IN THE SUPREME COURT OF FLORIDA

CASE NO. 02-219

DAVID HARRIS,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

****

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR ST. LUCIE COUNTY, FLORIDA
(Criminal Division)

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SUPPLEMENTAL ANSWER BRIEF OF APPELLEE

CHARLES J. CRIST, JR.
Attorney General
Tallahassee, Florida

JAMES J. CARNEY
Assistant Attorney General
Florida Bar Number 475246

Melanie A. Dale
Assistant Attorney General
Florida Bar No. 0168556
1515 N. Flagler Drive
9th Floor
West Palm Beach, Fl. 33401
Phone: 561-837-5000
Fax: 561-837-5099

Counsel for Appellee

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PRELIMINARY STATEMENT

Appellant, defendant in the trial court below, will be referred to as “Appellant”, “Defendant” or “Harris”. Appellee, the State of Florida, will be referred to as the “State”. References to the record will be by the symbol “R”, to the transcript will be by the symbol “T”, to any supplemental record or transcript will be by the symbols “SR” or “ST”, and to Harris’ supplemental brief will be by the symbol “SIB”, followed by the appropriate page numbers.

STATEMENT OF THE CASE AND FACTS

Appellee accepts the Statement of Facts as set out in Appellant's initial brief.

SUMMARY OF THE ARGUMENT

The plain meaning and purpose of the phrase "engaged in the lawful performance of his or her duties" is that an officer was engaged in legitimate official police activity or criminal investigation, not whether an officer is legally searching or arresting. Such a distinction is essential as the latter is a question for the courts. The question falls upon whether a technical illegality of a search or arrest means that an officer is unlawfully performing her or her duties. The state submits that such is not the case.

Moreover, the lawful duty requirement is an essential element to be shown by the prosecution and subject to jury determination, applying the reasonable doubt criterion.

ARGUMENT

WHAT IS THE MEANING AND PURPOSE OF THE PHRASE "ENGAGED IN THE LAWFUL PERFORMANCE OF HIS OR HER DUTIES" WITHIN § 784.07(2)(B); AND IS THE DETERMINATION OF WHETHER THE OFFICER IS SO ENGAGED A QUESTION OF LAW OR FACT?

1. "ENGAGED IN THE LAWFUL PERFORMANCE OF HIS OR HER DUTIES".

"[T]he plain meaning of statutory language is the first consideration of statutory construction." Capers v. State, 678 So. 2d 330, 332 (Fla. 1996). There is no room for alternative construction if the meaning of a statute is plain on its face. State v. Harvey, 693 So. 2d 1009, 1010 (Fla. 4th DCA 1997). "When the language of a statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation to alter the plain meaning." Mancini v. Personalized Air Conditioning & Heating, Inc, 702 So. 2d 1376, 1378 (Fla. 4th DCA 1997) quoting Ross v. Gore, 48 So. 2d 412, 415 (Fla. 1950); State v. Cohen, 696 So. 2d 435, 438 (Fla. 4th DCA 1997).

The plain meaning and purpose of the phrase "engaged in the lawful performance of his or her duties" is that an officer was engaged in legitimate official police activity or criminal investigation, not whether an officer is legally searching or arresting. Such a distinction is essential as the latter is a

question for the courts. See Ivester v. State, 398 So. 2d 926 (Fla. 3d DCA 1981)(reasoning that the statutes regarding resistance of arrest and battery on a law enforcement officer exempt the use of force because the principle of self-help forms of resistance promote intolerable disorder in a situation where the damage done by an improper stop or arrest can be repaired through the legal system); Rosenberg v. State, 264 So. 2d 68 (Fla. 1972)(Assuming that appellant was in fact innocent of the misdemeanor for which he was arrested, the proper forum in which to deal with such charge is a court of law. Appellant's determination to conduct his defense then and there at the scene of the arrest with a crude type of 'trial by wager of battle', while understandable as a natural impulsive reaction, nonetheless simply cannot be condoned).

