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IN THE SUPREME COURT OF FLORIDA

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SID J. WHITE
MAR 19 1998
CLERK, SUPREME COURT
By_______
Chief Deputy Clerk

CASE NO. 91,488

DANIEL MARCUS MCLAUHLIN,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

REPLY BRIEF OF PETITIONER

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ARGUMENT

DEFENDANT'S CONVICTION AND SENTENCE FOR AGGRAVATED ASSAULT ON A LAW ENFORCEMENT OFFICER ALONG WITH THE EIGHT YEAR MINIMUM MANDATORY SENTENCE MUST BE VACATED.

Defendant in its initial brief argues that his convictions for aggravated assault on a law enforcement officer must be reduced to aggravated assault since federal officers are not included in the definition of law enforcement officers as contained in Florida Statute §948.10, which is the statute that Florida Statute 9784.07, indicates should be used to define a law enforcement officer for the purposes of that statute. Defendant also argued that the imposition of an eight year minimum mandatory sentence was improper in this case since the information did not allege that a semiautomatic firearm was used during the commission of the offense.

To support its contention that federal officers are included in the definition of law enforcement officer contained in Florida Statute 784.07 the state initially argues that since the statute contains the word "includes" "which is a term of enlargement not of limitation" federal officers can be considered in the definition of a law enforcement officer despite the fact that the statute specifically states that the definition to be used in determining who is a law enforcement officer is contained in Florida Statute $943.10 which does not include federal officers. The state goes on to argue that if the legislature had intended the list of officers contained in 784.07 to be inclusive the legislature would have used the word mean rather than the word include.

Florida Statute §784.07 clearly states that the definition of a law enforcement officer for the purposes of this statute is the definition contained in Florida Statute 948.10 which defines a law enforcement officer as follows:

> (1) "Law enforcement officer" **means** any person who is elected, appointed, or employed full time by any municipality or the state or any political subdivision thereof; who is vested with authority to bear arms and make arrests; and whose primary responsibility is the prevention and detection of crime or the enforcement of the penal, criminal, traffic, or highway laws of the state. This definition includes all certified supervisory and command personnel whose duties include, in whole or in part, the supervision, training, guidance, and management responsibilities of full-time law enforcement officers, part-time law enforcement officers, or auxiliary law enforcement officers but does not include support personnel employed by the employing agency.

When the court reviews the language contained in 943.10 the court will discover that the legislature stated that law enforcement officer **means** any person who is elected, appointed or employed full time by any municipality or the state or any political subdivision thereof. Therefore, as the state properly conceded in its brief when the legislature uses the word means they intend for the list to be exhaustive. Since federal officers are not included in the list contained in 943.10 which is the statute that 784.07 refers to when defining a law enforcement then a strict reading of 784.07 results in the inescapable conclusion that federal officers are not included in 784.07.

The state next argues that pursuant to this court's opinion in *Soverino v. State, 356* So.2d 269 (Fla. 1978), the trial judge properly used the definition contained in 790.001 to justify the inclusion of federal officers in the definition of law enforcement officers contained in 784.07, As argued in the initial brief Florida Statute 784.07 has been amended since this court's decision in *Soverino.* When this court issued its decision in *Soverino,* Florida Statute 784.07 was materially different then the statute under which defendant was charged.

The old 5784.07 listed numerous officers that were intended to be included in the definition of law enforcement officer. Immediately preceding the list the statute stated that the definition of

who is a law enforcement officer was <u>not</u> limited to those contained in the list. More importantly, the old statute contained no reference to any other statute to help clarify who should be considered a law enforcement officer under the statute. Based upon the fact that the old statute clearly indicated that who was a law enforcement officer was not to be limited to who was listed in the statute and that the statute did not refer to any other statute this court held that courts can rely on the definition of a law enforcement officer contained in Florida Statute 5790.001.

In 1988, the legislature amended §784.07 in two material ways. The legislature took out the language "includes but is not limited to" and replaced it with the word includes. And more importantly the legislature specifically stated that the statute used to determine who is a law enforcement officer for the purposes of this statute is Florida Statute $943.10. If the legislature had intended that the courts use the definition contained in $790.001 as urged by the state rather than the definition contained in $948.10 the court would have referenced $790.001 rather than $948.10.

