IN THE SUPREME COURT OF FLORIDA

CASE NO. SC05-2122

STATE OF FLORIDA,

Petitioner,

vs.

BILL MONROE HEARNS,

Respondent.

* *

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE THIRD DISTRICT COURT OF APPEAL

* *

PETITIONER'S INITIAL BRIEF ON THE MERITS

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INTRODUCTION

The Petitioner, the State of Florida, was the appellee in the Third District Court of Appeal and the prosecution in the trial court of the Eleventh Judicial Circuit, in and for Miami-Dade County. The Respondent was the appellant and the defendant, respectively in the lower courts. In this brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "R" refers to the record on appeal previously forwarded to this Court by the clerk of the Third District Court of Appeal. The symbol "A" refers to the Appendix attached to this brief, which includes a copy of the district court's opinion. Unless otherwise indicated, all emphasis has been supplied by Petitioner.

STATEMENT OF THE CASE AND FACTS

By amended information, Respondent Bill Monroe Hearns was charged with aggravated assault with a firearm (count 1) and unlawful possession of a firearm by a violent career criminal (count 2). As to count 2, the information specifically included the allegation that Respondent met the criteria for a violent career criminal (VCC) pursuant to §775.084(1)(c), Fla. Stat., due to his prior convictions for violent felonies, "to-wit: a conviction on MARCH 28, 1995, for the felony crime of AGGRAVATED ASSAULT ON LAW ENFORCEMENT OFFICER AND UNLAWFUL POSSESSION OF A CONCEALED WEAPON BY A CONVICTED FELON, in the court of THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY FLORIDA, a conviction on AUGUST 30, 1985, for the felony crime of BATTERY ON LEO AND RESISTING W/ VIOLENCE, in the court of THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY FLORIDA, a conviction on MARCH 21, 1988, for the felon crime of ROBBERY AND POSSESSION OF COCAINE, in the court of THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY FLORIDA ..." Following a jury trial, Respondent was convicted of "unlawful possession of a firearm by a three time convicted felon, the crime charged" in count 2. The aggravated assault count was nolle prossed. Respondent was subsequently sentenced to life in prison without parole as a VCC

pursuant to §775.084(1)(c), Fla. Stat. (1998 Supp.)[1]. On direct appeal, the Third District Court of Appeal affirmed Respondent's judgment and sentence without a written opinion. Hearns v. State, 792 So.2d 464 (Fla. 3rd DCA 2001)(table).

Respondent thereafter filed a motion for post-conviction relief pursuant to rule 3.850, Fla. R. Crim. P., in which he alleged that a prior conviction he had for battery on a law enforcement officer (LEO) did not qualify as a "forcible felony" within the meaning of §776.08, Fla. Stat. (1998 Supp.)[2], so as to

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[1] "(1) As used in this act:
. . . .
(c) 'Violent career criminal' means a defendant for whom the court must impose imprisonment pursuant to paragraph (4)(c), if it finds that:
1. The defendant has previously been convicted as an adult three or more times for an offense in this state or other qualified offense that is:
a. Any **forcible felony, as described in s. 776.08**;
b. Aggravated stalking, as described in s. 784.048(3) and (4);
c. Aggravated child abuse, as described in s. 827.03(2);
d. Aggravated abuse of an elderly person or disabled adult, as described in s. 825.102(2);
e. Lewd, lascivious, or indecent conduct, as described in s. 800.04;
f. Escape, as described in s. 944.40; or
g. A felony violation of chapter 790 involving the use or possession of a firearm."

[2] §776.08, Fla. Stat., provides:

"Forcible felony" means treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing,

permit the trial court's enhanced sentencing of him as a VCC under §775.084(1)(c), Fla. Stat. (1998 Supp.). Following the denial of this motion by the trial court, Respondent appealed to the Third District Court of Appeal.

