FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

vs.

Case No. 87,633
5th DCA No. 95-0842

RICHARD ESPINOSA,

Respondent.
_____/

PETITIONER'S INITIAL BRIEF ON THE MERITS

ROBERT A. BUTTER WORTH
ATTORNEY GENERAL

ALLISON LEIGH MORRIS
ASSISTANT ATTORNEY GENERAL
Fla. Bar #931660
444 Seabreeze Blvd.
Fifth Floor
Daytona Beach, FL 32118
(904) 238-4990

COUNSEL FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

Espinosa was charged by information of one count of attempted escape while in the custody of lawful confinement and one count of resisting an law enforcement officer with violence. §843.01, Fla. Stat. (1993); §944.40, Fla. Stat. (1993). (R. 6). Espinosa was tried by jury on February 22 and 23, 1995. (R. 19).

Officer Teddy Hey testified that he had been a law enforcement officer since 1968 and has been employed by the City of Oakland since 1985. (T. 18). Officer Figuero testified that he has been a reserve officer for the Oakland Police Department for two and a half years. (T. 61). On September 20, 1994, they attempted to arrest Espinosa at his residence. (T. 20-22). Espinosa answered the door, but he then tried to shove the door closed and fled through the house to the bathroom area. (T. 22-23, 81). The officers pursued, restrained and cuffed him. (T. 23). Espinosa was placed in the back of the patrol car, but as the officer put the vehicle in gear, Espinosa opened the door and attempted to flee. (T. 27, 65). Officer Figuero pursued and apprehended Espinosa approximately forty yards away from the patrol car. (T. 27, 66-67). The officers were forced to "hog-tie" Espinosa because he continued to attempt to flee and kick

the officers. (T. 30-31, 68). When Espinosa quit resisting, Officer Hey attempted to remove the cuffs. (R. 33). They were unable to remove the cuffs because they had become bent. (T. 34). Espinosa was taken to the fire station, and the cuffs were removed with the aid of a bolt cutter. (T. 34, 69).

At the close of the State's evidence, Espinosa moved for judgment of acquittal on the grounds that the state failed to prove a prima facie case. (T. 134). The trial court denied the motion on the grounds that Officer Hey's testimony was sufficient if the jury accepted it. (T. 134). At the close of all the evidence, the court asked Espinosa if he wished to renew his motion. (T. 181). He did, and the trial court denied the motion on the same grounds. (T. 181).

Espinosa requested that the jury be charged on the lesser included offense of resisting without violence. (T. 186). The court gave the following instructions:

> Therefore, if you decide the main accusation on count two has not been proven beyond every reasonable doubt, you need to see if the evidence would support a lessor charge. In count two, the lessor included offense is resisting an officer without violence. Before you can find the defendant guilty of that charge, the State must prove beyond every reasonable doubt

> that the defendant resisted, obstructed or opposed Mr. Hey.
>
> Secondly, that Mr. Hey was engaged in the performance of a legal duty, or lawful execution of a legal duty. And at the time of the incident, that he was a law enforcement officer. As you see, the charge of resisting without violence does not require the State to prove that any violence was involved, simply resisting, obstructing or opposing.

(T. 218). Neither party expressed any objection with the jury instructions. (T. 255).

The jury found Espinosa not guilty of Count I, but on Count II convicted him on the lesser included offense of resisting an officer without violence. (R. 21-22). On March 1, 1995, the trial court sentenced Espinosa to time served and one year probation. (R. 28).

On March 6, 1995, Espinosa filed a motion for new trial alleging that the verdict was contrary to the law and the weight of the evidence and the trial court erred in denying the motion for judgment of acquittal made at the close of the State's evidence and at the close of all of the evidence. (R. 32-33). The trial court denied the motion on March 8, 1995. (R. 35).

Espinosa timely appealed and challenged the court's denial

of his motion for judgment of acquittal. (R. 36). Espinosa and the State submitted briefs. The Fifth District Court of Appeal rendered an opinion on March 8, 1996. See Espinosa v. State, 21 Fla.L.Weekly D600 (Fla. 5th DCA March 8, 1996). The court ruled that the State had not proven the legality of the arrest which is an element of resisting arrest without violence and reversed Espinosa's conviction. Id. Judge Harris asked in his opinion, "But what happens when the trial court, at the request of the defense, gives a lesser included offense instruction informing the jury that it may convict the defendant for resisting without violence even though this additional element has not been proved?" Id. The court certified the following broader question:

> IS RESISTING AN OFFICER WITHOUT VIOLENCE (Section 843.02) A LESSER INCLUDED OFFENSE OF RESISTING WITH VIOLENCE (Section 843.01)?

