IN THE SUPREME COURT OF THE STATE OF FLORIDA,

STATE OF FLORIDA,

Petitioner,

v.

KELVIN FRANKLIN,

Respondent.

Case No. SC04-1523

****
ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEAL
****

PETITIONER'S BRIEF ON THE MERITS

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CERTIFICATE OF TYPE FACE AND FONT

Counsel for the Petitioner/Appellant hereby certifies, pursuant to this Court's Administrative Order of July 13, 1998, that the type used in this brief is Times Roman 14 point proportionally spaced font.

____
JOSEPH A. TRINGALI
Assistant Attorney General

PRELIMINARY STATEMENT

Petitioner was the prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, and the appellee in the Florida Fourth District Court of Appeal. Respondent was the defendant in the trial court and the appellant in the district court.

In this brief, the parties will be referred to as they appear before this Court, except that the Petitioner may also be referred to as "State" or "Prosecution."

The following symbols will be used;

R = Record on Appeal

T = Transcripts

STATEMENT OF THE CASE AND FACTS

Respondent, Kelvin Franklin, was charged in the Circuit Court of the Fifteen Judicial Circuit with the crimes of attempted first degree murder with a firearm; Count II, attempted second degree murder with a firearm, Count II, attempted second degree murder with a firearm; and Count IV, delinquent in possession of a weapon/firearm. At trial the State elected not to proceed on Count IV.

The evidence showed that Respondent shot a gun at a car which contained two victims, Tavares Pierce and Chris Lorick. One of the bullets went through the car and struck an three-year-old girl, Makayla Campbell. Her father, Michael, testified that he and his family had lived in the neighborhood where the incident took place for nine years; that he knew Respondent by his street name, "Haircut"; that he saw a green car come down the street; and that he saw Respondent take a gun from his waistband and heard the shots. He was absolutely certain that Respondent had fired the shot that hit his daughter (T 354-368).

At the conclusion of the State's case, the trial judge granted a judgment of acquittal as to Count I, attempted first degree murder with a firearm, down to the lesser-included offense of attempted second degree murder with a firearm. Then, at the conclusion of the trial, the judge instructed the jury on three counts of attempted second degree murder with a firearm. As to Counts I and II, trial judge instructed the

jury on the lesser-included offenses of aggravated assault with a firearm, aggravated assault with a deadly weapon, and improper exhibition of a dangerous weapon. As to Count III, the trial judge, over Respondent's objection, instructed the jury on the lesser-included offenses of aggravated battery with a firearm, aggravated battery with a deadly weapon, and improper exhibition of a deadly weapon (R 732). The jury found Respondent guilty of two counts of attempted second degree murder as charged in Counts I and II, and in Count III guilty of aggravated battery with a firearm, with special findings that he discharged a firearm and inflicted serious bodily injury.

Respondent appealed his conviction to the Fourth District Court of Appeal, which held that under these facts the aggravated battery was not a lesser included offense and remanded the case for a new trial. The Fourth District relied heavily on this Court's holding in Ray v. State, 403 So.2d 956 (Fla. 1981), and said that "a lesser included offense, by definition, is an offense which carries a lesser penalty." The Fourth District then granted Petitioner's motion to certify a question of great public importance. In doing so, the Court stated, "we are uncertain as to whether our resolution of this issue is required by Ray v. State, 403 So.2d 956 (Fla. 1981), which defined lesser included offenses, but did not consider the effect of a statute such as section 775.087."

Petitioner timely filed a Notice to Invoke the jurisdiction of this Court.

SUMMARY OF THE ARGUMENT

The concept of relying on the possible sentence that might be imposed following the application of enhancement statutes – rather than the statutory degree of the crime – to determine whether or not one crime is a lesser included offense of another represents a significant prospective and retrospective change in the law of Florida in light of the recently-enacted "10-20-life statute."

In reaching its conclusion in the case at bar, the Fourth District claimed it was following the reasoning of this Court in Ray v. State, 403 So.2d 956 (Fla. 1981), where, it said, the Court held that a lesser included offense is by definition an offense which carries a lesser penalty. However, the issue before this Court in Ray was whether it was fundamental error to convict a defendant under an erroneous lesser-included offense when he had the opportunity to object. The language used by this Court in Ray cannot in any reasonable way be taken to mean that every permissible lesser included offense must, by definition, be one in which a defendant is subject to a lesser penalty. In very clear language this Court said that while a crime of lesser penalty might be one type of permissible lesser included offense, there was another type of crime that was equally suitable: "a crime of lesser degree."

