeling over the decedent and shaking him (R. 189). He also testified to seeing the Defendant being pulled off the decedent by a man named Norman Rush (R. 182). Alex Hiller, a personal friend of the decedent (R. 206), testified that when the fracas began he (Hiller) "followed the crowd outside because he knew Tommie was in trouble" (R. 196). It was his testimony that he saw the Defendant bang Tommie Carter's head against the paved road surface several times (R. 197, 198). According to Hiller, there were other fights going on at the same time (R. 205). On recross-examination, he multiplied three-fold his earlier estimate of the number of times Tommie Carter's head was banged against the ground. Cocktail waitress, Tammy Anderson, was just leaving the bar about the time the brawl broke out. Her description of what she saw when she opened the door to leave was "It was chaos. There [were] groups of people to the left of [the] door that I walked out, of fighting" (R. 215). Her attention was not drawn to Tommie Carter at that point. Ms. Anderson ran back inside the bar and yelled for owner/manager, Norman Rush (R. 215). He immediately responded and <u>together</u> she and Norman went outside (R. 216, 221). On her second venture outside, Ms. Anderson noticed Tommie Carter for the first

time (R. 217, 221). Specifically, she saw him lying in an unconscious state on the ground and she immediately went to his side and stayed with him until the paramedics arrived (R. 217, 218). At no point did she observe the Defendant around Tommie or observe any contact between the two men (R. 217, 221). At no point did she see Norman Rush have any involvement with Defendant or intervene to break up any fights when he was outside (R. 221). She testified that after the paramedics arrived, she heard Terry Howell yell out, "Hey man, you hurt my uncle" to Jason and the Defendant -- to which the Defendant responded, "Come out here, and I'll fucking hurt you too." (R. 218, 219).

From the bar's parking lot, Duey Lee claimed to have witnessed the Defendant push Tommie Carter to the ground, straddle him, and hit Carter's head against the asphalt pavement three or four times (R. 231, 233-235). He also claimed to have seen Norman Rush attempt to intervene while warning Defendant, "Quit beating him, you're going to kill him", and to have heard the Defendant say he wasn't going to let go of Tommie (R. 236, 238).

Bruce Brunson, M.D., a neurological surgeon, testified to the serious head injuries suffered by Tommie Carter (R. 317-321), and expressed his opinion that the head injuries received by Mr. Carter on November 16, 1991, were the initiating factors which led to his death on December 9, 1991 (R. 317-322). During cross-examination of Dr. Brunson, the Court sustained the State's hearsay objection and prevented the defense from eliciting the numerical results of

the decedent's blood alcohol level (R. 337).

William Anderson, M.D., a pathologist, testified to his conducting of an autopsy on Tommie Carter on December 9, 1991 (R. 345-347). He described various countre coup injuries observed on Tommie Carter's brain and testified to his conclusion that Mr. Carter died of blunt force trauma causing head injuries that were consistent with the victim's head being knocked at least several times against a hard, flat surface (R. 379, 380).

Defense witness, Jason Shuster, testified that he and the Defendant arrived at Anthony's bar about 10:30 p.m. or 11:00 p.m. on November 15, 1991 (R. 421). During their second game of pool, it was Jason who broke the cue stick out of frustration (R. 425). After he and the Defendant made separate attempts to pay for the broken stick, they were requested to leave by both a very small man [George Tommie Carter] and a large man [Jerry Carter] (R. 425, 426). While he and the Defendant were reluctantly complying with the request to leave, the larger of the two men, Jerry Carter, pushed the Defendant in the back of his neck causing him to exit the bar (R. 426). Along with several other people, Jason exited the bar (R. 427). As soon as he stepped outside he was struck in the face (R. 428). When he saw that the Defendant was pinned on the ground and being punched and kicked by five or six persons, Jason came to the Defendant's aid (R. 429, 430). After some scuffling, the Defendant and Jason each managed to break free and run toward the other end of the parking lot (R. 431). Jason

estimated that the entire skirmish from start to finish lasted perhaps two and one-half minutes (R. 434).

