IN THE SUPREME COURT OF THE STATE OF FLORIDA

CHRISTOPHER MERRITT,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

_____/

CASE NO. 90,557

5th DCA CASE NO. 96-2257

RESPONDENT'S BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

By enacting section 784.07, prohibiting the crime of battery of a law enforcement officer, the Legislature created a substantive offense prohibited by law. The offense is included within the chapter defining the offenses of assault, battery and culpable negligence, and is referenced in the sentencing guidelines as a substantive offense. In addition, section 784.07 has been treated by Florida courts as defining an offense prohibited by law. Because the general attempt statute applies to offenses prohibited by law, the general attempt statute applies to the crime of battery of a law enforcement officer. Such a statutory construction meets the legislative purpose of both statutes and recognizes that a failed attempt to batter a law enforcement officer is worthy of both deterrence and punishment. Accordingly, the Fifth District Court of Appeal was correct in affirming Petitioner's conviction of the crime attempted battery of a law enforcement officer, a third degree felony.

Fredericks v. State, 675 So. 2d 989 (Fla. 1st DCA 1996), relied on by Petitioner in support of his argument for reversal, is based on flawed reasoning. Section 784.07 creates an aggravated form of battery similar to aggravated battery, it does not merely provide for enhanced penalties. Because the statute defines an offense prohibited by law, the general attempt statute automatically applies and need not be repeated in section 784.07.

ARGUMENT

WHETHER THE GENERAL ATTEMPT STATUTE APPLIES TO THE OFFENSE OF BATTERY OF A LAW ENFORCEMENT OFFICER, SUCH THAT ATTEMPTED BATTERY OF A LAW ENFORCEMENT OFFICER IS A THIRD DEGREE FELONY

Petitioner was found guilty by a jury of attempted battery of a law enforcement officer for spitting on and attempting to kick an Orange County deputy sheriff who was arresting him for domestic battery. On Petitioner's direct appeal, the Fifth District Court of Appeal certified conflict with the First District on the question of whether the general attempt statute, section 775.04, applies to the offense of battery of a law enforcement officer, section 784.07, making Petitioner's attempted battery of a law enforcement officer a third degree felony. Because section 784.07 defines a discrete offense prohibited by law which was intended to criminalize and deter violence against law enforcement officers, the Fifth DCA's holding that the attempt statute applies to the crime of battery of a law enforcement officer was correct.

The statute defining the crime of battery of a law enforcement officer makes it a third degree felony to knowingly commit a battery of a law enforcement officer while the officer is engaged in the lawful performance of his or her duties. §784.07(2)(b) Fla. Stat. (1995). While this statute defines the prohibited offenses by reference to previously defined offenses of assault, battery, aggravated assault, and aggravated battery, it is treated by the legislature and as a discrete, substantive offense. For example, the crime of battery of a law enforcement officer is included

within Chapter 784, defining assault, battery, and culpable negligence, and is listed as a substantive offense in the sentencing guidelines. Chapter 784 and §921.012, Fla. Stat. (1995). It is defined as a substantive offense within the Florida Standard Jury Instructions, and has consistently been treated as a substantive offense by Florida courts. See Fla. Std. Jury Instr. (Crim.); State v. Henriquez, 485 So. 2d 414 (Fla. 1986)(comparing the statutory elements of resisting an officer with violence and battery of a law enforcement officer). Thus, the Legislature intended for the crime to be treated as an offense prohibited by law, and Florida courts have done so.

The general attempt statute operates to criminalize a failed attempt to commit any offense prohibited by law. §777.04(1), Fla. Stat. (1995); Lewis v. State, 269 So. 2d 692 (Fla. 4th DCA 1972). The recognized exceptions to this general rule are when the underlying offense itself includes an attempt to complete the criminal act, or when an attempted commission of the crime is logically impossible. See Ward v. State, 446 So. 2d 267 (Fla. 2d DCA 1984)(attempted uttering a forged instrument is not an offense); Hutchinson v. State, 315 so. 2d 546 (Fla. 2d DCA 1975) (attempt does not apply to conspiracy); State v. Gray, 654 So. 2d 552, 553 (Fla. 1995)(attempted felony murder is a logical impossibility). To establish attempt, the State must prove a specific intent to commit a particular crime and an overt act toward its commission which manifests the specific intent. Thomas v. State, 531 So. 2d 708, 710 (Fla. 1988).

