IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. SC 03-1291
LOWER TRIBUNAL NO. 4D01-2049

WILLIE PERRY,

Petitioner,

vs.

STATE OF FLORIDA ,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the Prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. In this brief, the parties shall be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

In this brief, the following symbols will be used:

"R" to denote the record on appeal;

"SR" to denote the supplemental record on appeal;

"MST" to denote the hearing on the Motion to Suppress;

"S" to denote the sentencing hearing conduct on 5-18-01;

"SS1" to denote the supplemental transcript of the sentencing hearing conduct on 5-4-01;

"SS2" to denote the supplemental transcript of the sentencing hearing conduct on 5-5-01;

"ST" to denote the supplemental transcript of the proceedings held below.

STATEMENT OF THE CASE AND FACTS

The only relevant facts to a determination of this Court=s discretionary jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution are those set forth in the appellate opinion sought to be reviewed. A copy of the opinion is contained in the appendix to this brief.

SUMMARY OF THE ARGUMENT

Point I: Although this Honorable Court has accepted jurisdiction in this case, Respondent maintains that since there was no express and direct conflict between this case and Taylor v. State, 740 So. 2d 89 (Fla. 1st DCA 1999), this Court should not have accepted jurisdiction to consider the case at bar. On the merits, it is Respondent's contention that the trial court correctly denied Petitioner's motion for judgment of acquittal as to the charge of resisting an officer with violence, since there was competent, substantial evidence to support the verdict that the strip search was conducted within the parameters of section 901.211, Florida Statutes. However, even if the strip search did not comply with that statute, the trial court still properly denied the motion for judgment of acquittal, since an officer's allegedly improper performance of his legal duty at the time of a defendant's forcible resistance to the officer is not a defense to a charge of resisting with violence. This Court should affirm.

Point II: Respondent contends that the Petitioner failed to properly request the strip search instruction, and thus, did not properly preserve this issue for appellate review. Assuming arguendo that the issue was preserved, the trial court did not commit reversible error by denying the request for a special

instruction and by reading the standard jury instruction on resisting officer with violence. Further, the trial court's reading of the standard jury instruction did not direct the verdict against Petitioner. Alternatively, even if it was error in not giving the additional instruction regarding the strip search, even though that special instruction would have incorrectly given the state of the law as it now stands in Florida, any presumption of prejudice was overcome when the record evidence of Petitioner's guilt was overwhelming. Thus, the alleged error was harmless. This Court should affirm.

ARGUMENT

POINT I (RESTATED)

PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL TO THE CHARGE OF RESISTING AN OFFICER WITH VIOLENCE WAS PROPERLY DENIED SINCE THE EVIDENCE ESTABLISHED THAT THE LEGAL DUTY FORCEFULLY OBSTRUCTED OR OPPOSED, I.E., A STRIP SEARCH, WAS EXECUTED LAWFULLY.

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. Respondent disagrees.

Before addressing the merits of Petitioner's argument, Respondent will briefly readdress 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.

This Court has jurisdiction to review the decision of a district court when that decision "expressly and directly conflicts" with a decision of either this Court or of another district court. Art. V, § 3(b)(3), Fla. Const. This Court has repeatedly held that such conflict must be express and direct, that is, "it must appear within the four corners of the majority decision." Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986).

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 Perry v. State, 846 So. 2d 584 (Fla. 4th DCA 2003). 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. In this case, the charges arose from events that occurred while Petitioner was being booked into the Broward County jail following his arrest for possession of cocaine. The evidence at trial established that Petitioner violently resisted efforts by detention deputies to conduct a strip search of him.

Given the fact that Taylor can be distinguished, it is the position of the State that there is no direct conflict between

the two cases.

Turning to the merits of this case, Petitioner challenges the trial court's denial of his motion for judgment of acquittal as to the charge of resisting an officer with violence, as the evidence failed to show that the detention of Petitioner was not conducted in a lawful manner because his strip search was not authorized under Florida statute section 901.211, which states in subsection (5) that "[n]o law enforcement officer shall order a strip search within the agency or facility without obtaining the written authorization of the supervising officer on duty." Respondent strongly disagrees.

The standard of review for the denial of a motion for judgment of acquittal is whether the verdict is supported by substantial, competent evidence. See, Crump v. State, 622 So. 2d 963, 971 (Fla. 1993)(question of whether evidence fails to exclude any reasonable hypothesis of innocence is for jury to determine, and if there is substantial, competent evidence to support jury verdict, verdict will not be reversed on appeal); Tibbs v. State, 397 So. 2d 1120 (Fla. 1981), aff'd, 457 U.S. 31 (1982)(concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefore have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and

judgment).

