IN THE SUPREME COURT OF FLORIDA

THOMAS W. FREY,

Petitioner

v. FSC No. 88,924

STATE OF FLORIDA,

Respondent.

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL
SECOND DISTRICT

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND OF THE FACTS

Respondent State of Florida agrees that Petitioner's Statement of the Case and of the Facts is substantially correct for purposes of this appeal.

SUMMARY OF THE ARGUMENT

Resisting an officer with violence is a general intent crime to which voluntary intoxication is not a defense. The words 'knowingly' and 'willfully' merely distinguish the act prohibited from a strict liability crime or an accidental or non-criminal act. The wording of the statute displays no requisite of a subjective intent to bring about any particular result in addition to that which is substantially certain to result from the statutorily prohibited act of doing violence to (or offering to do violence to) the officer engaged in executing his legal duty.

ARGUMENT

ISSUE

IS THE OFFENSE OF RESISTING ARREST WITH VIOLENCE A SPECIFIC INTENT CRIME TO WHICH THE DEFENSE OF VOLUNTARY INTOXICATION APPLIES? (AS CERTIFIED BY THE SECOND DISTRICT COURT OF APPEAL).

On 16 August 1996, the Second District Court of Appeal affirmed Petitioner's convictions for resisting arrest with violence and aggravated battery on a police officer. Frev v. Statg, 21 Fla. L. Weekly D1883 (Fla. 2d DCA August 16 1996). The Second District Court of Appeal acknowledged conflict of its decision with Gonzalez v. State, 488 So. 2d 610 (Fla. 4th DCA 1986) and certified a question of great public importance as stated above.

In its opinion, the Second District Court of Appeal held that were it not for the Florida Supreme Court's remarks in Linehan v. State, 476 So. 2d 1262 (Fla. 1985) concerning Williams v. State, 250 So. 2d 11 (Fla. 3d DCA 1971) the court would have relied upon Colson v. State, 73 So. 2d 862 (Fla. 1954) and Gonzalez v. State, 488 So. 2d 610 (Fla. 4th DCA 1986) and reversed. Out of "due consideration" to this Court's remarks in Linehan the Second District Court instead affirmed Petitioner's convictions and certified the question.

Appellant was charged pursuant to Section 843.01 Florida Statutes (1993) which provides:

> "Whoever knowingly and willfully resists, obstructs, or opposes any officer as defined in section 943.10(1), (2), (3), (6), (7), (8) or (9);... or any other person legally authorized to execute process in the exercise 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...."[1] [2]

Florida courts recognize voluntary intoxication as a defense to specific intent crimes. Cirack v. State, 201 So. 2d 706 (Fla. 1967); Garner v. State, 28 Fla. 113, 9 so. 835 (Fla. 1891). Florida courts have rejected the voluntary intoxication defense involving general intent crimes.

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[1] The information charged Petitioner as follows: "THOMAS W. FREY ... did unlawfully, knowingly and willfully, resist, obstruct and oppose a desuty, to wit: Deputy Charles Britt of the Manatee County Sheriff's Department, in the lawful execution of a legal dutv. to wit: attempting to arrest the defendant, and THOMAS W. FREY did then and there do violence to the person or offer to do violence to the person of said officer, in violation of Florida Statute 843.01 ..."

[2] Respondent State of Florida notes that the statute is referred to in a shorthand fashion as prohibiting "resisting arrest with violence," but in fact is phrased in more general language forbidding an individual to "resist, obstruct or oppose any officer" engaged in the "lawful execution of any legal duty...." This language encompasses a broad range of legal duties of which arrest is only one example.

In Linehan v. State, 476 So. 2d 1262 (Fla. 1985), the Florida Supreme Court considered a three part certified question including the query: "Whether voluntary intoxication is a defense to arson or to any other crime " (Emphasis supplied) In response the Court cited a list of cases in which voluntary intoxication is not a defense based on the fact that the charged crime was one of general intent, among them Williams v. State, 250 So. 2d 11 (Fla. 3d DCA 1971) in which the defendant was charged with resisting arrest with violence.

The trial court in the case sub iudice correctly relied on the Florida Supreme Court's opinion in Linehan when it denied Petitioner's request for a jury instruction on voluntary intoxication as a defense to the charge of resisting arrest with violence.