The question turns upon whether a technical illegality of a search or arrest means that an officer is unlawfully performing her or her duties. The state submits that such is not the case. This Court must evaluate the meaning of the term lawful, and find that with respect to Florida Statutes 784.07(2)(b), the legislature clearly meant that an officer was legitimately acting in his or her official capacity when conducting a criminal

investigation. [1]

The state has a legitimate, if not compelling public policy interest in discouraging citizens from using force against its law enforcement officers. The federal courts have long recognized the principle that officers engaged in good faith and colorable performance of their duty may not be forcibly resisted, even if the resistor turns out to be correct that the resisted actions should not in fact have been taken. A defendant is required to submit peaceably, seeking legal redress thereafter. See United States v. Martinez, 465 F.2d 79 (2d Cir. 1972) (statute protects officer from interference with arrest even if made without probable cause, provided an officer not off on "frolic of his own"); United States v. Heliczer, 373 F.2d 241, 245 (2d Cir. 1967) ("'Engaged in . . . performance of official duties' is simply acting within the scope of what the agent is employed to do. . . . It cannot be said that an agent who has made an arrest loses his official capacity if the arrest is subsequently adjudged to be unlawful.").

Moreover, the Arizona Supreme Court has explained the history and purpose of protecting an officer from violent

[1]According to Webster's Revised Unabridged Dictionary, © 1996, the term lawful means: (1) Conformable to law; allowed by law; legitimate; competent; (2) Constituted or authorized by law; rightful; as, the lawful owner of lands.

resistance. The common law rule allowing persons to resist an unlawful arrest arose under significantly different circumstances than those existing today. State v. Hatton, 568 P. 2d 1040, 1045 (Ariz. 1977). The right to resist developed when the procedural safeguards which exist today were unknown. Id.

> "One who suffers the imposition of an unlawful police search has the assurance that any evidence so acquired is rendered inadmissible in a subsequent criminal trial by the exclusionary rule. Likewise any incriminating evidence obtained by exploiting an illegal arrest will be excluded in a subsequent criminal trial. [citation omitted] And in any event damage remedies are available in the federal courts for violations of constitutional rights stemming from either an unlawful search or arrest." United States ex rel Kilheffer v. Plowfield, 409 F.Supp. 677, 680-81 (E.D.Pa.1976).

In Hatton, 568 P. 2d at 1046, the Court further reasoned that if resistance to an arrest or a search made under the color of law is allowed, violence is not only invited but can be expected. See, e.g., State v. Lockner, 20 Ariz.App. 367, 513 P.2d 374 (1973) (dictum); United States v. Ferrone, 438 F.2d 381 (3d Cir.), cert. denied, 402 U.S. 1008, 91 S.Ct. 2188, 29 L.Ed.2d 430 (1971). Self-help exposes both the officer and suspect to graver consequences than an unlawful arrest. State v. Ramsdell, 285 A.2d 399 (1971).

In Lamb v. State, 786 A. 2d 783,797 (Court of Special

Appeals of Maryland 2001), the Court reasoned that there is no entitlement to an inquiry regarding an officer's potential bad faith unless an appellant can proffer objective evidence of an improper motive, including the patent illegality of the officer's actions. The case was remanded to determine whether the Officer knew or should have known that his actions were not lawful and whether they constituted actions of a "reasonably well-trained officer". Id.

Additionally, this Court, in Soverino v. State, 356 So. 2d 259, 271-72 (Fla. 1978), as cited by appellant, this Court stated:

> The statute reclassifies the offense only if the law enforcement officer or firefighter "is engaged in the lawful performance of his duties." Because the public welfare is protected by the performance of these duties, the legislature in its wisdom has chosen to accord greater protection to one who performs these indispensable public services. **When an officer is not performing his official duties, he is no longer protecting the public welfare** and, consequently, the statute yields him no greater protection than that accorded to members of the general public.

(Emphasis added).

It is apparent that this Court understood that “engaged in the lawful performance of his or her duties” must be construed to mean that the officer is legitimately acting in his or her official capacity to protect the public welfare.

