IN THE SUPREME COURT OF FLORIDA

PAUL O. STOVALL,	)	
	)	
Petitioner,	)	
	)	
vs.	)	S. CT. CASE NO. 95,059
	)	
STATE OF FLORIDA,	)	
	)	5th DCA Case No. 97-2556
Respondent.	)	
_____	)	

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT, IN AND FOR VOLUSIA COUNTY, FLORIDA

PETITIONER'S REPLY BRIEF

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER
FLORIDA BAR NO. 0845566
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
(904) 252-3367

COUNSEL FOR PETITIONER

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POINT ONE

IN RESPONSE TO RESPONDENT'S ASSERTION THAT THE FIFTH DISTRICT PROPERLY AFFIRMED EACH OF THE APPELLANT'S CONVICTIONS EXCEPT FOR THE OFFENSE OF POSSESSION OF A FIREARM BY A CONVICTED FELON.

Respondent first asserts that the argument on appeal was not preserved below as to the state's evidence being insufficient to support the aggravated assault upon a law enforcement officer offense relating to Officer Janet Hawkins. (Respondent's Merit Brief pp. 6-8) The argument made by defense counsel, however, i.e., that the battery on a law enforcement officer offense, as to Officer Hawkins, subsumed the aggravated assault charge, also pertaining to Officer Hawkins, **did** preserve the acquittal argument made on appeal. This is because the lack of any showing by the state's evidence that the offense of **aggravated assault** occurred, apart from the battery offense as to Officer Hawkins, **does** encompass the legal argument that the state's evidence presented during its case-in-chief only supported the battery on a law enforcement offense and not a separate charge of aggravated assault upon Officer Hawkins. At the very least, it is fundamental error to convict an accused of an offense that simply did not occur. *Williams v. State*, 516 So.2d 975 (Fla. 5th DCA 1987).

Respondent further argues that the state's evidence supported the aggravated

assault offense involving Officer Hawkins because it established that Officer Hawkins had a well-founded fear that violence was imminent, citing to Officer Hawkins' testimony concerning the struggle with the Petitioner. (Respondent's Merit Brief pp. 7-9) Petitioner would point out, however, that the Petitioner's statement to Officer Hawkins that ***he was not going to shoot*** clearly shows the Petitioner did not possess the requisite intent to threaten any imminent violence towards Officer Hawkins. Further, Officer Hawkins testimony that she was ***not afraid of the Petitioner shooting her*** could not be any clearer that she did not possess a well-founded fear of imminent harm even when considered in the factual context cited by the Respondent. *Martinez v. State*, 561 So.2d 1279 (Fla. 2d DCA 1990). Neither can defense counsel's general comments made during the sentencing hearing, pertaining to "people" being "horribly intimidated" by the Petitioner's display of the weapon or " psychologically injured" because of the Petitioner's actions, be viewed as a concession by defense counsel that Officer Hawkins possessed a well-founded fear of *imminent harm*. Id.

Respondent next addresses the aggravated assault upon a law enforcement officer charge (count six in the amended information) pertaining to Officer Wendell DallaRosa. Respondent first contends that defense counsel's argument made to the trial court, that the state failed to present the testimony of Officer DallaRosa or any

evidence that Officer DallaRosa was personally impaired, did not encompass the argument made on appeal, i.e., that the state failed to establish that Officer DallaRosa had a well-founded fear of imminent threat of violence. (Respondent's Merit Brief pp. 9-10) Petitioner disagrees. The obvious problem with the lack of any testimony by Officer DallaRosa is that, without it, the state's evidence simply does not establish that the Petitioner's actions created a well-founded fear in ***Officer DallaRosa*** of imminent violence.

