IN THE SUPREME COURT OF FLORIDA

CHRISTOPHER MERRITT)	CASE NO. 90,557
)	
Petitioner,)	
)	
vs.)	5TH DCA CASE NO. 96-2257
)	
STATE OF FLORIDA,)	
)	
Respondent)	

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

STEPHANIE H. PARK
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 0047562
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: 904/252-3367

COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES CITED

PRELIMINARY STATEMENT

Record citations including the letter (R) refer to the general pages of the record on appeal found in volume I. Record citations including the letter (S) refer to the transcript of the sentencing proceedingfound in volume I. Record citations including the letter (H) refer to the transcript of the hearing on Petitioner's motion for a new trial found in volume I. Record citations including the letter (T) refer to the trial transcript found in volume II. (Vol.) denotes the specific volume of the record on appeal.

STATEMENT OF THE CASE AND FACTS

This is an appeal from the Fifth District Court of Appeal's ("DC,") affirmance of the trial court's denial of Petitioners motion for a new trial based on his conviction for attempted battery of a law enforcement officer.

Petitioner was charged by information with, among other charges, battery on a law enforcement officer. (Vol. I, R 27-29). The case proceeded to jury trial on June 6, 1996 before the Honorable Charles Prather of the Ninth Judicial Circuit in Orange county. (Vol. I, R 55-56). At trial, the State's evidence regarding the battery on a law enforcement officer charge was that on January 14, 1996, Deputy Faine went to Petitioner's place of employment to arrest him on the charge of domestic violence. (Vol. II, T 48-49). Petitioner told the deputy that he wasn't going to be arrested, that he had a witness. (Vol. II, T 50). The deputy told him to turn around and place his hands on his head, (Vol. II, T 50). Petitioner took what the deputy believed was a defensive stance. (Vol. II, T 50). The deputy threatened Petitioner with his pepper spray. (Vol. II, T 50). Petitioner turned around while cursing and put his hands behind his head. (Vol. II, T 50). The deputy cuffed Petitioner and shoved him onto the patrol car. (Vol. II, T 51). During the subsequent course of the arrest, Petitioner sprayed spit several times in the direction of the deputy. (Vol. II, T 55, 58, 59). Petitioner's spittle landed twice on the deputy's arm and once on the deputy's hand. (Vol. II, T 71). Petitioner also kicked in the direction of the deputy. He did this once while he was being patted down for weapons and once while being placed in the patrol car. (Vol. II, T 52, 59). His foot never made contact with the officer. (Vol. II, T 44-70). The deputy's conduct during this arrest was being investigated based on a complaint filed by Petitioner. (Vol. II, T 61-62).

At the close of the State's case and again at the close of all the evidence, trial counsel for Petitioner moved for a judgement of acquittal. (Vol. II, T 78-79). Both motions were denied. (Vol. II, T 78-79). Petitioner chose not to testify and the defense rested without putting forth any witnesses. (Vol. II, T 78-79).

After deliberations, the jury found Petitioner guilty of *attempted* battery on a law enforcement officer instead of battery on a law enforcement officer. (Vol. I, R 51-53). Petitioner was adjudicated guilty and sentenced on this count. (Vol. I, S 8). Petitioner filed a timely motion for a new trial on the grounds that *attempted* battery on a law enforcement officer is a non-existent crime, relying on Fredericks v. State, 675 So.2d 989 (Fla. 1st DCA 1996). (Vol. I, R 66, 73-74); (Vol. I, H 16). After a hearing, the motion was denied. (Vol. I, H 13-20); (Vol. I, R 76-77). Petitioner filed a timely notice of appeal and the office of the Public Defender was appointed for purposes of this appeal. (Vol. I, R 78-88).

After receiving briefs in this case, the Fifth DCA affirmed the trial court's denial of Petitioner's motion for new trial and certified conflict with the First DCA's decision in Fredericks v. State, 675 So.2d 989 (Fla. 1st DCA 1996). Petitioner filed a notice to invoke the discretionary jurisdiction of this Court . This appeal follows.

SUMMARY OF ARGUMENT

The trial court erred in denying Petitioner's motion for a new trial because Petitioner was found guilty and convicted of attempted battery on a law enforcement officer under section 784.07, Florida Statute (1996). Section 784.07 is an enhancement statute which reclassifies certain enumerated offenses when the victim is a law enforcement officer, thereby enhancing the penalties for those enumerated offenses, Attempted battery is not one of the enumerated offenses included in that statute. Because section 784.07 does not list "attempted battery" as one of the enumerated offenses to be reclassified as a felony when the victim is a law enforcement officer, attempted battery on a law enforcement officer is a non-existent crime. Conviction of a non-existent crime is fundamental error mandating reversal.

