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

REPLY BRIEF OF PETITIONER ON THE MERITS

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REPLY BRIEF OF PETITIONER ON THE MERITS

I 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).

The state argues that adopting the analysis suggested by petitioner, Timothy Anderson, would create bad policy (State's Answer Brief (AB). p. 8. The state's argument assumes what it must prove - that a lesser-included offense of reckless driving would have to be "inferred" from the charged crime - aggravated assault by deadly weapon, where the deadly weapon is a motor vehicle.

Petitioner contends the issue here is fairly limited with no clear application beyond similarly-charged crimes, but the state argues that a slippery slope of bad policy could result. This case does present certified conflict between two cases in fairly

similar legal situations.

Petitioner does not dispute the controlling caselaw set out in this court's opinion in State v. Von Deck, 607 So.2d 1388 (Fla. 1992), that a party - in that case, the **state** - is not entitled to jury instruction on a lesser-included offense, when an essential element was not charged in the information, but would have to be "inferred" from the evidence. Petitioner does not dispute the principle; petitioner disputes whether reckless driving would have to be inferred in this case; he contends that reckless driving is not inferred, but rather, derives from/ is included in the elements of the charged crime. Petitioner will return to Von Deck later in this brief.

The state claims repeatedly that, if reckless driving were found to be a lesser-included offense to aggravated assault where the weapon is a motor vehicle, that would place the state in the position of having to prove a crime it did not charge. The state argued at trial and on appeal that, under this reasoning, the state could have requested a jury instruction on fleeing or attempting to elude a police officer, a discrete crime not charged (AB 9).

The state's argument is not limited to this case or to similar cases. Rather, the state seeks to convince the court that a ruling favorable to the defense would start Florida down a slippery slope where, supposedly, the defense would be entitled at will to jury instructions on lesser crimes not charged, and so would the state. However, the state's argument is untenable.

In order to convict of aggravated assault with a motor vehicle, the state must prove it was "used" or threatened to be used in a manner likely to cause death or great bodily harm. The state has never cited a case in which the manner of use was other than driving, but theoretically, a vehicle could be used differently. The First District below and other cases have speculated on alternate methods of using a vehicle to commit aggravated assault, but many examples sound like they come from stunts in action movies. Neither the state nor any court has cited an actual case in which aggravated assault with a motor vehicle was committed by a method other than driving.

If this court were to affirm the conviction here, one result would be that the state would be allowed to charge a crime using general or generic language and, by that means, to deprive the defendant of a lesser-included offense to which he would be entitled. "Using" the vehicle is an essential element of aggravated assault when a motor vehicle is the weapon. In contrast, fleeing or eluding an officer has no common elements with aggravated assault allegedly committed on a former girlfriend.

For fleeing an officer to be a lesser to aggravated assault on a different person, not an officer, not just one element, but all the elements, would have to be inferred. The state's argument on fleeing or eluding is even less tenable than the argument this court rejected in Von Deck, supra.

The state had a stronger argument for aggravated assault as a lesser of attempted murder in Von Deck than it has for fleeing

or eluding as a lesser - assuming arguendo it would even be a lesser - in this case. The state offers only an extreme example of instructing the jury on discrete uncharged crimes, which has no basis in reality.

The state argues that instructing on reckless driving would put the state in the position of having to prove a crime it did not charge (AB 9). If only the state had explained what that means, or how it would apply here, but it never did. Saying it over and over does not make it so. The state's undisputed proof at trial was that Anderson was driving recklessly; its contention that he intended to threaten the woman was disputed. The intent element was proved only by inference, not direct evidence. This case hardly constitutes the state having to prove a crime it did not charge. Proof of reckless driving was intrinsic to the charge. It is not an inferred element or a discrete element; it is not proof of a crime the state did not charge.

The state's claim that "pleading by inference" would force it to prove crimes not charged (AB 6) fails to acknowledge the difference between failing to charge a discrete element which would have to be inferred and charging an element intrinsic to the crime charged. The state was not "forced" to prove that Anderson was driving; his reckless driving was intrinsic to the facts of the state's case.

This is a key distinction - in Von Deck, the state asked for the jury to be instructed on the lesser of aggravated assault, which has an element discrete from the elements of the charged

crime of attempted murder; the additional, discrete element was not charged. The state's argument fails to distinguish between an uncharged, discrete element of a proposed lesser offense, and an element which is included in and derives from the charged crime.

This case also involves the issue that this court has included improper exhibition of a deadly weapon, not as a permissive lesser, but as a mandatory category 1 lesser of aggravated assault with a deadly weapon. Fla. Std. Jury Insts. - Crim. 8.2; In re Standard Jury Instr. in Crim. Cases, 131 So.3d 755 (Fla. 2013). Probably because motor vehicles are not the typical weapon, no provision was explicitly made for a lesser crime - or a more appropriate lesser than improper exhibition - when the alleged weapon is a vehicle. In principle, if the charge has a mandatory lesser as to most deadly weapons, it is not reasonable and violates due process and equal protection to exclude motor vehicles from the otherwise universal right - without regard to the facts - to instruction on a lesser offense.

