ORIGINAL

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 REPLY BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ARGUMENT

The gravamen of the Respondent's ("the State's") argument in its answer brief is that section 784.07(2), Florida Statute (1996) is not an enhancement statute. The State contends that the statute creates a discrete, substantive offense and therefore the general attempt statute should apply. (Respondent's brief at 2-3). To support this position, the State makes three arguments that require some degree of rebuttal.

First, the State argues that because section 784.07(2) is located within a chapter of the Florida statutes that defines other substantive offenses, as opposed to proscribing sentencing schemes, then section 784.07(2) must therefore be substantive. (Respondent's brief at 2,7-8, 9). It is in this manner that the State attempts to distinguish Petitioner's analogy to section 775.087(3)(a), Florida Statute (1995) (the firearm enhancement statute) and the case of Henderson v. State, 370 So. 2d 435 upon which Petitioner relies. (Respondent's brief at 7-8, 9).

It is not, however, the location of a statute within one chapter or another which determines whether it creates a substantive offense or merely enhances the penalty for already existing offenses. Rather it is the legislature's intent as shown through the language and effect of the statute. In the instant case, the title and text of section 784.07, Florida Statutes (1996) make it clear that the legislature did not intend to create a new substantive offense but rather intended merely to provide enhanced punishment when the victim of certain enumerated crimes is a law enforcement officer. The title of section 784.07 reads:

> 784.07. Assault or battery of law enforcement officers, firefighters, emergency medical care providers, or other specified officers; ***reclassification*** of *offenses*; minimum sentence.

[emphasis added]

The text of section 784.07(2) reads in pertinent part:

> Whenever any person is charged with knowingly committing an assault or battery upon a law enforcement officer . . . while the officer. . . is engaged in the lawful performance of his or her duties, ***the offense for which the person is charged shall be reclassified as follows:***
>
> (a) In the case of assault from a misdemeanor of the second degree to a misdemeanor of the first degree.
>
> (b) In the case of battery, from a misdemeanor of the first degree to a felony of the third degree.
>
> (c In the case of aggravated assault, from a felony of the third degree to a felony of the second degree.
>
> (d) In the case of aggravated battery, from a felony of the second degree to a felony of the first degree.
> [emphasis added] ; Section 784.07(2), Florida Statute (1996).

Consequently, by its own terms, section 784.07 indicates that it does not create a new substantive offense, by rather "reclassifies" certain enumerated offenses for enhanced punishment when the victim is a law enforcement officer. The legislature was clear in its purpose when it specifically chose the language "reclassification of offenses" in the title and "the offense for which the person is charged shall be reclassified as follows" in the text. Section 784.07(2),is designed to enhance punishment for certain enumerated crimes and is therefore an enhancement statute. It does not create a new substantive offense.

This is apparently the way this honorable Court chose to view a similarly worded statute in State v. Stalder, 630 So.2d 1072 (Fla. 1994). In Stalder, this Court was called upon to decide whether Florida's Hate Crimes Statute, section 775.085 (1989), was constitutional.

That statute, like the one in the instant case, specifically spoke in terms of the "reclassification" of certain already enumerated offenses when the victim was a member of certain enumerated groups. In its opinion, this Court referred to the statute in terms of an "enhancement charge" providing for "enhanced penalties" as opposed to referring to it as a substantive offense. Id., at 1073, 1076. Because section 784.07(2) has almost identical wording as that of the Florida Hate Crime Statute in Stalder, it should also be viewed as an enhancement statute. Id.

Second, the State attempts to analogize section 784.07(2) to the substantive offense of aggravated battery in order to argue that it creates a substantive offense. (Respondent's brief at 7-8). However, a comparison of section 784.045, Florida Statute (1988), the aggravated battery statute, and section 784.07(2) reveals a striking difference in the was the legislature chose to word these two statutes. The aggravated battery statute does not speak in terms of the "reclassification" of already existing offenses and is thus not analogous to section 784.07(2). It is clear from a reading of both statutes that the legislature intended to create a substantive offense in the case of aggravated battery but it intended simply to create an enhancement statute in the case of section 784.07(2).

Finally, the State argues in its answer brief that section 784.07(2) must be substantive because "battery of a law enforcement officer" is listed within the sentencing guidelines and within the standard jury instruction. (Respondent's brief at 3). Such listings of section 784.07(2) do not indicate that the statute is substantive as opposed to an enhancement statute. Because section 784.07(2) "reclassifies" certain offenses for felony punishment, "battery of a law enforcement officer" must be listed in the sentencing guidelines as the enhancement will

affect the scoresheet. Similarly, just because a statute is an enhancement statute does not mean that a jury should not be instructed on it. The jury must still make a determination as to whether the element which triggers the enhanced penalty has been proven. In fact, juries are regularly instructed on enhancement statutes. For example juries are instructed upon and requested to determine whether a semi-automatic firearms were used in the commission of felony offenses in order to trigger the application of the applicable minimum mandatory sentence. Section 775.087(3)(a); See Fla. Std. Jury Instr. (Crim). 3.05(d). The fact that "battery on a law enforcement officer" is listed within the sentencing guidelines and within the standard jury instructions has no bearing on whether section 784.07(2) creates a substantive offense or is merely an enhancement statute.

In spite of the State's arguments to the contrary, section 784.07(2), by its own terms, is an enhancement statute. Consequently, the general attempt statute does not automatically apply to punish an "attempt" of one of the offenses enumerated therein. Fredericks v. State, 675 So.2d 989 (Fla. 1st DCA 1996); Henderson v. State, 22 Fla.LWeekly D635 (Fla. 4th DCA March 12, 1997); See *also* Respondent's brief at 9 (the State appears to concede that when a statute does not define an offense prohibited by law that the general attempt statute does not automatically apply and the legislature must include specific language to enhance the penalties for attempts). Until the legislature plainly expresses such an attention in section 784.07(2), "attempted battery" should not receive enhanced punishment under that section. Thus Petitioner's felony conviction for attempted battery on a law enforcement officer under section 784.07 is a non-existent crime and should be reversed. Achin v. State, 436 So.2d 30 (Fla. 1982).

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,
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon the Honorable Robert Butterworth, 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.

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