The trial court and the appellate court are equally capable of determining whether it is proper to grant a judgment of acquittal. See, State v. Smyly, 646 So. 2d 238 (Fla. 4th DCA 1994). However, this Court, in reviewing the trial court's denial of the motion for judgment of acquittal should be guided by the well settled principle that a defendant, in moving for a judgment of acquittal, admits all facts stated in the evidence adduced and the court draws every conclusion favorable to the state which is fairly and reasonably inferable from that evidence. See, Spinkellink v. State, 313 So. 2d 666, 670 (Fla. 1975), cert denied, 428 U.S. 911 (1976); Lynch v. State, 293 So. 2d 44, 45 (Fla. 1974); T.J.T. v. State, 460 So. 2d 508, 510 (Fla. 3d DCA 1984); McConnehead v. State, 515 So. 2d 1046, 1048 (Fla. 4th DCA 1987). A motion for judgment of acquittal should not be granted unless it is apparent that no legally sufficient evidence has been submitted under which a jury could legally find a verdict of guilty. See, Busch v. State, 466 So. 2d 1073, 1079 (Fla. 3d DCA 1984) (emphasis added); Rogers v. State, 660 So. 2d 237 (Fla. 1995)(citing Taylor v. State, 583 So. 2d 323 (Fla.1991)); Lynch, 293 So. 2d 44. Because conflicts in the evidence and the credibility of the witnesses have to be resolved by the jury, the granting of a motion for judgment of

acquittal cannot be based on evidentiary conflict or witness credibility. See, Lynch, 293 So. 2d 44; Hitchcock v. State, 413 So. 2d 741, 745 (Fla. 1982). A judgment should not be reversed if there is competent evidence which is substantial in nature to support the jury's verdict. See, Welty v. State, 402 So. 2d 1159 (Fla. 1981). The testimony of a single witness, even if uncorroborated and contradicted by other State witnesses, is sufficient to sustain a conviction. See, I.R. v. State, 385 So. 2d 686 (Fla. 3d DCA 1980). Any conflicts in the evidence are properly resolved by the jury. See, Jent v. State, 408 So. 2d 1024 (Fla. 1982); Hampton v. State, 549 So. 2d 1059 (Fla. 4th DCA 1989).

When reviewing the sufficiency of the evidence to support a conviction, the appellate court must consider all of the evidence presented at trial, including the evidence it determines was improperly admitted. See, Barton v. State, 704 So. 2d 569 (Fla. 1st DCA 1997); Fluellen v. State, 703 So. 2d 511 (Fla. 1st DCA 1997). Appellate courts may not consider the weight of the evidence as a basis for overturning a criminal conviction, but the sufficiency of the evidence is a proper subject of concern on review. See, Tibbs v. State, 397 So. 2d 20 (Fla. 1981); Smyly, 646 So. 2d 238.

Deputy Enrique was a booking deputy in Broward County. (ST

at 107). His duties in booking were to screen new arrested inmates and introduce them into the correctional system. (ST at 108). The first step is to conduct a search, process them for fingerprints, take photographs and then process them for teletype. (ST at 108). Also, he inquires of their medical history. (ST at 108).

They search for weapons and contraband. (ST at 109). The search is "conducted for the care, custody, control of the inmate" and for the "care, custody and control" of other inmates and staff. (ST at 109). The deputy testified that it was not his decision to perform the strip search but rather it was authorized policy. (ST at 129). He was not required to have verbal authority to strip search Petitioner. (ST at 130). The deputy is aware of Florida Statute Section 901.221 which deals with the strip search of a person and that it provides that no law enforcement officer shall conduct a strip search without obtaining the written authorization of the supervising officer on duty. (ST at 141-42). At bar, the deputy testified that written authorization was given by a supervising officer. (ST at 142). The Sheriff of Broward County gave written authorization. (ST at 142). The Sheriff was not at the jail the night the search was conducted. (ST at 143). The officer answered in the affirmative that he got written authorization from a supervision

officer on duty, the Broward County Sheriff. (ST at 144).

Under Florida Statute section 951.061, the Sheriff is designated as chief correctional officer of the county correctional system. Moreover, the sheriff under Florida Statute section 100.041 is an elected official and remains in that capacity even when not physically present at that jail.

As such, the trial court did not err in denying the motion for judgment of acquittal as there was competent substantial evidence to support the verdict that the search was done within the parameters of section 901.211.

However, even if the strip search did not comply with section 901.211, Florida Statutes, the trial court still properly denied the motion for judgment of acquittal, since an officer's improper performance of his legal duty at the time of a defendant's forcible resistance to the officer is not a defense to a charge of resisting arrest with violence.

Resisting an officer with violence is proscribed by section 776.051(1), Florida Statutes (1997), which states that "A person is 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."

In Lowery v. State, 356 So. 2d 1325, 1326 (Fla. 4th DCA 1978), the Fourth District Court of Appeal held that the use of

force to resist an arrest is unlawful, notwithstanding the technical illegality of the arrest. The Fourth District reached that ruling after determining that section 843.01 (resisting and obstructing with violence) must be read together with section 776.051.

