

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. SC04-0485
5D03-120

STEVEN EUGENE ISELEY,

Respondent.

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ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

JURISDICTIONAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

The facts of the case and its procedural history are contained in the decision below:

"The defendant appeals from his conviction for "aggravated assault with a firearm" and the mandatory minimum sentence of three years imprisonment that was imposed. [FN1]

[FN1] As our opinion will illustrate, the offense is more accurately labeled aggravated assault with a deadly weapon with the use of a firearm being a sentencing enhancer.

There was evidence at trial establishing that the defendant threatened another motorist with a gun during a traffic confrontation."

"The defendant argues he was improperly convicted of aggravated assault with a firearm because: (1) the information charged aggravated assault with a deadly weapon and aggravated assault with a firearm is a greater offense, and (2) the trial court erroneously declined to instruct the jury on aggravated assault with a deadly weapon or to allow it as either a lesser included offense or as an alternative charge on the verdict form. The contention that aggravated assault with a firearm is a greater offense than aggravated assault with a deadly weapon is predicated on the fact that the firearm aspect carries a

minimum mandatory sentence of three years imprisonment. See § 775.087(2)(a)(1), Fla. Stat."

"During the charge conference the defendant objected to instructing the jury on aggravated assault with a firearm claiming he had been charged with aggravated assault with a deadly weapon. The defendant urged that aggravated assault with a firearm is not the same crime as aggravated assault with a deadly weapon and should not be presented to the jury. The defendant alternatively sought an instruction on aggravated assault with a deadly weapon as a lesser included offense. The verdict form offered three alternatives, guilty of aggravated assault with a firearm, guilty of assault, or not guilty."

"The State counters that the jury was properly instructed, that the thrust of the defendant's position, that aggravated assault with a deadly weapon and aggravated assault with a firearm are separate, distinct offenses, is flawed. The State maintains that aggravated assault with a deadly weapon and aggravated assault with a firearm are sentencing variants of the offense of aggravated assault, not separate and distinct offenses." *Iseley v. State*, 865 So. 2d 580 (Fla. 5th DCA 2004), 29 Fla. L. Weekly D125 (Jan.2, 2004).

The State moved for rehearing of the court'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, and this brief follows.

SUMMARY OF ARGUMENT

The opinion of the district court below requires that in a case of aggravated assault with a deadly weapon when the weapon is a firearm the trial court shall instruct the jury on aggravated assault with a deadly weapon with a separate special verdict form for whether there was use of a firearm. This requirement expressly and directly conflicts with this Court's opinion in *State v. Overfelt*, 457 So. 2d 1385 (Fla. 1984) and *Tucker v. State*, 726 So. 2d 768 (Fla. 1999).

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEALS EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF THIS COURT AND ANOTHER COURT.

This Court has jurisdiction under article V, section (3)(b)(3) of the Florida Constitution and Florida Rule of Appellate Procedure 9.030 of a case where a decision of a district court expressly and directly conflicts with a decision of this Court or another district court. The opinion in this case presents such a conflict. Review should be granted.

The Fifth District held that the problem in this case arose because; "The jury should have been instructed on aggravated assault with a deadly weapon and then been asked to make a special finding as per the charging document and evidence adduced at trial as to whether that weapon was a firearm." *Iseley v. State*, 865 So. 2d 580 (Fla. 5th DCA 2004). The Fifth District then reversed and remanded Iseley's conviction of aggravated assault with a deadly weapon, a firearm. Specifically, the Fifth District held: "The trial court committed reversible error in failing to instruct on aggravated assault with a deadly weapon. A new trial is required." *Id.* The effect of this statement is to create express and direct conflict with opinions of this court.

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.*

726 So. 2d 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. The Fifth District's requirement that a separate verdict form be used in an aggravated assault with a deadly weapon case is an express and direct conflict with the above cited decisions of this Court.

Alternatively, the Fifth District's opinion in this case may possibly be read to require the trial court to instruct the jury on the elements of aggravated assault and then provide the jury a verdict form that contains an option for aggravated assault with a firearm and a separate option for aggravated assault, but without a firearm, as a lesser included offense. This reading

of the opinion also expressly and directly conflicts with the opinions of other district courts.

As the district court opinion notes: "There was evidence at trial establishing that the defendant threatened another motorist with a gun during a traffic confrontation." (Opinion, p. 1). In other words, without the presence of the firearm, there would have been no aggravated assault, but only simple assault. §784.021, Fla. Stat. To the extent that it requires an instruction and verdict for aggravated assault without the firearm, the district court opinion requires the trial court to instruct the jury, and provide a verdict form, for a crime for which there is no evidence in the record. This 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).

CONCLUSION

Based on the arguments and authorities presented herein, the State asserts that this Court has jurisdiction to review the decision in this case.

Respectfully submitted,

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CERTIFICATE OF FONT AND TYPE SIZE

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).

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 _____ day of March, 2004.

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