IN THE SUPREME COURT OF FLORIDA

EARNEST TILLMAN,

Petitioner,

v.

CASE NO.: SC02-717
DCA case no.: 5D01-83

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

MISCELLANEOUS

STATEMENT OF CASE AND FACTS

In addition to the facts provided by the Petitioner, the State offers the following relevant information (all of which is specifically set out in the majority opinion of the district court):

1. The victim testified that after being hit by the car:

> The car began to accelerate and I was still with my right hand trying to hold the strap (of her purse) that I was clinging to. As the car accelerated, I started to lose ground, and that's when I went down. I fell. I was dragged along the asphalt....

(TR 34). When asked how far she was dragged, the victim responded

> I don't honestly remember how long I was being dragged, but it seemed like forever at the time. But once I felt the actual burning and ripping of my skin, I just gave up.

(TR 36).

2. The majority opinion also noted in response to the defense's argument that the car was simply a conveyance and was not used as a weapon:

> The notion that the evidence at trial does no more than show that the vehicle was used as transportation to and from the site of the purse snatching ignores the victim's description of the events. At the very least, it is a jury question whether the automobile was used as a weapon.

Jenkins v. State, 747 So. 2d 997, 998 (Fla. 5th DCA 1999).

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SUMMARY OF ARGUMENT

The fact that a robbery was committed by the Petitioner in this case is undisputed. The only issue is whether there was sufficient evidence as to the use of the motor vehicle to submit the charged offense to the jury. It is the State's position that the trial court determination to deny the defense's motion for judgment of acquittal should be affirmed by this Court.

ARGUMENT

POINT OF LAW

WHETHER A DEFENDANT CAN ARGUE JUSTIFIABLE USE OF FORCE OR VIOLENCE AGAINST A LAW ENFORCEMENT OFFICER WHEN THE OFFICER'S ACTIONS WERE LATER DETERMINED BY A COURT TO BE IMPROPER.

Petitioner's position is that he can justifiably resist and batter a law enforcement officer if the officer's interactions with him are later found by a court to be illegal. The State disagrees.

Before addressing the merits of Petitioner's argument, the State will briefly reassert to this Court the issue of jurisdiction. While this Court has accepted jurisdiction in this case, it is still the position of the State that such was done improvidently. In Jenkins v. State, 385 So. 2d 1356, 1357-1358 (Fla. 1980), this Court discussed the creation of the district courts of appeal and quoted from Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958):

> It was never intended that the district courts of appeal should be intermediate courts... To fail to recognize that these are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy.

In the instant case, the alleged direct conflict is between the case of Taylor v. State, 740 So. 2d 89 (Fla. 1st DCA 1999), and Tillman v. State, 807 So. 2d 106 (Fla. 5th DCA 2002). The First District Court of Appeal held in Taylor that a defendant could resist with violence the illegal entry by law enforcement into the defendant's house if law

enforcement lacked probable cause for an arrest. Of course, those are not the facts of the instant case as noted by the Fifth District Court of Appeal when it wrote

> [t]his case is distinguishable from Taylor because the police did not illegally enter Tillman's home; they entered the home of another. Although Tillman was invited to a party at the home, this fact alone does not give him standing to contest the illegality of the police entry. See State v. Suco, 521 So. 2d 1100, 1102 (Fla. 1988) (distinctions in the law among guests, licensees and invitees ought not to control; rather, the totality of the circumstances must be examined to determine whether a defendant had a reasonable expectation of privacy in the premises searched).

Give the fact Taylor can be distinguished, it is the position of the State that there is no direct conflict between the two cases. could not enter the defendant's house

Turning to the merits of Petitioner's argument, the issue is the application of section 776.051(1),[1] Fla. Stat., to interactions between defendants and law enforcement. Clearly, defendants cannot resist an arrest with force.[2] This point was recognized by this Court in State v. Espinosa, 686 So. 2d 1345, 1347 (Fla. 1996), when it wrote that courts consistently have read section 776.051 in pari materia with section 843.01 to eliminate the issue of the legality of the arrest as an element of resisting with violence.