Petitioner argues that section 776.051 does not apply when an officer is engaged in the unlawful performance of some other duty, such as a detention. Here, Petitioner was not charged with resisting arrest but with resisting detention at the county jail. Thus, Petitioner argues that he was free to use force or violence if the detention, i.e., the strip search, was not properly performed.

The Fourth District Court of Appeal disagreed with Petitioner's argument:

> We disagree with appellant's argument that the rule prohibiting the use of force against a known police officer is limited to an arrest situation. Rather, courts have extended it to apply to illegal stops, searches, and detentions. See 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); Tillman v. State, 807 So. 2d 106, 109 (Fla. 5th DCA 2002)(holding that defendant was not justified in using violence to resist police

> officers even if the officers' entry into the screened enclosure of his residence and subsequent pat-down and detention were illegal); State v. Roux, 702 So. 2d 240 (Fla. 5th DCA 1997)(holding than 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). But cf. Taylor v. State, 740 So. 2d 89 (Fla. 1st DCA 1999)(holding that if a defendant is charged under section 843.01 with resisting or opposing an officer with violence in the performance of some duty – other than an arrest – the state must prove that the officer was engaged in a lawful duty).

Perry v. State, 846 So. 2d 584, 587-588 (Fla. 4th DCA 2003).

Further, in Dominique v. State, 590 So. 2d 1059 (Fla. 4th DCA 1991), the Fourth District reasoned that if the use of force is not permitted in resisting an unlawful arrest, "[i]t logically follows that the use of force would be even less acceptable when a law enforcement officer has merely stopped an individual, since a stop involves less of an invasion of an individual's privacy than does an arrest." Dominique v. State,

590 So. 2d at 1061 n.1.

In the case at bar, Petitioner was not merely stopped or temporarily detained. Petitioner was already in custody, undergoing post-arrest procedures, where the prohibition against violently resisting or opposing an officer would apply as well. In Vlahovich v. State, 757 So. 2d 1219 (Fla. 2d DCA 2000), quashed in part on other ground, 788 So. 2d 245 (Fla. 2001), the defendant was convicted of resisting arrest with violence, among other offenses, following an incident at a hospital emergency room. The defendant had been arrested for a misdemeanor, but the deputy could not take him to jail because the defendant had a head injury. The defendant was taken to the emergency room in handcuffs. While awaiting treatment, the defendant became unruly, sticking himself with medical instruments from a surgical tray. He made threatening gestures with the instruments and refused to drop the instruments. He threatened to stab anyone attempting to keep him at there. The deputy drew his gun, but was able to subdue the defendant with pepper spray and the assistance of a paramedic. On appeal, the defendant alleged he could not be convicted of resisting with violence under section 843.01 because he was already in custody at the time that he resisted with violence. The Second District Court of Appeal held that the fact that the defendant was already in custody at the

time of the incident would not preclude his conviction for resisting arrest with violence.

As the Fourth District stated below, “While a person in custody retains his or her Fourth Amendment rights against unreasonable searches and seizures, these rights are weighed against the legitimate concerns of jail officials for security and the prevention of smuggling drugs, weapons, and other contraband into the detention facility.” Perry v. State, 846 So. 2d at 588, citing Bell v. Wolfish, 441 U.S. 520(1979). Contrary to what Petitioner alleges, a determination that an officer acted improperly in the performance of his legal duty at the time of a defendant's forcible resistance to the officer is not a defense to a charge of resisting arrest with violence. Bradford v. State, 567 So. 2d 911, 914 (Fla. 1st DCA 1990), review denied, 577 So. 2d 1325 (Fla. 1991); Delaney v. State, 489 So. 2d 891 (Fla. 1st DCA 1986); see, also, Reed v. State, 606 So. 2d 1246 (Fla. 5th DCA 1992)(Battery upon law enforcement officer was illegal even if officer was attempting invalid arrest.)

In 1974 the legislature modified the common-law rule by enacting Section 776.051, Florida Statutes (1975) (effective July 1, 1975). This statute provides that a person is 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. Thus, in Lowery v. State, 356 So. 2d 1325, 1326 (Fla. 4th DCA 1978), the Fourth District Court of Appeal held that after July 1, 1975, Section 843.01 must be read in pari materia with Section 776.051; the end result being that the use of force in resisting an arrest by a person reasonably known to be a law enforcement officer is unlawful notwithstanding the technical illegality of the arrest. Further, this Court stated in State v. Espinosa, 686 So. 2d 1345, 1347 (Fla. 1996), 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.

The above rule has been extended to cover the crime of battery on a law enforcement officer, and to apply to illegal stops, detentions and even illegal contacts. See, Miller v. State, 636 So. 2d 144 (Fla. 1st DCA 1994)(Engaging in scuffle with officer during improper detention constitutes battery upon law enforcement officer and can itself give rise to valid arrest and conviction for offense of resisting arrest with violence;) Dominique v. State, 590 So. 2d 1059 (Fla. 4th DCA 1991)(Illegal investigative stop was no defense to battery of known police officer engaged in lawful performance of his duties); State v.

