IN THE SUPREME COURT OF FLORIDA

TIMOTHY ANDERSON,

Petitioner,

v. CASE NO. SC18-1059

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW OF THE DECISION
OF THE FIRST DISTRICT COURT OF APPEAL

INITIAL BRIEF OF PETITIONER ON THE MERITS

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INITIAL BRIEF OF PETITIONER ON THE MERITS

I PRELIMINARY STATEMENT

Timothy Anderson was the defendant in the trial court, and the appellant before the First District Court of Appeal.

The record, including the sentencing hearing, will be referred to as "R" and the trial transcript as "T."

II STATEMENT OF THE CASE AND FACTS

This is an appeal from the decision of the First District Court of Appeal. Anderson v. State, 247 So.3d 680 (Fla. 1st DCA 2018).

Petitioner was charged with aggravated assault with a motor vehicle, a deadly weapon. The evidence was undisputed that he drove recklessly. Anderson's girlfriend left a club in her car with some friends. Anderson followed in his truck, "driving erratically at times and eventually hitting his girlfriend's car." 247 So.3d at 681. During trial, she said he hit her car twice, but in context, they were relatively slight contacts; once when she was making a turn (T 32); the second time, she felt a "slight bump" (T 34).

The district court said his defense was that, while he did drive recklessly, he did not intentionally hit the girlfriend's car. Id. His request for the jury to be instructed on the lesser-included offense of reckless driving was denied; he was convicted of aggravated assault; the First District Court affirmed on appeal.

The First District disagreed with the analysis of the Fourth District Court in Piggott v. State, 140 So. 3d 666 (Fla. 4th DCA 2014), on whether reckless driving is a permissive lesser offense, and certified conflict with Piggott.

II SUMMARY OF THE ARGUMENT

Certifying conflict with the decision of the Fourth District in Piggott, the First District ruled that reckless driving was not a lesser-included offense of aggravated assault with a motor vehicle, because the information did not explicitly charge that petitioner, Timothy Anderson, was driving the vehicle.

Aggravated assault requires a threat by word or act with a deadly weapon. When a motor vehicle is the deadly weapon charged, it must be used or threatened to be used in a manner likely to cause death or great bodily harm. Reckless driving derives from and is included in charging aggravated assault with a motor vehicle; unlike Von Deck, it does not require an inference from the facts.

Further, the district court opinion is inconsistent with the provision in the Standard Jury Instructions that improper exhibition of a deadly weapon is a Category 1 lesser-included offense of aggravated assault with a deadly weapon. Because a motor vehicle is different from most deadly weapons, improper, i.e., reckless, careless, threatening, exhibition does not translate directly to motor vehicles, but reckless driving is an analogous lesser offense.

III ARGUMENT

ISSUE PRESENTED

THE TRIAL COURT ERRED REVERSIBLY IN DENYING THE DEFENSE REQUEST FOR A JURY INSTRUCTION ON THE LESSER-INCLUDED OFFENSE OF RECKLESS DRIVING; THE FIRST DISTRICT COURT CERTIFIED CONFLICT WITH THE DECISION IN PIGGOTT V. STATE, 140 SO.3D 666 (FLA. 4TH DCA 2014); THE COURT ALSO MISAPPLIED THIS COURT'S DECISION IN STATE V. VON DECK, 607 SO.2D 1388 (FLA. 1992).

Standard of review

"Since this issue involves a question of law based upon undisputed facts, our standard of review is de novo." Anderson v. State, 247 So.3d 680, 681 (Fla. 1st DCA 2018), citing Khianthalat v. State, 974 So.2d 359, 360-61 (Fla. 2008).

Argument

Not at issue in this case are 1) whether a motor vehicle can be a deadly weapon under the aggravated assault statute - caselaw says it can; or 2) whether petitioner, Timothy Anderson, was driving recklessly; he admitted he was; or 3) whether any alleged threat was made by word; the state introduced no evidence of a verbal threat; the only evidence of any alleged threat was his reckless driving. The question on appeal is whether reckless driving is a lesser-included offense of aggravated assault with a motor vehicle.

Petitioner contends that reckless driving is a proper lesser-included offense; the Fourth District Court so held in Piggott v. State, 140 So.3d 666 (Fla. 4th DCA 2014); but the First District Court said it was not a proper lesser because, while the information charged that Anderson made an assault with

a motor vehicle, it did not specifically say he was driving when he "intentionally and unlawfully threatened, either by word or act, to do violence to [alleged victim]" (T 133). Fla. Std. Jury Inst. - Crim. 8.2. Petitioner contends that the majority opinion of the First District does not withstand scrutiny, and that the Fourth District's opinion in Piggott and the dissenting opinion in Anderson are better reasoned. Further, the First District's reliance on this court's decision in Von Deck is misplaced, or the court misapplied it. State v. Von Deck, 607 So.2d 1388 (Fla. 1992).

