IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. SC02-984
5TH DCA CASE NOS. 5D00-2262
5D00-2459

STEVEN DARST,

Respondent.
_____/

ON NOTICE TO INVOKE DISCRETIONARY REVIEW
OF A DECISION OF THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Although Respondent, Steven Darst, had his cases consolidated for purposes of appeal, the only issue before this Court relates to his conviction for the offense of aggravated assault upon a law enforcement officer as charged in Brevard County Circuit Court Case No. 99-37513-CFAX, DCA No. 5D00-2459. The record on appeal in that case consists of an initial two volumes with a supplemental record. For purposes of consistency, Petitioner will cite to the record for Case No. 5D00-2459 as "2459R" and to the Supplemental Record as "2459Supp.R" with the applicable volume and page numbers thereafter as was done in the District Court.

STATEMENT OF THE CASE

Respondent was charged by Information in Brevard County Circuit Court Case No. 99-37513-CFAX with aggravated assault upon a law enforcement officer, aggravated fleeing and eluding and resisting arrest without violence. (2459R Vol.1, 189-190). On January 5, 2000, he was tried by jury and found guilty as charged. (2459Supp.R Vol. III, 394-395). A sentencing guidelines scoresheet was prepared using the aggravated assault on a law enforcement officer conviction as the primary offense resulting in a minimum permissible sentence of 75.3 months imprisonment. (2459R Vol. II, 238-240). The trial court judge imposed concurrent downward departure sentences of three years imprisonment to be followed by five years of probation for the aggravated assault on a law enforcement officer and aggravated fleeing and eluding and one year imprisonment for the resisting arrest. (2459R Vol. II, 241-250).

In an opinion filed on March 28, 2002, the Fifth District Court of Appeal remanded the case to the trial court only for purposes of correcting Respondent's sentencing guidelines scoresheet without employing the 1.5 law enforcement multiplier pursuant to Section 921.0024. The Court certified conflict with Mills v. State, 773 So. 2d 650 (Fla. 1st DCA 2000), review granted 790 So. 2d 1105 (Fla. 2001). Darst v. State, 27 Fla. L. Weekly D737 (Fla. 5th DCA March 28, 2002). (Appendices I). The State filed it Notice to Invoke Discretionary Jurisdiction on April 22, 2002.

In its Case No. SC02-984, this Court issued its order postponing its decision on jurisdiction and setting a briefing schedule on May 21, 2002.

SUMMARY OF ARGUMENT

Respondent was charged with and convicted of committing the second degree felony offense of aggravated assault on a law enforcement officer in violation of section 784.07(2)(c), Florida Statutes (1999). The sentencing guidelines scoresheet prepared for his sentencing properly included the 1.5 law enforcement multiplier pursuant to Section 921.0024(1)(b), Florida Statutes (1999). The District Court of Appeal erred in remanding this case to the trial court for the correction of Respondent's sentencing guidelines scoresheet by calculating his sentencing guidelines total without using the multiplier. The Florida legislature created the new substantive second degree felony offense of aggravated assault on a law enforcement officer and intended that the punishment for such crimes against law enforcement officers be further enhanced by use of the multiplier. Sentencing in accord with the intent of the legislature does not violate the concept of double jeopardy.

ARGUMENT

SECTION 784.07(2)(c), FLORIDA STATUTES, CREATED THE NEW SUBSTANTIVE OFFENSE OF AGGRAVATED ASSAULT AGAINST A LAW ENFORCEMENT OFFICER AND, THEREFORE, THE USE OF THE 1.5 MULTIPLIER PURSUANT TO SECTION 921.0024, FLORIDA STATUTES, IN PREPARING THE SENTENCING GUIDELINES SCORESHEET DOES NOT CONSTITUTE AN IMPERMISSIBLE DOUBLE ENHANCEMENT.

In Gordon v. State, 780 So.2d 17, 19 (Fla. 2001), this Court said: "The Double Jeopardy Clause in both the state and federal constitutions protects criminal defendants from multiple convictions and punishments for the same offense." In remanding this case to the trial court for correction of Respondent's sentencing guidelines scoresheet, the Fifth District Court of Appeal found that double jeopardy would bar both the reclassification of an aggravated assault committed against a law enforcement officer from a third to a second degree felony pursuant to Section 784.07, Florida Statutes (1999), and the use of the 1.5 multiplier pursuant to Section 775.0823(10) and Section 921.0024(1)(b), Florida Statutes (1999), the Criminal Punishment Code.