The State filed its notice to invoke the discretionary jurisdiction of this Court.

SUMMARY OF THE ARGUMENT

The Respondent was initially charged with resisting arrest with violence. He requested that the jury be instructed on resisting arrest without violence as a lesser included offense. The trial court obliged and the jury convicted him of this lesser offense. On appeal, the Respondent challenged the State's failure to prove all of the elements of this crime.

Resisting arrest with violence does not require proof of the legality of the arrest, whereas resisting arrest without violence does. By requesting resisting arrest without violence as a lesser included offense, the Respondent waived his right to challenge on appeal the State's obligation to prove the legality of the arrest. To hold otherwise would obligate the State to present evidence of this in the midst of the charging conference.

ARGUMENT

THE FIFTH DISTRICT ERRED IN REVERSING ESPINOSA'S CONVICTION, AS ESPINOSA REQUESTED THAT THE JURY BE INSTRUCTED ON RESISTING ARREST WITHOUT VIOLENCE AS A LESSER INCLUDED OFFENSE OF RESISTING WITH VIOLENCE, AND THUS WAIVED THE RIGHT TO CHALLENGE HIS CONVICTION FOR RESISTING WITHOUT VIOLENCE ON APPEAL.

The Fifth District Court of Appeal certified the following question as one of great public importance:

> IS RESISTING AN OFFICER WITHOUT VIOLENCE (Section 843.02) A LESSER INCLUDED OFFENSE OF RESISTING WITH VIOLENCE (Section 843.01)?

While this is an interesting question and one which has not been resolved by this Court, it fails to address the issue raised in this case: whether Espinosa, by requesting the jury be instructed on resisting arrest without violence as a lesser included offense of resisting arrest with violence, waived the right to challenge his conviction for resisting arrest without violence. The State asserts that Espinosa did, in fact, waive any right to challenge his conviction for resisting arrest without violence.

In Ray v State, 403 So. 2d 956, 958 (Fla. 1981), the defendant was charged with sexual battery on a child over 11

years of age, but the court also instructed the jury on lewd and lascivious acts as a lesser included offense. The jury convicted the defendant on the lewd and lascivious charge although it is not a crime for which he was charged and not a permissible lesser included offense of the crime for which he was charged. Id. at 959. This Court held that:

> [I]t is not fundamental error to convict a defendant under an erroneous lesser included charge when he had the opportunity to object to the charge and failed to do so if: 1) the improperly charged offense is lesser in degree and penalty than the main offense or 2) defense counsel requested the improper charge or relied on that charge as evidenced by argument to the jury or other affirmative action.

Id. at 961.

This Court applied the Ray holding in Armstrong v State, 579 So. 2d 734 (Fla. 1991). During Armstrong's trial for second degree murder, his attorney requested that the jury be given an abbreviated version of the standard instruction on excusable homicide. Id. On appeal, Armstrong argued that this amounted to reversible error. This court, citing Ray, supra, observed that fundamental error may be waived where defense counsel requests an erroneous instruction. Id., at 735.

Resisting arrest with violence is a third degree felony with a penalty of up to five years in prison. §775.082(3)(d), Fla. Stat. (1993); §843.01, Fla. Stat. (1993). Resisting without violence is a first degree misdemeanor with a penalty of up to one year in prison. §775.082(4)(a), Fla. Stat. (1993); §843.02, Fla. Stat. (1993). Not only is resisting without violence lesser in degree and penalty than resisting with violence, but Espinosa specifically requested that the jury be instructed on resisting without violence as a lesser included offense. The following took place during the trial:

> Court: Are there any lessors that are going to be requested here?
>
> Defense Attorney: Judge, I need to confer with my client for just a second about that.
>
> * * *
>
> Defense Attorney: Your honor, I have conferred with my client. An as to the issue of lessors, he requests I do not request any lessors.
>
> * * *
>
> Defense Attorney: Your Honor?
>
> Court: Yeah.
>
> Defense Attorney: My client has reconsidered as to the resisting

arresting with violence charge, and we would ask for a lessor of resisting without violence on the misdemeanor.

Court: Okay. Discussions on lessors are closed.

(T. 185-186; emphasis added). This was not a mere acceptance of an offer to instruct; it was an affirmative request.

