

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. SC04-0485
5D03-120

STEVEN EUGENE ISELEY,

Respondent.

-----/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Iseley was charged by Information filed June 28, 2002, with one count of aggravated assault with a deadly weapon, a firearm. (R. Vol. I, p. 67). At trial, the following evidence was presented to the jury:

The victim, riding a scooter, pulled up to a stoplight just over the Main Street bridge, heading east on Main Street. (R. Vol. III, p. 235-36). Iseley, driving a large white pickup truck, pulled up next to the victim, very close. (R. Vol. III, p. 236-38). Iseley rolled down the passenger side window. (R. Vol. III, p. 346; 358). Iseley then said something to the victim about the victim's driving of his scooter. The victim responded. (R. Vol. III, p. 237).

Iseley then pulled a small black handgun out of the center console in his truck, worked the slide as if to chamber a round, and said that the victim would not be driving on the Florida roads anymore. (R. Vol. III, p. 239-41). The victim was in fear for his life and took off. (R. Vol. III, p. 245). The victim immediately flagged down an approaching law enforcement officer, who, having heard the victim's allegations, stopped Iseley's truck within minutes of the incident. (R. Vol. III, p. 170; 172; 174).

The police asked Iseley if he had a gun in his truck and obtained Iseley's consent to search for and retrieve the gun.

The gun was found in the center console. (R. Vol. III, p. 177). The victim identified the gun the police retrieved from Iseley's truck as the one he saw. (R. Vol. II, p. 243; 182; State's Exhibit 1). The police then placed Iseley under arrest. (R. Vol. III, p. 213).

During the jury instruction conference, Iseley requested that the jury be instructed only on aggravated assault with a deadly weapon, without reference to the firearm. (R. Vol. IV, p. 285-87). The trial court denied that request and, noting Iseley's objection, indicated that the jury would be instructed on aggravated assault with a firearm. (R. Vol. IV, p. 288-89). At Iseley's request, the only lesser included charge upon which the jury was instructed was simple assault. (R. Vol. IV, p. 405-46).

The jury returned a verdict of guilty to aggravated assault with a firearm as charged in the information. (R. Vol. I, p. 80). Iseley filed a motion for arrest of judgment, again raising the issue of whether the trial court erred in refusing to instruct the jury on assault with a deadly weapon without reference to a firearm. (R. Vol. I, p. 131-142). The trial court denied Iseley's motion. (R. Vol. I, p. 143). The trial court then adjudicated Iseley guilty and sentenced Iseley to three years incarceration. (R. Vol. I, p. 148-153).

Iseley filed a timely notice of appeal to the Fifth District Court of Appeal. After briefing, the Fifth District issued its opinion reversing Iseley's conviction and remanding for a new trial. *Iseley v. State*, 865 So. 2d 580 (Fla. 5th DCA 2004). The State moved for rehearing of the Fifth District's decision on January 16, 2004, asserting that the opinion of the court conflicted with opinions of this Court, the Fifth District itself, and other district courts. Rehearing was denied on February 18, 2004. The State timely filed its notice to invoke this Court's jurisdiction, this court accepted jurisdiction on July 7, 2004, and this brief follows.

SUMMARY OF ARGUMENT

The crime of aggravated assault is defined by statute and does not include separate divisions for whether there is a firearm or any other deadly weapon. A penalty enhancement does not change or alter the elements of the substantive crime. The trial court properly instructed the jury on the elements of aggravated assault with a firearm. The Fifth District's holding that the jury be instructed on aggravated assault with a deadly weapon without reference to the firearm is not required by the Court's opinions or the law.

ARGUMENT

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE ELEMENTS OF AGGRAVATED ASSAULT WITH A DEADLY WEAPON.