The Defendant testified that he had no quarrel with the decedent and was in the process of complying with the decedent's request that he and Jason leave the bar when Jerry Carter ran across the room and hit the Defendant in the stomach (R. 455-457). As he got near the exit door, he was struck in the back of the neck, near the center of his shoulder blades, which caused him to fall down onto the sidewalk outside (R. 458). At that time, Jerry Carter came over, bent down over Defendant, and struck him one time in the mouth (R. 459). Jerry Carter was then pulled off (R. 459-460). Although two or three other people were kicking at Defendant, he managed to squirm away and ran off (R. 460). The Defendant denied even seeing Tommie Carter outside the bar, much less fighting with him (R. 461, 469). The Defendant estimated that the whole skirmish lasted five to seven minutes (R. 471). He admitted having called Jerry Carter a "fuck-you, you four-eyed fucker", but denied ever making any statement such as "come over and I'll hurt you too" (R. 474, 478).

SUMMARY OF ARGUMENT

Defendant responds to the definition Summary of the Argument of the State by saying that the question of whether or not a paved parking lot is a weapon for sentence enhancement purposes under Florida Statutes, §775.087(1), is a matter of law not fact in the context of this case. The argument by the State that numerous dictionaries must be consulted in order to determine the meaning intended by the legislation under §775.087(1), Florida Statutes. illustrates that the court must construe the statute well beyond the statute itself (which contains no definition), in order to apply it under the instant facts. Such construction is contrary to the need to strictly construe penal statutes where there is an ambiguity in the statute's terms or application. The majority opinion below is well-reasoned and exhaustively treated. The Court should either decline discretionary jurisdiction under the facts of this case, or adopt the en banc majority opinion of the Fifth District Court of Appeal.

In the event the Court accepts jurisdiction of this case, the Defendant urges the Court to vacate the judgment of the trial Court below and remand the proceedings to grant the Defendant a new trial. The grounds for this argument are that the Defendant was denied a fair trial because his requested jury instruction on aggravated battery was improperly denied.

ARGUMENT I

IT IS A LEGISLATIVE FUNCTION TO PROPERLY DEFINE THE TERM "WEAPON" IN §775.087(1), FLORIDA STATUTES, A PENAL STATUTE USED FOR SENTENCE ENHANCEMENT.

The State urges this Court to broadly construe the penal enhancement statute, §775.087(1), to include an immovable object which is not otherwise capable of being "used as a weapon" in the ordinary meaning of the term. This Court should prudently refrain from substituting its definition of the term "weapon" as the Court below did and confirm the en banc majority decision of the Florida Fifth District Court of Appeal.

As pointed out below in the briefs submitted to the Fifth District Court of Appeal, innumerable substances could be a weapon under the broad construction urged by the State. For example, if a fight occurs as in the instant facts, and a person is pushed out of a window and strikes the ground, is the ground a weapon for penalty enhancement purposes? Under the construction urged by the State, this Court would have to struggle with such applications of the law. The statute in question, §775.087(1), Florida Statutes (1991), is for penalty enhancement. Under the instant sentencing in the trial Court, the offense was enhanced from Felony II to Felony I.

The majority opinion of the Court below is a cogent and logically reasoned opinion, with even the dissent conceding the well-reasoned analysis of the majority opinion. That opinion

reached the conclusion that the Court's obligation under Florida law is to strictly construe penal statutes and resolve any ambiguity in scope or application in favor of the accused. See Perkins v. State, 576 So.2d 1310, 1312 (Fla. 1991); Dixon v. State, 603 So.2d 570, 572 (Fla. 5th DCA) rev. den. 613 So.2d 9 (Fla. 1992); Duba v. State, 446 So.2d 1167, 1169 (Fla. 5th DCA 1984). The Court held below:

> "We agree with Houck's argument in his motion for rehearing that the original panel was in error in deeming the issue of whether a paved surface is a weapon to be one of fact.[2] (Footnote omitted) It is not. It is a question for the court to determine as a matter of law. The failure of the statute to broadly define the term "weapon" cannot be cured by jury speculation. As Houck contends, the panel opinion would open a veritable "Pandora's Box" and allow a creative prosecutor, in conjunction with the jury, to turn almost any intentional injury into one caused by a weapon. For example, would the ground be transformed into a weapon merely because it was the point of impact for a person pushed from a cliff or high building? Would the water become a weapon if the victim was pushed overboard from an ocean liner?"

If this Court determines that the majority opinion of the Appellate Court (which comes to this Court clothed with a presumption of correctness) is incorrect, then it will be faced with a "veritable Pandora's Box" of possible constructions, each of which would have to be dealt with on a separate basis. That is a legislative function not a judicial one. The proper inquiry under the law and facts below is whether or not the legislature of the State of Florida has written §775.087(1) in such a way as to make

it plainly and unmistakably clear that the term "weapon" encompasses an object like the ground which is an inherent part of the surrounding environment that is incapable of being physically possessed, brought to the scene and dominated by the actor. Clearly, that is the ordinary meaning of "use of a weapon".