By asking the trial court to instruct the jury on resisting without violence, Espinosa was asking the jury to exercise it's "pardon power". See Amado v State, 585 So. 2d 282 (Fla. 1991); State v Wimberly, 498 So. 2d 929 (Fla. 1986). This Court has stated that the reason lesser included offenses are given to the jury as alternatives to the crime charged is to implement the nonconstitutional right of an accused to an instruction which gives the jury an opportunity to convict of an offense with less severe punishment than the crime charged. State v Baker, 456 So. 2d 419, 422 (Fla. 1984). Espinosa asked the jury to exercise their pardon power, and they did. By making such a request, Espinosa has waived his right to challenge his conviction on the lesser offense of resisting arrest without violence. Ray, supra; Armstrong, supra.

The First District Court addressed the same issue in an almost identical situation in Bradford v State, 567 So. 2d 911

(Fla. 1st DCA 1990), rev. den. 577 So. 2d 1325 (Fla. 1991). Bradford was charged with battery on a law enforcement officer, possession of drug paraphernalia, constructive possession of cocaine, and resisting arrest with violence. Id., at 913. Bradford requested and the judge instructed the jury on resisting arrest without violence as a lesser included offense of resisting arrest with violence. Id. Bradford was convicted of the first three crimes as charged and the lesser offense of resisting without violence. Id.

On appeal, Bradford argued that the State failed to prove an element of the offense, i.e., the legality of the arrest. In rejecting Bradford's argument, the First District stated:

> Defense counsel requested a jury instruction on the lesser included offense of resisting arrest without violence, and may not, therefore, complain of his conviction for that offense. Silvestri v State, 332 So. 2d 351, 353-354 (Fla. 4th DCA 1976), aff'd 340 So. 2d 928 (Fla. 1976). Nor can the sufficiency of the evidence on a lesser included crime be considered when the evidence is sufficient to convict for a greater one. Morley v State, 362 So. 2d 1013 (Fla. 1st DCA 1978). Whether or not resisting arrest without violence is a lesser included offense of resisting with violence (when conviction for the former requires a valid underlying

> arrest), the parties treated it as such and waived the issue by requesting jury instructions accordingly.

Bradford v State, at 915.

The ruling in Bradford is logical and fair to both the defense and the prosecution where a lesser offense is requested, given and later turns out not to be a lesser included offense of the crime charged. The defense gets its opportunity for a jury pardon and the state is not penalized for any invited error of the defense. As this Court observed in Armstrong, "Any other holding would allow a defendant to intentionally inject error into the trial and thus await the outcome with the expectation that if found guilty the conviction will be automatically reversed." Armstrong, 579 So. 2d at 735.

As an additional procedural bar, the State observes that the Initial Brief challenged the trial court's denial of the Respondent's motions for judgment of acquittal at the close of the State's case and the close of all of the evidence. Initial Brief at 9. However, it was impossible for the trial court to rule on whether the State had presented sufficient evidence for the charge of resisting arrest without violence to go to the jury because the motions were made prior to Petitioner even requesting

that the court instruct on this crime as a lesser included offense of the crime charged. Espinosa moved for a new trial on the grounds that the verdict was contrary to the law, contrary to the weight of the evidence, and the trial court erred in denying the judgment of acquittal. It is apparent that Espinosa was again challenging the trial court's denial of his motions for judgment of acquittal, and not the State's "failure" to prove the legality of the arrest. This issue was never raised prior to the Initial Brief at the Fifth District Court of Appeal.

While the foregoing analysis resolves the dilemma presented in Espinosa's case, it does not answer the certified question of whether section 843.02 is a lesser included offense of 843.02, and if so, whether it is permissive or necessary.

The elements of resisting arrest with violence are set forth in Section 843.01, Florida Statutes (1995):

> Whoever knowingly and willfully resists, obstructs, or opposes 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; parole and probation supervisor, county probation officer; 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, by offering or doing violence to the person of such officer or legally authorized person, is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083 or s. 775.084.

Section 843.02, Florida Statutes (1995) sets forth the crime of resisting without violence:

> 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 aid 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 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. 775.082.

A comparison of the statutes reveals that section 843.01 contains two elements not contained in section 843.02. The state prosecutor must show that 1) the defendant acted knowingly and willfully and 2) that he offered or did violence to the law

enforcement officer. State v Henriquez, 485 So. 2d 414, 415 (Fla. 1986).