Giddens, 633 So. 2d 503 (Fla. 5th DCA 1994); State v. Gilchrist, 458 So. 2d 1200 (Fla. 5th DCA 1984). See also, State v. Roux, 702 So. 2d 240 (Fla. 5th DCA 1997); Jones v. State, 570 So. 2d 433 (Fla. 5th DCA 1990); 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)); 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 officers, 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), rev. dismissed, 29 Fla. L. Weekly S 143 (Fla. March 25, 2004)(holding that an illegal stop does not automatically preclude a conviction for battery on a law enforcement officer).

Despite these cases, Petitioner argues that section 776.051(1), Florida Statutes, only applies to cases in which the

defendant is charged with resisting arrest, as opposed to resisting some lesser duty, such as a contact, stop or detention. Petitioner cites to Taylor v. State, 740 So. 2d 89 (Fla. 1st DCA 1999), to support his argument. The First District Court of Appeal in Taylor has stated:

> ... 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.

740 So.2d at 91.

This Court should not be persuaded by Taylor. First, the case at bar is distinguishable from Taylor because the police did not illegally enter a home; in this case Petitioner had been arrested and was being processed into a correctional facility. The Taylor holding rests on the fact that entry into a defendant's home was a "far greater invasion of privacy" than a stop on the street. It is also a far greater invasion of privacy than this case, where Petitioner was being processed into a correctional facility pending an arrest. It is true that while the State must prove that the alleged victim was a law enforcement officer who was engaged in the lawful execution or performance of a legal duty, the technical illegality of that action does not justify resisting with violence or battering the

officer. Tillman v. State, 807 So. 2d 106, 109 (Fla. 5th DCA 2002)(Defendant was not justified in using violence to resist pat-down and detention). See, Bradford v. State, 567 So. 2d 911 (Fla. 1st DCA 1990), review denied, 577 So. 2d 1325 (Fla. 1991)(Defendant can be convicted of resisting arrest with violence, even though officer is improperly searching him and is not engaged in lawful execution of legal duty at time of resistance.).

Further, although a strip search may represent a substantial invasion of an arrestee's privacy interest, the Legislature enacted minimal acceptable standards of conduct for law enforcement officers conducting strip searches of persons arrested in Florida. Section 901.211, Fla. Stat.; D.F. v. State, 682 So. 2d 149, 153 (Fla. 4th DCA 1996). "A strip search conducted in violation of the statutory requirements set forth in section 901.211, in essence, establishes police misconduct and constitutes a Fourth Amendment violation." State v. Augustine, 724 So. 2d 580, 581 (Fla. 2d DCA 1998). However, the appropriate remedy for a statutory strip search violation is the suppression of evidence obtained by the unlawful search. State v. Augustine, 724 So. 2d 580, 581 (Fla. 2d DCA 1998); D.F. v. State, 682 So. 2d at 154. Also, a complainant may seek civil damages. Id. at 153.

In the instant case, Petitioner did not seek to suppress any evidence obtained from the strip search or to recover any civil damages. Instead, Petitioner raised the strip search violation as a defense to the charge of resisting an officer with violence. The Fourth District Court of Appeal stated below that "the use of force or violence to resist an officer during a post-arrest strip search is unlawful, even though the officer improperly performs the search. (Footnote omitted.). In other words, noncompliance with the strip search statute is not a defense to resisting with violence." Perry v. State, 846 So. 2d at 588-589.

Respondent would also maintain that the holding in Taylor constitutes an extremely dangerous public policy since it encourages people to subjectively determine whether the officer's actions are illegal and to resist that action with violence. There is a system currently in place to deter such illegal acts by law enforcement. If law enforcement illegally enters a house, for example, a defendant may file a motion to suppress any evidence seized from within the home. See Mapp v. Ohio, 367 U.S. 643 (1961). Additionally, illegal police action can lead to civil suits. However, to endorse a policy that encourages people subjectively to decide whether the actions of law enforcement are proper and to act upon their decision with

force could easily lead to an escalation of violence and danger to the public in general.

For example, if law enforcement was attempting to effectuate what was later found to be an illegal traffic stop, defendants could justifiably flee at high speeds endangering the public at large. Also, defendants could use weapons to resist a stop and then defend their use of weapons by asserting that law enforcement's actions were illegal. An officer could obtain a warrant which later is found to be defective and could go to a house for a search. The occupant could read it, determine that it fails to be specific enough as to the items listed or the area to be searched and could resist the officer's actions by force. Case law in Florida has correctly found that such subjective determinations are unfair and dangerous to the officers involved and to the defendants themselves.

