ORIGINAL

IN THE SUPREME COURT OF FLORIDA

CASE NO. 91, 154

STATE OF FLORIDA

Petitioner,

vs.

CAMERON ELLIS,

Respondent.

****

ON PETITION FOR CERTIORARI REVIEW

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PETITIONER'S REPLY BRIEF ON THE MERITS

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Florida Statutes:

STATEMENT OF THE CASE AND FACTS

Petitioner reasserts the statement of the case and facts from the initial brief, accepts the additions submitted by Respondent in the answer brief, and submits the following additions:

A. Respondent was charged and found guilt of battery on a police officer in violation of Florida Statutes 784.03 and 784.07(2)(b) and resisting arrest with violence in violation of Florida Statute 843.01 (R. 1, 14, 19-24, 31-36).

B. At trial the witnesses' testimony was as follows:

Officer Ross testified: "Mr. Ellis then began to talk to Officer Jones, Mr. Ellis went for his pocket to get something out of his pocket, I don't know for what reason, and Mr. Jones -- Officer Jones went for Mr. Ellis' pocket and a scuffle ensued at that point." (T. 33). Under further questioning, the Officer went over the incident again:

> I heard Cameron Ellis state "Get away from my pocket" with vulgar language involved.
>
> And then he grabbed Officer Jones and they went to the ground, as I said, a struggle ensued.
>
> Q. How did he grab Officer Jones?
>
> A. If I remember correctly, it's like a bear-hug. He at first went for his -- for his pocket to push his hand away.

(T. 37). After Jones and Respondent fell to the ground, Officer Hall joined in the fray. (T. 38).

Jones testified that when he patted Respondent's shorts,

Respondent grabbed his hand and said "Get your fucking hand away from me." (T. 50). Respondent slapped the hand away. Id. As Jones reached a second time for Respondent's shorts, "he lunged at me, grabbed me around the chest and arms and slammed me against the back of the patrol car." (T. 51). Jones continued: "I hit the car, I kinds stumbled a little bit and fell down toward -- down to the ground. We didn't go on the ground, but we were -- I guess I was on my knee or something and then we fell over, I was on my back and I was holding him" as Respondent tried to flail with his arms. Id.

The third officer to testify, Officer Hall, stated that when he heard Respondent tell Officer Jones to take his hand away (T. 61), he saw that "their hands were down towards the defendant's right pocket at which point, the defendant then pushed Officer Jones away from him and jumped on Officer Jones, and like a bear-hug with his legs wrapped around Officer Jones' waist also." (T. 62).

Anthony Ellis, Respondent's brother, testified that Officer Jones grabbed Respondent's pocket "lifted him up in the air," "got outrageous and hit him in the mouth." (T. 77). Respondent fell backwards into a police car and "Officer Hall came from behind Cameron and he hit Cameron from the back. So Cameron went down as Cameron was trying to prevent -- he was trying to prevent his fall from hitting on his face, so he slightly brushed against Officer

Jones, tried to break his fall. . . . He didn't grab him, he didn't hold on to him in any kind of a way, he slight, you know. As you are going down you got to grab on something, you know." (T. 78).

Respondent testified that Officer Jones "proceeded to grab for my pants pocket, my right pant pockets, left up my leg and he punched me in the mouth. And I fell against the car. . . . And him lifting my leg up, it caused me to lose balance and when he hit me, I fell agains the car." (T. 85). He denied striking Jones' hand, saying he merely grabbed his own pants pocket. (T. 86). "Officer Hall came from behind me. I don't know if it's Officer Hall, but he was the only guy that was standing behind me. I had discovered a blow from the back and I -- I proceeded -- as the blow struck me in the back, I proceeded to fall and prevent me falling on my face, I brushed against Officer Jones." Id.

SUMMARY OF ARGUMENT

Point I

Respondent, as the appellant below, had the burden of making the record on appeal show that he was not present during jury selection. The Fourth District incorrectly shifted this burden to the State or trial court.

Point II

The Fourth District erred in reversing Respondent's conviction based on a presumption that Respondent was not present during the bench conference. Respondent was present during jury selection by virtue of his being present in the courtroom and by not raising any objection to the selection procedure.

Point III

The District Court found no reversible error in the other two issues raised by Respondent. This Court should decline review of same. The evidence presented established the separate and distinct elements of battery on a law enforcement officer and resisting arrest with violence. Respondent failed to establish the trial court erred in allowing the officer's testimony to show why they were at the scene.

ARGUMENT

POINT I

WHETHER RESPONDENT AS APPELLANT HAD THE BURDEN OF MAKING THE RECORD ON APPEAL SHOW THAT HE WAS NOT PRESENT DURING JURY SELECTION.

The State, Petitioner herein, adopts and reasserts the arguments made in the initial brief before this Court.

The State will further again emphasize that while this case was tried post-Coney (April 9, 1996), the appeal was pending and was not decided until after this Court's ruling in Boyett v. State, 688 So. 2d 308 (Fla. 1996), which made it clear that as long as the defendant is present in the courtroom and has a meaningful opportunity to be heard through counsel, due process rights have not been violated. In the present case, there is no argument that Respondent was present in the courtroom and had a meaningful opportunity to be heard through his attorney in exercising the peremptory challenges.