The Appellate decision below cited jurisdictions which have considered the issue and have decided that objects which are part of the environment and are not dominated by the actor are not weapons. The issue before this court to consider for discretionary jurisdiction, as stated in the opinion below, is:

> "Since the issue we have addressed in this opinion -- the meaning of the word "weapon" as used in section 775.087(1), Florida Statutes (1991) -- is one of first impression at the appellate level and one which may impact upon future cases and jury instructions, we certify it to the Florida Supreme Court as one of great public importance."

Therefore, it is respectfully urged that it would be a strained interpretation or construction of the term "weapon" to construe objects that are inseparable and remain a part of the environment as a weapon. That point is clearly illustrated in the State's argument by its numerous grasping of definitions from various dictionary sources to try to urge an open-ended construction of the word "weapon". The legislature should define the term "weapon" as it is intended to be used in Florida Statutes, §775.087(1). It is not for the jury to decide if the legislature meant for a paved ground surface to be a "weapon" in the context of an enhancement statute which contained no definition of the term "weapon". Nor is

it the judiciary's role to engage in judicial legislation, particularly given that penal statutes are to be strictly construed.

The majority opinion of the Court below has used the statutory construction principle of ejusdem genris in its construction of the term "weapon" and the entire Court sitting en banc has acknowledged that the Florida Legislature has never indicated that it ever intended for the term "weapon" to include an immovable structure inherently located within the environment, such as a paved parking lot. The lower Court opinion states:

> "The rule of "ejusdem genris" provides that where general words follow enumeration of specified persons or things, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. See Black's law Dictionary, 464 (5th ed. 1979). Therefore, the general words "other deadly weapon" cannot be construed as encompassing a paved surface, which is not in the same general class as those instruments and devices enumerated in the statute. A paved surface is an immovable structure that is incapable of being personally possessed, handled, or wielded in the manner of a dirk (knife), club or chemical device."

Accordingly, it is urged either that discretionary jurisdiction not be granted by this Court; or alternatively, that if jurisdiction is accepted, that this Court affirm and adopt the carefully crafted majority en banc decision of the Fifth District Court of Appeal.

ARGUMENT II

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN DENYING DEFENDANT'S REQUEST THAT THE JURY BE INSTRUCTED ON AGGRAVATED BATTERY AS A LESSER OFFENSE.

At the charge conference the Defendant requested that an instruction be given on aggravated battery as a lesser offense to second degree murder (R. 402, 487). The Court denied the request (R. 402-403, 492) and ultimately submitted the case to the jury with instructions and a verdict form which identified manslaughter (with or without a weapon) as the only applicable lesser offense (R. 82, 525-526). Due to Defendant's timely and specific request for the instruction, this issue is preserved for judicial review. See Hewitt v. State, 575 So.2d 273 (Fla. 4th DCA 1991).

Ordinarily, it would not be error for a trial court to refuse to give a requested instruction on non-homicide lesser offenses, such as aggravated battery or battery, in a murder case. Martin v. State, 342 So.2d 501 (Fla. 1977). However, Florida law does recognize an exception to that general rule which becomes applicable when there is an issue for the trier of fact as to whether the death was caused by the defendant's act, or some other cause. The viability of this exception is reflected in cases such as Drotar v. State, 433 So.2d 1005 (Fla. 3rd DCA 1983), review denied, 443 So.2d 979 (Fla. 1984), and Rossi v. State, 602 So.2d 614 (Fla. 4th DCA 1992); as well as in the Florida Standard Jury Instructions in Criminal Cases. See In Re Standard Jury Instructions and Criminal Cases, 543 So.2d 1205, 1233 (Fla. 1989);

Standard Jury Instructions--Criminal Cases, 603 So.2d 1175, 1250 (Fla. 1992).

In Drotar v. State, supra, the issue on appeal was whether the trial court had erred in giving an aggravated battery instruction, over defense objection, in a second degree murder trial. The facts in the case were that Drotar and the victim had engaged in a violent fight during which the defendant had kicked the victim in the stomach and stomped him in the chest. Later, while the semi-conscious victim was being readied by by-standers for transport to a hospital, the victim rolled off a make-shift stretcher and struck the windshield of a parked car. The injured person ultimately died with the cause of death pinpointed as internal bleeding caused by blunt trauma. On review, the Court upheld the trial judge's giving of a non-homicide lesser at the State's request, noting that the case involved an issue of fact as to whether the victim died as a consequence of the fall from the stretcher, or from the altercation with Drotar.

