IN THE SUPREME COURT OF FLORIDA

CASE NO. 93,062

DCA NO. 97-2116

OSCAR TRAYLOR,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

BRIEF OF RESPONDENT ON JURISDICTION

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

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INTRODUCTION

The Petitioner, OSCAR TRAYLOR, was the Appellant in the district court of appeal, and the Defendant in the Circuit Court. Respondent, the State of Florida, was the Appellee in the district court of appeal, and the prosecution in the Circuit Court. In this brief, the parties will be referred to as they appear before this Court.

STATEMENT OF THE CASE AND FACTS

In April of 1998, Petitioner was convicted of attempted sexual battery with a deadly weapon, attempted first degree murder and trespass of an occupied dwelling with a dangerous weapon. Petitioner's challenge is directed at the first two charges. (R.). The information under which Petitioner was charged listed the offenses as follows: (1) attempted sexual battery "and in the process thereof [Traylor] used or threatened to use a DEADLY WEAPON, to wit: a KNIFE or OTHER SHARP OBJECT"; (2) attempted murder in the first degree "from a premeditated design ... or while engaged in the perpetration of, or in an attempt to perpetrate a BURGLARY and/or a SEXUAL BATTERY ... and is such attempt [Traylor] did stab [the victim] ... with a KNIFE or OTHER SHARP OBJECT." Thus, both offenses as charged in the information specifically indicated that the offense was committed with a deadly weapon, that being a knife. Further, the jury verdict forms specifically found Petitioner guilty of the offenses "with a deadly weapon.".

Pursuant to section 775.087, Florida Statutes (1995), a felony shall be reclassified as the next higher degree of felony when the use (or threatened or attempted use) of a firearm or weapon is involved, unless the use of a firearm or weapon is an essential element of the felony. Accordingly, the trial court reclassified

Petitioner's conviction of attempted first degree, a first degree felony, to a life felony and sentenced Petitioner to life imprisonment.

On the attempted sexual battery conviction, the trial court properly listed the crime as a second degree felony without reclassifying it. However, the trial court ultimately enhanced Petitioner's sentence by imposing a thirty year sentence, as the appropriate sentence for the second degree felony would have been a term of imprisonment not exceeding 15 years. Section 775.082(3)(c).

Petitioner filed a Rule 3.800 motion challenging the sentences on the grounds that the reclassification of these crimes pursuant to section 775.087, Florida Statutes (1995), was improper and that the resultant enhanced sentences imposed were illegal, in that use of a weapon was, under the facts of his case, an essential element of the crimes charged. The trial court denied Petitioner's motion to correct his sentences, and ruled that since "the use of a weapon is not an essential element for the offenses of attempted first-degree murder and [attempted] sexual battery," reclassification and enhancement were proper. Petitioner appealed the denial to the Third District Court of Appeal, arguing that the reclassification was improper, thus making the enhanced sentences illegal, because

use of a weapon was an essential element of the crimes charged.

On January 14, 1998, the Third District Court of Appeal entered an opinion in which it agreed with Petitioner as to the attempted sexual battery offense but not as to the attempted first degree murder. Traylor v. State, 23 Fla. L. Weekly D213 (Fla. 3d DCA Jan. 14, 1998). Accordingly, the court affirmed Petitioner's conviction and sentence on the attempted murder conviction and vacated Petitioner's sentence on the attempted sexual battery conviction and ordered that the case be remanded for resentencing on that conviction only. Petitioner filed a motion for rehearing and clarification. In requesting a rehearing, Petitioner alleged that the appellate court erroneously relied on State v. Gray, 654 So.2d 552 (Fla. 1995). In an opinion filed April 2, 1998, the Third District Court of Appeal denied Petitioner's motion for rehearing, but granted his motion for clarification. Accordingly, the third district withdrew its previous opinion and entered a corrected opinion, in which it again affirmed the sentence imposed on the attempted first degree murder and vacated the sentence on the attempted sexual battery conviction, and remanded for resentencing on that count. Traylor v. State, 23 Fla. L. Weekly D 1017 (Fla. 3d DCA April 22, 1998).

Petitioner thereafter filed a notice of intent to invoke this

court's discretionary jurisdiction, based on alleged conflict with this Court's opinion in Gonzalez v. State, 585 So.2d 932 (Fla. 1991).

QUESTION PRESENTED

WHETHER THE DECISION OF THE LOWER COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN GONZALEZ V. STATE, 585 SO.2D 932 (FLA. 1991)? (REPHRASED).