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[1] That section provides: A person in not justified in the use of force to resist an arrest by a law enforcement officer who is known, or reasonably appears, to be a law enforcement officer.

[2] Prior to 1975, Floridians could resist unlawful arrests with force. See State v. Saunders, 339 So. 2d 641 (Fla. 1976).

The more disputed question would be whether people can use force to resist encounters during which the officer does not have probable cause for an arrest such as illegal stops, searches, and detentions. Most cases have eliminated the issue of the legality of the detention and have held that a defendant cannot resist with violence even if the encounter is at a level short of an arrest. See Miller v. State, 636 So. 2d 144, 151 (1st DCA 1994), citing, Reed v. State, 606 So. 2d 1246 (Fla. 5th DCA 1992); Savage v. State, 494 So. 2d 274 (Fla. 2d DCA 1986), rev. denied, 506 So. 2d 1043 (Fla. 1987)); See e.g., State v. Downer, 789 So. 2d 1208 (Fla. 4th DCA 2001)("Even if the initial contact by the officers was unauthorized or illegal, [defendant] had no right to commit battery on the officer. Battery on a law enforcement officer is illegal. . . . Once [defendant] committed battery on one of the officer, the officers had the lawful right to seize and arrest him"); Norton v. State, 691 So. 2d 616, 617 (Fla. 5th DCA 1997)(citing State v. Barnard, 405 So. 2d 210 (Fla. 5th DCA 1981)(warrantless felony arrest in suspect's home did not justify suspect's use of force to resist arrest by uniformed officer he knew to be law enforcement officers); Bradford v. State, 567 So. 2d 911, 914 (Fla. 1st DCA 1990); see also Harris v. State, 801 So. 2d 321 (Fla. 4th DCA 2001)(holding that an illegal stop does not automatically preclude a conviction for battery on a law enforcement officer); Dominique v. State, 590 So. 2d 1059 (Fla. 4th DCA 1991)(holding that an illegal investigative stop was not a defense to battery of a known police officer engaged in lawful performance of his duties); State v. Roux, 702 So. 2d 240 (Fla. 5th DCA 1997)(holding that an illegal detention does not authorize a defendant

to commit a battery upon a law enforcement officer); Miller v. State, 636 So. 2d 144 (Fla. 1st DCA 1994)(discussing that engaging in scuffle with officer during improper detention constitutes battery on law enforcement officer and can give rise to valid arrest and conviction for resisting arrest with violence); Bradford v. State, 567 So. 2d 911 (Fla. 1st DCA 1990)(discussing that although officer was not engaged in lawful performance of his duties when he initially searched defendant, defendant's intentional striking of officer during the encounter constituted battery or resisting arrest with violence).

Even the court in Taylor wrote

> The comparison between a detention and an arrest may be similar enough in this contest, [unlawful detentions] but we do not think that section 776.051(1) can be extended to a situation in which an officer has entered someone's house without any arguable legal justification. An unlawful entry to a person's home is a far greater invasion of privacy than an unlawful arrest or detention on the street.

Taylor, 740 So. 2d at 91. Therefore, Taylor did not even hold that a defendant could resist an officer with force in situations short of an arrest. In fact, the court seems to accept the fact that such a principle should apply to most detention situations. What Taylor held was that a defendant in his home when encountering an officer who unlawfully entered that home could resist with violence.

Assuming for the sake of argument that Taylor was a proper interpretation of the law (a point the State will address later in this brief), Petitioner still cannot take advantage of this exception to justify his use of force to resist and batter

Officer Henriquez. As already noted in the jurisdictional point made previously, Petitioner's situation was not like Taylor's. Petitioner was not at his home. Petitioner was at best a guest who was invited to the party and lacks standing to argue that the officers were improperly on the owner's property. See Rakas v. Illinois, 439 U.S. 128 (1978); see also, Minnesota v. Olson, 495 U.S. 91, 95 (1990) ("Since the decision in Katz v. United States, 389 U.S. 347 [] (1967), it has been the law that 'capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.'", citing Rakas, 439 U.S. at 143.