Moreover, the district courts have long held that the fact of an illegal stop is no defense to the charge of battery of a known police officer engaged in the lawful performance of his duties. The technical illegality of a stop does not give a defendant license to batter an officer. Lowery v. State, 356 So.2d 1325 (Fla. 4th DCA 1978); Dominique v. State, 590 So. 2d 1059 (Fla. 4th DCA 1991); Jones v. State, 570 So.2d 433 (Fla. 5th DCA 1990) (a person is not justified in using force to resist an arrest where it is reasonably believed that the person making the arrest is a law enforcement officer; this is true even if the arrest is technically illegal); Rosenberg v. State, 264 So.2d 68 (Fla. 4th DCA 1972) (proper forum to contest the legality of an arrest is a court of law rather than resisting arrest with violence at the scene; State v. Gilchrist, 458 So.2d 1200 (Fla. 5th DCA 1984) (there is no privilege to use force against an officer attempting to effect an illegal arrest); State v. Barnard, 405 So.2d 210 (Fla. 5th DCA 1981) (use of force in resisting arrest by a person reasonably known to be a law enforcement officer is unlawful notwithstanding the technical illegality of the arrest); Meeks v. State, 369 So.2d 109 (Fla. 1st DCA 1979); K.G., a juvenile v. State, 338 So.2d 72 (Fla. 3d DCA 1976) (even had the arrest not been valid the juvenile would still not have been justified in violently resisting arrest).

Appellant argues that the term lawfully should be broadly construed to include situations where a court has determined that an arrest or detention was improper. Appellant also states that law enforcement officers are charged with knowing the constitution and laws and are required to act accordingly. Under Appellant's analysis officers would have to bring a magistrate with them every time they intend to stop, detain, or arrest a defendant. If that is what the legislature intended officers would be hard pressed to do their jobs.

In the context of a § 1983 action, the United States Supreme Court has said it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present when executing a search warrant, and the Court has indicated that in such cases those officials, like other officials who act in ways they reasonably believe to be lawful should not be held personally liable. Anderson v. Creighton, 483 U.S. 635, 641 (1987). The question is whether a reasonable officer could have believed a warrantless search to be lawful, in light of clearly established law and the information the searching officers possessed. Id.

The same analysis must be employed with respect to Florida Statutes § 784.07(2)(b). The question must be whether a reasonable officer could have believed that he was lawfully

engaged in legitimate official police activity or criminal investigation.

Upon a review of decisions from this court as well as the district courts of appeal, it is apparent that even judges disagree as to the propriety of a detention or arrest. Placing such a burden on law enforcement is absurd. See Parker v. State, 406 So.2d 1089 (Fla.1981)(finding that we do not use a "literal" interpretation of a statute if it leads to an absurd result.) An example of why officers should not have the burden of knowing if a stop or arrest is legal is this Court's decision in State v. Diaz, 850 So. 2d 435 (Fla. 2003). This Court accepted conflict jurisdiction based upon the Second Districts certification of conflict with the Fourth District's opinion in State v. Wikso, 738 So.2d 390 (Fla. 4th DCA 1999), and the Fifth District in State v. Bass, 609 So.2d 151 (Fla. 5th DCA 1992). Diaz v. State, 800 So. 2d 326 (Fla. 2d DCA 2001). Although by a majority this Court approved of the Second District's opinion and disapproved of Wikso and Bass, there was a special concurrence by Justice Pariente, who was joined by Justice Anstead and Justice Quince and there was a dissenting opinion by Justice Wells. As it is apparent that judges of this State's highest court disagree as to when a detention or arrest is illegal, law enforcement officers cannot, and should not be expected to know

if a court of law will find a detention or arrest legal. Such a burden undermines the purpose of protection the officers.

Appellant also argues that a defendant can be charged with a simple assault or battery, hence there is still a deterrent to the crime. However, such a theory undermines the public policy concern in discouraging citizens from using force against its law enforcement officers. A simple assault or battery charge is a misdemeanor offense, whereas the crime of battery on a law enforcement officer pursuant to Florida Statutes 784.07(2)(b) is a third degree felony carrying a harsher sentence. Clearly, the legislature intended to more harshly punish those who batter law enforcement officers.

