

**IN THE SUPREME COURT OF FLORIDA**

**CASE NO. 93,062**

**OSCAR TRAYLOR,**

Petitioner,

-vs-

**STATE OF FLORIDA,**

Respondent.

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ON DISCRETIONARY REVIEW FROM  
THE DISTRICT COURT OF APPEAL, THIRD DISTRICT

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**PETITIONER'S AMENDED INITIAL BRIEF ON THE MERITS**

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## TABLE OF CONTENTS

CERTIFICATE OF TYPE SIZE AND STYLE .....	ii
TABLE OF AUTHORITIES .....	iii
STATEMENT OF THE CASE .....	1
STATEMENT OF FACTS .....	2
SUMMARY OF ARGUMENT .....	6
ARGUMENT .....	6
THE DEPARTURE SENTENCE BASED ON USE OF A KNIFE WAS IMPROPER BECAUSE, UNDER THE FACTS OF THIS CASE, THE USE OF A KNIFE WAS AN ESSENTIAL ELEMENT OF THE CRIME AS CHARGED .....	6
CONCLUSION .....	10
CERTIFICATE OF SERVICE .....	10

## **CERTIFICATE OF TYPE SIZE AND STYLE**

Undersigned counsel certifies that this brief was prepared using 14-point Times New Roman type.

## TABLE OF AUTHORITIES

<b>Cases</b>	<b>Page</b>
<i>Franklin v. State</i> , 541 So. 2d 1227 (Fla. 2d DCA 1989) .....	8
<i>Gonzalez v. State</i> , 585 So. 2d 932 (Fla. 1991) .....	7
<i>Gonzalez v. State</i> , 569 So. 2d 782 (Fla. 4th DCA 1990) .....	7
<i>Strickland v. State</i> , 437 So. 2d 150 (Fla. 1983) .....	9
<i>Traylor v. State</i> , 710 So. 2d 172 (Fla. 3d DCA 1998) .....	5, 6, 9
<i>Webb v. State</i> , 410 So. 2d 944 (Fla. 1st DCA 1982) .....	9
<i>White v. State</i> , 714 So. 2d 440 (Fla. 1998) .....	7
<b>Other Authorities</b>	
Section 775.087, Florida Statutes (1987) .....	6, 7

## STATEMENT OF THE CASE

The petitioner, Oscar Traylor, was charged in the circuit court for Dade County with attempted sexual battery with a deadly weapon, attempted first degree murder with a deadly weapon, and burglary of a structure with a deadly weapon. R. 16-19. In April, 1988, Traylor was convicted by a jury and adjudicated guilty by the court (Hon. Arthur Rothenberg) of attempted sexual battery with a deadly weapon, attempted first-degree murder with a deadly weapon, and the lesser included offense of trespass with a dangerous weapon. R. 51-56. He received enhanced sentences of thirty years for the attempted sexual battery and life imprisonment for the attempted murder. R. 57-58. He also received a five year sentence for the trespass conviction. R. 59. The convictions and sentences were affirmed on direct appeal.

Traylor filed a motion to correct illegal sentence, pursuant to Florida Rule of Criminal Procedure 3.800(a), challenging the reclassification of the attempted sexual battery and attempted first degree murder based upon the use of a deadly weapon. R. 6-12. The trial court (Hon. Leslie B. Rothenberg) denied the motion on September 15, 1995. R. 69-70.

Traylor then filed a second motion to correct illegal sentence. This motion was denied nunc pro tunc on May 22, 1997. A written order denying the motion on its merits was filed on July 18, 1997. R. 72.

Traylor appealed the denial of his second motion to correct illegal sentence to

the Third District Court of Appeal, which affirmed the sentence as to the attempted first-degree murder conviction but remanded the sentence on the attempted sexual battery conviction for resentencing without enhancement. *Traylor v. State*, 710 So. 2d 172 (Fla. 3d DCA 1998).

This appeal timely followed.

### STATEMENT OF FACTS

Traylor was charged by way of information. R. 16-18. Count I alleged that Traylor

did unlawfully and feloniously attempt to commit SEXUAL BATTERY . . . and in the process thereof used or threatened to use a DEADLY WEAPON, to wit: a KNIFE or OTHER SHARP OBJECT.

Count II alleged that Traylor

did unlawfully and feloniously attempt to commit a felony, to-wit: MURDER IN THE FIRST DEGREE . . . and in furtherance thereof, . . . with felonious intent and from a premeditated design to effect the death of a human being, or while engaged in the perpetration of, or in an attempt to perpetrate a BURGLARY and/or a SEXUAL BATTERY attempt to kill [the victim] and in such attempt did stab her and/or slash her one (1) or more times with a KNIFE or OTHER SHARP OBJECT.