POINT II

THE DISTRICT COURT ERRED IN REVERSING RESPONDENT'S CONVICTION BASED ON A PRESUMPTION THAT RESPONDENT WAS NOT PRESENT AT THE BENCH CONFERENCE DURING JURY SELECTION.

The State again reasserts and adopts the arguments made in the initial brief, and emphasizes that the record clearly reflects that Respondent was present during the questioning of the potential jurors and was in the courtroom and had a meaningful opportunity to be heard through counsel during peremptory challenges. At no time did Respondent ever object to the procedure used or to an inability to communicate his preferences. Therefore, Respondent should have been estopped from asserting that he was not given an opportunity to be heard on the issue of jury selection. See Kellar v. State, 690 So. 2d 630 (Fla. 1st DCA 1997).

POINT III

THE DISTRICT COURT FOUND THE OTHER ISSUES RAISED BY RESPONDET DID NOT WARRANT REVERSAL OF THE CONVICTION; THUS THIS COURT SHOULD DECLINE TO REVIEW SAME.

Jurisdiction

This Court should decline to consider this point, and its subissues. The District Court's opinion in the case at bar states: "Only one of the three issues merits discussion." With the amendment to the Florida Constitution in 1980, the District Courts of Appeal became the appellate courts of last resort in Florida. Whipple v. State, 431 So. 2d 1011 (Fla. 2d DCA 1983). The District Court having considered all three issues as raised by Respondent on direct appeal, and found only one had merit, this Court should decline to address the additional issues which were properly decided by the District Court.

Merits

A. The trial court properly adjudicated and sentenced Appellant for both resisting an officer with violence and battery on a law enforcement officer. State v. Henriquez, 485 So. 2d 414 (Fla. 1986) and State v. Carpenter, 417 So. 2d 986 (Fla. 1982); see

also Nelson v. State, 665 So. 2d 382 (Fla. 4th DCA 1996); Savage v. State, 494 So. 2d 274 (Fla. 2d DCA 1986).

Petitioner would point out that in United States v. Dixon, 113 S.Ct. 2849 (1993), the Court specifically rejected a "same conduct" analysis, and applied only a "same elements" test. 113 S.Ct. 2859-2864. The State further points out that while the battery in this case was obviously predicated on the grabbing and slamming of the officer, the resisting was likely to have resulted from the vulgar language directed at the officer (T. 37, 50), and the initial pushing away of the officer's hand to prevent the feel of the bulge. See City of St. Petersburg v. Walle, 261 So. 2d 151, 159 (Fla. 1972). Thus because the evidence presented establish the elements to support the convictions for the two separate and distinct crimes under Dixon, the analysis employed by this Court in State v. Anderson, 695 So. 2d 309 (Fla. 1997) and Gibbs v. State, 698 So. 2d 1206 (Fla. 1997) dealing with different degrees of the same crime, does not apply to the facts of the case at bar.

B. It is a well settled principle that the conduct of trial proceedings lies within the broad discretion of the trial judge and

should not be lightly interfered with by an appellate court. Revels v. State, 59 So. 2d 951, 952 (Fla. 1912); Harris v. State, 229 So. 2d 670, 671 (Fla. 3d DCA 1969). Likewise, the trial court has broad discretion in determining the admissibility of evidence, Heath v. State, 648 So. 2d 660, 664 (Fla. 1994). Thus, the trial court's ruling on the admissibility of such evidence is not subject to review except for a clear abuse of discretion. Welty v. State, 402 So. 2d 1159, 1163 (Fla. 1981). Here, the trial court did not abuse its discretion in allowing the testimony because it permissibly explained the context of the encounter.

In State v. Baird, 572 So. 2d 904, 908 (Fla. 1990), the court stated that the "better practice" was to limit an officer's testimony to the fact of a tip without going into the details of the "accusatory statement" that he received. The State submits that the officers' testimony did little more than note that they had received a tip about criminal activity in the vicinity, for it included no details.

In Boykin v. State, 601 So. 2d 1312 (Fla. 4th DCA 1992), the court held that the following broadcast was not inadmissible

hearsay:

> The name that I received via police radio was the name of Bill Crosby as the individual being involved in the armed robbery.

The court reasoned that the testimony was not presented to show the truth of the matter asserted, but was offered to show that the witness had prepared an array of photographs that included the defendant's. Id. At 1314. See also Johnson v. State, 456 So. 2d 529, 530 (Fla. 4th DCA 1984), pet. for rev. denied, 464 So. 2d 555 (Fla. 1985). Similarly, here, the evidence showed why the officers were at the scene.

Regardless, any error was harmless. In opening argument, defense counsel frankly told the jury that the police were conducting an investigation when Respondent encountered them (T. 28). The officers' testimony added nothing to this statement. Moreover, the officers never suggested that the dispatch was about Respondent. The jury's verdict would not have been different absent the testimony, because multiple eyewitnesses testified against Respondent.

CONCLUSION

WHEREFORE, based on the foregoing arguments and authorities, the State of Florida respectfully submits that the decision of the district court should be QUASHED and the conviction and sentence be REINSTATED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing "Brief of Petitioner on the Merits" has been furnished by courier to: GARY CALDWELL, Assistant Public Defender, 421 Third Street, Sixth Floor, West Palm Beach, Florida 33401, on this 15th day of December, 1997.

Of Counsel