Respondent additionally argues that the state's evidence was sufficient to establish a well-founded fear by Officer DallaRosa of imminent violence relying on the testimony of ***Officer Harrison***. (Respondent's Merit Brief p. 10) Petitioner would respond, as pointed out by the Fifth District in *James v. State*, 706 So.2d 64 (Fla. 5th DCA 1998), that separate and distinct offenses of aggravated assault, such as those charged *sub judice*, may not be established where the state's evidence does not support that the *specifically alleged victim* ***possessed a well-founded fear of imminent violence,*** irrespective of ***another witness' testimony as to what that witness personally perceived***. *See also State v. Von Deck*, 607 So.2d 1388 (Fla. 1992). In fact, according to what John Duffy witnessed as the officers approached the break room, the Petitioner never pointed the gun directly at either of the officers or up to the ceiling. (T 252; Vol. 4)

Respondent further argues that the state's evidence was sufficient to support both aggravated assault offenses (charged in counts eleven and twelve of the amended information) pertaining to Greg Kennedy and John Duffy.[1] Specifically, Respondent maintains that the issue of whether these two aggravated assault offenses occurred was waived by defense counsel. (Respondent's Merit Brief pp. 10-11) Petitioner would rely on the previously cited decision of the Fifth District in *Williams*, *supra*, as well as this Court's decision in *Troedel v. State*, 462 So.2d 392, 399 (Fla. 1984), that the failure of the state to prove ***each element of the offense charged offense constitutes fundamental error***. Specifically, the testimony cited by Respondent concerning the Petitioner "waiving" the gun in the break room does not, contrary to Respondent's assertion, include *ipso facto* that the gun was pointed directly at either Mr. Kennedy or Mr. Duffy. Nether does the cited testimony by Respondent establish that either of them believed that the Petitioner was ***directly threatening them with imminent violence***. In fact, the testimony of both Mr. Kennedy and Mr. Duffy clearly points to their ***not*** being ***in direct fear of imminent violence***. (T 232, 235, 252-3; Vol. 4)

Respondent next argues, as to the motions for judgment of acquittal made by defense counsel for each of the three charged armed kidnapping offenses that " [t]he

[1]The aggravated assault charges involve ***only*** Greg Kennedy and John Duffy. No aggravated assault charge was filed in the instant case pertaining to Mark David. (R 95-8; Vol.1)

evidence presented ... demonstrates that Petitioner... held these three men for ransom (for cigarettes) or as hostages to prevent his recapture..." (Respondent's Merit Brief pp. 12-13) Alternatively, Respondent contends that the kidnapping offenses were established by the Petitioner's "...positioning [Mr. Kennedy, Mr. David, and Mr. Duffy] to set a shield to prevent his recapture." (Respondent's Merit Brief p. 13) Petitioner disagrees on both accounts. To begin with, the Petitioner merely ***stated to*** Mr. Mr. Duffy that he wanted to have a cigarette while he calmed down and thought of what to do and ***Mr. Duffy suggested that he use the phone to see if he could get a cigarette***. (T 248; Vol. 4) Certainly, this can not be viewed as a kidnapping with the ***specific intention of seeking a ransom of a monetary price***.

Neither can the facts *sub judice* be viewed as a kidnapping for the purpose of using Mark David, Greg Kennedy, or John Duffy, as a shield "...to prevent his recapture" as maintained by Respondent. While Respondent cites to *Fitzpatrick v. State*, 437 So.2d 1072, 1074-5 (Fla. 1983), the factual circumstances in that case are not comparable to the instant facts. Specifically, in *Fitzpatrick*, the hostage situation that was employed involved ***moving two hostages down a hallway while the hostages had a gun pointed directly at them as one hostage was held by the defendant around the waist and then moving three hostages to another area of the building and forcing one hostage to sit on the defendant's lap***. Further, the

defendant in *Fitzpatrick* told one of the hostages, *after he accosted her*, ***that he wanted to use her as a shield and take her to a bank located a block away from the real estate building he entered and told all the hostages that he would have to shoot the police and then shoot the hostages as well as himself***. *Id*., 1074-5. Accordingly, the Petitioner should be discharged as to each of the aforementioned offenses.

POINT TWO

IN RESPONSE TO RESPONDENT'S ASSERTION THAT THE FIFTH DISTRICT PROPERLY AFFIRMED THE TRIAL COURT'S DENIAL TO HAVE TESTIMONY REREAD TO THE JURY AND THE TRIAL COURT'S JURY INSTRUCTION AS TO VOLUNTARY INTOXICATION.

