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 REPLY BRIEF

CHARLES J. CRIST, JR.
Attorney General
Tallahassee, Florida

RICHARD L. POLIN
Bureau Chief, Criminal Appeals
Florida Bar No. 0230987

DOUGLAS J. GLAID
Senior Assistant Attorney General
Florida Bar No. 0249475
444 Brickell Avenue, Ste. 650
Miami, Florida 33131
Tel. (305) 377-5441

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CITATIONS

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 "AB" refers to the Respondent's answer brief. Unless otherwise indicated, all emphasis has been supplied by Petitioner.

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.

Although Respondent Hearns agrees that the statutory elements test set out in Perkins v. State, 576 So. 2d 1310 (Fla. 1991), represents the correct standard to apply in resolving the issue before this Court, Respondent's argument actually seeks to have this Court depart from that test. This is evident from his argument that if an offense "can somehow be committed in a manner" that does not involve the use or threat of physical force or violence, then it is "never" a forcible felony under the test of Perkins. (AB 7). This argument is defective for two reasons. First, this approach improperly focuses on the manner in which a crime is committed, i.e., the facts of the offense, rather than on the elements of the crime. Secondly, Respondent's argument ignores the fact that the offense of battery requires an actual and intentional touching, which invariably requires the use of at least some physical force.

The district court's 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) necessarily involves inquiring into the particular facts of each case, which is contrary to this Court's teaching in Perkins. Citing to its prior decision in Johnson v. State, 858 So. 2d 1071 (Fla. 3d DCA 2003), the district court reasoned that a "mere unwanted touching" did not constitute the "use or threat of physical force or violence" to qualify as a forcible felony under §776.08, Fla. Stat. However, this general statement ignores the elements of the battery statute, which requires 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. Certainly, it is beyond dispute that in order to accomplish a touching of another person within the battery statute, there must be some force used. And, since there must be some *physical* contact with another person, as opposed to merely a mental one, it logically follows that some physical force is required to commit a battery. The fact that the amount of physical force used to commit the battery is slight or does not result in injury is immaterial in determining whether battery on a LEO is a forcible felony, as the forcible felony statute only requires that the

felony "involve the use or threat of physical force or violence against any individual." See §776.08, Fla. Stat.

Furthermore, contrary to the Third District's opinion and Respondent's argument, the State maintains that an unwanted intentional touching *does*, in fact, constitute a "use of physical force" against another within the meaning of the forcible felony statute. See §776.08, Fla. Stat. This is because an intentional physical *touching*, as is required for the offense of battery, whether wanted or not, always involves the use of physical force, however slight. See L.D. v. State, 355 So. 2d 816, 817 (Fla. 3d DCA 1978) ("It is clear that the force used in a criminal battery need not be sufficient to injure."). Also, since the offense of battery must involve an *intentional* touching, as opposed to a mere inadvertent or accidental one, it is obvious that any such touching contemplates the use of some physical force in order for the defendant to carry out his/her intent. Therefore, contrary to the Third District's opinion here, the offense of battery cannot be accomplished without the use of physical force. As such, the State submits that battery on a LEO always constitutes a "forcible felony" within the meaning of 776.08, Fla. Stat.

Despite Respondent's thinking, the examples of cases cited by Respondent involving what the Third District in Johnson termed an "unwanted touching" nevertheless implicated the use of physical force. Indeed, Respondent's argument, which myopically focuses on the force felt by the victim as opposed to the force used by the defendant, overlooks the fact that it required physical force to intentionally cause all of the touches involved in the cited cases. For instance, the act of flicking a cigarette and the other intentional hand/arm movements involved in these cases all resulted from the use of some physical force emanating from the defendant's fingers, hands or arms. And, in the Third District's Johnson case, it is clear that the defendant's act of spitting constituted a use of physical force originating from his mouth. Thus, whether wanted or not, and whether violent or not, an intentional physical touching of another person necessarily implicates the use of physical force. Accordingly, the offense of battery on a LEO qualifies as a forcible felony so as to be a qualifying offense for VCC sentencing purposes.

Moreover, in light of the foregoing, it is clear that the Third District's decision below creates a distinction between the two forms of battery on a LEO where no distinction should

exist. Indeed, contrary to the Third District's opinion, since ***both*** the "intentional touching" form of battery on a LEO [under §784.03(1)(a), Fla. Stat. (1985)] and the "bodily harm" form of battery on a LEO [under §784.03(1)(b), Fla. Stat. (1985)] constitute forcible felonies, it is immaterial whether the State demonstrated with record evidence or otherwise the particular form of Respondent's prior battery on a LEO conviction. Thus, the Third District's decision requiring the State to do so should be quashed by this Court.

Respondent argues that since battery on a LEO is not listed as a forcible felony in §776.08, Fla. Stat., while sexual battery and aggravated battery are, the legislature must not have intended it to be a forcible felony. For two reasons, the State disagrees. First, since it is clear from the plain language of the forcible felony statute that the offense of battery on a LEO "involves the use . . . of physical force or violence," there exists no reason to resort to the rules of statutory construction, as Respondent does here. Id.; see Maddox v. State, 923 So. 2d 442, 445 (Fla. 2006) (reiterating that "[I]t is a fundamental principle of statutory construction that where a statute is plain and unambiguous there is no occasion for judicial interpretation.") (quoting Forsythe v.

Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 454 (Fla. 1992)). Secondly, excluding the "intentional touching" form of battery on a LEO as a forcible felony would run counter to the obvious intent of the legislature to give law enforcement officers the "greatest possible protection" under the law. See State v. Iacovone, 660 So. 2d 1371, 1373 (Fla. 1995), citing Ch. 89-100, §2(1), Laws of Fla. (enacting section 775.0823) ("Law enforcement ... officers are constantly exposed to great risk of personal injury and death, and consequently are entitled to the greatest protection which can be provided through the laws of this state."). Therefore, Respondent's argument regarding the legislature's intent should be rejected.

Lastly, Respondent's assertion that it is "incongruous" for battery on a LEO to be considered a forcible felony, when simple battery can never be a forcible felony and the victim's status does not involve the use or threat of physical force or violence, is inapposite. This Court, in Mills v. State, 822 So. 2d 1284, 1287 (Fla. 2002), held that offenses that are reclassified as felonies pursuant to §784.07, Fla. Stat., including the offense of battery on a LEO, qualify as substantive felony offenses for purposes of the habitual offender statute. Consistent with this holding, the State

submits that it is immaterial to the issue before this Court that the victim's status does not involve the use or threat of physical force or violence. So long as the actual and intentional touching or striking required for battery on a LEO involves such physical force or violence, the offense of battery on a LEO qualifies as a forcible felony under §776.08, Fla. Stat.

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,

CHARLES J. CRIST, JR.
Attorney General

_____
RICHARD L. POLIN
Senior Assistant Attorney General

_____
DOUGLAS J. GLAID
Florida Bar No. 0249475
Senior Assistant Attorney General
Department of Legal Affairs
444 Brickell Avenue, Ste. 650
Miami, Florida 33131
(305) 377-5441
Facsimile (350) 377-5655

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petitioner's Reply Brief 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 August, 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).

_____
DOUGLAS J. GLAID
Senior Assistant Attorney General