

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

CASE NO.: SC04-0485
5DO3-120

v.

STEVEN EUGENE ISELEY,
Respondent.

***ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL***

RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF FACTS AND OF THE CASE

In its Statement of The Case And Facts, the State has presented half of the decision in *Iseley v. State* 865 So.2d 580 (Fla. 5th DCA 2004). The balance of that opinion, which is attached as the appendix to the Petitioner's Jurisdictional Brief, is also relevant in reviewing this matter.

A summary of the facts show that STEVEN E. ISELEY was originally charged in the trial court with a single count of "Aggravated Assault (Deadly Weapon)", resulting from a traffic confrontation. Over the Defendant's objection at trial, the jury was instructed on the elements of "aggravated assault with a firearm", but not on aggravated assault with a deadly weapon. The verdict form allowed three alternatives, guilty of aggravated assault with a firearm, guilty of misdemeanor assault, or not guilty. The jury then found him "Guilty Of The Offense Of Aggravated Assault With A Firearm, as charged in the information".

On appeal, the Fifth District Court Of Appeal held that a defendant charged with aggravated assault with a deadly weapon is entitled to have the jury instructed on, and the verdict form reflect the crime of aggravated assault with a deadly weapon. There is no separate crime of aggravated assault with a firearm. If the jury finds the defendant guilty of the crime of

aggravated assault with a deadly weapon, then it can determine whether or not the sentence should be enhanced under *Fla. Stat. §775.087 (2)(e)(1)*, because the defendant used a firearm in the commission of the crime. The trial court in this case thus erred in having the jury skip that first step, by not instructing on, nor giving the jury an opportunity to determine whether the defendant should be convicted of aggravated assault with a deadly weapon without the sentencing enhancement for use of a firearm. The district court reversed and remanded for a new trial.

SUMMARY OF THE ARGUMENT

The opinion of the district court requires that when a defendant is charged with aggravated assault with a deadly weapon, that a jury first be instructed on the crime of aggravated assault with a deadly weapon, and the jury may then determine whether the defendant's sentence should be enhanced by his use of a firearm. The opinion does not require that the jury verdict be in any special form, only that it provide an opportunity for the jury to determine whether or not the sentencing enhancement for use of a firearm applies. The opinion is consistent with *Fernandez v. State* 570 So.2d 1008 (Fla. 2d DCA 1990). It does not conflict with any of the decisions cited by the State, nor with any other Florida decisions on this point.

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL NEITHER EXPRESSLY NOR DIRECTLY CONFLICTS WITH ANY DECISION OF THIS COURT OR OF ANY OTHER COURT

In the present case, the Defendant, Mr. Iseley, was charged with aggravated assault with a deadly weapon pursuant to §784.021, *Fla. Stat.* At trial the jury was instructed on the merged crime of "aggravated assault with a firearm", with the alternatives of misdemeanor assault or not guilty. Neither the trial court's instructions to the jury, nor the verdict form, allowed the jury to consider the crime actually charged, i.e., aggravated assault with a deadly weapon.

As the district court noted in its decision, there is no specific crime of aggravated assault with a firearm. The statutory crime is aggravated assault with a deadly weapon, which may be enhanced with a three year mandatory minimum sentence of imprisonment, if the jury specifically finds that the defendant used a firearm in the commission of that crime.

The issue before the district court in this case was not whether the jury found the defendant guilty of the crime of using a firearm in the commission of an aggravated assault - - clearly the jury did check that line on the verdict

form. The issue was whether the jury should have been instructed on, and allowed to determine whether the defendant was guilty of the crime charged without the penalty enhancement provided for use of a firearm. As noted by the district court, "the effect of the instructions given and the verdict form was to bypass the 'deadly weapon' aspect and go directly to the firearm aspect."

The present case does not conflict with *State v. Overfelt*, 457 So.2d 1385 (Fla. 1984). In *Overfelt*, this court emphasized the separate and distinct functions of judge and jury, by holding that before a trial court may enhance the 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 on a special verdict form. This is true even if the evidence of a firearm is un rebutted. See, *Tucker v. State* 726 So.2d 768 (Fla. 1999) (citing to *Hargove v. State* 694 So.2d 729 (Fla. 1997).

In *Tucker v. State* 726 So.2d 768 (Fla. 1999), this court held it to be sufficient to impose a mandatory minimum sentence for use of a firearm, if the jury finds the defendant committed the crime with a firearm, or by special

interrogatory on the verdict form. However, the district court opinion in *Tucker v. State* 701 So.2d 398 (Fla. 5th DCA 1997), shows that the other, lesser included crimes which did not encompass use of a firearm were listed on the verdict form. In *Tucker*, the jury was thus given the opportunity to find the defendant guilty of the crimes charged without enhancing the sentence by use of a firearm - - but elected to find him guilty of use of a firearm. This does not conflict with the district court's opinion in the present case, because in the present case the error was that the jury was not instructed on the commission of the crime without use of a firearm, and then was not given the opportunity to find that the defendant guilty of the crime without reference to the use of a firearm.

The form of the verdict is not the focus of the decision in this case. The present case simply requires that the trial court instruct the jury on the crime actually charged, and allow them to determine whether the defendant is or is not guilty of the use of a firearm in commission of that crime. The case at bar is consistent with the findings in *Overfelt* and *Tucker*, and with the remainder of the case law.¹ The present case is the logical correlary of the

¹ The balance of the cases cited by the State are likewise not in conflict with the decision in the present case. They each discuss either the use of special interrogatory verdict forms, or whether the trial court must instruct the jury on an

other cases; it is the jury that has the right to determine whether the defendant is not guilty of the use of a firearm in the commission of the crime charged.

The present case is consistent with the decision in *Fernandez v. State* 570 So.2d 1008 (Fla. 2d DCA 1990), upon which the district court relied. It is consistent with the caselaw involving other crimes that are subject to enhancement of penalties - - e.g., in drug trafficking cases where the penalties may be enhanced based upon the quantity of drugs involved, it is the jury that must find the applicable quantity of drugs involved, it is the jury that must find the applicable quantity of drugs, even where the evidence as to quantity is uncontradicted. See, e.g., *State v. Weller* 590 So.2d 923 (Fla. 1991); *Limose v. State* 656 So.2d 947 (Fla. 5th DCA 1995). The trial court cannot bypass instructing the jury, nor have them bypass consideration of the lesser crime.

attempt as a lesser included offense.

CONCLUSION

The cases upon which the State relies hold that it is the jury that must find that a sentence for aggravated assault should be enhanced because the defendant possessed a firearm. The present case holds that the jury must also be given the opportunity to find that a sentence for aggravated assault should not be enhanced. The decision in *Iseley v. State* 865 So.2d 580 (Fla. 5th DCA 2004), neither expressly nor directly conflicts with any decision of this court or of any other court of this State. Discretionary jurisdiction should therefore be denied.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished via U.S. Mail this ____ day of April, 2004, to Kellie A. Nielan, Assistant Attorney General and Timothy D. Wilson, 444 Seabreeze Blvd., Daytona Beach, Florida 32118.

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CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 14 point Times New Roman, in compliance with Fla.R.App.P. 9.210(a)(2).

ATTORNEY