The Fourth District admitted it was unsure of whether Ray mandated reversal in the case at bar, and this Court should rule in the premises.

ARGUMENT

THE CERTIFIED QUESTION OF THE FOURTH DISTRICT COURT OF APPEAL SHOULD BE ANSWERED IN THE AFFIRMATIVE.

Jurisdiction

Florida Rule of Appellate Procedure 9.030(a)(2)(v) provides the jurisdiction of this Court may be invoked to pass upon a question certified to be of great public importance. On May 19, 2004, the Fourth District issued an opinion, Franklin v. State, 877 So.2d 19 (Fla. 4th DCA 2004) in which it held that the crime of aggravated battery while discharging a firearm and causing serious bodily injury is not a lesser included offense of attempted second degree murder with a firearm. The Court reasoned, that "Under section 775.087, Florida Statutes (2002), our 10-20-life statute, the findings that [the defendant] discharged a firearm and caused serious bodily injury increased the penalty on aggravated battery so that it was not actually less than the penalty for the greater offense, attempted second degree murder with a firearm."

Following the denial of a motion for rehearing, the Fourth District Court of Appeal certified the following question as being one of great public importance:

> WHERE THE EVIDENCE WOULD SUPPORT FINDINGS UNDER SECTION 775.086, [sic] FLORIDA STATUTES, THAT RESULT IN THE PENALTY FOR AGGRAVATED BATTERY BEING THE SAME AS FOR ATTEMPTED SECOND DEGREE MURDER, IS

AGGRAVATED BATTERY A LESSER INCLUDED OFFENSE OF SECOND DEGREE MURDER?

Argument

Petitioner respectfully submits the certified question should be answered in the affirmative, that is, that aggravated battery may be a lesser-included offense of attempted second degree murder, in spite of that fact that the penalty for aggravated battery may be enhanced and result in the same punishment. Petitioner further submits the Fourth District Court of Appeal erred both in its interpretation of Ray and in its in reasoning with respect to defining lesser-included offenses.

In the first place, the decision of the Fourth District Court misapplies this Court's holding in Ray. It is not supported by the decisions of this Court and at least one other district court. In reaching its conclusion in the case at bar, the Fourth District claimed it was following the reasoning of this Court in Ray v. State, 403 So.2d 956 (Fla. 1981), where, it said, the Court held that a lesser included offense is by definition an offense which carries a lesser penalty. However, Petitioner submits the majority of the Fourth District Court panel misapprehended the law as laid down in Ray. Judge Stone, dissenting from the majority decision, correctly pointed out that the jury was advised that the additional findings would subject the defendant to enhanced penalties and that affirming on the given facts would not be inconsistent with

Ray.

The issue before this Court in Ray was whether it was fundamental error to convict a defendant under an erroneous lesser-included offense when he had the opportunity to object. This Court began its opinion by saying, "To dispose of this case, we must first determine whether committing a lewd and lascivious act on a minor under the age of fourteen is a lesser included offense of sexual battery of a person over the age of eleven." After considering – and rejecting – the ideas that the crime might be necessarily included or permissively included, the Court said, "It is also not 'lesser' because both sections 794.011(5) and section 800.04 are second-degree felonies." However, much later in its opinion, the Court said, "If the instant complained-of instruction had been a permissible lesser included offense, i.e., a crime of lesser degree or one subject to a lesser penalty . . . the district court would have been correct in affirming the conviction." (Emphasis added).

Thus the language used by this Court in Ray cannot in any reasonable way be taken to mean that every permissible lesser included offense must, by definition, be one in which a defendant is subject to a lesser penalty. In fact, in very clear language – by the use of the disjunctive "or" – the Court said that while a crime of lesser penalty might be one type of permissible lesser included offense, there was another type of crime that was equally suitable: "a crime of lesser degree." Thus, the concept of

relying on the possible sentence that might be imposed following the application of enhancement statutes – rather than the statutory degree of the crime – to determine whether or not one crime is a lesser included offense of another represents a significant change in Florida law in light of the recently-enacted "10-20-life statute." It is a change that is not supported by case law.