Count III alleged that Traylor

did unlawfully enter or remain in a STRUCTURE, to-wit: a DWELLING . . . having an intent to commit an offense therein, to-wit: ATTEMPTED SEXUAL BATTERY and/or ATTEMPTED MURDER, and in the course of committing said burglary, the defendant was armed or did arm himself with a dangerous weapon, to wit: a KNIFE or OTHER SHARP OBJECT and/or made an assault or battery upon [the

victim].

The verdict forms for counts I and II show that the jury found Traylor guilty of both crimes "as charged . . . in the information."<sup>1</sup> R. 21-22. On each count, the verdict forms show that the jury specifically found the crimes had been committed "WITH A DEADLY WEAPON."<sup>2</sup> On count III, the verdict form shows that the jury found Traylor guilty of "TRESPASS; A LESSER INCLUDED OFFENSE OF COUNT THREE OF THE INFORMATION WITH A DANGEROUS WEAPON."<sup>3</sup> R. 23.

The judgment of the trial court shows that Traylor was found guilty on count I of "ATTEMPTED SEXUAL BATTERY WITH A DEADLY WEAPON." R. 54. The judgment lists the crime as a second degree felony, which carries a maximum sentence of fifteen years, but Traylor was given an enhanced sentence of thirty years on count I. R. 57.

On count II, the judgment shows Traylor was found guilty of "ATTEMPTED

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<sup>1</sup> Undersigned counsel has attempted, without success so far, to locate a copy of the jury instructions that were given in this case. The court of appeal did not have a copy, and the file in the clerk's office of the circuit court did not have them either. While the Public Defender represented Traylor at trial and in his direct appeal, the trial file cannot be located and the appeal file was destroyed pursuant to office policy as it was more than ten years old.

<sup>2</sup> The verdict forms provided boxes for the jury to check off whether the offense had been committed with or without a deadly weapon.

<sup>3</sup> Similar to counts I and II, the jury had boxes to check off whether the crime was committed with or without a dangerous weapon.

MURDER - FIRST DEGREE WITH A DEADLY WEAPON." R. 54. This conviction was reclassified by the trial court, pursuant to section 775.087, Florida Statutes (1987), to a life felony, and Traylor was given a sentence of life imprisonment. R. 58.

On count III, the judgment shows Traylor was found guilty of "TRESPASS OF AN OCCUPIED DWELLING WITH A DANGEROUS WEAPON." R. 54. This crime was listed as a third degree felony and the trial court sentenced Traylor accordingly, to five years imprisonment. R. 59.

Traylor filed a motion to correct illegal sentence, alleging that counts I and II were improperly reclassified under section 775.087 because the use of a deadly weapon was an essential element of both crimes as charged and so could not be the basis for a sentence enhancement. R. 6-12. The trial court denied the motion on its merits, holding that "The use of a weapon is not an essential element of these offenses and therefore the enhancement or reclassification was proper." R. 69. The second motion to correct illegal sentence was also denied on its merits, for the same reason. R. 3.

Traylor appealed the denial of his motion to correct illegal sentence. The court of appeal acknowledged that "both offenses as charged in the information specifically indicated that the offense was committed with a deadly weapon--in this case, a knife.



Further, the jury verdict forms specifically found the defendant guilty of the offenses 'with a deadly weapon.'" R. 102; *Traylor v. State*, 710 So. 2d 172, 173-74 (Fla. 3d DCA 1998).

The court of appeal agreed with Traylor that the sentence for the attempted sexual battery conviction should not have been enhanced due to the use of a knife. According to the court of appeal, "in the instant case, use of a deadly weapon was an 'essential element' of the attempted sexual battery as charged and under the specific statutory section with which Traylor was charged." R. 105; 710 So. 2d at 175.<sup>4</sup> It thus vacated the sentence for the attempted sexual battery conviction and remanded for resentencing. R. 108; 710 So. 2d at 176.

On the attempted first degree murder conviction, however, the court of appeal held that "the trial court properly reclassified Traylor's attempted first-degree murder conviction from a first-degree felony to a life felony and properly enhanced Traylor's sentence because Traylor used a weapon in the attempt." R. 103-104; 710 So. 2d at 174. According to the court of appeal, the dispositive issue was whether the statutory elements of the crime made use of a weapon an essential element. As neither premeditated murder nor felony murder where the underlying felony was burglary or

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<sup>4</sup> Traylor was charged under section 794.011(3), Florida Statutes (1987), which makes criminal "sexual battery upon a person 12 years of age or older, without that person's consent, and in the process thereof uses or threatens to use a deadly weapon or uses actual physical force likely to cause serious personal injury."

sexual battery include use of a weapon as an essential element, the court of appeal found the reclassification proper. *Id.*

### **SUMMARY OF ARGUMENT**

A sentence may not be enhanced pursuant to section 775.087(1) if the use of a weapon is an essential element of the crime or if other factors present in the case effectively work to charge a felony for which the use of a weapon was an essential element. The court of appeal here considered only whether the use of a knife was an essential element of attempted first degree murder, and that consideration was done only in the abstract. Under the facts of this case, the use of a knife was an essential element of the crime of attempted murder as charged. The upward departure on the sentence for attempted murder was therefore improper.