Respondent argues the trial court did not abuse its discretion in refusing the jury's request to have the testimony of Officer Janet Hawkins reread to them based on her testimony being "...over fifty pages long," and that it was not crucial since the "...[Petitioner essentially admitted the aggravated assault on [Officer Hawkins]" (Respondent's Merit Brief pp. 14-15) Petitioner disagrees as to both assertions. To begin with, the *entire* testimony of Officer Hawkins was specifically requested by the jury to be reread. (T 450; Vol. 5) In *Cole v. State*, 701 So.2d 845, 850 (Fla. 1997), the Florida Supreme Court pointed out that an abuse of discretion may occur when the trial court *does not directly respond* to a jury's specific request for the rereading of testimony *unless the testimony reread is unfairly misleading to the jury*. Generally, as noted in *United States v. Holmes*, 863 F.2d 4 (2d Cir. 1988), the better course of action is to allow rereading of testimony when requested. Respondent certainly has not argued that the jury would have been unfairly misled in any manner by the testimony of Officer Hawkins being reread to them as they requested.

As to the Respondent's assertion that the testimony of Officer Hawkins was not

crucial to the jury in light of the Petitioner's testimony concerning Officer Hawkins, Petitioner would point out that Officer Hawkins testimony was obviously vitally important to the jury or they would not have asked to have her *entire testimony to be reread just after having heard the Petitioner testify before they began to deliberate*. More importantly, this testimony was the starting point for the entire course of events which took place at Halifax Hospital and it was particularly crucial in that it would have allowed the jury to fully consider how Officer Hawkins perceived the totality of the Petitioner's actions at the hospital room by the jury being able to review her testimony once again.

Respondent next contends the trial court's jury instructions as to Petitioner's defense of voluntary intoxication did not amount to fundamental error. (Respondent's Merit Brief pp. 15-17) Specifically, Respondent argues that the trial court gave the standard jury instructions for each of the charged offenses, as well as the voluntary intoxication instruction, and that there was no indication that the jury was confused. (Respondent's Merit Brief pp. 15-16) Petitioner would respond that the very fact that the voluntary intoxication instruction given by the trial court was incomplete; because it did not specifically define to the jury the various essential mental states which the Petitioner's voluntary intoxication defense would prevent the Petitioner from forming, is not rendered harmless simply because the trial court initially instructed the jury as

to the elements of the various charged specific intent offenses. Similarly, the fact that the incomplete voluntary intoxication jury instruction failed to explain to the jury that defense of voluntary intoxication did not apply to any lesser-included general intent offenses can not be viewed as being "...to the [Petitioner's] benefit" as maintained by the Respondent. (Respondent's Merit Brief pp. 16-17) This is because the Petitioner was found guilty of the ***charged specific intent offenses*** and the jury could have been mislead into thinking that Petitioner's voluntary intoxication defense would automatically acquit him of the specific intent charged offenses along with each of the general intent lesser-included offenses. Thus, the jury's inherent pardon power to find the Petitioner guilty of the various lesser included general intent offenses may have been adversely chilled. Moreover, the fundamentally incomplete voluntary intoxication jury instruction failed to explain to the jury that the State had the burden of proof to establish *Petitioner's requisite specific intents for the charged offenses and th*at *the Petitioner's* ***voluntary intoxication can prevent him from forming the various requisite specific intents of the charged offenses.*** *Redwitz v. State*, 23 Fla. L. Weekly D987 (Fla. 2d DCA April 17, 1998). Based on the aforementioned trial errors, remand for a new trial is required as to each of the instant charged offenses except for the vacated offense of possession of a firearm by a convicted felon.

POINT THREE

IN RESPONSE TO RESPONDENT'S ASSERTION THAT THE FIFTH DISTRICT PROPERLY AFFIRMED THE TRIAL COURT'S DENIAL OF THE PETITIONER'S MOTION FOR MISTRIAL AND THE TRIAL COURT ADMITTING INTO EVIDENCE THE PETITIONER'S PRIOR FELONY CONVICTION.