In Fredericks v. State, 675 So.2d 989 (Fla. 1st DCA 1996), the First DCA held that section 784.07 does not reclassify or enhance the penalty for an attempted commission of an offense enumerated in that section. In its opinion in this case, Merritt v. State, 22 Fla.L.Weekly D937 (Fla. 5th DCA April 11, 1997), the Fifth DCA disagreed with the First DCA's decision in Fredericks and certified conflict. The Fifth DCA stated that it could see no logical reason why the general attempt statute (section 777.04) would not apply to the offense of battery on a law enforcement officer.

The general attempt statute does not apply to section 784.07 because section 784.07 is an enhancement provision. It does not create the crimes enumerated within it, merely enhances the classification and penalty for those crimes when they are committed upon a law enforcement officer. In Henderson v. State, 22 Fla.L.Weekly D635 (Fla. 4th DCA March 12, 1997), the Fourth DCA declined to apply a similar enhancement provision in conjuction with

the general attempt statute, because the plain language of the enhancement provision failed to indicate an intent to apply the provision to attempts. Enhancement statutes should not be interpretted to include the attempted commision of offenses enumerated within them, unless the Legislative intent to do so appears in the plain language of the enhancement statute. In the instant case, the Legislature has not provided for section 784.07 to apply in conjunction with the general attempt statute and so section 784.07 should not be interpretted otherwise. Statutes in derogation of the common law are to be strictly construed and the courts will infer that such a statute was not intended to make any alteration other than what is specifically and plainly pronounced.

Furthermore, the Legislature has, in other instances regarding enhancement statutes, specifically included language indicating a clear intent to enhance penalties for the attempted commission of certain crimes. The fact that they chose not to do so in this instance indicates that the Legislature did not intend for the section 784.07 to enhance the punishment for the attempted commission of the crimes enumerated in that section.

Therefore, because section 784.07 does not specifically include "attempted battery", that crime remains under its original classification and penalty as a misdemeanor regardless of whether the victim is a law enforcement officer. Until the Legislature intends otherwise and plainly expresses that intention, attempted battery should not receive felony punishment under section 784.07. Because the Legislature has not yet done so, Petitioner's felony conviction for attempted battery of a law enforcement officer under section 784.07 should be reversed.

ARGUMENT

WHETHER THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR A NEW TRIAL WHERE PETITIONER WAS CONVICTED OF ATTEMPTED BATTERY ON A LAW ENFORCEMENT OFFICER, A THIRD DEGREE FELONY, UNDER SECTION 784.07, FLORIDA STATUTE (1996), WHEN THAT SECTION DOES NOT LIST ATTEMPTED BATTERY AS ONE OF THE ENUMERATED OFFENSES TO BE RECLASSIFIED AS A FELONY WHEN THE VICTIM IS A LAW ENFORCEMENT OFFICER.

The trial court erred in denying Petitioner's motion for a new trial because Petitioner was found guilty at trial and convicted of *attempted* battery on a law enforcement officer under section 784.07, Florida Statute (1996). Because that section does not list "attempted battery" as one of the enumerated offenses to be reclassified as a felony when the victim is a law enforcement officer, *attempted* battery on a law enforcement officer -- a third degree felony -- is a non-existent crime, Fredericks v. State, 675 So.2d 989 (Fla. 1st DCA 1996). Conviction of a non-existent crime is fundamental error mandating reversal. Achin v. State, 436 So.2d 30 (Fla. 1982).

Section 784.07 reclassifies certain enumerated offenses when the victim is a law enforcement officer, thereby enhancing the penalties for those enumerated crimes. Fredericks v. State, 675 So.2d 989, 990 (Fla. 1st DCA 1996). Battery is one of the enumerated offenses included in that statute. However, *attempted* battery is not. Section 784.07, Fla. Stat. (1996). In Fredericks v State, the First District Court of Appeal held that section 784.07 does not reclassify or enhance the penalty for an *attempted* commission of an offense enumerated in that section. Fredericks v. State, 675 So.2d 989, 990 (Fla. 1st DCA 1996). Therefore, an attempt of one of the enumerated offenses in section 784.07, Fla. Stat, would remain under its

original classification and penalty regardless of the fact that a law enforcement officer was involved. Id.

