IN THE SUPREME COURT OF FLORIDA

IN RE: CASE NO.: SC07-705
STANDARD JURY INSTRUCTIONS
IN CRIMINAL CASES-
REPORT 2007-4
_____/

COMMITTEE ON STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES

RESPONSE TO THE COMMENTS OF MR. JAY THOMAS, MR. LEE G. COHEN, AND MR. R. BLAISE TRETTIS

To the Chief Justice and Justices of the Supreme Court of Florida:

Comes now the Supreme Court Committee on Standard Jury Instructions in Criminal Cases, by and through the Chair, the Honorable Terry D. Terrell, Circuit Court Judge, and files this response to the comments received by Mr. Jay Thomas, Mr. Lee G. Cohen, and Mr. R. Blaise Trettis.

The committee filed a report with the court on April 19, 2007, proposing a set of new and amended standard jury instructions in criminal cases.

The court published the proposed instructions in *The Florida Bar News* on July 1, 2007. Comments were received from Mr. Jay Thomas, Mr. Lee G. Cohen, and Mr. R. Blaise Trettis. No comments were received by the committee for proposed instructions 3.6(f), Justifiable Use of Deadly Force; 3.6(g), Justifiable Use of Nondeadly Force; 11.10, Lewd, Lascivious, Indecent Assault upon or in the Presence of a Child; Sexual Battery; and 29.16, Disturbing a Military Funeral.

The committee met on August 17, 2007, to address the comments received by the committee. The individual comments and responses of the committee are captured under each separate proposal. The committee only approved amendments to instructions 28.83, 28.85 and 29.13. They are attached at Appendix A. The

comments of Mr. Thomas, Mr. Cohen, and Mr. Trettis can be found at Appendix B.

I. Proposal 3 — 21.2 Resisting Officer without Violence

Mr. Thomas did not comment on that portion of the proposed instruction that would be read to the jury. He did suggest that the note to the judge be expanded to ensure that the word "lawful" was used consistently. He proposed amending the note to include language to expand a lawful arrest to include a lawful investigatory stop, or lawful traffic stop. The committee did not agree with the suggestion. In Hierro v. State, 608 So.2d 912 (Fla. 3d DCA 1992), the court took exception to the trial judge referring to the defendant when instructing the jury on the duty being performed by the arresting officer. The committee has already amended the instruction to include a reference to Hierro and a direction to the trial court to refer only to the type of legal duty being performed. The committee felt there was no need to expand the holding in Hierro by including investigatory detention or lawful traffic stops. The committee felt the trial court could choose the duty being performed based on the evidence, and properly instruct the jury.

II. Proposal 4

28.6 Fleeing to Elude a Law Enforcement Officer
28.7 Fleeing to Elude a Law Enforcement Officer
28.8 Fleeing to Elude a Law Enforcement Officer
28.81 Fleeing to Elude a Law Enforcement Officer
28.83 Aggravated Fleeing to Elude a Law Enforcement Officer
28.85 Aggravated Fleeing to Elude a Law Enforcement Officer

28.6. Mr. Thomas recommended that instruction 28.6 be reworded to include four elements rather than three. He suggested taking the proposed element three and dividing it into two distinct elements. By expanding the elements, Mr. Thomas proposed adding the words "in knowing compliance with the order." The committee felt this language was unnecessary since the proposed committee instruction already required the state to prove that the defendant "knowing [he] [she] had been directed to stop" willfully failed to do so. Mr. Thomas also recommended rewording the definition of the word "operator." Mr. Trettis, a member of the committee, moved to have the committee adopt the proposal of Mr. Thomas. Mr. Schneider did not believe the recommended changes to the instruction were substantive in nature. The committee voted not to accept the

recommended changes. It is noted that Mr. Lee Cohen commented in his submission to the court that proposed instruction 28.6 "looks okay."

28.7. Proposed instruction 28.7 is modeled after the statutory language found in section 316.1935(2), Florida Statutes. Mr. Thomas had several recommendations for changing the proposal. The committee agreed with Mr. Thomas that the title of the instruction should be amended to include "lights and siren activated." This helps distinguish this instruction from instruction 28.6.

Mr. Thomas disagreed with the decision of the committee to delete element 2 from the instruction:

> **A duly authorized law enforcement officer ordered the defendant to stop or remain stopped.**

He felt that even though the statute does not require it, it is implied that the state must prove this element of the offense. The committee previously explained the rationale of this deletion in the report submitted to the court. Chapter 94-276, Laws of Florida, require the state to prove that the defendant had knowledge that he or she had been directed to stop. However, Chapter 98-274, Laws of Florida, deleted the knowledge requirement in this section of the statute. Mr. Thomas submitted a proposed rewrite of the instruction. Besides inserting element 2 back into the instruction, he expanded the number of elements from four to seven. The committee voted not to accept these recommendations from Mr. Thomas. The instruction is clear, and adding additional elements are not necessary since the proof required is incorporated in the existing proposal.