Instead, the state argues that a defendant who drives recklessly will receive less due process - in being deprived of instruction on a lesser offense - than a defendant who uses any other deadly weapon. That looks like an equal protection violation. If a person threatens another with a firearm - a deadly weapon per se, whether loaded or not, or operational or not - the defendant is entitled to instruction on the lesser offense of improper exhibition, but a person who drove recklessly is not

entitled to a lesser.

The state repeats again that it would be put in the position of having to prove a crime it did not charge, while citing Von Deck (AB 11). In Von Deck, during trial on a charge of attempted murder, the state - not the defense - requested a lesser of aggravated assault, even though the state had not alleged all the elements of the lesser crime; instead, the state argued the missing discrete element could be inferred.

In other words, in Von Deck, the state requested an unfair advantage in the instructions and verdict, when it had not charged all the elements of the lesser crime. That is the opposite of the state's claim that it would be forced to prove a crime it did not charge.

Given the arguments at trial in this case, it would be like the state asking to instruct the jury on the separate crime of fleeing or eluding, even though it was never charged in the information, but theoretically could be inferred from the facts. Due process prohibits this. This argument seems to misapprehend the law and facts of Von Deck.

A key issue could be characterized not so much as whether an element can be inferred, but rather, what are the consequences of the state charging an element using general language - "using" a motor vehicle. Does the state's use of general language deprive the defendant of an appropriate lesser offense because the charging document was not specific, or does the state's lack of specificity allow the defendant the right to request a lesser-

included offense?

Although it concerns a different subject, the rule of lenity provides that ambiguous statutory language must be interpreted in the light most favorable to the defense. §775.021, Fla.Stat. Petitioner contends this would be the proper, constitutional view of the problem of the state using general language to charge this crime. The general - and thereby ambiguous - language of the charging document must be interpreted in the light most favorable to the defendant; that would enhance, rather than limit, the defendant's right to lesser-included offenses. Fundamental fairness requires that the state may not use generic language in the charging document to deprive a defendant of jury instruction on a lesser-included offense under the circumstances of this case.

The charging document is wholly in the control of the prosecutor. The state already has almost total discretion to manipulate the language of the charging document. However, the state's discretion stops short of unilaterally depriving a defendant of lesser-included offenses.

The court's having made improper exhibition a category 1 lesser, which must be given in every trial of aggravated assault, no matter the facts, highlights the inequity of treating a reckless driver differently. The state seems to suggest floodgates would open if this Court ruled in petitioner's favor, but its only argument about that is highly speculative and already limited by the court's opinion in Von Deck.

The state argues that, under the analysis in Piggott v. State, 140 So.3d 666 (Fla. 4th DCA 2014), not only defendants but also the state could request jury instructions when the defendant was not put on notice of a crime. The state suggests this policy could violate the defendant's own due process rights (AB 17). Using the trial prosecutor's suggestion that it could instruct on fleeing or eluding shows that the argument is absurd.

Fleeing or eluding requires the defendant to operate a vehicle on a street or highway; be ordered to stop by a law enforcement officer; knowing of the order to stop, refuse to stop, or stop and then flee. It has no elements in common with aggravated assault on a different person. It has in common with reckless driving the element of operating a vehicle; all other elements are far different. Thus, the comparison is inapposite. The evidence was undisputed that Anderson drove recklessly. He was deprived of instruction on a lesser offense based solely on the non-essential fortuity that the state charged "using" the vehicle but not driving it.

The state argues that trial counsel did not want the jury instructed on any charge supported by the facts; counsel only wanted the charge that best fit his version of the facts (AB 17). If the state is arguing that defense counsel did not want the jury instructed on aggravated assault with a motor vehicle, it is another untenable argument. The jury is always instructed on the crime charged; that is not at issue. Further, yes, petitioner wanted a jury instruction that fit the defense theory of the

case, just like the state wanted the jury to be instructed on its theory of the case. The difference is the jury **was** instructed on the state's theory, but petitioner was deprived of instruction on his theory of the case.

The state claims the defendant would be required to defend against crimes for which he was not provided notice. No, such a scenario would violate due process, and the state has made no reasonable argument to the contrary.

The state points to the dissent below to argue that this case would limit prosecutorial discretion in how to charge a crime (AB 18). With respect, that is not an issue here, not even in the dissent. First, of course, the state is complaining about the dissent, **not** the majority opinion. Second, the dissent should not be read as challenging prosecutorial discretion to make charging decisions so much as discussing what are the defendant's rights to lesser-included offenses after the state has exercised discretion. Here, the state received a windfall benefit from charging the element of "use" generally or sloppily rather than specifically. Caselaw on prosecutorial discretion does not address this issue; it is not an issue in this case.

The lesser offense of reckless driving does not infer an element, as in Von Deck; it is included within the crime charged. The trial court erred in denying the requested jury instruction.

II 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, May 17, 2019.

CERTIFICATION OF FONT AND TYPE SIZE

This brief is typed in Courier New 12.

/s/
KATHLEEN STOVER