IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 91,279

REGINALD WELLS,

Respondent.

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

References to the supplemental volumes (containing the trial testimony) shall be by the supplemental volume number followed by the appropriate page number.

References to the state's brief shall be by the letters "SB" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Because the state's rendition of the facts is much too simplistic, respondent provides the following:

On December 9, 1995, Jacksonville Sheriff's Office law enforcement officers Willingham and Miller were in separate patrol cars but both parked behind the library branch at 13th and Myrtle in Jacksonville, Florida. (III 208-210). The officers had received a "BOLO" for a two-tone Ford Taurus that had been reported as a stolen car some time the previous evening. (III

212). About 2:00 in the morning Willingham observed the approach of car lights and then observed what he believed to be a two-tone Taurus automobile driving by. (III 213). Willingham informed Miller that he wanted to check this car out, so he backed his car out and accelerated in order to catch up with the car. (III 213-214). When he did so, the car accelerated away from him. (III 214). Willingham did not realize that until he got to sixty miles an hour in his patrol car that the car was still accelerating away from him. (III 215). The marked speed limit in this residential district was thirty miles an hour. (III 215).

The car that he was chasing accelerated, and Willingham accelerated after it. The car made a left turn onto Whitner Street and cut across the on-coming lane of traffic. (III 216). Because of the rate of speed that the car was traveling, Willingham had to do the same. (III 216). As soon as Willingham could safely do so, he energized his emergency equipment because it was unsafe to drive at this speed. (III 216-217).

By this time, Willingham was attempting to effect a traffic stop. Willingham had not gotten close enough in order to look at the tag of the car that he was chasing. (III 217). Notwithstanding his police lights, the car that he was chasing continued to accelerate, and Willingham continued to chase it. (III 217). They were still in a residential area, but Willingham did not see any other cars on the street. (III 218).

At this point, Willingham noticed that Miller was in his rearview mirror following. (III 218). Miller, like Willingham,

also had on his emergency equipment. (III 218-219).

The chase continued, and the car that the officers were chasing ran a stop sign. (III 219). Ultimately, the car made a left turn onto Wilson, and then slid to a stop in front of a house there. (III 219).

The officers still did not know whether the car that they had chased was a stolen car. (III 220). However, Willingham did believe that he had probable cause to arrest respondent (who was driving this car) for fleeing and attempting to elude and for reckless driving. (III 220).

Shining his spotlight in such a manner as to hide his exit from his patrol car, Willingham got out with his weapon drawn and ordered the driver (who had opened his car door) to stay inside. However, respondent jumped out and faced Willingham. (III 221).

Apparently, by now, Willingham realized that the car that he had been chasing was a two-tone Mercury Sable (which is similar to but not exactly the same as a Ford Taurus). (III 222).

Again, Willingham ordered respondent back into his car for safety reasons as well as to prevent his flight, but respondent took off running instead. (III 223).

Willingham holstered his weapon and gave chase, yelling for respondent to stop. (III 225-226). Willingham caught up with him at the door of the residence in whose yard respondent had parked. (III 226). Willingham thought that respondent was attempting to gain entry into the house because respondent was shouting for someone in the house. However, no one came to the door. (III

226).

Willingham grabbed respondent around the neck in an attempt to stop him from running. (III 226). Willingham considered respondent under arrest at that point. (III 227).

This apparently left respondent's left hand free. In the meantime, Officer Miller came up behind the two of them. With Willingham holding on to respondent, Miller approached and apparently started striking respondent on the left hand (who, with his keys, appeared to be attempting to gain entrance into the house). (III 227).

Miller had first attempted to use force on a "pressure point" on respondent's hand in order to make respondent release the door or door jamb that he was holding on to. (III 318-319). When this didn't work, Miller struck him on the forearm with his knuckles twice, with the latter blow resulting in respondent's releasing the door. (III 319). After respondent's arm was released from the door, respondent struck Miller in the face several times, causing Miller's glasses to come off, and also respondent struck Miller in the upper torso. (III 319).

Although the officers apparently repeatedly told respondent to stop resisting, that he was under arrest, respondent struggled against the both of them. (III 228). Willingham first described respondent's struggles as "bucking." Willingham was struck in the face by respondent's right hand a couple of times. Willingham also heard sounds of Officer Miller being struck by respondent. (III 228-229).

At some point, Willingham realized that the officers were "...in a pretty good fight" and so Willingham took respondent to the ground by putting his (Willingham's) leg in front of respondent's, and pulling him over the leg onto the ground in front of the car. (III 232-233).

Once on the ground, however, respondent still continued to struggle. While on the ground, respondent was told repeatedly to stop resisting. (III 236). Because of his continued struggle on the ground, Willingham ordered Miller to spray respondent with pepper spray, which he did. (III 236-237). Both Willingham and Miller got pepper spray on them, but apparently respondent continued to struggle. (III 237).