Thus, it would seem that resisting without violence is a necessarily lesser included offense of resisting with violence. However, in order to obtain a conviction for resisting arrest without violence under section 843.02, the prosecution must also prove the legality of the arrest. This requirement is based on a long line of cases which hold that a person has the right to resist an unlawful arrest with or without violence. State v Saunders, 339 So. 2d 641, 642 n 2 (Fla. 1976). In 1974, the legislature enacted section 776.051(1), Florida Statutes (1974), which provides, "A person is not justified in the use of force to resist an arrest by a law enforcement officer who is known, or reasonably appears to be a law enforcement officer." By virtue of section 776.051(1), a person does not have the right to resist a lawful arrest with violence regardless of whether the arrest is technically legal and proof of the legality of the arrest is no longer an element of resisting arrest with violence. Ivester, supra; see also State v Davis, 652 So. 2d 942 (Fla. 5th DCA 1995), State v Johnson, 382 So. 2d 866 (Fla. 2d DCA 1980), Lowery

v State, 356 So. 2d 1325 (Fla. 4th DCA 1978).[1] However, it appears that an arrestee may still resist an unlawful arrest without violence. Even though this is an apparently well settled point of law, this Court may want to consider the wisdom of permitting persons to resist arrest without violence if the arrest is unlawful. Encouraging persons to submit to law enforcement requests, even if those requests are later determined by a court to be unlawful orders, advances the rule of law and protects the safety of both law enforcement officers and arrestees.

The District Courts of Appeal have treated resisting arrest without violence as a permissive lesser included offense of resisting with violence. Thus, if the evidence and charging document supports this "lesser" charge, the judge must instruct the jury on it. Ferrell v State, 544 So. 2d 336 (Fla. 1st DCA 1989) and White v State, 618 So. 2d 354 (Fla. 1st DCA 1993). In Tice v State, 569 So. 2d 1327 (Fla. 2d DCA 1990), the defendant, charged with resisting with violence, challenged the trial court's denial of his request for the jury to be instructed on

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[1] However, section 776.051(1) has never been held to preempt section 843.02, probably because section 776.051(1) refers to resisting with force and section 843.01 refers to doing or offering to do violence.

resisting without violence. The court observed that resisting without violence may become a lesser included offense depending upon the allegations of the charging document and the proof presented at trial. Id. at 1328. The Court observed that the defendant's testimony, if accepted by the jury, would support this lesser included charge. Id. Further, the trial court also denied an instruction concerning a defense based upon the alleged unlawfulness of the deputies' actions. Id. In Lee v State, 368 So. 2d 395 (Fla. 3d DCA 1979), cert. den. 378 So. 2d 349 (Fla. 1979), the Third District Court of Appeal apparently treated section 843.02 as a permissive lesser included offense of section 843.01 (although it questioned the wisdom of this- Id. at 396 fn 1). Again, the jury instruction was given in response to the defendant's request at the close of the evidence, but the appellate court noted, "The record shows that the evidence adduced by appellant at trial as well as the arguments made by his defense counsel supported and advanced this theory of defense [the unlawfulness of the arrest]." Id. At 396. In Benjamin v State, 462 So. 2d 110, 112 (Fla. 5th DCA 1985), the Fifth District Court of Appeals held that the jury must be instructed on section 843.02 as a permissive lesser included offense where the evidence adduced by the defendant at trial supports his

theory that there is no violence directed at the arresting officers.

The conundrum becomes two crimes which each contain an element not contained in the other, but one appears to be a lesser included offense of the other. This in turn gives rise to situations, such as the present one, where a defendant is charged with the crime of resisting a law enforcement officer with violence. At the close of all the evidence, he then requests that the jury be instructed on resisting without violence as a lesser included offense. The trial court obliges, and the jury convicts him of this lesser offense. On appeal, he then argues that this conviction cannot stand because the State has not proven all of the elements of resisting with violence. The State is required to prove a completely new element after all the evidence has been presented. This "gotcha" maneuver is unfair and not legally permissible.

One logical answer is that the Appellant, by requesting the jury instruction on the lesser included offense, has waived the right to later challenge on appeal the State's failure to prove all the elements of the lesser included offense.

There are other options for describing the relationship between these two offenses. As suggested by Judge Harris in his

concurring opinion in Foreshaw v State, 639 So. 2d 683 (Fla. 5th DCA 1994), the "legality of the arrest" may have been mischaracterized as an element by the District Courts of Appeal, and it is really an affirmative defense. If this is so, then section 843.02 is a necessarily included offense of section 843.01 because all of its elements are subsumed within the crime of resisting without violence. The legality of the arrest is not an element which the State must prove, but rather, an affirmative defense.