Hence, this Court must find that the plain meaning and purpose of the phrase "engaged in the lawful performance of his or her duties" is that an officer was engaged in legitimate official police activity or criminal investigation, not whether an officer is legally searching or arresting.

Lastly, such reasoning is inapplicable in the instant case as the officer was engaged in the lawful performance of his or her duties at the moment Appellant struck him. Irrespective of whether the detention was legal, at the moment appellant committed a crime by striking the officer, the officer was lawfully performing his duties and then lawfully arrested

Appellant.

2. THE DETERMINATION OF WHETHER THE OFFICER IS SO ENGAGED IS A MIXED QUESTION OF LAW AND FACT.

The state maintains that the fact of an illegal arrest or detention is a question of law for the judge as they are exempt as a defense. The only question of fact surrounds whether the officer was legitimately performing his official duties to protect the public. The lawful duty requirement is an essential element to be shown by the prosecution and subject to jury determination, applying the reasonable doubt criterion. Licata v. State, 156 Fla. 692, 24 So.2d 98 (1945); Lee v. State, 368 So.2d 395 (Fla. 3rd DCA 1979), cert. denied, 378 So.2d 349 (Fla. 1979).

Furthermore, in Nicolosi v. State, 783 So. 2d 1095 (Fla. 5th DCA 2001), the fifth district clearly understood that whether or not an officer is engaged in the lawful performance of his or her duties must be a question of fact. In Nicolosi, the court stated

> A conviction for battery on a law enforcement officer requires proof that the officer was "engaged in the performance of a lawful duty" not just "on the job." See Taylor v. State, 740 So.2d 89 (Fla. 1st DCA 1999). See also Jay v. State, 731 So.2d 774 (Fla. 4th DCA 1999) (holding that, in a case involving resisting an officer without violence, undercover police officer was not performing a legal duty where officer was not detaining or attempting to detain defendant for a crime he had committed). A police officer can be engaged in a lawful duty when working an off-duty job, such as where the officer is assisting in the investigation of an alleged

> shoplifter, see State v. Hartzog, 575 So.2d 1328 (Fla. 1st DCA), rev. denied, 581 So.2d 1308 (Fla.1991), where the police officer is assisting other officers who are struggling to maintain custody of a man they had arrested; see State v. Robinson, 379 So.2d 712 (Fla. 5th DCA 1980); and where the officer is trying to apprehend a shoplifter; see Hughes v. State, 400 So.2d 533 (Fla. 1st DCA) rev. denied, 411 So.2d 382 (Fla.1981). As the court in Robinson aptly noted, an officer's off-duty status is "not a limitation upon his right to exercise police authority in the presence of criminal activity." 379 So.2d at 715.

Hence, it is clear that as an element of the offense, whether an officer is engaged in the lawful performance of his or her duties is a question of fact. In the instant case, the jury was instructed as such and found Appellant guilty of battery on a law enforcement officer (Harris I, T3. 332, R 32). Hence, there can be no finding of error in this case.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, the State of Florida respectfully requests this Honorable Court to AFFIRM the opinion of the Fourth District Court of Appeal.

Respectfully Submitted,

CHARLES J. CRIST JR.,
Attorney General

_____
JAMES J. CARNEY
Assistant Attorney General
Florida Bar Number 475246

_____
MELANIE A. DALE
Assistant Attorney General
Florida Bar Number 0168556
Office of the Attorney General
Department of Legal Affairs
1515 Flagler Avenue, Suite 900
West Palm Beach, Florida 33401
(561) 837-5000

CERTIFICATE OF SERVICE

I, Melanie A. Dale, certify that a true and correct copy of the foregoing has been furnished by Courier to: Benjamin Maserang, Assistant Public Defender, Criminal Justice Building/ Sixth Floor, 421 Third Street, West Palm Beach, Florida, 33401, this ___ day of _____, 2004.

_____
Melanie A. Dale

Of Counsel

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with Fla. R. App. P. 9.210, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not proportionately spaced.

_____
Melanie A. Dale
Assistant Attorney General