The state's argument that the amended statute does not effect this court's holding in *Soverino* since the statute was amended ten years after *Soverino* is without merit. The entire issue before the court in *Soverino* was how to interpret a vague statute which did not contain a precise definition of a law enforcement officer. Since the legislature failed to recite which statute should be used in defining a law enforcement officer this court relied upon the definition contained in 790.001.

However, the amended statute eliminates the problem presented to this court in *Soverino* and specifically states that the definition that should be used is the definition contained in 948.10. Since this statute clearly does not include federal officers this court should reverse the Third District Court of Appeal decisions which holds that federal officers are included in the definition of law enforcement officers as contained in Florida statute 784.07 and remand this case to the trial court

to reduce defendant's convictions to aggravated assault and order a resentencing.

It is also defendant's position that the court erred in imposing an eight year minimum mandatory sentence since the information failed to allege that a semiautomatic firearm was used. The state argues that this issue was not preserved and even if it was preserved no error occurred.

In making this argument the state not only ignores but fails to even recognize the case of *Palmer* v. *State*, 692 So. 2d 974 (Fla. 5th DCA 1997). In *Palmer v. State,* 692 So.2d 974 (Fla. 5th DCA 1997), the Fifth District Court of Appeal correctly recognized that in order for a defendant to receive an eight-year minimum mandatory sentence the information must allege that a semiautomatic weapon was used when the court stated:

> "Analogous cases have made it clear that Palmer's possession of a semi-automatic weapon during the commission of the aggravated battery had to be charged in the indictment before his sentence could be enhanced on this basis." See, e.g., Mesa v. *State*, 632 So.2d 1094, 1097 (Fla. 3d DCA 1994) (possession of a firearm is "an essential element of the crime charged" which "must be alleged in the indictment or information" before enhancement is permitted pursuant to section 775.087, Florida Statutes); *Cox* v. *State, 530* So.2d 464 (Fla. 5th DCA 1988) (fundamental error to enhance offenses and impose minimum mandatory sentence because of use of firearm in commission of offenses where defendant was not charged with possession of firearm under battery counts in amended information).

Therefore, it is clear since the information did not allege that a semiautomatic weapon was used in the commission of the crime, defendant could not receive an eight-year minimum mandatory sentence.

The state's argument that *Palmer* conflicts with Florida Rules of Criminal Procedure 3.140(d)(1) is disingenuous. The portion of Florida Rule of Criminal Procedure Rule 3.140(d)(1), which the state highlights in its brief, is the portion of the rule dealing with the omission of a statute

number from the information. In this case similar to the *Palmer* case, not only did the state fail to include the statute number dealing with semiautomatic weapons more importantly the information failed to even allege that a semiautomatic weapon was used. Since the information did not allege that a semiautomatic weapon was used, it was error to impose an eight year minimum mandatory sentence.

The state also argues that this court should not correct the fundamental error that has occurred since this was not the basis for accepting jurisdiction in this case and that the issue has not been properly preserved for review. As the state candidly concedes this court once it accepts jurisdiction can resolve any issue that is dispositive of the case. In this case the defendant was convicted of aggravated assault on a law enforcement officer and received an eight year minimum mandatory sentence. The main issue this court must resolve in this appeal is whether defendant's conviction could be enhanced to a second degree felony since the assault was on a law enforcement officer and whether defendant could receive an eight year minimum mandatory sentence. Since the state's failure to allege in the information that a semiautomatic weapon was used is dispositive of the eight year minimum mandatory sentence issue this court should consider this issue.

Next, the state argues that this issue has been waived since defendant did not present this issue to the trial court or the appellate court. A review of the record reveals that this issue was raised at the motion for judgement of acquittal when defense counsel argued that the information was defective. (T. 385-388). Defendant would concede that this issue was not raised on appeal however it is defendant's position that the law clearly establishes that the error in this case was fundamental error and, therefore, could not be waived and that this court can now resolve the injustice that has occurred by the court imposing an eight-year minimum mandatory sentence.

