IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

v. : CASE NO. SC00-695

JOHANN S. WARREN, :

Respondent. :

_____/

ANSWER BRIEF OF RESPONDENT

GLEN P. GIFFORD
Assistant Public Defender
Second Judicial Circuit
Fla. Bar No. 0664261
301 S. Monroe, Suite 401
Tallahassee, FL 32301
(850) 488-2458

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
Petitioner,	)	
v.	)	CASE NO. SC00-695
JOHANN S. WARREN,	)	
Respondent.	)	

ANSWER BRIEF OF RESPONDENT[1]

STATEMENT OF THE CASE AND FACTS

Respondent accepts the state's rendition of the case and facts. He adds that, the trial court, in dismissing the case, agreed with the defense perspective that battery as defined in section 784.03(2), Florida Statutes, was limited to the misdemeanor form of battery defined in subsection (1) of the statute. (R17-18) The court also found that the issue was ripe for determination on a motion to dismiss because this construction, applied to the undisputed fact that one of the two predicate convictions was for aggravated battery, left the circuit court without jurisdiction. (R18-19)

[1]This brief is typed in 12-point Courier New font. Record citations follow the format (R[page number]).

SUMMARY OF THE ARGUMENT

Section 784.03(2), Florida Statutes, provides that one who commits battery and has two prior convictions for battery is guilty of a felony of the third degree. Under Florida law, "battery" is the offense defined in § 784.03(1) and is a first-degree misdemeanor. "Aggravated battery," the offense defined in § 784.045, is a second-degree felony. Statutory terms are to be construed strictly, and any ambiguity must be resolved in favor of the accused. As used in the statutes, these are technical terms, defined by their elements. Therefore, the reference in § 784.03(2) to "battery," as opposed to "any battery," is limited to the misdemeanor form of the offense in § 784.03(1). Where it is beyond dispute that one of the two prior offenses on which the state relies for felony enhancement was actually a conviction of aggravated battery, there is no prima facie proof of a violation of § 784.03(2), and no jurisdiction in the circuit court.

This result, reached in both the circuit and district courts, is neither illogical nor absurd. Using the same reasoning this court employed in construing a previous version of the felony petit theft law, lawmakers could have opted against felony treatment of battery for offenders who were previously convicted and more severely punished for the felony of aggravated battery, reserving enhancement for misdemeanor recidivists.

The dissenting judge below was mistaken in giving the benefit of generality in language to the prosecution. In the context of chapter 784, the term "battery" must be given a

specific and narrow meaning. The majority below reached the correct interpretation. The decision of the district court should be approved.

ARGUMENT

THE DISTRICT AND CIRCUIT COURTS CORRECTLY CONCLUDED THAT FELONY BATTERY AS DEFINED IN SECTION 784.03(2) REQUIRES TWO PREDICATE CONVICTIONS OF MISDEMEANOR OR SIMPLE BATTERY.

The district court certified the following question of great public importance:

> CAN A CONVICTION FOR AGGRAVATED BATTERY SERVE AS A PRIOR CONVICTION FOR BATTERY FOR PURPOSES OF SECTION 784.03(2), FLORIDA STATUTES?

The provision is one of several in the state's criminal code that transform misdemeanors into felonies upon repetition of the same crime or type of crime. One of these provisions, defining felony petit theft, provides:

> A person who commits petit theft and who has previously been convicted two or more times of *any theft* commits a felony of the third degree, punishable as provided in s. 775.082 or s. 775.083.

§ 812.014(3)(c), Fla. Stat. (1999)(emphasis added). The statute previously limited predicate convictions to petit thefts. State v. Jackson, 526 So. 2d 58 (Fla. 1988). A 1992 amendment expanded the coverage to "any theft." See Grimes v. State, 724 So. 2d 614 (Fla. 5th DCA 1998).

Pending possible revision of the statute at issue here, history repeats. In 1996, the legislature amended section 784.03, which to that point defined the misdemeanor offense of battery, to provide:

> (2) A person who has two prior convictions for battery who commits a third or subsequent battery commits a felony of the third degree,

> punishable as provided in s. 775.082, s. 775.083 or s. 775.084.

Ch. 96-392, § 5, Laws of Florida.

Here, the state charged Warren with a felony under § 784.03(2) and alleged two prior convictions of battery. In a motion to dismiss, defense counsel asserted that one of the two prior convictions was for aggravated battery, not a qualifying predicate offense under the statute. In response, the state disputed that an aggravated battery could not qualify as a predicate offense, but did not counter the defense claim that it was relying on an aggravated battery as an element of the felony offense charged.

Therefore, the issue for the circuit and district courts, and again before this court, is whether aggravated battery may qualify as one of the "two prior convictions for battery" under the statute. Because statutory language is strictly construed, with any ambiguity resolved in favor of the accused, and because the legislature might plausibly have intended to exclude aggravated battery as a predicate offense, the lower courts correctly resolved the issue against equating aggravated battery with battery under the provision. Therefore, the district court decision affirming the dismissal of the prosecution in circuit court should be approved.