Petitioner dismisses as dicta and a mere "slip of the pen," the Florida Supreme Court's citation to Williams as a case holding resisting arrest with violence is a general intent crime to which voluntary intoxication is not a defense. It is well-established that dicta of the Florida Supreme Court, in the absence of a contrary decision by this Court, should be accorded persuasive weight. Aldret v. State, 592 So. 2d 264 (Fla. 1st DCA 1991) reversed on other grounds, 606 So. 2d 1156 (Fla. 1992) vacated on

other grounds, 610 So. 2d 1386 (Fla. 1992); O'Sullivan v. City of Deerfield Beach, 232 So. 2d 33 (Fla. 4th DCA 1970); Weber v. Zoning Board of Appeals of the City of West Palm Beach, 206 So. 2d 258 (Fla. 4th DCA 1968); Milligan v. State, 177 So. 2d 75 (Fla. 2d DCA 1965). Clearly, dicta of the Florida Supreme Court is of value as precedent. Weisenberg v. Carlton, 233 So. 2d 659 (Fla. 2d DCA 1970).

In Williams v. State, 250 So. 2d 11 (Fla. 3rd DCA 1971) the defendant was charged with resisting an officer with violence. The court did not speak in terms of "general intent" versus "specific intent". The court stated, however, (citing Colson v. state, 73 so. 2d 862 (Fla. 1954)), "Appellant's argument that because he was intoxicated he ought not be held to account for his violence is without basis in the law."

Respondent State of Florida asserts that the word 'willfully" as used in the resisting an officer statute should be construed to mean that the accused need have only a general criminal intent, and that therefore resisting an officer is a general intent crime, rather than a specific intent crime and that evidence of voluntary intoxication is not available as a defense. The trial court in the case sub iudice did not err in relying on Linehan, supra in denying Appellant's request for a jury instruction on voluntary intoxication

as a defense to resisting arrest with violence.

Respondent is generally reluctant to include lengthy quotations from cases this honorable Court is well able to read for itself, but quotes here due to the unusual nature of the quotation.

In Linehan v. State, 442 So. 2d 244 (Fla. 2d DCA 1983), Judge James E. Lehan gave a closely-reasoned analysis of specific intent crimes vis-a-vis general intent crimes. Judge Lehan's analysis was later cited with approval by Justice Shaw in his dissenting opinion in which Justice Alderman concurred. Linehan v. State, 476 So. 2d 1267.

> 'On the surface, particular statutes defining criminal offenses which contain the words "willfully" or "intentionally" might be thought to encompass 'specific intent" crimes simply because they contain words denoting intent as a requisite mental state. However, that approach would ignore a fundamental concept of criminal law that there are three broad categories of crimes. (1) "Strict liability" crimes (e.g. DWI manslaughter or statutory rape) which are criminal violations even if done without the intent to do the prohibited act, see Baker v. State, 377 So. 2d 17, 19 (Fla. 1979); (2) general intent crimes; and (3) specific intent crimes. See W. LaFave and A. Scott, Handbook on Criminal Law Sec. 28 (1972). The inclusion of words denoting a state of mind as an element of the offense (e.g. "willfully" or "intentionally") serves to distinguish general intent and specific intent crimes from strict liability crimes. But the distinction between general intent and specific intent depends on how

words denoting state of mind are used in a statute.... (emphasis supplied)

A 'general: intent" statute is one that prohibits either a specific voluntary act or something that is substantially certain to result from the act. (E.g. damage to a building is the natural result of the act of setting the building afire). A person's subjective intent to cause the particular result is irrelevant to general intent crimes because the law ascribes to him a presumption that he intended such a result,... Thus, in general intent statutes words such as "willfully", or "intentionally", without more, indicate only that the person must have intended to do the act and serve to distinguish that conduct from accidental (noncriminal) behavior or strict liability crimes..... (emphasis supplied)

* * * * *

Specific intent statutes, on the other hand, prohibit an act when accompanied by some intent other than the intent to do the act itself or the intent (or presumed intent) to cause the natural and necessary consequences of the act. See State v. Gullett, 606 S.W. 796, 804 (Mo. Ct. App. 1980) For example, Section 817.233, Florida Statues (1981) defines a specific intent crime when it refers to "any person who willfully and with intent to injure or defraud the insurer sets fire to . ..any building. (Emphasis added)....Thus, to be a. " pecific intent" crime, a criminal statute should include language encompassing a subjective intent for example intent to cause a result in addition to that which is

> substantially certain to result from a statutorily prohibited act. (Emphasis supplied)

Linehan, 442 So. 2d at 247-248.

Applying this analysis to Section 843.01 Florida Statutes (1993), Respondent notes that the words "knowingly" and "willfully" merely distinguish the act prohibited from a strict liability crime or accidental or non-criminal act. "Any officer engaged in the lawful execution of a legal duty" describes a statutorily protected class of individuals, as it were. In this case the officer was trying to effectuate an arrest. Appellant thereupon proceeded to 'resist, obstruct or oppose" him by the act of "do(ing) violence to the person or offer(ing) to do violence to the person of said officer". The wording of the statute displays no requisite of a subjective intent to bring about any particular result, in addition to that which is substantially certain to result from the statutorily prohibited act of doing violence to (or offering to do violence to) the officer engaged in executing his legal duty.