Around the time that Miller sprayed respondent with pepper spray, Miller apparently was also able to reach the radio that he had around his waist and to call for additional help. (III 237).

Finally, with the help of new officers, three officers on respondent's arm, respondent's arms were placed behind his back and handcuffs were put on him. (III 238).

Respondent was then placed in the back of the police car, where he continued to yell and curse. Once in the car, he started to kick and, ordered by his sergeant, Willingham sprayed respondent with more pepper spray in the back of the vehicle. (III 238-239).

Respondent was then strapped in the back of the vehicle with the use of a nylon strap which was intended to keep people from kicking the windows out of the vehicle if they struggled. (III

240).

RESPONDENT'S CASE

Respondent testified that on the night of December 9, 1995, he had called over to his mother's house (the residence where the struggle ultimately took place) but had not received an answer. It was cold that night, and his mother was taking care of his kids, and he became concerned for them. (III 389).

Although respondent was aware that his license had been suspended, he decided that he'd better drive over to his mother's house, which he proceeded to do in a 1991 Mercury Sable. (III 392). He did not drive fast because he knew that his license had been suspended. (III 392-393). As he drove towards his mother's house, he noticed that two patrol cars were parked behind the library. (III 396). However, he didn't pay any attention to them. (III 396). He drove at his normal speed, and he didn't see any traffic on the way to his mother's house. (III 397-398). He was not paying any attention to what went on behind him, and he did not see any blue lights behind him. (III 398).

He first noticed the police car behind him on the corner of 11th and Wilson, but there was nowhere to stop, and he was almost at his mother's house, so he continued on. (III 398). His only thought in regard to the blue lights was to get out of their way, because he had not been speeding and he did not believe that he had been doing anything wrong. (III 399).

Contrary to the officer's testimony, respondent testified that he did not stop at the stop sign although he did not come to

a complete stop (merely yielding), making his turn, and pulling directly into his mother's driveway. (III 399-400).

Respondent got out of his car, and then he observed that one of the officers had his gun drawn. The officer ordered him back into the car, and he responded by asking what he had done. The officer just continued to yell at him, telling him to get back into the car. (I 404-405). Respondent, apparently fearing that he was going to be shot, made a complete turn placing his back in front of the gun, walking toward the house, and told the officer to wait a second, that he had to go to the bathroom. (I 405). The officer did not respond. (I 405-406).

He made it to the door of his mother's house, and started to put the key in the door, when he was snatched from behind by the bigger officer and thrown to the ground. (I 407-408). He didn't attempt to break free, and he did not try to strike the officer. (I 408). He continued to ask the officers to explain what he did, but they kept yelling for him to put his hands behind his back. (I 408).

The reason that he didn't put his hands behind his back was because he was afraid the officer had a gun. (I 408-409). He locked his hands under his body and continued to yell "What did I do, what did I do?" (I 409).

He wouldn't put his hands behind his back, and at times he relaxed his body. In the meantime, he was choked twice, pepper sprayed twice on the ground, but he was never pepper sprayed in the car. (I 410). One of the officers punched him in the face

with his fist, cutting respondent's nose. He was kneed, kicked, and his head was stepped on. (I 410). In respondent's words, he was "savagely beat"[en]. (I 410). During all of this, respondent yelled for help in the neighborhood, but no help came. (I 411).

When a black officer arrived on the scene, and he heard his voice, he then put his hands behind his back. (I 411-412). The reason that he did this for that officer was because he felt safer, and because that officer didn't step on him. (I 412).

Respondent suffered numerous injuries from this episode, including a broken rib. (I 412). No medical attention was provided for respondent, other than a wet napkin to alleviate the sting of the pepper spray.

Respondent denied ever intentionally trying to kick the officers, and testified that the only reason that he ever moved his feet was because the pepper spray was burning his eyes, and the officers were choking him. (I 413-414).

Once the handcuffs were placed upon him, respondent cooperated, and he was walked to the back of the police car. Once in the police car, he screamed because the pepper spray was burning him. (I 414). Respondent did not find out what he was being charged with until he got downtown. (I 415).

SUMMARY OF THE ARGUMENT

Respondent was charged and convicted on two counts of resisting an officer with violence. The Florida First District Court of Appeal properly threw out one of respondent's

convictions on the basis that the term "any" restricts one conviction for resisting an officer with violence per episode.

The Florida First District Court of Appeal properly construed the term "any" to restricting conviction under this statute under the circumstances. The term "any" is ambiguous, and because criminal law must be strictly construed against the state and in favor of the defendant, the Florida First District Court of Appeal was correct in its construction.

Finally, the state's fear that there are no crimes available to charge an individual who continually batters a police officer in the course of resisting is unfounded because an individual can be charged with multiple other crimes multiple times.

ARGUMENT

ISSUE [RESTATED]

THE DISTRICT COURT DID NOT ERR BY REVERSING ONE OF RESPONDENT'S CONVICTIONS FOR RESISTING ARREST WITH VIOLENCE.