The heart of the problem may be that, even though Florida courts have held that a motor vehicle can be a deadly weapon, it is unlike most weapons. Most firearms and all the weapons enumerated/defined in section 790.001, Florida Statutes (dirk, knife, etc.) are held in the hand or attached to the hand; motor vehicles are not.

Improper exhibition of a deadly weapon is a category 1 lesser of aggravated assault with a deadly weapon. It would be unusual, assuming it were even possible, to improperly exhibit a motor vehicle within the meaning of aggravated assault. If a person stood outside a car and threatened to hit someone with the car, that might be a threat, but it would probably not be imminent enough to constitute assault. It is also difficult to view that as "exhibiting" a deadly weapon. If a case involved a more common type of weapon, for example, a knife or firearm, and the state failed to prove all the elements of assault, then

improper exhibition is clearly - and per the standard jury instructions - a necessarily lesser-included offense. When the deadly weapon is a motor vehicle, driving would be the corollary lesser to improper exhibition of a handheld deadly weapon.

As a handheld weapon is the paradigm, this court has added improper exhibition of a deadly weapon as a Category 1 (i.e., necessarily) lesser-included offense of aggravated assault. Fla. Std. Jury Insts. - Crim. 8.2; In re Standard Jury Instr. in Crim. Cases, 131 So.3d 755 (Fla. 2013). It may be possible to conceive of a situation in which a motor vehicle as deadly weapon could be "improperly exhibited," but exhibiting a weapon would usually mean the accused was holding the weapon, or about to pick it up. When the deadly weapon is a motor vehicle, reckless driving is the analogous lesser-included offense.

Further, in light of the fact that anyone charged with a handheld weapon is entitled to have the jury instructed on a lesser-included offense, but a motor vehicle is an outlier in the world of weapons in that it cannot be held in the hand, the First District's opinion would deprive a person charged with an outlier weapon of any lesser-included offense on his theory of defense - yes, he drove recklessly, but no, he did not intend to threaten the alleged victim.

The Second District Court has noted the amendment to the standard jury instruction. In Collier v. State, 159 So. 3d 963 (Fla. 2d DCA 2015), during an argument with his wife, a 74-year-old man picked up a chair, which he struck on a table hard enough

to break it. He was charged with aggravated assault; at trial, he requested the jury be instructed on the lesser-included offense of improper exhibition of a weapon. The court said:

> A chair, of course, is not specifically listed as a weapon in [the statutory] definition. Thus, for a chair to be a "weapon" under section 790.10, it must be an "other deadly weapon." To be a deadly weapon, a chair must be "used or threatened to be used in a way likely to cause death or great bodily harm." See Fla. Std. Jury Instr. (Crim.) 8.2.; see also D.B.B. v. State, 997 So.2d 484, 485 (Fla. 2d DCA 2008). In the trial court, the State argued that because a chair must be used as a weapon to be a weapon, it was not appropriate to give this lesser instruction. The trial court did not give the instruction, and Mr. Collier was convicted as charged.
>
> On first examination, the State's argument below seems somewhat logical to this court. But the chair could have been used by Mr. Collier as a deadly weapon for purposes of exhibiting it as a deadly weapon without necessarily committing the more serious offense of aggravated assault. That is, he could have threatened to use the chair in a way likely to cause death or great bodily harm without creating a well-founded fear in his wife that violence was in fact imminent.

159 So. 3d at 964.

In footnote 1, the court said:

> As a practical matter, our holding will have little precedential value. While this case was pending on appeal, the **Florida Supreme Court amended the standard jury instruction**, designating **improper exhibition of a dangerous weapon as a category one, necessarily lesser-included instruction rather than a category two, permissive lesser-included instruction**. In re Standard Jury Instr. in Crim. Cases, 131 So.3d 755 (Fla. 2013). Thus, the wording of the information will no longer be a factor in deciding whether to give this lesser instruction. See Boland v. State, 893 So.2d 683, 686 (Fla. 2d DCA 2005) (citing State v. Abreau, 363 So.2d 1063 (Fla.1978), and explaining that the "[f]ailure to give a requested instruction on a category one lesser-included offense when it is only one step removed from the offense charged is per se reversible error not subject to harmless error analysis"). (emphasis added)

159 So. 3d at 965.

So, the decision of the First District Court below would deprive a person charged with aggravated assault with a motor vehicle of the same due process of law and equal protection accorded to a person who commits aggravated assault with a knife, a gun or a chair. U.S. Const., am. XIV; Fla. Const., art. I, §§ 2, 9. If a weapon other than a vehicle were used, the defendant would be entitled to a jury instruction on the category 1 lesser-included offense of improper exhibition, but a person who drove recklessly would not entitled to any lesser offense, even though the lesser is his only defense.