In crafting an analysis of the distinction between general intent and specific intent crimes, Judge Lehan observed:

> 'The distinction we draw under the foregoing guidelines might be emphasized by the following observations. The Washington appellate court in State v. Edmon, 28 Wash. App. 98, 621 P.2d 1310 (1981) felt that specific intent is intent

> In addition to simply the intent to do a particular physical act. 621 P. 2d at 1314. The Indiana appellate court in Myers v. State, 422 N.E. 2d 745 (1981) said that "it is difficult to find courts or commentators today who will recognize as a specific intent crime any definition of the offense not containing the specific words 'with intent to' effect a certain result." 422 N.E. 2d at 750. (Additional citation omitted). For discussions which we consider to be consistent with our holding and the foregoing guidelines but which are also indicative of the recondite nature of the subject, see W. LaFave and A. Scott, supra at Sec. 28 and R. Perkins, Perkins On Criminal Law 744-51, 762-74 (2d ed. 1969) (citation amplified)

The wording of Section 843.01 Florida Statutes (1993) contains no language encompassing a subjective intent to cause a result in addition to that which is substantially certain to result from a statutorily prohibited act.

Judge Lehan cited State v. Stasio, 78 N.J. 467, 396 A. 2d 1129 (1979) for its "thoughtful, extensive consideration of voluntary intoxication as a defense to numerous crimes." Linehan, 442 So. 2d at 249. Judge Lehan noted:

> "A number of the following bases for our holding as representing sound policy are indicated in Stasio.
>
> (1) Intoxication, short of such a state as to render a person unconscious or incapacitated, can be said to have not destroyed a person's ability to form an intent, whether it be called

general or specific intent. Although a person's mental abilities may be impaired and his inhibitions reduced, his brain still functions to stimulate actions by his body. At the least, there would be justification to find under those circumstances (intoxication short of unconsciousness or incapacitation) a probability that the person meant to do what he did and that therefore he should not be relieved or excused of the consequences thereof. The New Jersey Supreme Court in Stasio quoted Murphy, Has Pennsylvania Found a Satisfactory Intoxication Defense? 81 Dick. L. Rev. 199, 208 (1977) as saying:

'The great majority of moderately to grossly drunk or drugged persons who commit putatively criminal acts are probably aware of what they are doing and the likely consequences. In the case of those who are drunk, alcohol may have diminished their perceptions, released their inhibitions and clouded their reasoning and judgment, but they still have sufficient capacity for the conscious mental processes required by the ordinary definitions of all or most specific mens rea crimes. 396 A. 2d at 1134. See also J. Hall, Intoxication and Criminal Ressonsibilitv, 57 Harv. L. Rev. 1045, 1053 (1977) saying that: Rather obviously, harms committed by inebriates reveal not wild, disorganized, aimless motor activity but conduct well adapted to attain specific goals.'

(2) The issue here involves voluntarv intoxication and there is no basis in abstract fairness not to hold a person accountable for the results of what he voluntarily undertakes. To borrow from tort terminology, we are saying in a general sense, that a person's own voluntary intoxication should not be considered a legal, supervening cause which shields him from the consequences of his conduct. As the Supreme Court of Mississippi said in an armed

robbery case which placed Mississippi among at least six states which do not recognize voluntary intoxication as a defense to either specific or general intent crimes,'if a person casts off the restraints of reason and consciousness by a voluntary act, no wrong is done to him if he is held accountable for any crime which he may commit in that condition. Society is entitled to this protection.' McDaniel v. State, 356 So. 2d 1151, 1159 n.1, 1160-61 (Miss. 1978)

(3) By restricting the applicability of voluntary intoxication as a criminal defense, "the opportunities of false claims by defendants can be minimized and misapplication by jurors of the effect of drinking on the defendant's responsibility eliminated." Stasio, 396 A. 2d at 1134.

(4) Of primary importance, a purpose of the criminal law is to protect society from behavior that endangers the public safety. See Section 775.012, Fla. Stat. (1981); Stasio, 396 A. 2d at 1134. That purpose and the deterrentobjectives of criminal law, may be subverted by relieving a person from the consequences of his own conduct. . . ."[3]

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[3]The Stasiocourtwenton to consider the impact of voluntary intoxication in the context of disposition: "(5)In cases where the defense of voluntary intoxication is not allowed, the trial court nonetheless may consider such intoxication, in proper circumstances, as a mitigating factor at sentencing. There should be no reason why compulsive intoxication (dipsomania) cannot receive adequate, if not superior consideration by a trial judge who has the aid of background investigation into the life of a convicted defendant as compared with the consideration a jury may be able to give in assessing guilt. Similar informed consideration may also be given by a trial judge to the other extreme: a totally inexperienced inebriate."