Of course, this question is not unique to Florida. The Eleventh Circuit Court in United States v. Bailey, 691 F.2d 1009, 1017 (11th Cir.), cert. denied, 461 U.S. 933 (1983) wrote

> [w]here the defendant's response is itself a new, distinct crime, there are strong policy reasons for permitting the police to arrest him for that crime. A contrary rule would virtually immunize a defendant from prosecution for all crimes he might commit that have a sufficient causal connection to the police misconduct. Where the police misconduct is particularly egregious, many serious crimes might plausibly be the

> product of that misconduct. For example, if the police illegally fired warning shots at a person, would that person be shielded from arrest and prosecution if he fired back and killed someone? ... Or would a person be justified if he seized an innocent hostage as a human shield to protect himself from wrongful police fire? Unlike the situation where in response to the unlawful police actions the defendant merely reveals a crime that already has been or is being committed, extending the fruits doctrine to immunize a defendant from arrest for new crimes gives a defendant an intolerable carte blanche to commit further criminal acts so long as they are sufficiently connected to the chain of causation started by the police misconduct. This result is too far reaching and too high a price for society to pay in order to deter police misconduct. ...

See also Ford v. Wilson, 90 F.3d 245 (7th Cir. 1996), cert. denied, 520 U.S. 1105 (1997)(Legal remedies exist to challenge an illegal traffic stop but resisting with physical resistance is not one of the options for a defendant); Arizona v. Windus, 86 P.3d 384 (Ariz. Ct. App. 2004) (Court found exclusionary rule would not be served given that defendant's conduct of committing a new crime of aggravated assault and resisting arrest were distinct independent acts not sufficiently related to the illegal entry by police).

Returning to Taylor, the First District Court of Appeal found that section 776.051(1) did not apply to the unique facts of that case. The court acknowledged that case law had applied that section to the offense of battery on a law enforcement

officer, to resisting an arrest with violence, and even to illegal detentions; however, the court found that based on the unique facts in Taylor the defendant could resist with force. The facts of that case show the officer went to the defendant's house based upon a noise complaint. Taylor, 740 So. 2d at 89. A different officer had earlier been to the defendant's house and warned him to turn down his music. When the second officer arrived to address the new complaint, the officer again told the defendant to turn down his stereo. Id. This officer asked the defendant why he had not complied with the earlier request and, in response, the defendant cursed the officer and told him he had turned the music down. The officer asked for the defendant's name and identification, and the defendant ignored him. The officer asked the defendant to step outside so they could talk, and the defendant continued to ignore him. The officer next entered the open door, walked up to the defendant, touched him on the arm, and motioned for him to accompany him outside. The defendant pulled away, the officer attempted to take the defendant's arm, and the defendant pushed the officer. The officer backed away, the defendant came at the officer, and the officer pepper sprayed the defendant. The defendant was charged with battery on a law enforcement officer and resisting an officer with violence.

These facts help illustrate the danger of the ruling in Taylor. The officer had illegally entered the defendant's door and touched the defendant on the arm. In response to the officer's attempt to get the defendant to go outside, the defendant responded by pushing the officer and, then, charging at him. In modern society allowing people to subjectively decide an officer's actions are "illegal" and to resist those encounters with force increases the likelihood of additional injuries and harm to the defendant, to the officer and even to others.

In the instant case, Petitioner was being processed into a correctional facility pending an arrest. This limited contact would seem to fall far short of the egregious behavior necessary to rise to the level of violating substantive due process. See Albright v. Oliver, 510 U.S. 266 (1994).

Therefore, it is the position of the State that the majority of Florida cases have correctly recognized that regardless of whether the initial contact by law enforcement is later determined to have been illegal defendants cannot commit a new separate criminal act of resisting with violence or battering a known officer. The State would respectfully ask this Court to affirm the holding of the Fourth District Court of Appeal in Perry and to reject the ruling made in Taylor.

POINT II (RESTATED)

THE TRIAL COURT DID NOT COMMIT REVERSIBLE ERROR BY GIVING THE STANDARD INSTRUCTION ON RESISTING OFFICER WITH VIOLENCE. FURTHER, THIS ISSUE WAS NOT PROPERLY PRESERVED FOR APPELLATE REVIEW.

Petitioner alleges that the trial court reversibly erred by refusing to give the requested jury instruction on the strip search as being unlawful and by giving the standard jury instruction on Resisting Officer With Violence. Petitioner also alleges that giving the standard instruction caused the trial court to direct a verdict against Petitioner by relieving from the State its burden of proving that the detention was lawful.

Respondent maintains that Petitioner did not properly request the strip search instruction, and therefore, did not properly preserve this issue for review. Alternatively, even if that issue was properly preserved, the trial court did not commit reversible error by denying the request for a special instruction and by reading the standard jury instruction. Further, the giving of the standard jury instruction did not direct the verdict against Petitioner.

Petitioner's claim that error was committed by not granting his request for special instructions was not properly preserved. Florida Rule of Criminal Procedure 3.390(d) states:

> No party may raise on appeal the giving or

> failure to give an instruction unless the party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the presence of the jury.