In Pierce v. State, 681 So.2d 873 (Fla. 1st DCA 1996), the Florida First District Court of Appeal (properly) held that only one conviction of resisting an officer with violence is permitted in connection with a single episode or incident. Because respondent's double convictions for resisting an officer with violence all occurred in the same episode or incident, the Florida First District Court of Appeal properly reversed one of those convictions.

The First District Court of Appeal's ruling in Pierce followed this court's decision in Grappin v. State, 450 So.2d 480, 482 (Fla. 1984) which held:

> Federal courts have held that the term "any firearm" is ambiguous with respect to the unit of prosecution and that several firearms taken at the same time must be treated as a single offense with multiple convictions and punishments being precluded. See United States v. Rosenbarger, 536 F.2d 715 (6th Cir. 1976), cert. denied, 431 U.S. 965, 97 S.Ct. 2920, 53 L.Ed.2d 1060 (1977); United States v. Kinsley, 518 F.2d 665 (8th Cir. 1975).

There is no question but that the term "any" can be ambiguous. Consider, for example, its definition found in Black's Law Dictionary, 6th ed. (West Publishing Company, St. Paul, Minnesota, 1990) which defines the term as:

> Any. Some; one out of many; an indefinite number. One indiscriminately of whatever kind or quantity. Federal Deposit Ins. Corporation v. Winton, C.C.A.Tenn. 131 F.2d 780, 782. One or some (indefinitely). Slegel v. Slegel, 135 N.J.Eq. 5, 37 A.2d 57, 58. "Any" does not necessarily mean only one person, but may have reference to more than one or to many. Doherty v. King, Tex.Civ.App., 183 S.W.2d 1004, 1007.
>
> Word "any" has a diversity of meaning and may be employed to indicate "all" or "every" as well as "some" or "one" and its meaning in a given statute depends upon the context and the subject matter of the statute. Donohue v. Zoning Bd. of Appeals of Town of Norwalk, 155

> Conn. 550, 235 A.2d 643, 646; 647.
>
> It is often synonymous with "either", "every", or "all". Its generality may be restricted by the context; thus, the giving of a right to do some act "at any time" is commonly construed as meaning within a reasonable time; and the words "any other" following the enumeration of particular classes are to be read as "other such like," and include only others of like kind or character.

In the absence of a statutory definition, a court must use the common ordinary meaning of a word (defined ambiguously above). State v. Buckner, 472 So.2d 1228 (Fla. 2d DCA 1985).

Statutes defining criminal acts are to be strictly construed against the state and most favorably to the accused. Chicone v. State, 684 So.2d 736 (Fla. 1996); Jeffries v. State, 610 So.2d 440 (Fla. 1992); Scales v. State, 603 So.2d 504 (Fla. 1992); Perkins v. State, 576 So.2d 1310 (Fla. 1991).

Here, it is clear from the context of the statute that only one crime may be charged:

> **843.01 Resisting officer with violence to his person.** - Whoever knowingly and willfully resists, obstructs, or opposes any officer as defined in s. 943.10(1), (2), (3), (6), (7), (8), or (9); member of the Parole Commission or any administrative aide or supervisor; county probation officer; personnel or representative of the Department of Law Enforcement; or other person legally authorized to execute process in the execution 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, punishable as provided in s.775.082, s. 775.083, or s. 775.084.

The state, in its argument, disingenuously associates the phrase "any officer" with the phrase "offering or doing violence to the person of such officer" as if the former phrase was immediately next to the latter. One glance at the statute indicates that a vast gulf of words separate the two phrases. Under the statutory construction doctrine of the last antecedent, the state's argument regarding the singularity of the term "person" is weak at best. See Kirksey v. State, 433 So.2d 1236 (Fla. 1st DCA 1983).

The state, relying upon Wallace v. State, 689 So.2d 1159, 1161-1162 (Fla. 4th DCA), review pending, case number 90,287, quotes the Fourth DCA's rationale as: "After Butch and Sundance have shot the first member of the posse chasing them, they would have no reason not to shoot them all." (Quoted in the state's brief at 7).

Nope, not any reason at all if they shot them in the Draconian state of Florida other than aggravated battery on each law enforcement officer that was shot that survived, or homicide as to each and every victim if they didn't. See, for example, Section 784.07, Florida Statutes (Supp. 1996).

At any rate, it is a ridiculous argument because battery on a law enforcement officer is not limited to one act (and is even enhanced because of the status of the officer), and the state of

Florida, with is cornucopia of statutory crimes, is never at a loss to multiply charge a hapless defendant who batters a law enforcement officer one or more times.

CONCLUSION

Based on the foregoing arguments and authorities, the Florida First District Court of Appeal's opinion in this case should be affirmed.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been forwarded by delivery to the Office of the Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, this 10th day of December, 1997.

Respectfully submitted,

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