The burden is still upon the State prove all of the elements of resisting arrest without violence, but the illegality of the arrest must be asserted by the defendant under this view. Due process is not offended by imposing the burden of proving an affirmative defense upon the defendant once the State has met its initial burden. Martin v Ohio, 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1986). An affirmative defense assumes that the charges to be correct but raises other facts that, if true, would establish a valid excuse, right or justification to engage in the conduct in question. State v Cohen, 568 So. 2d 49 (Fla. 1990). Thus, "an affirmative defense says, 'Yes, I did it, but I had a good reason.'" Id.

The illegality of the arrest would be considered in the same

way that excessive force by law enforcement is a defense to resisting arrest with violence. This Court read section 776.051(1) in pari materia with section 776.012[2] to hold that,"[W]hile a defendant cannot use force to resist an arrest, he may resist the use of excessive force in making the arrest." State v Holley, 480 So. 2d 94 (Fla. 1985). Once the State proves the defendant opposed a law enforcement officer in the lawful execution of his duty, the burden is on the defendant to show that he was asserting his common law right to resist an illegal arrest. In other words, the defendant concedes that he arrested arrest without violence, but that is excusable because the arrest was illegal or unlawful.

Finally, section 843.01 and section 843.02 may represent two completely separate crimes which merely happen to share common elements and often occur in factually similar situations. Lewd and lascivious assault on a child under age sixteen and sexual

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[2]Section 776.012, Florida Statutes (1995) provides:

> A person is justified in the use of force, except deadly force, against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force.

battery present a similar scenario. §§ 794.011, 800.04, Fla.Stats. (1995). A review of the elements of both crimes make it appear as if lewd and lascivious assault is a lesser included offense of sexual battery. However, the Florida legislature clearly defined lewd and lascivious assault as the act of sexual battery as defined in section 794.011(2) without committing the crime of sexual battery. As this Court observed in State v. Hightower, 509 So. 2d 1078, 1079 (Fla. 1987), "the unique language contained in the amendment to statute 800.04 makes it clear that these particular crimes are mutually exclusive." If the legality of the arrest is an element of resisting arrest without violence, then each crime contains an element that the other does not, and so the two crimes are separate. Like many other crimes the existence of overlapping elements is a mere legal curiosity.

Espinosa affirmatively waived the argument that the State failed to prove the misdemeanor of resisting without violence by expressly requesting this instruction be given as a lesser offense of the crime for which he was on trial. This Court need not answer the certified question in this case due to this affirmative waiver.

Should this Honorable Court reach the certified question,

there are several possible ways that these two offenses could be treated. This Court may choose to revisit the wisdom of permitting arrestees to resist unlawful arrests without violence. Eliminating this defense advances the rule of law and promotes safety of both officers and arrestees. Like sexual battery and lewd and lascivious assault, these two crimes could be considered two completely separate crimes which share common elements, but which are not related as lesser/greater offenses. The legality of the arrest could be treated as an affirmative defense, and not an element of the lesser offense, in which case resisting without violence is a necessarily lesser included offense of resisting arrest with violence. Another alternative is to hold that by requesting an instruction on resisting without violence as a lesser of resisting with violence, a defendant can be deemed to have waived proof of the legality of the arrest. This would have the effect of a permissive lesser, which may or may not be given depending on the allegation and proof. However, by requesting the instruction, a defendant must be considered to have waived any failure of the state to prove any additional requirement of the legality of the arrest. It is only then that the State is not unfairly subjected to being required to present evidence of the legality of the arrest after all the evidence is presented in

the midst of the charge conference. Whatever this Court decides, the interplay between these two crimes is an issue which needs resolution.

CONCLUSION

Based on the arguments and the authorities presented herein, the Petitioner respectfully prays this honorable court answer the certified question in the negative.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ALLISON LEIGH MORRIS
ASSISTANT ATTORNEY GENERAL
Fla. Bar #931660
444 Seabreeze Blvd.
Fifth Floor
Daytona Beach, FL 32118
(904)238-4990

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Initial Brief of Petitioner has been hand delivered to the Public Defender's box at the Fifth District Court of Appeals on this 23d day of May, 1996.

Allison Leigh Morris
Of Counsel