At trial, objecting to the giving or denial of instructions is the responsibility of a defendant's attorney, and the attorney's failure to object to such instructions can properly constitute a waiver of any defects. See, Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) (Burger, C. J., concurring). It is not sufficient that Petitioner merely requests an instruction. The contemporaneous objection rule requires an objection sufficiently specific both to apprise the trial judge of the putative error and to preserve the issue for review. Gainer v. State, 633 So. 2d 480 (Fla. 1st DCA 1994). See, also, Nelson v. State, 97 So. 2d 250 (1957); Dalton v. State, 42 So. 2d 174 (1949), certiorari denied, 70 S.Ct. 612, 339 U.S. 923, 94 L.Ed. 1346.

Additionally, Fla.R.Crim.P. 3.390(c) states that any party may "file written requests" that the court instruct the jury on the law as set forth in the request. In Taylor v. State, 410 So. 2d 1358 (Fla. 1st DCA 1982), the Court stated that failure to include a written request for a jury instruction would preclude appellate review under Rule 3.390(c). Id. at 1359-60.

Respondent would assert that the requirement of written jury instructions is applicable when the instruction is not a Florida standard jury instruction.

In the case at bar, defense counsel did not submit a written request for special instructions. Petitioner orally requested the following:

> Judge, I want to ask that special instruction be read regarding the statute of 901.211, whatever the statute was that we have been talking about this afternoon, in its entirety. I know I read a small portion of it. Prosecutor read much more of the rest of it. I would ask that the statute be read to the jury.

(ST at 214-15).

The defense did not fully comply with Fla.R.Crim.P. 3.390(d) in that defense counsel did not object to the trial court's refusal to give his instruction before the jury retired to consider its verdict, counsel did not state distinctly the matter to which he objected and the grounds of his objection. Rather, he stated that he had no objections other than previously stated. (ST at 257). The only instruction to which Petitioner lodged an objection to was where the court proposed that the detention of a defendant constituted a lawful execution of a legal duty. (ST at 210-11).

In Brown v. State, 206 So. 2d 377, 384 (Fla. 1968), Brown's

attorney did not file a written request for an instruction. The court concluded "that a lawyer is not required to pursue a completely useless course when the judge has announced in advance that it will be fruitless" citing to Birge v. State, 92 So. 2d 819 (Fla. 1957). The Court noted that "ordinarily, if a particular instruction is desired, it should be drafted and submitted to the trial judge." The Court also noted that this is the proper course to be followed.

The exceptional circumstance permitting review without a written instruction is not present at bar. It cannot be said that the submission of a particular formal written instruction was unnecessary to preserve the point for appeal because this would have been a useless gesture. Counsel did not give the complete statute but stated that it was read in parts at times by him and the state attorney. And, when the court refused to give such instruction, counsel did not object and specifically argue why the instruction was necessary and why the standard instruction failed to adequately address the legal principles involved. It cannot be said that the trial court's denial of a specially requested instruction is futile when counsel never objected to the refusal to give such or gave reasons why it should be given. As such, the requirement of written special instruction is applicable here in order to preserve the issue.

Even if this issue was preserved, the trial court did not commit reversible error by denying the request for a special instruction. Petitioner was not entitled to a special instruction stating that he could resist the deputies with force if the strip search was improper, since this is not a valid defense under the law to an allegedly improper strip search during the booking process while in detention. (See Point I.) The standard jury instructions are presumed correct and are preferred over special instructions. See, State v. Bryan, 290 So. 2d 482 (Fla. 1974). Thus, Petitioner has the burden of demonstrating that the trial court abused its discretion in giving standard instructions. See, Phillips v. State, 476 So. 2d 194 (Fla. 1985), cert. denied, 509 U.S. 908 (1993); Williams v. State, 437 So. 2d 133 (Fla. 1983); Stephens v. State, 787 So. 2d 747, 756 (Fla. 2001). "A trial court's decision on the giving or withholding of a proposed jury instruction is reviewed under the abuse of discretion standard of review." Bozeman v. State, 714 So. 2d 570, 572 (Fla. 1st DCA 1998); Sheppard v. State, 659 So. 2d 457, 459 (Fla. 5th DCA 1995). On appeal, the trial court's ruling on a jury instruction is presumed correct. See, Shimek v. State, 610 So. 2d 632, 638 (Fla. 1st DCA 1992).

Respondent asserts that Petitioner below failed to meet his burden that the standard instruction should not be given. In

order to be entitled to a special jury instruction, Petitioner had to prove: (1) the special instruction was supported by the evidence; (2) the standard instruction did not adequately cover the theory of defense; and (3) the special instruction was a correct statement of the law and not misleading or confusing. Below, the trial court did not err by denying the special instruction because Petitioner failed to meet his burden and prove that the instruction satisfied the above factors. See, Parker v. State, 641 So. 2d 369, 376 (Fla. 1994)(trial court did not err in denying special instructions where "[a]ll of the requested instructions [were] either adequately covered by the standard instructions, misstate[d] the law, or were not supported by the evidence."). Petitioner made no argument below that the requested special instruction was supported by the evidence, that the standard instructions did not adequately cover the theory of defense, and that the special instruction would not be misleading or confusing. As such, it cannot be said that the trial court abused its discretion when Petitioner failed to meet his burden.