When it had the opportunity, at least one other district court of appeal weighed in on the issue, and published on opinion which provides some guidance. In S.L.S. v. State, 404 So.2d 105 (Fla. 1st DCA 1981), the First District Court of Appeal rejected the idea that in order for an offense to be considered lesser included, there is a requirement that it be one subject to a lesser penalty. In so doing, the First District could not have been more specific in its interpretation of this Court's prior holding: "We do not view Ray as imposing an absolute requirement that in order to be a proper lesser included offense . . . the offense must be one subject to a lesser penalty." In short, Petitioner respectfully submits the Fourth District simply misapplied the holding of Ray.

Secondly, Petitioner submits the Fourth District Court of Appeal erred in its reasoning with respect to defining lesser-included offenses. In reaching its decision the Fourth District Court apparently overlooked the holding of its own opinion in Miller v. State, 438 So2d 83 (Fla. 4th DCA 1983), a opinion which was subsequently

affirmed by this Court. See Miller v. State, 460 So.2d 373 (Fla. 1984).

In Miller, the defendant was charged with second degree murder with a handgun, and the jury brought back a verdict of guilty on the lesser included offense of attempted second degree murder. Judge Hurley, writing for a unanimous panel, had no difficulty saying that the offense at conviction was lesser included in spite of the fact that, because of the existing enhancement statute, the trial court reclassified the attempted second degree murder from a second degree to a first degree felony and sentenced the defendant to twenty years, five years more than the maximum sentence he would have received for the lesser included offense without the enhancement. Significantly, this Court agreed with the Fourth District Court that reclassification provisions did not apply under those circumstances and affirmed this Court.

One appellate opinion supports the Fourth District Court's conclusion. In Rivers v. State, 425 So.2d 101, 105 (Fla. 1st DCA 1982) the appellant, who was charged with robbery with a firearm, alleged the trial court erred in refusing to give a just instruction on the lesser-included offenses of robbery with a deadly weapon and robbery with a weapon. The appellant stipulated at the trial that he entered a store and committed the robbery with a shotgun. In upholding the trial court's refusal to give the requested instructions the First District said, "There was no evidence upon which to base a finding that the shotgun was not a firearm. Robbery with a deadly weapon and

robbery with a weapon carry the same penalty as the offense charged. Each offense is a felony of the first degree. Section 812.13(1), (2)(a) and (b), Florida Statutes (1981). No offense is deemed to be a lesser offense if it carries the same penalty as the crime under consideration."

However, when this Court was invited join in similar reasoning, it declined to do so. In State v. Weller, 590 So.2d 923, 927 (Fla.,1991), the defendant was charged with two first-degree felonies: trafficking in 400 grams or more of cocaine in violation of section 893.135(1)(b)(3) and conspiracy to traffic in 400 grams or more of cocaine in violation of section 893.135(4) Florida Statutes (1983). At trial, the defendant requested instructions on lesser-included offenses, including the first-degree felony of conspiracy to traffic in cocaine in amounts less than 400 grams but more than 200 grams (which carries a minimum mandatory sentence of five calendar years and a fine of $100,000), see § 893.135(1)(b)(2), Fla.Stat. (1983); and the first-degree felony of conspiracy to traffic in cocaine in amounts less than 200 grams but more than twenty-eight grams (which carries a minimum mandatory sentence of three calendar years and a fine of $50,000). The trial court denied his request, and the Fourth District reversed based on the failure of the give the requested instructions. Weller v. State, 501 So.2d 1291 (Fla. 4th DCA 1986).

On review, this Court affirmed. It admitted that "at first blush" it would be

inclined to agree with the trial court and hold that two trafficking offenses were not lesser included offenses of the conspiracy offense since all of them were first-degree felonies and the Court had previously stated that offenses are not "lesser" if they carry the same penalty. See State v. Carpenter, 417 So.2d 986 (Fla.1982). Yet in Weller the Court went on to hold that in spite of their shared status as first-degree felonies, two of the three offenses were lesser-included because they carried different minimum penalties. The Court reiterated that "before the trial court can impose sentence on a defendant when enhancements of this type are authorized, the trial court must inform the jury that the minimum mandatory punishment for the offense is greater depending upon the quantity of the substance involved."