As the dissent states in Anderson, if this ruling were to stand, it would be a recipe for gamesmanship in how the state words an information, an issue completely and solely in the state's control:

> Limiting review solely to the information as originally drafted — and forcing trial judges to ignore subsequent indisputable factual developments — is a recipe for gamesmanship when defendants request instructions on lesser-included offenses. Because an information's content is exclusively controlled by the State, a game of "heads I win, tails you lose" can result if a Spartan information is drafted, alleging aggravated assault but leaving out whether the car was driven, thereby precluding a defendant from claiming a legitimate lesser-included offense based on the facts developed prior to trial; no suggestion is made that was the intent here, but that is the result.

247 So. 3d at 685 (Makar, J., concurring in part, dissenting in part). Further, reading the defendant's right to lesser-included jury instructions so narrowly deprived him of the right to have the jury instructed on his theory of defense, that he drove

recklessly, but did not commit aggravated assault

The dissent said:

> Had the State alleged in its information against Anderson that the assault upon the victim was by "driving with a motor vehicle," it could not now argue that the lesser-included offense of reckless driving was precluded. **What an odd result:** Anderson loses his right to the lesser-included offense instruction of reckless driving simply because the original information left out the word "driving"—even though everyone knew pre-trial that was the means of assault. (emphasis added)

247 So. 3d at 685 (Makar, J., concurring in part, dissenting in part).

The dissent compared the ruling in Pigott:

> As Judge Gerber said in Piggott, the charged conduct must be considered in light of the **"undisputed evidence" at the time of the charge conference**:
>
> > While we recognize the possibility of a defendant being charged with battery for "slamming the hood or door of a car on the head of a victim" or the more remote possibility of "dropping a car from a crane onto a victim," our interpretation of **the information, when viewed at the time of the charge conference,** cannot ignore the undisputed evidence that the defendant was driving the automobile which is alleged to have been the instrument of the alleged aggravated battery with a deadly weapon upon the victim.
>
> Piggott, 140 So.3d at 671 n.1. Simply put, trial judges should not be told to put on blinders at a charge conference, looking only at an information filed months or years earlier, when it has become obvious that a lesser-included instruction requested by the defendant is appropriate in light of a fact not then in dispute . . . (emphasis added)

247 So. 3d at 684–85 (in dissent).

> Unlike when the prosecution seeks to inject a new charge at trial as a lesser-included offense, which implicates notice and due process concerns, a defendant requesting a lesser-included offense instruction at trial acquiesces to the instruction and thereby

obviates constitutional concerns to a great extent. Id. at 685.

In Piggott, the Fourth District said the information and the undisputed evidence of driving made reckless driving a lesser-included offense. The First District disagreed. It did not matter to the First that the evidence that Anderson, like Piggott, was driving was undisputed. The key to the First District's disagreement with Piggott is its misapprehension or misapplication of this court's decision in Von Deck, supra. The majority opinion compares this case to Von Deck, but Von Deck is not comparable. 247 So.3d at 684. In Von Deck, this court held that the elements of an offense cannot be "established by mere inference." 607 So.2d at 1389, quoted in Anderson, at 683, but this case is distinguishable.

Von Deck was charged with attempted premeditated murder of a law enforcement officer with a firearm; the state - not the defense - requested an instruction on aggravated assault as a lesser; Von Deck was convicted of aggravated assault. This court held that the information did not charge all the elements of aggravated assault, in particular, it did not charge the putting-in-fear element. The state argued the element could be inferred from the shooting; this court rejected that argument. The First District said of this court's ruling:

> Unpersuaded, the court explained, "While this may be true in some cases, it will not be true in all. It is possible to commit an attempted murder without also committing aggravated assault, such as where the victim remains unaware of the attempted murder until some time

> has elapsed after the commission." Id. The court concluded that aggravated assault was not a lesser-included offense of attempted murder as charged. Id. at 1389-90. . .

Anderson, 247 So. 3d at 683-84.

This is the difference between Von Deck and the instant case; Von Deck involved a discrete element which is not present in every case. Putting in fear is an essential element of aggravated assault but, in Von Deck, it was not included in the information charging attempted murder. Nor is putting in fear present in every case of attempted murder, as this court explained, and this court rejected the state's argument that the putting in fear element could be inferred.