Petitioner has the burden to demonstrate reversible error in the lower court's refusal to give the requested instruction. See, section 924.051(7), Fla. Stat. (1997); Savage v. State, 156 So. 2d 566 (Fla. 1st DCA 1963). The law in Florida is well

settled that "a defendant is entitled to have the jury instructed on the rules of law applicable to his theory of defense if there is any evidence to support such instruction." Campbell v. State, 577 So. 2d 932, 935 (Fla. 1991) (quoting, Smith v. State, 424 So. 2d 726, 732 (Fla. 1982), cert. denied, 462 U.S. 1145 (1983)). However, the trial court still has wide discretion in instructing the jury, and the court's decision regarding the charge is reviewed with a presumption of correctness on appeal. James v. State, 695 So. 2d 1229, 1236 (Fla. 1997). Further, the standard jury instructions should be used so long as they accurately and adequately state the relevant law. Davis v. State, 373 So. 2d 382 (Fla. 4th DCA 1979).

In this case, the first factor in the analysis contemplates that there was evidence presented regarding the statute but none to support that the statements were obtained in violation of it. Deputy Enrique was a booking deputy in Broward County. (ST at 107). The deputy testified that it was not his decision to perform the strip search but was authorized by policy. (ST at 129). He was not required to have verbal authority to strip search. (ST at 130). The deputy was aware of Florida Statute section 901.221 that deals with strip search of a person and that no law enforcement officer shall order a strip search

without obtaining the written authorization of the supervising officer on duty. (ST at 141-42). A written authorization was given by a supervising officer. (ST at 142). The Sheriff of Broward County gave written authorization. (ST at 142). The officer answered in affirmative that he got written authorization from a supervision officer on duty, the Broward County Sheriff. (ST at 144). As such, the evidence does not support the giving of the special requested instruction.

Moreover, the standard instruction accurately addresses the applicable law. The trial court did not abuse it discretion in giving the standard instruction in its entirety. The failure to give special jury instructions does not constitute error where the instructions given adequately address the applicable legal standards. See, Palmes v. State, 397 So. 2d 648 (Fla. 1981).

The standard jury instruction for section 843.01, Florida Standard Jury Instructions in Criminal Cases Section 21.1, Fourth Edition with 2004 Pocket Part, provides as follows:

> To prove the crime of Resisting Officer With Violence, the State must prove the following three elements beyond a reasonable doubt:
>
> 1. (Defendant) knowingly and willfully [resisted] [obstructed] [opposed] (victim) by [offering to do [him] [her] violence] [doing violence to [him][her]].
>
> 2. At the time (victim) was engaged in the [execution of legal process][lawful execution of a legal duty].

> 3. At the time (victim) was an officer.
>
> The court now instructs you that every (name of official position of victim designated in charge) is an officer within the meaning of this law.
>
> The court further instructs you that (read duty being performed from charge) constitutes [execution of legal process][lawful execution of a legal duty].

The standard instruction also instructs the trial court: "*In giving this instruction, refer only to the type of duty or legal process that was being performed, e.g., making an arrest, serving a subpoena, serving a domestic violence order. See Hierro v. State, 608 So. 2d 912 (Fla. 3d DCA 1992).*" Florida Standard Jury Instructions in Criminal Cases Section 21.1, Fourth Edition with 2004 Pocket Part. The Standard Jury Instruction calls for the court to describe the "duty being performed" in generic terms.

In the instant case, the trial court instructed the jury: "The Court now instructs you that every Broward Sheriff's Deputy is an officer within the meaning of the law. The Court further instructs you that the detention of a Defendant constitutes lawful execution of a legal duty." (ST at 248).

The standard instruction requires that the court instruct that the victim was in the lawful execution of a legal duty; as

such, the trial court adequately instructed the jury on defense's theory.

Also, the standard for reviewing the failure to give a jury instruction is whether there was a reasonable possibility that a jury could have been misled by the failure to give that instruction, when examined within the context of the entire charge to the jury. Cronin v. State, 470 So. 2d 802 (Fla. 4th DCA 1985). A judgment will not be reversed for failure to give a particular requested instruction where, on the whole, the instructions as given were clear, comprehensive and correct. Mathew v. State, 209 So. 2d 234 (Fla. 2d DCA 1968).

A reading of the court's instructions shows that the law was fairly presented to the jury and that the jury would not have been misled by the failure to give that instruction. The instructions as given were clear, comprehensive and correct.

Petitioner's claim that the standard jury instruction as given directed a verdict against Petitioner by relieving from the State its burden of proving that the detention was lawful is without merit.