On appeal, although the district court initially per curiam affirmed the trial court's decision, the court subsequently granted Respondent's motion for rehearing and issued a substitute opinion in which it reversed the trial court's order denying post-conviction relief and remanded for re-sentencing without the VCC enhancement. (A 1-5). In this opinion, the district court held that Hearns' prior conviction for battery on a LEO did not qualify as a forcible felony for VCC sentencing purposes. In arriving at this conclusion, the district court explained that the State had not shown with "record evidence that Hearns' conduct against a law enforcement officer was a forcible felony." (A 4).

Thereafter, Petitioner filed its notice to invoke the discretionary jurisdiction of this Court based on the existing express and direct conflict between the Third District's decision and the decisions of the First, Second and Fourth

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placing, or discharging of a destructive device or bomb; and any other **felony which involves the use or threat of physical force or violence against any individual**.

District Courts of Appeal holding that battery on a law enforcement officer is a qualifying offense for enhanced sentencing purposes. See Branch v. State, 790 So. 2d 437, 439 (Fla. 1st DCA 2000); Brown v. State, 789 So.2d 366 (Fla. 2d DCA 2001); Spann v. State, 772 So.2d 38 (Fla. 4th DCA 2000).

Upon this Court's acceptance of jurisdiction of this case by order dated April 21, 2006, this brief followed.

SUMMARY OF THE ARGUMENT

Battery on a law enforcement officer (LEO) is a qualifying offense for sentencing a defendant as a violent career criminal (VCC) since the statutory element of an actual and intentional touching or striking of an officer required for that offense includes the use of physical force, no matter how slight, so as to constitute a "forcible felony" as defined in §776.08, Fla. Stat. (1998 Supp.). Indeed, under the plain language of §776.08, it is clear that the amount of physical force used is wholly immaterial in determining whether the felony in question is a "forcible felony."

ARGUMENT

BATTERY ON A LAW ENFORCEMENT OFFICER (LEO) IS A QUALIFYING OFFENSE FOR SENTENCING A DEFENDANT AS A VIOLENT CAREER CRIMINAL (VCC) SINCE THE STATUTORY ELEMENT OF AN ACTUAL AND INTENTIONAL TOUCHING OR STRIKING OF AN OFFICER REQUIRED FOR THAT OFFENSE INCLUDES THE USE OF PHYSICAL FORCE SO AS TO CONSTITUTE A "FORCIBLE FELONY" AS DEFINED IN §776.08, FLA. STAT.

The district court's instant holding that the offense of battery on a law enforcement officer (LEO) is not "invariably" a qualified offense for sentencing as a violent career criminal (VCC) is in conflict with decisions of the First, Second and Fourth District Courts of Appeal, all of which hold that battery on a LEO ***is*** a qualifying offense for enhanced sentencing purposes. (A 3).

In Brown v. State, 789 So.2d 366 (Fla. 2d DCA 2001), the Second District agreed with an *en banc* decision of the Fourth District in Spann v. State, 772 So.2d 38 (Fla. 4th DCA 2000), finding that the crime of battery on a law enforcement officer (LEO) is a qualifying offense for prison releasee reoffender sentencing. See also State v. Crenshaw, 792 So. 2d 582 (Fla. 2d DCA 2001). Similarly, in Branch v. State, 790 So. 2d 437, 439 (Fla. 1st DCA 2000), the First District observed that battery on a LEO was a qualifying offense that fell within the ambit of the catch-all subsection of the PRR statute which includes "any

felony that involves the use or threat of physical force or violence against an individual." Most recently, the First District in Jenkins v. State, 884 So. 2d 1014, 1016 (Fla. 1st DCA 2004), rev. denied, 898 So. 2d 937 (Fla. 2005), citing Spann and Brown, reiterated that "battery on a law enforcement officer is a qualifying offense for prison releasee reoffender sentencing." See also Robinson v. State, 751 So.2d 737 (Fla. 1st DCA 2000), approved in part, 793 So.2d 891 (Fla. 2001).