In Fredericks v. State, the defendant was charged with the offense of aggravated assault on a law enforcement officer. In that case, police officers were called to the scene on a 911 call, Upon arriving, the defendant raised a knife, faced one of the officers and took a step towards him. The defendant was tackled and physically subdued by one of the officers at the scene. Id. at 990. At trial, the defendant was found not guilty of aggravated assault on a law enforcement officer, but was convicted of *attempted* aggravated assault on a law enforcement officer. Id. The First DCA reversed the conviction finding that *attempted* aggravated assault on a law enforcement officer is a non-existent crime. Id. The court reasoned that:

> As we explained in Crumelv v. State, 489 So.2d 112, 114 (Fla. 1st DCA 1986), approved State v. Crumely, 512 So.2d 183 (Fla. 1987), "by enacting the enhancement statute, section 784.07, the legislature merely provided for a felony punishment when the victim [of one of the enumerated offenses] . . . is a law enforcement officer. " Thus, because the statute does not include the offense of attempted aggravated assault among the enumerated offenses to be enhanced when the victim is a law enforcement officer, the offense of attempted aggravated assault on a law enforcement officer is a non-existent offense.

Id. at 990; *citing* Crumely v. State, 489 So.2d 112, 114 (Fla. 1st DCA 1986), *approved* 512 So.2d 183 (Fla. 1987). The First DCA further held that the defendant had already been acquitted by the jury on the principal charge of aggravated assault on a law enforcement officer and so the case was remanded for a new trial on the charge of attempted aggravated assault. Fredericks v. State, 675 So.2d 989, 991 (Fla. 1st DCA 1996).

The instant case is very similar to the Fredericks case. In the instant case, the

Petitioner was originally charged with a crime enumerated in section 784.07 of the Florida Statutes (1996), battery on a law enforcement officer, but was only found guilty of an attempt of that crime. *Attempted* battery on a law enforcement officer, like the *attempted* assault on a law enforcement officer in the Fredericks case, is not enumerated in 784.07. Section 784.07, Fla. Stat. (1996). Therefore, in the instant case, like in the Fredericks case, an attempt of one of the enumerated offenses in section 784.07 is a non-existent crime and should be reversed. Furthermore, in the instant case, like in the Fredericks case, the jury has acquitted the Petitioner of the principal charge by finding him guilty of a lesser, albeit non-existent crime. Because the Petitioner was convicted of a non-existent crime at trial, the trial court abused its discretion by denying the Petitioner's motion for a new trial. Conviction of a non-existent crime mandates reversal. Achin v. State, 436 So.2d 30 (Fla. 1982).

The Fifth DCA, in its opinion in this case, disagreed with the First DCA's decision in Fredericks, Merritt v. State, 22 Fla.L.Weekly D937 (Fla. 5th DCA April 11, 1997). The Fifth DCA stated:

> We do not agree that the Legislature's action in enhancing the penalty for either an assault or a battery if committed on a law enforcement officer somehow does away with the offense of attempted assault or battery on a law enforcement officer. Because there is an offense of "battery on a law enforcement officer, " we can see no logical reason why the general attempt statute (section 777.04) does not apply to that offense. Id.

The general attempt statute (section 777.04) does not apply to section 784.07 because section 784.07 is an enhancement provision. Fredericks v. State, 675 So.2d 989, 990, (Fla. 1st DCA 1996); Henderson v. State, 22 Fla.L.Weekly D635 (Fla. 4th DCA March 12, 1997). Section 784.07 does not create the crimes of battery, aggravated battery, assault, or

aggravated assault. It simply enhances the classification and penalties that these crimes carry when they are committed upon a law enforcement officer. Fredericks v. State, 675 So.2d 989, 990 (Fla. 1st DCA 1996). Because of their citation to Crumelv, the First DCA, in Fredericks, apparently considered the character of section 784.07 as an enhancement statute in determining that attempts of crimes enumerated in that statute were non-existent crimes. Id. The Fifth DCA did not.

In Henderson v. State, the Fourth DCA recently declined to apply a similar enhancement provision in conjunction with the general attempt statute because the enhancement provision did not include specific language indicating that it was intended to be applied to the attempted commission of the crime enumerated within that enhancement provision. Henderson v. State, 22 Fla.L.Weekly D635 (Fla. 4th DCA March 12, 1997). In that case, the defendant was charged with trafficking in cocaine. Id. The jury, however, convicted him of the lesser included offense of *attempted* trafficking in cocaine under the general attempt statute. Id. At sentencing, the trial court imposed the drug trafficking multiplier of 1.5. Id. The Fourth DCA noted that while Florida Rule of Criminal Procedure 3.702(d)(14) provides for penalty enhancement where the primary offense is drug trafficking, Rule 3.702(d)(14) does not provide for penalty enhancement when a defendant is convicted of *attempted* drug trafficking. Id.; See *also* Section 921.0014(1), Florida Statutes (1995) ("Sentencing multipliers" : this statute corresponds to Rule 3.702(d)(14) and contains identical language). In arriving at their decision, the Fourth DCA looked to the plain language of rule 3.702(d)(14) which made no mention of attempts, Id.