Initially, the issue was properly resolved via a motion to dismiss. The state argued to the contrary at the trial level, though not since. Predicate convictions in a recidivism

enhancement statute are elements of the crime. See State v. Swartz, 734 So. 2d 448 (Fla. 4th DCA 1999)(felony DUI). The validity of these prior convictions as elements of the offense is properly tested via a motion to dismiss. Swartz; State v. Gloster, 703 So. 2d 1174 (Fla. 1st DCA 1997), rev. granted, 717 So. 2d 531 (Fla. 1998)(felony driving while license suspended).

On the merits, the matter is simply put: Aggravated battery cannot qualify as one of the two prior convictions of battery because the terms have precise meanings in the statutes, and because, unlike the felony petit theft statute, not just "any battery" will do.

Section 784.03(1) provides:

> (1)(a) The offense of battery occurs when a person:
> 1. Actually and intentionally touches or strikes another person against the will of the other; or
> 2. Intentionally causes bodily harm to another person.

Section 784.045(1) provides:

> (1)(a) A person commits aggravated battery who, in committing battery:
> 1. Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or
> 2. Uses a deadly weapon.
> (b) A person commits aggravated battery if the person who was the victim of the battery was pregnant at the time of the offense and the offender knew or should have known that the victim was pregnant.

While, in common parlance and the schedule of lesser included offenses, aggravated battery may be seen as a form of battery, when used in statutes the terms have meanings wholly tied to

their statutory elements. Where, in a single statute, the legislature sets out the elements of "battery" and then refers back to "battery," reason dictates that lawmakers did not mean "aggravated battery," a creature of a different statute, or, absent explicit expansive language as in the felony petit theft statute, "any battery." The language simply will not support this enlargement. Statutory language must be strictly construed, and any ambiguity must be resolved in favor of the accused. § 775.021(1), Fla. Stat.; Perkins v. State, 576 So. 2d 1310, 1312 (Fla. 1991).

The state asserts that the trial court improperly added "misdemeanor" to the term "battery" in § 784.03(2) (IB6) This is incorrect. It is the state which attempts to add a term, "any," to battery, a statutory term of fixed meaning. The legislature may add the qualifier, as it did in the felony petit theft statute; but the legislature has not, and the courts may not, without doing violence to the rules of lenity and separation of powers.

The state asserts that the rule of lenity is a last resort. (IB10) It suggests its construction is rational and sensible, and would not defeat the legislature's obvious intention or create absurd or unreasonable results. Analogizing to Jackson, supra, the district court disagreed. As in Jackson, the legislature may have wished to reserve felony treatment for those who have not yet been punished for a felony. There is no discernible legislative intent to the contrary. Thus, the state cannot show that the law as strictly construed is not rationally related to a

legitimate state purpose. Cf. Lite v. State, 617 So. 2d 1058, 1060 (Fla. 1993) (setting forth rational basis test of constitutionality of legislation); Hamilton v. State, 366 So. 2d 8, 10 (Fla. 1979) (courts may not pass on wisdom of policy underlying enactment).

Moreover, the fact that the legislature made a different choice in 1992 as to felony petit theft does not require the same result here on different language. At this point, § 784.03(2) is like the ante-1992 felony petit theft statute, which restricted prior offenses to the misdemeanor form of theft.

Moreover, the state's position creates ambiguity within the statute. If, under § 784.03(2), "any" battery qualifies as a prior conviction, "any" battery, including the felony forms, could also qualify for the "third or subsequent battery" triggering felony enhancement. This goes against the obvious purpose of the statute, which is to make what would otherwise be a misdemeanor into a felony under specified circumstances.

Finally, Judge Kahn was mistaken in determining that because an aggravated battery is a battery, it can serve as a predicate offense. In the context of chapter 784 and specifically section 784.03, the term "battery" is a term of art that must be given a specific and narrow meaning. To do otherwise is to bring a level of generality to statutory construction that, if oft employed, would leave Floridians in a state of imprecision.

Consequently, unless and until lawmakers specify that the predicate convictions may be for "any" battery, two convictions

of the misdemeanor form of battery under § 784.03(1) are essential to felony enhancement under § 784.03(2). Because the state did not dispute the defense assertion that one of the predicate offenses did not meet this criterion, the circuit court correctly dismissed the information for lack of jurisdiction, and the district court correctly affirmed. The certified question must be answered in the negative.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, respondent requests that this Honorable Court answer the certified question in the negative and approve the decision of the district.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Karla D. Ellis, Assistant Attorney General, by delivery to The Capitol, Plaza Level, Tallahassee, FL, this ____ day of July, 2001.

Respectfully submitted
& Served,

GLEN P. GIFFORD
ASSISTANT PUB.DEFENDER
SECOND JUD. CIRCUIT
301 S. Monroe, #401
Tallahassee, FL 32301
Florida Bar #0664261
COUNSEL FOR RESPONDENT