It appeared that the Court was anticipating the very "jury pardon" issue raised by the Fourth District in the case at bar. Eight years after its decision in Weller, in State v. Estevez, 753 So.2d 1, 4 (Fla. 1999), this Court addressed the issue directly, saying that while a statute might limit a trial judge in sentencing once a specific conviction is secured, "none of its provisions obviates the jury's inherent power to "pardon" a defendant by convicting the defendant of a lesser offense." And although Judge Stone did not cite either Weller or Estevez in his dissenting opinion in the case at bar, his reasoning was very much the same when he said:

> The jury was given the option of finding Franklin guilty of

> attempted second-degree murder with a firearm (with special additional findings as to discharge and injury), or lessers that included attempted second-degree murder or aggravated battery with a firearm (with special additional findings to be made as to whether a firearm was discharged and whether great bodily harm was inflicted.). The jury could have determined that the offense was committed without discharge or without great bodily harm.

Franklin v. State, 877 So.2d 19, at 21.

The reasoning expressed by this Court in Estevez has changed little if at all since Brown v. State, 206 So.2d 377, 382 (Fla. 1968), where the Court defined a lesser-included offense simply as an offense which "must be an essential aspect of the major offense." "In other words," the Court said, "the burden of proof of the major crime cannot be discharged, without proving the lesser crime as an essential link in the chain of evidence. For example, in order to prove a robbery, the state must necessarily prove a larceny as an essential element of the major offense." In such a situation, the Court explained, the law required the instruction on the lesser offense, even though the proofs might satisfy the trial judge that the more serious offense was committed because it granted the jury the discretion to convict of a necessarily included lesser offense.

Petitioner submits the same reasoning must be applied in the present day of special verdicts and enhanced sentences. When properly-instructed, the jury has the

discretion to make factual findings which, in the words of the majority opinion, "allow a jury to exercise its "pardon" power . . . and gives the jury the opportunity to have the defendant receive a punishment which is less severe than the crime charged." Franklin, 877 So.2d 19, at 20. Thus, the main reason for the Fourth District Court's opinion cannot be supported.

Finally, Petitioner submits that even if the Fourth District Court's decision were to be affirmed, the remedy ordered by the Court is inappropriate in the case at bar. Here, the core issue is sentencing: whether, because of provisions based on enhancement of punishment, one crime is the lesser included offense of another. Regardless of the outcome of that legal question, the record clearly shows the jury found Respondent guilty of aggravated battery and made two special findings of fact: that he discharged a firearm and that as a result thereof great bodily harm was inflicted on a human being (R 137). Clearly, such factual findings cannot be overturned by an appellate court. Accordingly, Petitioner contends that if the Court were to answer the certified question in the negative, that is, hold that because of the provisions of section 775.087, aggravated battery is not a lesser included offense of second degree murder, the proper remedy would be to remand the case to the trial court for the imposition of the next-lower sentence based on the factual findings of the jury. Given those factual findings, the appropriate sentence under section 775.087(2)(a)1 and 2 would be twenty

years.

In conclusion, Petitioner submits that in the case at bar, the Fourth District Court clearly misapprehended the law as laid down by this Court. Its opinion represents a significant departure from established law. The implications of its opinion go far beyond the aggravated battery/attempted second degree murder question, and impact all lesser included offenses which may be subject to enhanced penalties because of the facts of a particular case. The question which it certified will affect sentencing procedures throughout the State of Florida. Petitioner respectfully submits the question should be answered in the affirmative; that the case at bar should be reversed and remanded, and that Respondent's conviction should be affirmed.

CONCLUSION

WHEREFORE based on the foregoing arguments and the authorities cited herein, Petitioner respectfully contends the decision of the Fourth District Court of Appeal is in error; it is in conflict with decisions of this Court and other district courts. Therefore, this Court should reverse and remand with instructions to reinstate Respondent's conviction and affirm the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Petitioner's Brief on the Merits" was sent by United States mail to EVELYN A. ZIEGLER, Esq., Attorney for Respondent, 328 Banyan Boulevard, Suite J, West Palm Beach, FL 33401 on October 25, 2004.

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