Respondent first contends that the trial court did not comment reversible error by denying the Petitioner's motion for mistrial when state witness, Mark David, testified that the Petitioner had told him that he really did not want to go back to jail because he had been in trouble before. (Respondent's Merit Brief pp. 18-19) Specifically, Respondent argues that this was relevant to "... show intent, negated the defense of voluntary intoxication, [and] did not become of feature of the trial..." (Respondent's Merit Brief p. 18) The Fifth District explained in *Farrell v. State*, 682 So.2d 204, 206 (Fla. 5th DCA 1996), that a specific reference to collateral crimes is *not* relevant. Unlike the situation in *Smith v. State*, 683 So.2d 577 (Fla. 5th DCA 1996), the Petitioner ***did not stipulate*** to the any prior felony convictions at trial. In fact, defense counsel initially objected to the state's admission of such evidence both on the basis of the state failing to provide a proper predicate and that the state had committed a discovery violation prior to the Appellant's testimony as to his prior felony convictions. (T 302-6, 313-17; Vol. 4)

In addition, Petitioner would point out that the prejudice caused by the state's

discovery violation as to the undisclosed witness, Deputy Edgerton, as well as the prejudice caused by the improper admission of the certified copy of the felony conviction, without the state establishing a proper predicate, is also apparent, irrespective of the Fifth District vacating the possession of a firearm by a convicted felon offense. (T 302-6, 313-17; Vol. 4) This is because the state was able to admit into evidence, before the Appellant testified, the certified copy, over defense counsel's objection, through the undisclosed witness, Deputy Edgerton, allowing the jury to learn that Petitioner was a convicted felon, even though Deputy Edgerton's testimony could not provide a sufficient predicate for the admission of the certified copy of the felony conviction. (T 316-17; Vol. 4) Accordingly, the Petitioner is entitled to a new trial as to each of the remaining charged offenses based on trial court's denial of the Petitioner's motion for a mistrial and in permitting the state to submit the certified copy of the felony conviction without a proper predicate through an undisclosed state witness.

POINT FOUR

IN RESPONSE TO RESPONDENT'S ASSERTION THAT THE SENTENCING ERRORS ARE NOT REVIEWABLE ON APPEAL.

Respondent argues that the consecutive habitual felony offender life sentences imposed by the trial court, which arose from a single criminal episode, are not correctable specifically on appeal. (Respondent's Merit Brief pp. 21-36) Respondent relies on the decision in *Maddox v. State*, 708 So.2d 617 (Fla. 5th DCA 1998). (Respondent's Merit Brief p. 21) Petitioner would respond that *Maddox* does not address the imposition of *consecutive habitual felony offender sentences.* Further, if this Court finds *Maddox* applicable, Petitioner would adopt the arguments already briefed and orally argued before this Court in *Maddox*, case number 92,805.

Therefore, resentencing is required in order to correct the aforementioned illegal and improper consecutive habitual felony offender sentences imposed by the trial court as to the armed kidnapping offenses charged in counts eight, nine, and ten, of the instant information in case number 96-34189-94. (R 95; Vol. 1) *See also Speights v. State*, 711 So. 2d 167 (Fla. 1st DCA 1999), quashed S. Ct. case no. 93,207 (Fla. May 14, 1999) and Attached slip opinion *Gonzalez v. State*, no. 98-2265 (Fla. 5th DCA August 20, 1999).

CONCLUSION

Based on the arguments and authorities cited herein and in Petitioner's initial brief, Petitioner respectfully requests that this Honorable Court, as to Point One, vacate the Petitioner's judgments and sentences for each of the armed kidnapping offenses (counts eight, nine, and ten), and the aggravated assault offenses charged in counts five, six, eleven, and twelve of the information filed in case numbers 96-34189-94 and order the Petitioner discharged as to those offenses, or alternatively, as to Points Two and Three, vacate each of the Petitioner's convictions in case numbers 96-34189-94 and 96-3418 and remand this cause for a new trial as to each of the charged offenses, or alternatively, as to Point Four, remand for resentencing in counts eight, nine, and ten, in case numbers 96-34189-94 and order that the trial court impose the habitual felony offender sentences, as to those counts, to run concurrently with the remaining sentences imposed in case numbers 96-34189-94.

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SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 0845566
112 Orange Avenue, Suite A
Daytona Beach, FL 32114
(904) 252-3367
COUNSEL FOR PETITIONER

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in this brief is 12 point Courier New, a font that is not proportionally spaced.

_____

SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, FL 32118 via his basket at the Fifth District Court of Appeal and mailed to: Mr. Paul O. Stovall, DC # 621892, Washington Correctional Institution, 4455 Sam Mitchell Drive, Chipley, FL 32428, on this 23rd day of August 1999.

_____

SUSAN A. FAGAN
ASSISTANT PUBLIC DEFENDER