### **ARGUMENT**

#### **THE DEPARTURE SENTENCE BASED ON USE OF A KNIFE WAS IMPROPER BECAUSE, UNDER THE FACTS OF THIS CASE, THE USE OF A KNIFE WAS AN ESSENTIAL ELEMENT OF THE CRIME AS CHARGED**

Section 775.087(1), Florida Statutes (1987), provides for a one-level enhancement of the degree of any felony where a weapon or firearm is used during its commission "except a felony in which the use of a weapon or firearm is an essential element." "In construing section 775.087(1), this Court has held that a crime may not be enhanced pursuant to section 775.087(1) where the use of the [weapon] is an

essential element of the crime, or the crime is charged as requiring the use of a [weapon] and the jury is so instructed." *White v. State*, 714 So. 2d 440, 444 (Fla. 1998).

Thus, in *Gonzalez v. State*, 585 So. 2d 932 (Fla. 1991), the jury was instructed that use of a firearm was an essential element of third-degree felony murder and the jury convicted defendant of third-degree murder with a firearm. The trial court then enhanced the felony conviction from second-degree to first-degree based on the use of a weapon. *Id.* at 933. This Court, adopting then-Judge Anstead's concurring opinion from below, held that the enhancement was improper. *Id.*; see *Gonzalez v. State*, 569 So. 2d 782, 784 (Fla. 4th DCA 1990) (Anstead, J., concurring in part and dissenting in part). In his opinion, Justice Anstead noted that the use of a weapon was not a necessary element in every third degree murder conviction, but enhancement was not proper where the conviction "was necessarily predicated on appellant's unlawful [use] of a [weapon]." 569 So. 2d at 784-85.

In *Gonzalez*, both this Court and Justice Anstead below cited to the case of *Franklin v. State*, 541 So. 2d 1227 (Fla. 2d DCA 1989). There, as in *Gonzalez*, a third-degree murder conviction had been enhanced due to the use of a weapon during the commission of the felony. 541 So. 2d at 1228. The court of appeal found the enhancement improper because "[a]lthough the information did not specifically charge

appellant with a felony for which the use of a weapon is an essential element, other factors present in this case worked together to effectively charge appellant with such a felony." *Id.* Those factors were that the information did specifically charge appellant with the use of a weapon; the jury instruction required the jury to find appellant had used a deadly weapon in the course of a battery in order to convict of third-degree murder; and the jury was asked to and did make a specific finding that a weapon was used during the commission of the offense. *Id.*

Here, Traylor was charged with attempted felony murder where the underlying felony was burglary and/or sexual battery. Surely, those underlying felonies were the same felonies charged in the other counts of the information. Both of those counts specifically alleged the use of a weapon, and the jury verdicts on those counts show that the jury found a weapon was used. Thus, while in the abstract it might be proper to enhance an attempted murder conviction where the underlying felony is burglary or sexual battery, here it was not proper because the underlying crimes as charged and as found by the jury involved the use of a weapon. *See Webb v. State*, 410 So. 2d 944, 945 (Fla. 1st DCA 1982) ("Although the use of a weapon is not an essential element of the substantive offense of felony murder in all cases, it is an essential element of the felony murder offense charged and proved in this case," where underlying felony

was aggravated assault or aggravated battery involving the use of a firearm).<sup>5</sup>

The trial court demonstrated by its sentence that it recognized the trespass conviction could not be enhanced as the use of a weapon was an essential element of that crime. The court of appeal corrected the trial court by holding that the sentence for attempted sexual battery also could not be enhanced as the use of a weapon was an essential element of that crime. Both of the felonies underlying the attempted murder charge and conviction, then, had as an essential element the use of a weapon. Consequently, the enhancement of the sentence for attempted murder was improper.

### CONCLUSION

For the foregoing reasons, Traylor's sentence of life imprisonment should be vacated and the case remanded for resentencing.

Respectfully submitted,

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<sup>5</sup> The court of appeal believed that *Strickland v. State*, 437 So. 2d 150 (Fla. 1983) was controlling here. *See Traylor*, 710 So. 2d at 174. *Strickland*, however, involved only a charge of attempted murder with premeditation; there was no charge of attempted felony murder. 437 So. 2d at 151. That case is thus factually inapposite as there was no underlying felony to consider, and so is not controlling here.

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the Amended Initial Brief of Appellant was delivered by mail to Linda Katz, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, RiverGate Plaza, Suite 950, 444 Brickell Avenue, Miami, FL 33131, on the 8th day of July, 1999.

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