IN THE SUPREME COURT OF FLORIDA

GAYSON J. MILLS, Petitioner, v. STATE OF FLORIDA, Respondent.

CASE NO. SC01-68

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Gayson J. Mills, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of one volume; however, this volume contains independently paginated trial and sentencing transcripts. Therefore, citation to the portion of the record containing pleadings will be made using the symbol "R." Citation to the trial transcript will be made using the symbol "TT" and reference to the sentencing transcript will be made by the symbol "ST." "IB" will designate Petitioner's Initial Brief. Each symbol will be followed by any appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State agrees with Petitioner's statement of the case and facts.

SUMMARY OF ARGUMENT

Neither Petitioner in his initial brief, nor Judge Browning in his dissent below, has shown how this Court's analysis in Merritt v. State, 712 So.2d 384 (Fla. 1988), whether there existed the offense of attempted battery on a law enforcement officer, has any direct impact on, or control over, the double jeopardy analysis involved in answering the issue in the instant case. The issue decided below was whether a felony conviction for battery on a law enforcement officer could be a qualifying felony under the habitual offender statute. In seeking review before this Court, Petitioner has claimed that the decision below directly conflicts with this Court's ruling in Merritt; however, Petitioner has not shown how the decision below conflicts with Merritt without the presupposition that the use of an "enhancement statute" and a recidivism statute automatically violates double jeopardy. Moreover, Petitioner presents no argument that the legislature intended that repeat offenders who commit the felony of battery on a law enforcement officer should be treated differently under the habitual offender statute.

ARGUMENT

ISSUE

WHETHER PETITIONER'S SENTENCE AS A HABITUAL FELONY OFFENDER UPON CONVICTION OF BATTERY ON A LAW ENFORCEMENT OFFICER VIOLATED THE DOUBLE JEOPARDY CLAUSES OF THE UNITED STATES AND FLORIDA CONSTITUTIONS? (Restated)

Mills argues that the trial court erred by sentencing him as a habitual felony offender upon conviction of battery on a law enforcement officer. The State respectfully disagrees.

Standard of Review & Preservation

Whether or not Mills's sentence as a habitual felony offender upon conviction of battery on a law enforcement officer violated double jeopardy is an issue of law which is subject to de novo review. See Armstrong v. Harris, 773 So.2d 7, 11 (Fla. 2000).

This Court has held that "an alleged double jeopardy violation, if proven, would constitute fundamental error which need not be preserved to be considered on appeal." Grant v. State, 770 So.2d 655, 663 (Fla. 2000)(citing Maddox v. State, 760 So.2d 89 (Fla. 2000)).

Jurisdiction

The State maintains that Mills has not shown any express and direct conflict between the decision below upholding a conviction for battery of a law enforcement officer and a sentence as an habitual felon and this Court's decision in Merritt v. State, 712 So.2d 384 (Fla. 1988), that there is no such crime as attempted battery of a law enforcement officer.

Argument

"The Double Jeopardy Clause in both the state and federal constitutions protects criminal defendants from multiple convictions and punishments for the same offense." Gordon v. State, 780 So.2d 17, 19 (Fla. 2001).

Petitioner argues that the prohibition against double jeopardy bars a trial court from imposing habitual offender sanctions for battery on a law enforcement officer because battery on a law enforcement officer is an enhancement of simple battery, rather than a new substantive offense. (IB, 5). However, Petitioner cites to no case law supporting his contention that a felony conviction under an enhancement statute cannot be used as a qualifying felony under a recidivism statute.

Petitioner does, however, support his argument with citation to this Court's holding in Merritt, and other cases, that section 784.07, Florida Statutes (2000), is an enhancement statute rather than a statute creating a new substantive offense. (IB, 4-7). In between these citations, Petitioner cites to Crumley v. State, 512 So.2d 183 (Fla. 1987), his only case dealing with a double jeopardy violation. (IB, 5-6). Yet, Petitioner makes no attempt to explain how Merritt works together with Crumley to make the imposition of a conviction for battery of a law enforcement officer and a sentence as an habitual felon a double jeopardy violation.

In Crumley, this Court found that "the legislature only intended to provide an aggravated penalty for a battery

accompanied by certain other factors, and not to impose multiple punishments where more than one aggravating factor happened to accompany a single criminal act." Id. at 185. In Crumley, the defendant had been charged with both aggravated battery and battery on a law enforcement officer based on a single underlying offense. In the instant case, Petitioner was convicted of only one aggravated version of battery, battery on a law enforcement officer. Thus, the holding in Crumley, does not support Petitioner's argument as he was not separately convicted and sentenced for two aggravated versions of battery for the same underlying offense.

Further, Petitioner does not challenge the legislature's authority to make battery, which is ordinarily a misdemeanor, a third degree felony when the victim is a law enforcement officer. Fla. Stat. Ch. 787.07(2)(b) (2000). Nor does Petitioner allege that the element of the crime that his victim was a law enforcement officer was not charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt.[1] What Petitioner does argue is that the "prohibition of double jeopardy bars a trial court from imposing habitual offender sanctions for battery on a law enforcement officer;" however, he omits from his

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[1]Accordingly, the battery on a law enforcement officer statute's higher penalties, imposed when the victim of the battery was a law enforcement officer, are not mere sentencing considerations. See Jones v. United States, 526 U.S. 227 (1999)(holding that provisions of carjacking statute that established higher penalties to be imposed when the offense resulted in serious bodily injury or death set forth additional elements of offense were not mere sentencing considerations).

brief any authority that prohibits a felony conviction for battery on a law enforcement officer from being used as a qualifying felony under the habitual offender statute.