In Cox v. State, 530 So. 2d 464 (Fla. 5" DCA 1988), the jury found *Cox* guilty of "battery on a law enforcement officer with a firearm, as charged in the information." Cox was adjudicated guilty and the offenses were reclassified from third degree felonies to second degree felonies and the three-year mandatory minimum sentence was imposed because of the use of a firearm in the commission of the offenses. On appeal, Cox argued that the trial court erred in enhancing the battery charges from third to second degree felonies and in imposing the mandatory minimum sentence because he was not charged with the possession of a firearm under the battery counts in the amended information. Cox admitted that defense counsel did not raise these matters below but argued that they constituted fundamental errors.

In ruling that the enhancement of defendant's Cox's conviction and the imposition of the three year minimum mandatory sentence was fundamental error the court relied upon the opinions in *Cochenet* v. *State,* 445 So.2d 398 (Fla. 5th DCA 1984) and *Colwell v. State,* 448 So.2d 540 (Fla. 5th DCA 1984).

In *Cochenet* v. *State, 445* So. 2d 398 (Fla. 5th DCA 1984), *Cochenet* was charged with entering or remaining in a dwelling with the intent to commit an offense therein, aggravated assault. *Cochenet* was convicted of first degree burglary. On appeal, the court reversed his conviction since the information did not allege a burglary with an assault and, therefore, defendant should have been adjudicated guilty for a second degree felony rather than a third degree felony. Once again the court recognized that despite defendant's failure to object reversal was warranted because:

> **Although the appellant failed to object to this error at the time of entry of judgment, the error is fundamental and may be raised for the first time on appeal.** This is so because the offense for which Cochenet was convicted is greater in degree and penalty that the offense with which he was charged. (emphasis in original)

In *Colwell* v. State, 448 So.2d 540 (Fla. 5th DCA 1984), Colwell was convicted of first-degree burglary and sexual battery. On appeal, the court agreed with Colwell that the information was insufficient to charge first-degree burglary:

> The first point on appeal asserts that the information charging the burglary was insufficiently alleged to support a life sentence as a felony of the first degree. Sec. 810.02, Fla.Stat. (1978); Sec. 775.082, Fla.Stat. (1978). We agree the information is deficient; it merely alleges burglary of an occupied dwelling, which is a felony of the second degree punishable by no more than fifteen years. It does not allege an assault was made in the course of committing the burglary. **The fact that no objection was made below is to no avail, nor is it of any importance that appellant was charged in other counts of the information with making an assault upon the occupant of the building. Each count of an information stands on its own, is the only vehicle by which the court obtains its jurisdiction and is a limit upon that jurisdiction. To sentence for a crime more serious than the statute under which the crime is charged is fundamental error. Cochenet v. State, 445 So.2d 398 (Fla. 5th DCA 1984). The sentence is reversed and this cause remanded for resentencing.**

Similarly, in this case the imposition of the eight year minimum mandatory sentence was fundamental error since the information failed to allege that a semiautomatic firearm was used. See ***Palmer v. State,*** 692 So.2d 974 (Fla. 5th DCA 1997).

In conclusion this court should reverse defendant's convictions for aggravated assault on a law enforcement officer which are second degree felonies and order the court to adjudicate defendant guilty of aggravated assault which are third degree felonies and then order a new sentencing hearing with instructions to vacate the eight year minimum mandatory sentences and impose three year minimum mandatory sentences.

CONCLUSION

Based on the foregoing arguments and authorities, this Court should reverse defendant's convictions and sentence as to the two aggravated assault convictions and order a new sentencing hearing.

Respectfully submitted,

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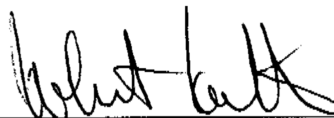
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, Sandra Jaggard, Assistant Attorney General, Suite #950, Rivergate Plaza, 444 Brickell Avenue, Miami, Florida 33 13 1 this 18th day of March, 1998.



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