While the foregoing cases involved enhanced sentencing under the prison releasee reoffender (PRR) statute, §775.082(9)(a), Fla. Stat., as opposed to the violent career criminal (VCC) statute, §775.084(1)(d), Fla. Stat. (1998 Supp.), the issue remains the same regardless of which enhancing statute is involved, i.e., whether the crime of battery on a LEO is a felony that "involves the use or threat of physical force or violence" against an individual. This is because in order for the offense of battery on a LEO to serve as a basis for sentence enhancement under either the "catch-all" provision of the PRR statute, §775.082(9)(a)(1)(o), Fla. Stat., or as a "forcible felony" under the VCC statute, §775.084(1)(d)a., Fla. Stat., it must "involve the use or threat of physical force or violence" against an individual.

Thus, whether or not the offense of battery of a LEO "involves the use or threat of physical force or violence" so as to permit sentence enhancement is the precise issue before this Court. Until the Third District's decision in the present case, the Third District utilized a statutory-elements test to determine similar issues in accordance with this Court's decision in Perkins v. State, 576 So. 2d 1310, 1313 (Fla. 1991), where this Court interpreted the term "involves" in the "catch-all" provision of the forcible felony statute, §776.08, Fla. Stat., to mean that "the statutory elements of the crime itself must include or encompass conduct of the type described. This Court therefore concluded that a "forcible felony" is a felony "whose statutory elements include the use or threat of physical force or violence against any individual." Id. at 1313.

Indeed, in accordance with this Court's instruction in Perkins, the Third District in Hudson v. State, 800 So. 2d 627 (Fla. 3d DCA 2001) (special concurring opinion of Chief Judge Schwartz adopted on rehearing as opinion of the court), clarified that to qualify as a forcible felony under §776.08, the crime, "**by statutory definition**, [must] necessarily involve physical force or violence against an individual." Id. at 629. The district court, speaking through then Chief Judge Schwartz,

also suggested that this rule would apply "no matter what the underlying facts or jury finding" are relating to the crime. Id. at 628.

More recently, in the case of Rodriguez v. State, 837 So. 2d 1177 (Fla. 3d DCA 2003) (on rehearing denied), the Third District had occasion to cite to this Court's decision in Perkins in rejecting the defendant's argument that the final clause of §776.08, Fla. Stat., modified the entire list of forcible felonies so that an enumerated felony was not "forcible" unless it involved the use or threat of physical force or violence against any individual. Speaking through Judge Cope, the district court directly observed that, "Under Perkins, the final clause of section 776.08 is interpreted by looking at the **statutory elements** of non-enumerated crimes." Id. at 1178. Accord Cala v. State, 854 So. 2d 840 (Fla. 3d DCA 2003).

Contrary to the statutory-elements test set forth by this Court in Perkins, it is clear that the Third District in the instant case used a fact-based approach in reaching its decision that Hearns' prior conviction for battery on a LEO was not a forcible felony for VCC sentencing purposes. Indeed, the district court came to this conclusion due to the fact that the

State had not shown whether Respondent's prior conviction for battery on a LEO was a mere unwanted touching or caused bodily harm. (A 4). Additionally, the court noted the absence of "record evidence that Hearns' conduct against a law enforcement officer was a forcible felony." (A 4). Hence, since the district court's preoccupation with the facts or "record evidence" (as opposed to merely viewing the statutory elements) of Respondent's prior forcible-felony conviction is directly contrary to this Court's teachings in Perkins, its decision cannot stand.

Due to the fact that the district court used the wrong standard in reaching its decision, the State submits that the Third District's conclusion that "battery on a law enforcement officer … is not invariably a qualified offense for VCC sentencing" is incorrect. (A 3). The State maintains that, when one properly looks solely to its statutory elements, it becomes obvious that the offense of battery on a LEO "involves" the use of "physical force" so as to constitute a forcible felony within the meaning of §776.08, Fla. Stat.