SUMMARY OF THE ARGUMENT

The lower court's decision does not conflict with this Court's opinion in Gonzalez v. State, 585 So.2d 932 (Fla. 1991). The distinction lies in the fact that aggravated battery was the underlying felony of the felony murder in Gonzalez. Because use of a weapon was an essential element of aggravated battery, the charges could not be enhanced. Although Petitioner was convicted of aggravated battery, it was not the underlying felony of his attempted murder conviction. Instead, the information charged Petitioner with attempted first degree murder from premeditation or while engaged in the perpetration or attempt to perpetrate a burglary and/or a sexual battery. As use of a weapon is not an essential element of burglary or sexual battery, Gonzalez is inapplicable to the facts of the instant case. Thus, the trial court properly enhanced Petitioner's attempted first degree murder conviction based upon use of a weapon.

ARGUMENT

THE DECISION OF THE LOWER COURT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THIS COURT'S DECISION IN GONZALEZ V. STATE, 585 SO.2D 932 (FLA. 1991). (REPHRASED)

Petitioner contends that conflict exists between the lower court's opinion in the instant case and this Court's opinion in Gonzalez v. State, 585 So.2d 932 (Fla. 1991) where the court found that defendant's third degree felony murder convictions with a firearm could not be enhanced for use of a firearm because use of a firearm was an essential element of the felony of aggravated battery with a firearm, the underlying felony for which he was convicted. The State maintains that no such conflict exists, as the instant case is factually and legally distinguishable from Gonzalez.

In its analysis of the attempted first degree murder conviction and sentence, the third district's corrected opinion stated that Florida Statutes section 782.04(1) comprises both premeditated murder, section 782.04(1)(a)a, and felony murder, section 782.04(1)(a)2. The court went on to point out that:

> [n]either premeditated murder nor felony murder (where the underlying felony was burglary or sexual battery, as here) include use

> of a weapon as an essential element.[1] See section 782.04(1)(a), Fla. Stat. (1995). Attempted first-degree murder (of either variety) is a first degree felony if the crime is charged as a capital felony, as here. See section 777.04(1), Fla. Stat. (1995). Neither attempted premeditated murder nor attempted felony murder include use of a weapon as an essential element, so it matters not which variety of attempted murder Traylor was convicted of.

Traylor v. State, 23 Fla. L. Weekly D1017, 1018 (Fla. 3d DCA April 22, 1998). (footnotes omitted). In a footnote, the court distinguished the instant case from Gonzalez v. State, 585 So.2d 932 (Fla. 1991) as the underlying felony in the instant case was burglary or sexual battery, as opposed to Gonzalez, where the underlying felony was aggravated battery with a firearm.

In reliance on Gonzalez, the lower court found the enhancement of Petitioner's aggravated battery to be impermissible, because like Gonzalez, Petitioner's aggravated battery was charged with a weapon and Petitioner was found to have a weapon, thus the weapon was an essential element of the crime, pursuant to section

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[1]In addressing the application of this Court's decision in State v. Gray, abolishing the crime of attempted felony, the lower court noted that when Petitioner was convicted of attempted first degree murder in 1988, attempted felony murder was a crime in this state. Thus, as Gray is not retroactive, at the time Petitioner was convicted and as charged in the information, he could have been convicted of either attempted first degree premeditated murder or attempted first degree felony murder.

784.045(1)(a)2. However, Petitioner fails to see that the aggravated battery count was not one of the felonies which were charged as the underlying felonies upon which the attempted felony murder was based. The charge of attempted murder in the first degree read: "from a premeditated design ... or while engaged in the perpetration of, or in an attempt to perpetrate a BURGLARY and/or a SEXUAL BATTERY ... and in such attempt [Traylor] did stab [the victim] ... with a KNIFE or OTHER SHARP OBJECT." This distinction is crucial because even if Petitioner were convicted of attempted felony murder, neither the burglary or sexual battery, as set forth in the information, included use of a weapon as an essential element.

CONCLUSION

As indicated by the foregoing facts, authorities and reasoning, the lower court's opinion does not expressly and directly conflict with Gonzalez v. State, 585 So.2d 932 (Fla. 1991). Thus, the Respondent respectfully maintains that this Court lacks jurisdiction for any proceedings and the petition to invoke discretionary jurisdiction should be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent On Jurisdiction was mailed this 12th day of June, 1998, to OSCAR TRAYLOR, DC# 183205, Everglades Correctional Institution, P.O. Box 659001, Miami, FL 33265-9001.

LINDA S. KATZ
Assistant Attorney General