At bar, Petitioner's defense was not that the detention in and of itself was unlawful but rather that the police were acting unlawfully because the strip search was not authorized under Florida Statute section 901.211. This then leaves for the

jury the factual determination whether the duty performed, i.e., the strip search, was being performed lawfully. The jury still could have concluded that the strip search was not authorized and therefore, the officers were not acting within a legal performance of their duty. As such, the jury still had to make the determination that the officers were acting lawfully. Therefore, the standard instruction adequately stated the legal principles involved and did not direct the verdict.

Moreover, the evidence did not support the theory that the detention in and of itself was unlawful. Rather, the case and the evidence focused on the officer's performance of the strip search being conducted in an unlawful manner. The defense counsel made this clear to the jury in closing argument. "He did not have legal right to conduct a body search. . ." (ST at 216). Defense counsel argued that the statute was violated and therefore the performance of their duty was not legal. (ST at 242-43). The State emphasized in its summation that the officers were acting in accordance with the statute. (ST at 227-231; 233). There was no evidence presented to support that the detention in and of itself was unlawful.

An omission from the charge in a criminal case or an erroneous instruction with respect thereto will not be regarded as reversible error if from the evidence in the case it is clear

that there was no issue between the parties with respect to such element. See Bolen v. State, 375 So. 2d 891, 892 (Fla. 4th DCA 1979)(no issue or contention to subject matter of challenged instruction, error not harmful). There were no disputed facts as to the issue of the detention in and of itself being unlawful, rather the case focused on the officer's performance of conducting the strip search as being unlawful. As such, there was no evidence presented to support the giving of such an instruction.

"[A]n appellate court will not set aside a verdict merely because an instruction which might have been proper is not given; the court must conclude that the jury was misled by the instructions which were used." Bohannon v. Thomas, 592 So. 2d 1246, 1248 (Fla. 4th DCA 1992).

Clearly, the jury was aware that Petitioner's defense was that the officers were not legally performing their duty because it was in violation of the statute. It is a well established principle that a jury is unlikely to disregard a theory flawed in law, but it is likely to disregard an option simply unsupported by the evidence. See, Sochor v. Florida, 504 U.S. 527, 538, 112 S.Ct. 2114, 2122, 119 L.Ed.2d 326 (1992).

The jury was aware of what the sole issue was at bar. The whole focus and defense in this case was that the officers were

not in performance of a legal duty because the strip search was not authorized by a supervising officer who was on duty. There was no record evidence to support the giving of the modified instruction regarding the defense of an unlawful detention/arrest, and the failure to give such an instruction was not confusing or misleading as the standard instructions adequately stated the legal principles that applied to this case.

Alternatively, even presuming that it was error in not giving the additional instruction regarding the strip search, even though that special instruction would have incorrectly given the state of the law as it now stands in Florida, any presumption of prejudice is overcome when the record evidence of the guilt of defendant is overwhelming. State v. Wilson, 276 So. 2d 45 (Fla. 1973). As such, at bar, the alleged error was harmless. Allen v. State, 424 So. 2d 101 (Fla. 1st DCA 1982), petition for review denied 436 So. 2d 97 (Fla. 1983)(Although instruction misstated the law by indicating that force may never be used, error was harmless in view of overwhelming evidence.)

The facts below showed that Petitioner was “very, very loud.” (ST at 116). “He was screaming.” Id. His hands were flailing up and down in an aggressive manner. Id. At first, there was no physical contact, but Petitioner’s reaction made

the officer fear that Petitioner had a weapon. (ST. at 126). As such, the deputy grabbed Petitioner's arm to protect himself in which time Petitioner fell to the ground and the altercation ensued. (ST at 124). Petitioner was violent. (ST at 117). He started to kick his feet and throw his hands in a violent manner, one deputy was punched and the other kicked. (ST at 117).

The deputy was punched in the right side of his face with a closed fist. (ST at 146). Deputy Anton arrived as backup; Petitioner was quite combative, flailing his arms about. (ST at 170-71). Anton issue warnings for Petitioner to keep his hands at his side. (ST at 172). At no time did Petitioner comply, Deputy Enrique reached and attempted to take control of Petitioner's arm. (ST at 173). Petitioner went straight to the ground. (ST at 173-74). Petitioner kicked Anton in both legs. (ST at 176). They continued to battle with him until they got restraints on. (ST at 118).

As such, the record conclusively shows that Petitioner is guilty of the crime charged.

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court AFFIRM the judgment and sentence below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Answer Brief on the Merits" has been furnished to: DAVID JOHN MCPHERRIN, Assistant Public Defender, Criminal Justice Building/6th Floor, 421 3rd Street, West Palm Beach, FL 33401, this ___ day of May, 2005.

_____

Of Counsel

Certificate Of Type Size And Style

In accordance with Fla. R. App. P. 9.210(a)(2), Respondent hereby certifies that the instant brief has been prepared with Courier New 12 point font.

_____
MYRA J. FRIED