The offense of battery requires as an element that the defendant "actually and intentionally touched or struck" the victim against his/her will. See §784.03, Fla. Stat. (1998

Supp.); Fla. Std. Jury Instr. (Crim.) 8.3. The Respondent's argument, with which the Third District agreed, posits that an "unwanted touching" of an officer, e.g., spitting on an officer, does not "involve the use or threat of use of physical force or violence." It is this premise with which the State most fervently disagrees.

The State submits that the element of an "intentional touching or striking" required for the offense of battery on a LEO necessarily contemplates and includes, at the very least, the use of "physical force," even if only a *de minimis* amount of such force is used. For, one cannot "intentionally touch" another person without performing the physical act of having his/her body or a body part make contact with the other person. The fact that only a very slight amount of physical force is used to accomplish a touching does not negate the fact that physical force is used. Had the legislature intended that a forcible felony involve the use of "great" or "substantial" or "significant" physical force, it would have so provided in its definition of the term. Since it did not, it is clear that the amount or degree of physical force used in committing a felony is wholly immaterial in determining whether the felony is a "forcible felony" under §776.08, Fla. Stat. (1998 Supp.).

Furthermore, under established rules of statutory construction, this Court is not at liberty to construe the legislature's definition of "forcible felony" as requiring an amount of force that is not expressed in the plain, unambiguous language of the forcible felony statute. See Van Pelt v. Hilliard, 78 So. 693, 694-695 (Fla. 1918) (even where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity); accord Baker v. State, 636 So. 2d 1342, 1343 (Fla. 1994); Brown v. State, 715 So. 2d 241, 243 (Fla. 1998).

Applying the foregoing argument to the Third District's decision in Johnson v. State, 858 So. 2d 1071 (Fla. 3d DCA 2003) (on motion for rehearing granted), which the district court relied on in the instant case, it becomes readily evident that Johnson was wrongly decided. There, the Third District concluded that, although the defendant's conviction for battery by spitting on an LEO amounted to an "unwanted touching," spitting is not a forcible felony involving "the use or threat of use of physical force or violence" so as to qualify one for sentencing as a VCC. Id. at 1072. However, in doing so, the appellate court improperly looked at the ***evidence*** in the case,

i.e., that the defendant spit on the officer, rather than at the ***statutory elements*** of the battery offense as required by this Court's decision in Perkins, i.e., whether the elements of an actual and intentional touching or striking an officer required for the charged offense of battery included the use or threat of physical force or violence. Accordingly, because it is clear that the decision in Johnson did not adhere to this Court's precedent in Perkins, the Third District incorrectly relied on Johnson in deciding the instant case.

The State submits that, for enhanced sentencing purposes, the statutory-elements approach in determining forcible felonies utilized by this Court in Perkins is much more practical and workable than an approach requiring the trial courts to assess the facts of each predicate conviction. Many, if not most, predicate offenses involve pleas, for which there were no trials and, hence, little or no factual development. Any approach other than the Perkins statutory-element approach would turn habitual offender sentencing proceedings into trials of all the qualifying predicates to ascertain their actual facts, generating a wide array of problems, such as old convictions, unavailable witnesses; predicate offenses from other

jurisdictions; etc. Hence, this Court should adhere to the precedent it established in Perkins.

CONCLUSION

Wherefore, based upon the foregoing argument and authorities cited herein, Petitioner respectfully requests that this Honorable Court to quash the decision of the Third District Court of Appeal and remand this cause to the district court for further proceedings consistent therewith.

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 furnished by U.S. Mail to Robert Godfrey, Asst. Public Defender, Counsel for Respondent, 1320 NW 14th Street, Miami, FL 33125, on this ____ day of June, 2006.

_____

DOUGLAS J. GLAID
Senior Assistant Attorney General

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the 12 point Courier New font used in this brief complies with the requirements of Fla. R. App. P. 9.210(a)(2).

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DOUGLAS J. GLAID
Senior Assistant Attorney General

APPENDIX