The First District thinks that instructing the jury on reckless driving would require inferring the element of driving. However, reckless driving is not "inferred" in this case; it is not a discrete element, unlike the putting in fear element in Von Deck. Instead, reckless driving is included in and derives from the charged crime, that Anderson allegedly made a threat by act with a motor vehicle. Reckless driving derives from charging aggravated assault with a motor vehicle. Neither the state nor the district court cited a single case in which aggravated assault with a motor vehicle was committed by an act other than driving. Other acts could be imagined, and the state and the district court did imagine other conceivable scenarios, although none that played out in real life. However, the possibility of a non-driving assault with a vehicle does not change petitioner's

right to have the jury instructed on his defense, a defense derived from, not inferred from, the crime charged.

The information did not expressly charge that a threat was made by word or act; it charged only that an assault was made with a motor vehicle. Reckless driving is not "inferred"; rather, it is included within the charge of making a threat with a motor vehicle. The act would typically be driving; as indicated, neither the state nor the district court cited any case that actually charged an act other than driving. It is worth noting that the information did not allege other elements of aggravated assault: neither 1) the ability to carry out the threat, or 2) putting in fear, were charged. Perhaps the state thinks those elements may be "inferred" from a charge of assault with a motor vehicle.

The state's use of generic language to charge the crime cannot in accordance with the requirements of due process be used to deprive him of the only meaningful lesser-included offense to be given to the jury. Because the undisputed facts are that Anderson recklessly drove a motor vehicle, he was deprived of any meaningful lesser-included offense, while anyone who threatened to use a handheld weapon - a knife, firearm, chair - is entitled to a necessarily lesser-included offense. Moreover, the trial court's refusal to instruct on this lesser-included offense deprived Anderson of his only defense to the charge, that he drove recklessly, but did not intend to threaten.

Most or all of the other cases cited by the district court

are consistent with Von Deck and inapposite to the instant case. They involve lesser offenses which have an element not charged in the information, which would have to be "inferred" from the facts. In Phillips v. State, 874 So.2d 705, 706 (Fla. 1st DCA 2004), the defendant was convicted of aggravated battery for stabbing two people with a knife. The district court held that improper exhibition was not a proper lesser-included offense

> because an element of the latter offense—that the defendant "exhibited his knife 'in a rude, careless, angry or threatening manner' "—was not charged in the information. Id. (quoting statute).

Anderson, 247 So. 3d 680, 683 (Fla. 1st DCA 2018).

The decision in Phillips is consistent with this court's ruling in Von Deck. Stabbing someone with a knife does not require the knife to be exhibited; this is very similar to Von Deck's holding that murder or attempted murder can be committed without putting the victim in fear, or indeed, without the victim being aware of what is about to happen. Improper exhibition is a discrete element from the touching required to commit aggravated battery, just as putting in fear is a discrete element from killing or attempting to kill. In contrast, aggravated assault requires a threat by word or act, in this case with a motor vehicle; the manner of use of the deadly weapon is "inextricably intertwined" with the charge; it is not a discrete act. Farley v. State, 740 So. 2d 5, 7 (Fla. 1st DCA 1999), cited at 247 So.2d 684, is similar to Phillips; the defendant was convicted of aggravated battery for stabbing someone; he requested a lesser of

improper exhibition, but the rude, careless, threatening element was not charged in the information.

Putting in fear is **not** an essential element of attempted murder, Von Deck, or aggravated battery, Phillips and Farley, supra; those crimes can be committed without that element. Unlike Von Deck and the others, Anderson was charged with aggravated assault, not attempted murder or aggravated battery. Using a deadly weapon to make a threat is an essential element of aggravated assault; every essential element must be charged in every case. The charge must put the defendant on notice of what the deadly weapon is alleged to be, or the information would violate due process.

When a motor vehicle is the deadly weapon charged, it must be used or threatened to be used in a manner likely to cause death or great bodily harm; using the motor vehicle would include driving it. That does not infer an element, as in Von Deck; it is included within the crime charged.

IV CONCLUSION

Based upon the foregoing argument, reasoning, and citation of authority, petitioner requests that this Court find that reckless driving is a necessary or permissive lesser-included of aggravated assault, when the deadly weapon charged is a motor vehicle, and remand for new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by electronic mail, by agreement of the parties, to Trisha Meggs Pate, Office of the Attorney General, at crimapptlh@myfloridalegal.com, and by mail to Mr. Timothy Anderson, 2302 S. Calhoun, Tallahassee, FL 32301, this day, January 15, 2019.

CERTIFICATION OF FONT AND TYPE SIZE

This brief is typed in Courier New 12.

/s/
KATHLEEN STOVER