A case with extremely similar facts to the case sub judice is Rossi v. State, supra. There, the defendant, Rossi, was charged with second degree murder and convicted of manslaughter as a consequence of his participation in a brawl outside a bar. Just as in the case sub judice, with the testimony of Alex Hiller and Duey Lee, there was evidence indicating Rossi inflicted fatal injuries on the victim. However, there was also evidence that the victim may have sustained his injuries at the hands of someone other than

Rossi during the course of a "chaotic and confusing fight".

The case at bar, like Rossi, supra, arises from a highly chaotic and confusing brawl outside a bar -- a brawl which involved an unspecified number of people and which was described by prosecution witness, Tammy Anderson, as follows: "It was chaos. There [were] groups of people...fighting" (R. 215). Sharon Carter, the decedent's sister-in-law, gave a similar description of the brawl (R. 100). Notwithstanding the testimony of Alex Hiller and Duey Lee which had the Defendant pounding Tommie Carter's head against the pavement -- the Defendant's jury could also have chosen to conclude that the decedent may have sustained fatal injuries at the hands of someone other than the Defendant. The proposition that Tommie Carter's injuries were inflicted by another, was clearly the defense raised by Defendant's testimony (R. 461, 463, 469). And, it was a defense that had support in the record by virtue of the fact that most of the State's eyewitnesses such as Sharon Carter, Jerry Carter, Terry Howell, and Tammy Anderson never claimed to have seen the head-banging episode described by Alex Hiller and Duey Lee. Three of the eyewitnesses just mentioned (Sharon Carter, Jerry Carter, and Tammy Anderson) never saw any physical contact whatsoever between the Defendant and Tommie Carter. Moreover, Tammy Anderson's account of re-entering the bar to get Norm Rush, then exiting the bar contemporaneously with Norm Rush, and running directly over to give comfort to Tommie who was lying alone on the ground (R. 215-218) is essentially

irreconcilable with Terry Howell's and Duey Lee's testimony about Norm Rush either pulling or attempting to pull the Defendant off Tommie Carter. Ms. Anderson's testimony was that she stayed right beside Tommie until such time as the paramedics arrived and that she never saw Norm Rush involve himself with the Defendant or intervene in any of the fighting (R. 215, 218).

In short, just as in Rossi v. State, supra, and Drotar, supra, there was a legitimate issue for the trier of fact as to whether the victim's death was caused by the Defendant, or by some other person's actions during the brawl. Accordingly, the trial court erred in refusing to instruct Defendant's jury on the non-homicide lesser offense of aggravated battery. Under Rossi v. State, supra, at 615, the Defendant would have been entitled to have his jury instructed on simple battery as well.

In the event that this Court accepts jurisdiction as urged by the State, the Defendant respectfully requests that this Court review and consider granting the relief set out in Point II of Defendant's original Appellate Brief as set out hereinabove.

Defendant is seeking a new trial due to the trial Court's refusal to instruct the jury that aggravated battery is a lesser-included crime under the facts sub judice. The Statement of the Facts show that the Defendant became involved in what was essentially a contemporaneous chaotic brawl.

The Defendant urges this Court to reverse his conviction and sentence, and to remand for a new trial.

CONCLUSION

It is a legislative function to properly define a statutory term. The Florida legislature did not define a "weapon" in §775.087(1), Florida Statutes, a penalty enhancement statute, to include a parking lot surface. The majority opinion of the Florida Fifth District Court of Appeal is logical, exhaustively treated, and well-reasoned. This Court should deny its discretionary jurisdiction in this case.

In the event that this Court accepts jurisdiction, it is urged that the trial Court judgment of conviction be reversed and a new trial ordered for the Defendant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Brief on the Merits in case number 83,502 has been furnished by U.S. Mail delivery to: CARMEN F. CORRENTE, ASSISTANT ATTORNEY GENERAL, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118; and to: DAVID A. HENSON, ESQUIRE, 1150 Louisiana Avenue, Suite 1, P.O. Box 2728, Winter Park, Florida 32790-2728, this the 10th day of June, 1994.

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