The real issue in this case is whether the legislature intended that a felony conviction for battery on a law enforcement officer be a qualifying felony under the habitual offender statute. "[T]he question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed." Albernaz v. United States, 450 U.S. 333, 344 (1981).

Neither Petitioner in his initial brief, nor Judge Browning in his dissent below, has shown how this Court's analysis in Merritt, whether there existed the offense of attempted battery on a law enforcement officer, has any direct impact on, or control over, the double jeopardy analysis involved in answering the issue in the instant case.[2]

Both Petitioner and Judge Browning argue that there was a double enhancement of appellant's criminal act, which is barred by the principle of double jeopardy. However, Petitioner's offense, or act, was not enhanced twice. Battery on a law enforcement officer deals with the status of the victim, which elevates the crime to a third degree felony, rather than a misdemeanor like simple battery. The habitual offender statute deals with the status of Petitioner as a repeat offender. Judge

[2] Thus, any argument that the use of the word "dicta" by the majority below was "clearly erroneous" is not relevant.

Browning recognizes this distinction in his closing sentence when he states "because the double enhancement by virtue of the appellant's act against a law enforcement officer, and his status as a previous felony offender..." Mills v. State, 773 So.2d 650, 652 (Fla. 1st DCA 2000).

In Merritt, this Court referenced its decision in State v. Crumley, 512 So.2d 183 (Fla. 1987), to support its labeling of section 784.07 as an "enhancement statute." Merritt, 712 So.2d at 385. However, this Court also noted that the context in Crumley, had been double jeopardy, distinguishing it from the issue in Merritt. Id. Clearly, the case that Petitioner should be relying upon for his "enhancement statute" argument is Crumley, not Merritt. However, the double jeopardy violation this Court found in Crumley, was based on a double enhancement of a single underlying offense. The instant case involves the applications of an enhancement statute and a recidivism statute, not the applications of two statutes charging separate crimes constituting aggravated versions of a single underlying offense.

In relying on Merritt, which contains no double jeopardy analysis, the arguments of both Petitioner and Judge Browning presume that the use of an enhanced felony to habitualize an offender automatically violates double jeopardy. However, this Court has determined that there is no per se violation of double jeopardy principles by the use of an enhanced felony to habitualize repeat offenders. See Gayman v. State, 616 So.2d 17, 18 (Fla. 1993) (stating that double jeopardy principles of the

United States and Florida Constitutions were not implicated by the reclassification of petit theft to felony petit theft and the subsequent classification of the offender as a habitual offender).

Again, the real issue is whether the legislature intended that a felony conviction for battery on a law enforcement officer be a qualifying felony under the habitual offender statute. "Because the legislature has provided both these subsections, both are to be followed. Absent an indication from the legislature that these subsections are an either/or proposition, both subsections will be followed." State v. Whitehead, 472 So.2d 730, 732 (Fla. 1985); see also Missouri v. Hunter, 459 U.S. 359, 366 (1983) (stating that "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended).

In that context, any reliance placed on a statutory construction argument to support a reversal is misplaced. In Spann v. State, 772 So.2d 38 (Fla. 4th DCA 2000), the District Court conducted a statutory construction analysis analogous to the statutory construction analysis that would be applicable in the instant case. In Spann, the court concluded:

> In the present case, the legislature made battery, which is ordinarily a misdemeanor, a third degree felony when the victim is a law enforcement officer. §784.07(2)(b). In section 775.082(8)(a)1.o, the legislature authorized increased sentences for defendants who qualify as prison releasee reoffenders and have committed certain felonies. Absent an ambiguity, and there is none here, the imposition of one sentence under the Prison Releasee Reoffender Act is not improper, and we recede from Oliveira.

Id. at 39. Similarly, in the instant situation there is no ambiguity. The State's position is also supported by the Fifth District Court of Appeals' statement in King v. State, 763 So.2d 546, 547-48 (Fla. 5th DCA 2000)(holding that using habitual offender statute to enhance sentence for battery on a law enforcement officer did not violate double jeopardy), *rev. den.* 779 So.2d 271 (Fla. 2000), that it believed "it is the intent of the legislature to impose the harsher treatment on this appellant and others like situated and that it does not work an unconstitutional double punishment to do so."

Regarding any application of the "rule of lenity," "[l]enity ... serves only as an aid for resolving ambiguity; it is not used to beget one." Albernaz, 450 U.S. at 342. The rule of lenity simply has no application in this case. Nonetheless, Petitioner argues that the rule of lenity, used with this Court's ruling in Merritt, supports a reversal under the facts of this case. (IB, 7). However, using a construction most favorable to the accused, that the statute is an enhancement statute, as already shown, does not automatically constitute a double jeopardy violation. Thus, any reliance on a "rule of lenity" argument to support a reversal is misplaced.

Wherefore, Petitioner has not shown that the legislature intended that repeat offenders who commit the felony of battery on a law enforcement officer should be treated differently under the habitual offender statute, or how Merritt conflicts with the decision below.

CONCLUSION

Based on the foregoing, the State respectfully submits the decision of the District Court of Appeal reported at 773 So. 2d 650 should be approved, and the judgment and sentence entered in the trial court should be affirmed.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to: Joel Arnold, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on July ____, 2001.

Respectfully submitted and served,

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[AGO# L01-1-1374]

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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Douglas T. Squire
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A P P E N D I X

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