The instant case is extremely similar to Henderson. Just as Rule 3.702(d)(14) is an

enhancement provision intended to increase punishment when a person is convicted of drug trafficking; similarly, in the instant case, section 784.07 is an enhancement provision intended to provide enhanced punishment when the victim of certain enumerated crimes is a law enforcement officer. In Henderson, the Fourth DCA held that the enhancement provision (Rule 3.702(d)(14)) does not apply to an attempt of the crime enumerated in that statute (drug trafficking). Likewise, in the instant case section 784.07, which is also an enhancement provision, should not be applied when Petitioner is convicted the *attempted* commission of an enumerated crime via the general attempt statute unless the Legislature plainly provides for this result.

In the instant case, the Legislature has not provided for section 784.07, to apply in conjunction with the general attempt statute. Section 784.07, Fla. Stat. (1996). Section 784.07 specifically enumerates only four offenses for enhanced punishment when the victim is a law enforcement officer. As the First DCA noted in Fredericks "by its terms [section 784.071 does not reclassify or enhance the penalty for *the attempted* commission of the enumerated offenses." [emphasis added]; Fredericks v. State, 675 So.2d 989, 990 (Fla. 1st DCA 1996). It is a fundamental principle of statutory construction that where a statute enumerates things on which it is to operate, it is ordinarily to be construed as excluding from its operation all those things not expressly mentioned. Thaver v. State, 335 So.2d 815 (Fla. 1976). Additionally, statutes in derogation of the common law are to be strictly construed and the courts will infer that such a statute was not intended to make any alteration other that what was specifically and plainly pronounced. Carlile v. Game and Fresh Water Fish Commission, *354* So.2d 362, 363 (Fla. 1977).

Furthermore, in the instant case, it appears that the Legislature did not intend for section 784.07 to enhance the punishment for the *attempted* commission of the crimes enumerated in that section. The Legislature clearly knows how to insert the proper language so that the attempted commission of certain crimes are encompassed within such enhancement statutes, but in this instance they chose not to do so. For example, the Legislature has formerly included such language in Section 784.07. Section 784.07(3), Fla. Stat. (1994) formerly provided that *the* "*attempted* murder of a law enforcement officer" would receive enhanced punishment. See Section 784.07(3), Fla. Stat. (1994). *Attempted* battery on a law enforcement officer, however, has never been enumerated for enhancement under 784.07. Additionally, the Legislature has specifically provided for attempts in another enhancement statute, section 775.087(3)(a), Florida Statute (1995). That section provides enhanced punishment when a defendant possesses a firearm during the commission of certain enumerated offenses. In that section, the Legislature specifically included language indicating a clear intent for this statute to apply when the defendant was convicted of the *attempted* commission of any of the enumerated crimes. The plain language of section 775.087(3)(a) reads:

> (3)(a) Any person who is convicted of a felony *or an attempt to commit a felony* and the conviction was for:
> [enumerates 17 felonies]
> and during the commission of the offense, such a person possessed a semiautomatic firearm . . ., shall be sentenced to a minimum term of imprisonment of 8 years.
> [emphasis added].

The fact that the Legislature has in other instances regarding enhancement statutes included language specifically indicating their intent to enhance penalties for *the attempted* commission

of certain crimes, but did not to do so in regards to section 784.07, Fla, Stat. (1996) indicates that perhaps the Legislature chose, for what ever reason, not to do so in this instance.

Finally, Petitioner is not arguing that when a person attempts to batter a police officer that no crime has been committed at all. Rather, it is Petitioner's position that the only crime committed is that of misdemeanor "attempted battery. " Until the Legislature intends otherwise and plainly expresses that intention in Section 784.07, "attempted battery" should not receive felony punishment under section 784.07, Thus, because the Legislature has not yet provided that this enhancement statute, section 784.07, should work in conjunction with the general attempt statute so as to enhance the penalties for the attempted commission of enumerated crimes, Petitioner's felony conviction for *attempted* battery of a law enforcement officer under section 784.07 is a non-existent crime and should be reversed.

CONCLUSION

Based on arguments and authorities cited, Petitioner respectfully requests that this Court vacate Petitioner's conviction and sentence on count I, attempted battery on a law enforcement officer, and remand to the trial court with directions to grant a new trial on the charge of attempted battery.

Respectfully submitted,
JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

STEPHANIE H. PARK
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0047562
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: 904/252-3367

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the Honorable Robert Butter worth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, in his basket, at the Fifth District Court of Appeal, and mailed to Christopher Merritt, c/o Dominic Sagorski, Assistant Public Defender, One North Orange Avenue, Suite 500, Orlando, Florida 32801, on this 16th day of June, 1997.

Stephanie H. Parr

STEPHANIE H. PARR
ASSISTANT PUBLIC DEFENDER