In Merritt v. State, 712 So. 2d 384 (Fla. 1998), this Court found that Section 784.07 is not applicable to an attempt to commit one of the enumerated offenses. The Court did refer to Section 784.07 as an "enhancement statute", but, in that case, it was not addressing the double jeopardy issue here before it. The First District Court of Appeal addressed this issue directly in Mills v.

State, 773 So. 2d 650 (Fla. 1st DCA 2000), review granted 790 So. 2d 1105 (Fla. 2001), and expressed its belief that Section 784.07(2)(c), Florida Statutes, created a new substantive offense consisting of the elements of aggravated assault plus the added elements that the victim was a law enforcement officer engaged in the lawful performance of his duties and that the defendant knew the victim was a law enforcement officer. The First District Court distinguished Merritt stating that double jeopardy was not the issue before the Court in that case and the use of the term "enhancement statute" with reference to Section 784.07 was *dicta*.

In Spann v. State, 772 So. 2d 38 (Fla. 4th DCA 2000), the Fourth District Court receded from its earlier decision in Oliveira v. State, 751 So. 2d 611 (Fla. 4th DCA 1999), review denied 770 So. 2d 161 (Fla. 2000), finding that this Court's decision in Gayman v. State, 616 So. 2d 17 (Fla. 1993), does not support the proposition that two enhancements violate double jeopardy. The Court cited to this Court's decision in State v. Whitehead, 472 So. 2d 730, 732 (Fla. 1985), which allowed a double enhancement by both the reclassification of an offense because it involved the use of a firearm and the imposition of a mandatory minimum sentence because of the use of a firearm. In holding that applying both statutes did not constitute an improper double enhancement, this Court explained:

> Determination of punishment for crimes is a legislative matter. 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.

The Whitehead decision is consistent with the United States Supreme Court's holding in Missouri v. Hunter, 459 U.S. 359, 366, 103 S.Ct. 673, 678, 74 L.Ed.2d 535, 542 (1983), that "...the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended."

In Matthews v. State, 774 So. 2d 1 (Fla. 2d DCA), review denied 779 So. 2d 272 (Fla. 2000), the Information filed against the defendant did not specifically allege a violation of section 775.0823. However, the Information did charge that the defendant had committed a violation of Section 784.07 by committing an aggravated assault on a law enforcement officer. The defendant was convicted as charged of the second degree felony aggravated assault on a law enforcement officer and the Second District Court concluded that the law enforcement multiplier, a "penalty enhancement" pursuant to Section 921.0014(1)(b) and Florida Rule of Criminal Procedure 3.703(d)(22), was correctly applied to enhance Mr. Matthew's sentence. Here, as in Matthews, the law enforcement multiplier was correctly applied, although the trial court judge chose not to impose an enhanced sentence and the Fifth District Court of Appeal erred in remanding this case to the trial court for preparation of a sentencing guidelines scoresheet that

does not include the multiplier. The fact that Respondent was charged with the second degree felony offense under Section 784.07 because the victim was a law enforcement officer rather than being charged with a third degree aggravated assault pursuant to Section 784.021, would not preclude the use of the law enforcement multiplier pursuant to Section 921.0024(1)(b) and Florida Rule of Criminal Procedure 3.703(d)(22). It is no more double jeopardy than the double enhancement for use of a firearm approved by this Court in Whitehead. As this Court held in that case: the determination of punishment for crimes is a legislative matter. Because the legislature has provided both these subsections, both are to be followed. As the United States Supreme Court said in Hunter, it is not a violation of the Double Jeopardy Clause to impose the punishment intended by the legislature.

CONCLUSION

WHEREFORE, since Section 784.07(2)(c), Florida Statutes, created the new substantive offense of aggravated assault against a law enforcement officer and is not an enhancement statute, the use of the 1.5 multiplier pursuant to Section 921.0024, Florida Statutes, and Florida Rule of Criminal Procedure 3.703(d)(22), does not constitute a double enhancement and this Court should approve the decision of the First District Court of Appeals in Mills v. State, 773 So. 2d 650 (Fla. 1st DCA 2000), review granted 790 So. 2d 1105 (Fla. 2001), and the decision of the Fifth District Court of Appeal remanding this case to the trial court for correction of Respondent's scoresheet should be disapproved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Petitioner's Initial Brief on the Merits has been delivered to Linda L. Gaustad, Esquire, Office of the Public Defender, Counsel for Respondent, via her basket at the Fifth District Court of Appeal, this ____ day of June, 2002.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Anthony J. Golden
Assistant Attorney General