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 BRIEF ON JURISDICTION

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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 "A" refers to the Appendix attached to this jurisdictional brief, which solely includes a conformed copy of the district court's opinion. Unless otherwise indicated, all emphasis has been supplied by Petitioner.

STATEMENT OF THE CASE AND FACTS

Following a jury trial, Respondent Bill Monroe Hearns was convicted of unlawful possession of a firearm by a three-time convicted felon. Hearns was sentenced to life in prison without parole as a violent career criminal (VCC). On direct appeal, the Third District Court of Appeal affirmed Respondent's judgment and sentence. 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 his prior conviction for battery on a law enforcement officer did not qualify as a "forcible felony" under s. 776.08, Fla. Stat. (2000), so as to permit the trial court's enhanced sentencing of him as a Violent Career Criminal (VCC) under s. 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. This jurisdictional brief followed.

SUMMARY OF THE ARGUMENT

This Court should accept discretionary jurisdiction in this cause since the decision below expressly and directly conflicts with decisions of the First, Second and Fourth District Courts of Appeal holding that battery on a law enforcement officer is a qualifying offense for enhanced sentencing purposes.

ARGUMENT

THIS COURT SHOULD ACCEPT DISCRETIONARY JURISDICTION IN THIS CAUSE SINCE THE DECISION BELOW EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THE FIRST, SECOND AND FOURTH DISTRICT COURTS OF APPEAL HOLDING THAT BATTERY ON A LAW ENFORCEMENT OFFICER IS A QUALIFYING OFFENSE FOR ENHANCED SENTENCING PURPOSES.

Petitioner seeks review through conflict jurisdiction pursuant to Article V, Section 3(b)(3), Fla. Const. (1980) and Fla. R. App. P. 9.030(a)(2)(A)(iv), which provides that the discretionary jurisdiction of the Supreme Court may be sought to review a decision of a district court of appeal which expressly and directly conflicts with a decision of another district court of appeal or of the Supreme Court on the same question of law. See Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986).

Here, the district court's holding that the offense of battery on a law enforcement officer is not invariably a qualified offense for VCC sentencing is at odds with decisions of the First, Second and Fourth District Courts of Appeal expressly holding that battery on a law enforcement officer ***is*** a qualifying offense for enhanced sentencing purposes.

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, s.775.082(9)(a), Fla. Stat., as opposed to the violent career criminal (VCC) statute, s. 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, s.775.082(9)(a)(1)(o), Fla. Stat., or as a "forcible felony" under the VCC statute, s. 775.084(1)(d)a., Fla. Stat., it must "involve the use or threat of physical force or violence" against an individual.

As evidenced by this case however, a dispute can arise as to whether or not a particular offense "involves the use or threat of physical force or violence" so as to permit sentence enhancement. Until this case, it appears that the courts have generally taken an element-based approach to this issue, apparently due to this Court's decision in Perkins v. State, 576 So. 2d 1310, 1312 (Fla. 1991), where this Court interpreted the term "involves" in the "catch-all" provision of the forcible felony statute, s. 776.08, Fla. Stat., to mean that "the statutory elements of the crime itself must include or encompass conduct of the type described. The 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. In accordance with this thinking, 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 s. 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.

In stark contrast to the statutory element test referred to above, it is quite evident 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 with "record evidence that Hearns' conduct against a law enforcement officer was a forcible felony." (A 4).

In light of the above, Petitioner submits that the Third District's conclusion here that "battery on a law enforcement officer then, is not invariably a qualified offense for VCC sentencing" and reference to "record evidence" of "Hearns'

conduct" will only serve to create confusion and thereby foster conflict or, at least, inconsistency among the district courts of appeal as to the proper test to be applied by the courts in determining whether a felony is one that "involves the use or threat of physical force or violence against an individual" so as to warrant enhanced sentencing under either the VCC or PRR statutes. Thus, this Court should therefore exercise its discretionary jurisdiction in this matter to resolve the conflict necessarily created by the Third District's decision in order to maintain uniformity of decisions throughout the state. See, e.g., Acensio v. State, 497 So. 2d 640 (Fla. 1986) (supreme court found that it had jurisdiction based upon the conflict created by district court of appeal's misapplication of the law).

CONCLUSION

Wherefore, based upon the foregoing argument and authorities cited herein, Petitioner respectfully requests that this Honorable Court to accept discretionary jurisdiction of this cause.

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 Jurisdiction 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 December, 2005.

_____
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).

_____
DOUGLAS J. GLAID
Senior Assistant Attorney General

APPENDIX