Because battery of a law enforcement officer is an offense prohibited by law, the attempt statute must apply to criminalize the failed attempt to commit the offense. Merrit v. State, 22 Fla. L. Weekly D937 (Fla. 5th DCA April 11, 1997). The logic of this conclusion is further supported by the inclusion of attempt as a category II lesser included offense of battery of a law enforcement officer, and by previous convictions for attempted battery of a law enforcement officer. Fla. Std. Jury Instr. (Crim) (1995); Dominique v. State, 590 So. 2d 1059, 160-61 (Fla. 4th DCA 1991); *cf.* Davis v. State, 527 So. 2d 962 (Fla. 5th DCA 1988) (defendant properly convicted of attempt to commit lewd assault where attempt was listed in the schedule of lesser included offenses and convictions had been obtained fr attempted lewd assault in the past). Accordingly, because the Petitioner spat upon and tried to kick the deputy engaged in arresting him for domestic battery the Petitioner is guilty of attempted battery of a law enforcement officer. (R-Vol. II, T-53-55)

The Legislature's intention to treat criminalize attempts to commit battery of a law enforcement officer as well as the completed crime can also be discerned from the purpose of both statutes. Section 784.07 was enacted to deter violence against police, firefighters, and emergency medical providers, affording greater protection to individuals who experience substantial personal risk while performing these indispensable public services. Soverino v. State, 356 So. 2d 269, 271-272 (Fla. 1978). The statute thus serves a public interest in protecting the individuals

who in turn protect the public welfare, a public interest which is "both legitimate and weighty". Maryland v. Wilson, 117 S. Ct. 882 (1997).

The common law doctrine of attempt developed in 1784 primarily in response to the need to deter a person who has unsuccessfully attempted or is attempting to commit a crime. W.R. LeFayve and A.W. Scott, Jr., Criminal Law, 496-498 (2d ed. 1986). As attempt law has evolved, it is now an accepted principle that an attempt to commit a crime is harmful in itself and that attempts are thus worthy of both prevention and punishment. Id., at 499. In addition, the criminalization of a failed attempt to commit a crime preserves our "common sense of justice" by awarding more equal treatment to those who commit identical acts of criminal misconduct but achieve different results through some intervening circumstance, so that a person who fails in his criminal misdeeds only because of some action of another is still culpable. Id.

The present case provides a good example of the need for deterrence which the two statutes address. At the time of the crime, the victim/officer was arresting Petitioner for domestic battery. (R-Vol. II, T-49) When the officer informed Petitioner of the arrest, Petitioner reacted violently, assuming a defensive stance and yelling obscenities and racial epithets. (R-Vol. II, T-50-51) While the officer attempted to pat the Petitioner down prior to seating him in the patrol car, Petitioner kicked at the officer, and the officer was forced to step back to avoid the kick. (R-Vol. II, T-53) Later, while being seated in the patrol car the

Petitioner continued kicking at the officer and also spat on the officer. (R-Vol. II, T-55-59) Clearly, a suspect's spitting upon and kicking at an officer engaged in a lawful arrest is conduct worthy of deterrence and punishment, and the conduct is no less offensive nor less worthy of deterrence or punishment simply because the officer was able to evade the errant kicks.

Petitioner nonetheless argues that the general attempt statute does not apply to the crime of battery of a law enforcement officer, based on the reasoning of Fredericks v. State, 675 So. 2d 989 (Fla. 1st. DCA 1996). However, the reasoning of Fredericks is flawed.

In Frederick, the defendant was convicted of attempted aggravated assault of a law enforcement officer for threatening a police officer with a knife during a domestic battery disturbance. When the defendant brandished his knife, the three officers on the scene drew their firearms and the defendant was then tackled by one of the officers and arrested without further incident. Fredericks, at 990. The First District Court of Appeal reversed the defendant's conviction, concluding that the offense of attempted aggravated assault of a law enforcement officer does not exist. Id. Relying on Crumley v. State, 489 So. 2d 112, 114 (Fla. 1st. DCA 1986) ***approved,*** State v. Crumley, 512 So. 2d 183 (Fla. 1987), the court reasoned that, because section 784.07 is an enhancement statute which provides for increased penalties for certain offenses when the victim of the offence is a law enforcement officer, and because attempts of those offenses are not mentioned in the

statute, attempted aggravated assault of a law enforcement officer is not a crime. Id.