When moving for a judgment of acquittal (JOA), a defendant admits the facts adduced at trial as well as every conclusion which may be inferred from the evidence which is favorable to the State. State v. Law, 559 So. 2d 187 (Fla. 1989), Lynch v. State, 293 So. 2d 44 (Fla. 1974). The facts of this case show that a car hit the victim, the Petitioner grabbed her pursed, and she was dragged along the asphalt causing permanent injury.

In addition to the argument that this car was not used as a weapon, the defense submits that the Petitioner was not the driver of the vehicle; however, the principal statute states:

> Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he or she is or is not actually or constructively present at the commission of such offense.

§ 777.011, Fla. Stat. (1997). The purpose of the statute is to make all participants in a crime equally accountable. Harris v. State, 513 So. 2d 169 (Fla. 5th DCA 1987). Also, felons are generally responsible for the actions of their co-felons. Lovette v. State, 636 So. 2d 1304, 1306 (Fla. 1994). One who participates with another in a common criminal scheme is guilty of all crimes committed in furtherance of that scheme. Id. (quoting Jacobs v. State, 396 So. 2d 713, 716 (Fla. 1981)). This is so even though the defendant does not physically participate in the act, Id., or know in advance it will be committed, Diaz v. State, 600 So. 2d 529, 530 (Fla. 3d DCA), rev. denied, 613 So. 2d 3 (Fla. 1992). The key is whether the extra criminal act done by the co-felon is in furtherance or prosecution of the initial common criminal design. Hampton v.

State, 336 So. 2d 378, 379-380 (Fla. 1st DCA), cert. denied, 339 So. 2d 1169 (Fla. 1976).

The facts at trial showed that the two defendants intended to rob the victim, and the facts also showed that they used the car to facilitate the robbery. Clearly, the claim that the Petitioner himself was not driving should not be a defense.

The Petitioner also contends that it was not the Petitioner's intent to use the car to injure the victim. Although the State must prove intent[3] just as any other element of a crime, a defendant's mental intent is hardly ever subject to direct proof. Instead, the State must establish the defendant's intent (and a jury must reasonably attribute such intent) based on the surrounding circumstances. Brewer v. State, 413 So. 2d 1217 (Fla. 5th DCA 1982). A trial court should rarely, if ever, grant a motion for judgment of acquittal based on the state's failure to prove mental intent. Id. As previously noted, these defendants intended to rob the victim, and they used the car to carry out their plan.

Another assertion by the Petitioner is that the vehicle did not increase the degree of injury. The Petitioner alleges that he was simply in the car or that it was used as a conveyance - incidental to the robbery. Again, this is a factual issue which was rejected by the jury. The Petitioner did not just use the

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[3] Of course intent to injure is not even an element of robbery. See, §812.13, Fla. Stat. (1997). The possible relevance of intent is to the issue of how the car was used by the defendants: as a weapon or as a conveyance.

car to aid his attempted escape after snatching the victim's purse. The car hit the victim, and the car pulled the victim across the pavement. The victim suffered a broken upper arm and other permanent injuries.

The Petitioner submits that the offense and the resulting injuries could have been the same if a defendant had grabbed someone's purse and ran off on foot or rode off on a bicycle. However, such argument would seem to miss the point that in addition to the concern and fear obviously suffered by someone who is hit by a car, the victim in this case was also drug across the parking lot. This dramatically increased the victim's injury. A defendant on foot or on a bike would not be able to drag someone down the road. Remove the power of the motor vehicle in this case from the Petitioner's use, and you remove the victim's injuries. Hit by the car, she fell fracturing her upper arm, and was then pulled along the pavement by the car.

Clearly, there were sufficient facts so as to submit the issue to the jury. That determination was made by the trial court, and it was affirmed by the Fifth District Court of Appeal.

CONCLUSION

Based on the arguments and authorities presented above, the State respectfully prays this Honorable Court affirm the judgments and sentences imposed by the trial court in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Merits Brief has been furnished by delivery via the basket of the Office of the Public Defender at the Fifth District Court of Appeal to Rosemarie Farrell, counsel for the Petitioner, 112 Orange Ave. Ste. A., Daytona Beach, FL 32114, this _____ day of May 2004.

_____
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