Iseley argued on direct appeal that it was improper for the trial court to instruct the jury on and provide a verdict form for aggravated assault with a firearm without also instructing the jury on and providing a verdict form for aggravated assault with a deadly weapon without reference to the firearm. The Fifth District Court of Appeal agreed with Iseley and reversed. *Iseley v. State*, 865 So. 2d 580 (Fla. 5th DCA 2004). Because the Fifth District's opinion is contrary to this Court's decisions, Iseley's conviction and sentence should be affirmed.

A. Standard of review.

This court reviews the refusal to give a requested jury instruction for an abuse of discretion. *James v. State*, 695 So. 2d 1229, 1236 (Fla. 1997)(noting that a trial court has wide discretion in instructing the jury).

B. Iseley was properly charged and properly convicted of aggravated assault.

Aggravated assault may be committed in two ways. An aggravated assault is an assault either "(a) with a deadly weapon without intent to kill, or (b) with an intent to commit a felony." §784.021(1), Fla. Stat. (2002). The Information

filed in this case charged Iseley with aggravated assault under the deadly weapon subsection, as opposed to the intent to commit a felony subsection. (R. Vol. I, p. 67). The reference to a "deadly weapon" in the title of the charge in the Information is a reference to using a firearm. The body of the charge clarified that the exact type of deadly weapon alleged to have been used was a firearm. (R. Vol. I, p. 67). It is undisputed in this record that the firearm Iseley used to threaten the victim was the only deadly weapon of any type involved in the assault.

Iseley and the Fifth District confused the elements of the crime of aggravated assault with the protections to which Iseley was entitled pursuant to due process of law at the time of sentencing. The elements of aggravated assault with a deadly weapon were satisfied by the trial court's instruction to the jury and the jury's verdict that Iseley had assaulted the victim with a firearm. Had the jury not believed that Iseley used a firearm, the only lawful verdicts would have been guilty of simple assault or not guilty. There was no evidence of any other deadly weapon.

Upon conviction for aggravated assault with a deadly weapon, Iseley's sentence could be enhanced for possession of a firearm if Iseley was first notified that it might be, and then only if the jury made the factual determination that Iseley actually

possessed a firearm. *State v. Overfelt*, 457 So. 2d 1385, 1387 (Fla. 1984); *Tucker v. State*, 726 So. 2d 768 (Fla. 1999). This due process protection is most often provided, as it was in this case, by charging use of a firearm, as the deadly weapon, in the Information, and then using the language "as charged in the information" in the verdict form. *Tucker*, 726 So. 2d at 771.

Admittedly, the trial court may, in its discretion, instruct the jury on assault with a deadly weapon and provide a verdict form that asks whether the defendant is guilty of assault with a deadly weapon and separately, whether the defendant possessed or used a firearm during the commission of the crime. This court has specifically held that the trial court is not required to use this method. *Overfelt; Tucker, supra*. The Fifth District's opinion in this case directly conflicts with those prior holdings on this same point.

In *State v. Overfelt*, 457 So. 2d 1385, 1387 (Fla. 1984), this Court stated that "before a trial court may enhance a defendant's sentence or apply the mandatory minimum sentence for use of a firearm, the jury must make a finding that the defendant committed the crime while using a firearm either by finding him guilty of a crime which involves a firearm or by answering a specific question of a special verdict form so indicating." (Emphasis added). The Court did not require that

a separate verdict form be used, but rather only that the necessary factual finding be made by the jury.

In *Tucker v. State*, 701 So. 2d 398 (Fla 5th DCA 1997), the Fifth District affirmed the imposition of the firearm enhancement based on the jury's verdict for the crime "as charged" in the information, that is, with a firearm. The Fifth District certified a question of great public importance to this Court on whether there needed to be a special verdict form, or whether it was sufficient for the jury to have found that the defendant committed the crimes "with a firearm" as charged in the information. *Id.* This Court granted review and answered the question, stating that there did not need to be a special verdict form. *Tucker v. State*, 726 So. 2d 768 (Fla. 1999). This Court stated; "Accordingly, the mandatory minimum can be based on jury verdicts which specifically refer to the use of a firearm, or to the information where the information contained a charge of a crime committed with the use of a firearm." *Id.* at 771. (Emphasis added). With regard to the requirement of a separate verdict form, this Court stated:

Moreover, while this Court in [*State v.*] *Hargrove* [694 So. 2d 729 (Fla. 1997)] stated that a specific question or special verdict form is the clearest way a jury can make the finding necessary to support sentence enhancement, it also recognized that *Overfelt* only requires a "clear jury finding." 694 So. 2d at 731. Under this

analysis, an enhanced sentence should be upheld if based on a jury verdict which specifically refers to the use of a firearm, either as a separate finding or by the inclusion of a reference to a firearm in identifying the specific crime for which the defendant is found guilty. *Id.*

Tucker, 726 So. 2d at 772.

C. **The Fifth District's opinion requires a result that is contrary to this court's rules and decisions of other district courts.**

To the extent that the Fifth District's opinion in this case requires an instruction and verdict form for aggravated assault with a deadly weapon, but without reference to a firearm, the Fifth District requires the trial court to instruct the jury on, and provide a verdict form for a crime for which there is no evidence in the record. Without the firearm, there is no weapon, deadly or otherwise, and there is no aggravated assault. The Fifth District's requirement directly and expressly conflicts with Fla. R. Crim. P. 3.510(a) and 3.490, and the opinions in *Pride v. State*, 511 So. 2d 1068 (Fla 1st DCA 1987), and *Henry v. State*, 445 So. 2d 707 (Fla. 4th DCA 1984), as well as the Fifth District's own opinions in *Gleason v. State*, 591 So. 2d 278 (Fla. 5th DCA 1991), *D'Ambrosio v. State*, 736 So. 2d 44 (Fla 5th DCA 1999), and *Nesbitt v. State*, 819 So. 2d 993 (Fla 5th DCA 2002).

Rule 3.490 provides that "The judge shall not instruct on any degree as to which there is no evidence." Rule 3.510(b) provides that "The judge shall not instruct on any lesser included offense as to which there is no evidence." Since there is no evidence of any assault with any deadly weapon other than the firearm, it would violate the rules to instruct the jury on aggravated assault with a deadly weapon without any reference to the firearm Iseley used.

In *Nesbitt v. State*, 819 So. 2d 993, 994 (Fla 5th DCA 2002), the court stated, "an instruction on a permissive lesser included offense is proper only where the elements of the lesser offense are set forth in the charging document and are supported by the evidence." (Emphasis added). Likewise, the court has said, "it was error to charge the jury on attempted sexual battery when ..' there is no evidence to support such attempt and the only evidence proves a completed offense.' Fla. R. Crim. P. 3.510(a)." *Gleason v. State*, 591 So. 2d 278, 279 (Fla. 5th DCA 1991)(citing *Pride v. State*, 511 So. 2d 1068 (Fla 1st DCA 1987), and *Henry v. State*, 445 So. 2d 707 (Fla. 4th DCA 1984)). In reversing and remanding for a new trial on the basis that the trial court should have given an aggravated assault with a deadly weapon instruction without reference to the firearm used, the Fifth District's opinion mandates that the

trial court commit a clear violation of the Criminal rules and the relevant law.

D. Aggravated assault with a deadly weapon is not a "lesser" offense than aggravated assault with a firearm.

The Fifth District's statement in their opinion that the offense of aggravated assault with a deadly weapon is a "less onerous" and therefor a lesser included offense of aggravated assault with a firearm, *Iseley*, 865 So. 2d at 583, is in error and conflicts with this Court's opinion in *Ray v. State*, 403 So. 2d 956 (Fla. 1981). In comparing the offenses based solely on one offense carrying a mandatory minimum component of the total available sentence, that statement also conflicts with other court's interpretations of the meaning and import of *Ray*.