However, the Fredericks court misapplied both Crumley v. State, 489 So. 2d 112, 114 (Fla. 1st. DCA 1986) and the holding of this honorable Court in State v. Crumley, 512 So. 2d 183 (Fla. 1987). The issue in Crumley was whether a defendant can be sentenced for the offenses of aggravated battery of a law enforcement officer and battery of a law enforcement officer when both crimes are predicated on the same act. Crumley v. State, at 113; State v. Crumley, at 184. In holding that convictions on both offenses are not permitted, the First DCA characterized section 784.087 as an enhancement statute which provides for increased penalties based on the additional element of the victim's status as a law enforcement officer. Crumley v. State, at 114. Similarly, this honorable Court noted that aggravated battery and battery of a law enforcement officer are only aggravated forms of simple battery. State v. Crumley, at 185. However, it does not follow from these observations that the attempt statute does not apply to section 784.07. In fact, this Court's opinion supports the application of the attempt statute to battery of a law enforcement officer, since attempt clearly does apply to aggravated battery. *See*, e.g., Henderson, 370 So. 2d 435 (Fla. 1st. DCA 1979).

Nor does the case of Henderson v. State, 22 Fla. L. Weekly D635 (Fla. 4th DCA March 12, 1997) provide support for Petitioner's position. Henderson holds that the 1.5 sentencing multiplier calculated into a drug trafficking guidelines sentence does not

apply to attempted trafficking offenses. Id. The sentencing multiplier, however, is purely procedural: it is a mathematical enhancement which is part of a comprehensive and complicated scoresheet computation scheme. It is contained within a chapter of the Florida Statutes which proscribes sentencing schemes but does not define a single crime, and it has an almost verbatim counterpart within the rules of criminal procedure. See 5921.0014, Fla. Stat. (1995) and Fla. R. Crim. P. 3.702(d) (14). In contrast, section 784.07 is substantive: it defines elements which, when present in connection with the elements of previously defined crimes, create an aggravated offense. State v. Crumley, at 185. It is contained within a section defining the crimes of assault, battery and culpable negligence, and has no counterpart within the rules of criminal procedure. 5784.07, Fla. Stat. (1995). Accordingly, Henderson does not apply to the instant case.

The Petitioner also argues that the Legislature did not intend for the general attempt statute to apply to battery of a law enforcement officer because it did not include attempted battery within the reclassification section of the statute. However, there was no need for the Legislature to do so because the general attempt statute, by its terms, applies to any offense prohibited by law. §777.04(1), Fla. Stat. (1995).

Further, contrary to the Petitioner's assertion, the fact that the Legislature has included attempts in other provisions is not dispositive. For example, Petitioner first argues that the Legislature did not intend to include attempted battery of a law

enforcement officer as an aggravated crime because the former statute, section 784.07(3) Florida Statutes (1994), included attempted murder of a law enforcement officer. However, Petitioner's logic is flawed. Because the crime of first degree murder already provides for the maximum penalty available, life in prison or death, the Legislature could hardly enhance the completed crime of first degree murder of a law enforcement officer. Accordingly, in the case of section 784.07(3), the Legislature had to address attempted murder of a law enforcement officer without relying on the general attempt statute the way that it has for the lesser offenses.

Similarly, the Legislature's inclusion of the language "or an attempt to commit a felony" within the statute providing for enhanced penalties for the use of a firearm does not imply that the same language must have been included within section 784.07 for the attempt statute to apply. The firearm enhancement statute, section 775.087, is contained within the chapter proscribing penalties and providing for registration of criminals, it does not define offenses. See *generally,* Chapter 775 Fla. Stat. (1995). Thus, unlike section 784.07, section 775.087 does not define an offense prohibited by law. Accordingly, the general attempt statute does not automatically apply to section 775.087 and the above quoted language is necessary to enhance the penalties for attempts. However, inclusion of the same phrase within section 784.07, which defines an offense prohibited by law, would be surplusage.

Accordingly, the Legislature's failure to specifically include

attempts to commit the offenses defined within section 784.087 does not imply that the general attempt statute does not apply to the offense of battery of a law enforcement officer. Petitioner's conviction for this offense is therefore proper, and must be affirmed.

CONCLUSION

Based on the arguments and authorities presented above, the State respectfully prays this Honorable Court affirm the judgment of the Fifth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Answer Brief has been furnished by delivery to Stephanie Park, Assistant Public Defender, attorney for the Petitioner, this 6th day of August 1997.

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