Mr. Cohen noted in his comments that the committee had properly deleted the knowledge requirement in element 2, but had not gone far enough by failing to delete the element of knowledge throughout the proposed instruction. The committee chose not to accept the recommendation. Section 316.1935(2), Florida Statutes, requires that the defendant willfully flee or elude an officer before the offense can be committed. The committee felt that the court's logic in State v. Giorgetti, 868 So.2d 512 (Fla. 2004) would also apply to a violation of section 316.1935(2), Florida Statutes. It certainly is conceivable that the statute can withstand a constitutional challenge with regard to due process since proof of willfulness is required. The instruction clearly does not raise any due process concerns by including both the requirement that the state prove knowledge and willful fleeing.

28.8. Mr. Thomas took exception to the committee removing element 2 in instruction 28.8. This instruction is patterned after section 316.1935(3)(a), Florida Statutes. The position taken by Mr. Thomas, and the counterpoint raised by the committee, regarding instruction 28.7, also apply to instruction 28.8. Mr. Thomas submitted a proposed instruction that also expanded the elements from four to eight. The committee felt these changes were stylistic, and unnecessary.

Mr. Cohen also expressed his objection to the proposed instruction based on the inclusion of the knowledge requirement found in the proposal. The argument of the committee is identical with that expressed for instruction 28.7.

28.81. Proposed instruction 28.81 is patterned after the language found in section 316.1935(3)(b), Florida Statutes. Mr. Thomas has advised the committee that his recommendations for change are identical to his proposals in instruction 28.7 and 28.8. The committee likewise adopts its same rationale for disagreeing with Mr. Thomas as noted in the committee response for instruction 28.7. The committee also does not agree that the elements of the offense need to be expanded from five to nine elements.

Mr. Cohen has objected to the knowledge requirement found in the proposed instruction. Again, his argument is simply that the legislature has not required the state to prove knowledge on the part of the offender when directed to stop the motor vehicle by a law enforcement officer. The committee has adopted the same logic expressed for instruction 28.7.

28.83. Instruction 28.83 is modeled after section 316.1935(4)(b), and section 316.061, Florida Statutes. Mr. Cohen acknowledged that this section has a knowledge requirement built into the statute, and he expressed no reservations about the proposed instruction submitted by the committee.

Mr. Thomas commented on the first six elements of the proposed instruction. He submitted a proposed instruction to the committee that consisted of eight elements. The committee agreed that element five of the committee's proposed instruction should be amended to delete the words "issued an order" and to substitute these words with the word "ordered." The committee also voted to amend instruction 28.85 to match the language in element five of 28.83. None of the other recommendations for change offered by Mr. Thomas were accepted by the committee. His changes were stylistic, and the committee preferred the existing proposal.

Mr. Cohen did not have any suggestions for change for proposed instruction 28.83.

28.85. Mr. Thomas submitted a proposed instruction with the same comments found in his proposed instruction for instruction 28.83. As noted above, the committee voted unanimously to amend element five of the instruction. The committee did not adopt any other recommendations of Mr. Thomas.

Mr. Cohen had no suggested changes for instruction 28.85.

III. Proposal 5 — 29.13 Animal Cruelty (Felony); 29.13(a) Animal Cruelty (Misdemeanor)

A comment was received by Mr. Jay Thomas on proposed instruction 29.13. He suggested the element reflect the statute more closely and recommended the phrase "to an animal" be inserted right after "committed an act." As written, the element could be taken to mean that a person could be punished for an inadvertent act resulting in the injury or death of an animal. The committee agreed and voted 13-2 to amend the instruction.

The committee spent a significant amount of time debating the misdemeanor instruction in light of the comments from Mr. Thomas and Mr. Trettis and the confusing wording of the statute. A motion to withdrawn both instructions from SC07-705 failed. The committee agreed the instruction needed further work and voted unanimously to file a motion to withdraw it from further consideration in this case. The motion was filled on September 6, 2007.

IV. Proposal 6 — 29.15 Disturbing a School, Religious or Lawful Assembly; 29.16 Disturbing a Military Funeral

Mr. Trettis submitted comments to the committee regarding proposed instruction 29.15. Mr. Trettis took exception to the comment in the instruction. He felt that the comment was actually the elements of the crime that had to be proven. He suggested that the committee define the words "interrupted" and "disturbed" and place them within the body of the instruction, to be read to the jury. As legal authority for his position, Mr. Trettis cited S.H.B. v. State, 355 So.2d 1176 (Fla. 1978). In a dissenting opinion, Justice England disagreed with a majority of the court in upholding the constitutionality of section 871.01, Florida Statutes. Justice England wrote that the majority of the court offered no objective

standard by which the term "disturbed" could be measured. Mr. Trettis felt that without defining the terms "interrupted" and "disturbed," the proposed instruction did not pass constitutional muster, since it impinged on the right of free speech and expression. The committee voted to submit the proposed instruction to the court without any changes, by a vote of 8 to 6.

Respectfully submitted this _____ day of September, 2007.

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CERTIFICATE OF FONT SIZE

I hereby certify that this brief has been prepared using Times New Roman 14 point font in compliance with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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CERTIFICATE OF SERVICE

I hereby certify a true and correct copy of the foregoing instrument has been furnished to:

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