This Court had occasion to interpret *Ray* a year after it was announced in *State v. Carpenter*, 417 So. 2d 986, 987 (Fla. 1982). Therein, with regard to lesser included offenses, the Court stated, "we decided this question in *Ray v. State*, 403 So. 2d 956 (Fla. 1981), when we said: *It is also not "lesser" because both section 794.011(5) and section 800.04 are second degree felonies. Id.* (Emphasis in original).

The Fifth District's opinion in this case seems to find that there is only one offense involved here, i.e., aggravated assault with a deadly weapon. "*Fernandez* makes clear that the

offense at issue in the instant case was aggravated assault with a deadly weapon and that the use of a firearm is a sentencing factor ..." *Iseley* at 582. "As our opinion will illustrate, the offense is more accurately labeled an aggravated assault with a deadly weapon with the use of a firearm being a sentence enhancer." *Id.* at 580, n. 1. However, the Fifth District court then went on to find that there are two offenses because there is a different penalty, the minimum mandatory component, if the jury finds the use of a firearm. *Id.* at 583 ("the offenses here, while both third degree felonies, do not carry the 'same penalty' because aggravated assault with a firearm, unlike with a deadly weapon, carries an enhanced sanction, ..."). These two statements are logically and legally inconsistent. There is only one crime and one offense.

The maximum penalty for aggravated assault with a deadly weapon is exactly the same whether the deadly weapon was a firearm or some other deadly weapon. Aggravated assault is a third degree felony punishable by up to five years in prison, regardless of the manner in which it is committed. §784.021(2); 775.082, Fla. Stat. (2002). As a separate matter, the penalty for aggravated assault may be enhanced with a mandatory minimum term if the defendant possess, uses or discharges a firearm during the commission of the crime. §775.087 Fla. Stat. (2002).

This enhancement of the penalty does not create a separate crime.

The Fifth District's approach in this case would substantially re-define what is and is not a "lesser" included offense in a manner inconsistent with the sentencing laws of this state. For example, Florida Statute §893.135(1)(b) provides different punishment enhancements for trafficking in cocaine depending on the amount the defendant possessed. Yet there is only one offense defined in that subsection, the first degree felony of trafficking in cocaine with the same possible maximum punishment. It is only the minimum portion of the possible life sentence that changes based on the amount of cocaine. The crime remains the same, and the elements of the crime remain the same.

The State acknowledges that because a defendant is entitled to due process, before a sentence may be enhanced, the amount of cocaine must be alleged in the information and proven at trial. However, once the State has proven an amount beyond the threshold of 28 grams, the amount only makes a difference in the sentence. In other words, once the amount that is the element of the crime is proven, the State need not prove any other fact about the amount except as it relates to sentencing. The amount of cocaine does not create an entirely separate crime that is

greater or lesser than any other amount of cocaine in a trafficking prosecution.

Similarly, in the instant case, the use of a firearm as the deadly weapon in a prosecution for assault with a deadly weapon does not create an entirely separate crime for purposes of proof of the crime itself. The Fifth District's approach would have the courts confusing proof of the elements of a crime with the entirely separate proof of a fact necessary only for enhancing the sentence after the crime has been proven. Further, the Fifth District's approach would then create a new hierarchy of lesser and greater offenses based solely on the proof necessary to enhance the punishment for an offense that is, based on its defined elements, only one offense. The Fifth District's approach to defining lesser included offenses is in error and should be reversed.

CONCLUSION

Based upon the foregoing, the trial court gave a clear instruction on the law of aggravated assault with a deadly weapon when the only evidence in the record was that the weapon was a firearm. Iseley's due process right to have a sentencing enhancement fact determined by the jury was honored. The Fifth District Court of Appeal's opinion is in direct conflict with the rules and this Court's prior opinions. Iseley's conviction and sentence should in all respects be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Jurisdictional Brief has been furnished by U.S. Mail to Nathan G. Dinitz, Esq., 555 Ballough Rd., Daytona Beach, Florida 32114, this 2nd day of August, 2004.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced, in compliance with Fla. R. App. P. 9.210(a)(2).

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