Linehan, 442 So. 2d at 249-250.

Judge Lehan noted that the Stasio court had observed that "the specific versus general intent distinction is at best, elusive and superfluous and, at worst, a possible vehicle for inconsistent and unjust results." Linehan, 442 So. 2d at 250. Judge Lehan concluded that 'regardless of the ambiguous background of the general law, we construe statutes which are phrased like Section 806.01 statute (arson) and contain the words "willfully" or "intentionally" to describe general intent crimes. On the other hand, specific intent crimes are described with the additional or different types of wording which we have described above as denoting specific intent." Linehan, 442 So. 2d at 251.

Respondent State of Florida asserts that a similar conclusion should be reached in regard to Section 843.01 Florida Statutes (1993), holding it to be a general intent crime to which the defense of voluntary intoxication is not available.

Without a doubt a person whose blood alcohol level shows a reading of .388 is an intoxicated person. But as this honorable Court observed long ago "...[I]t is an old saw that 'some are keener drunk than others are sober.'" Colson, 73 So. 2d 862 (Fla. 1954). As Judge Lehan observed in Linehan, citing to State v. Stasio, 78 N.J. 467, 396 A.2d 1129 (1979), and to J. Hall, Intaxication and

Criminal Responsibility, 57 Harv. Law Review 1045, 1053 (1977) 'harms committed by inebriates reveal not wild, disorganized, aimless motor activity but conduct well adapted to attain specific goals." Linehan, 442 So. 2d at 249.

An examination of the record facts in the case sub judice shows that Mr. Frey's acts exhibited mental comprehension and calculated response. Mr. Frey was observed running through a trailer park, physical action which requires motor coordination. Upon request of Officer Britt, Mr. Frey produced identification. Upon hearing the radio report back that there was a warrant outstanding for his arrest, Mr. Frey acknowledged the message content and stated that 'he had taken care of the outstanding warrant." (Tr.14,38-40,72) He understood the consequences of arrest, as evidenced by his statement, "I'm not going to jail." He threatened the arresting officer: "You ain't bad enough." (ie., presumably, tough enough to subdue me) . Furthermore, insignia pins, badges of Officer Britt's authority, were ripped off during the struggle. None of these acts evidence aimless motor activity. Why then should Petitioner be absolved of the legal consequences of his acts because he had a blood alcohol level of .388?

Respondent State of Florida rejects as irrelevant the argument of Petitioner, citing the testimony of the emergency room physician

that when persons have a high level of alcohol, they may suffer a blackout, which means they can do something and not remember it later. (T127) Simply because an individual has no recall after certain acts does not mean that he had no intention to do those acts **at** the time he committed them.

Respondent State of Florida acknowledges the case holding in Gonzales v. State, 488 So. 2d 610 (Fla. 4th DCA 1986) in which the defendant was charged with resisting arrest with violence and the court held it to be reversible error to fail to give the requested instruction to the jury regarding the effect of voluntary intoxication on the defendant's ability to form specific intent.

The court's opinion in Gonzales is 'bare-bones' conclusory, contains no analysis and merely cites to Mellins v. State, 395 So. 2d 1207 (Fla. 4th DCA), review denied 402 So. 2d 613 (Fla. 1981). Mellins is in fact distinguishable from both the instant case and Gonzales because Mr. Mellins was charged only with **battery on a police officer** which Respondent agrees is a specific intent crime. The Mellins case never addressed whether resisting arrest with violence **was** a specific intent crime. Therefore the Gonzales opinion has misread Mellins and erroneously cited it in support of its decision. Miller v. State, 636 So. 2d 144 (Fla. 1st DCA 1994) has perpetuated the misreading by citing to Gonzales for the

principle "like battery on a law enforcement officer, resisting arrest is a specific intent crime. Gonzales v. State, 488 So. 2d 610 (Fla. 4th DCA 1986)".

Respondent State of Florida asserts that the more appropriate analysis is that suggested by Judge Lehan in Linehan v. State , 442 so. 2d 244 (Fla. 2d DCA 1983) which leads to the conclusion that resisting arrest with violence is a general intent crime.

Appellee State of Florida respectfully requests this honorable Court to answer the certified question in the negative, and affirm Petitioner's conviction for resisting arrest with violence.

CONCLUSION

Based upon the foregoing reasons, arguments and citation of authority, the judgment and sentence should be affirmed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to John Fisher, Esquire, Public Defender's Office, P. 0. Box 9000 - Drawer PD, Bartow, Florida 33831 on this 7th day of November 1996.

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