

IN THE SUPREME COURT OF FLORIDA

ANICETO JAIMES, :

Petitioner, :

vs.

STATE OF FLORIDA, :

Case No. SC09-1694

Respondent. :

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

BRIEF OF PETITIONER

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TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE FACTS AND OF THE CASE

Petitioner was charged with two counts of aggravated battery by "by touching or striking said person, against said person's will, or by intentionally causing bodily harm to said person, and in committing said battery did use a deadly weapon, to wit: wooden stick or club" (emphasis added). The exact language of those counts, especially in count 4, in whom the named victim was Richard Miller, is critical to the understanding of this case. That count will usually be referred to as the "Miller" count. In neither aggravated battery count was Petitioner charged with committing the offense by inflicting serious or great bodily injury. Petitioner was also charged with one count of simple battery and one count of felony battery. Prior to trial, the felony battery count was somehow dropped, and it will not be discussed further.

A jury trial was conducted. The trial consisted of a credibility contest as to the exact details of a barroom brawl. Since those details are not critical to an understanding of the issue under review, most of the testimony will not be described at all, and the remainder will be presented in extremely truncated fashion.

Richard Miller, the alleged victim in count 4 of the information, described getting involved in the fight, and said he was hit on the back of the head with a fist by Petitioner. When the fight migrated outside, he said he was hit on the head by a club, by Petitioner. The club was identified and placed into evidence without objection. He also described his injuries as including a gash that needed to be stapled at the hospital. He said he was treated and released at the hospital.

Judy Proctor, the owner of "Judy's Place" (the location of the fight) also described the fight. She said she saw Miller placed in an ambulance and taken to the hospital. She saw that Miller had a big gash on the side of his head. She indicated how long it was, and said she knew it was deep, because she was the one who cleaned it. She followed the ambulance with Miller in it to the hospital and said they stapled the wound.

Jury instructions were agreed to, as well as a verdict form. Without objection, the verdict form as to counts 1 and 4 (#3 on the form itself, the "Miller" count) each allowed the jury to find that Petitioner was guilty of aggravated battery either by causing serious bodily injury or by using a deadly weapon, even though he had not been charged with inflicting serious or great bodily injury in either of those counts. Separate boxes were provided on the verdict form for the jury to indicate which of the two theories of prosecution (use of a deadly weapon or causing serious/great bodily injury) they relied on if they found Petitioner guilty of aggravated battery. Of course, the jury was so instructed as well, although the term "great" was used in place of the word "serious" which appeared on the actual form. Petitioner was found guilty as charged as to count one and the misdemeanor count. However, as to the "Miller" count (4 in the information, and 3 on the verdict form) the jury declined to find Petitioner guilty of aggravated battery by using a deadly weapon (with which he was charged) by not checking the guilty box for that charge. Instead the jury checked the box finding him guilty of aggravated battery by causing serious bodily harm, with which he was not charged. Interestingly, the jury had asked for a clarification of the difference between "serious harm" and a "deadly weapon", but the Court declined to further clarify. Also of interest, the word "serious" on the

verdict form for the "Miller count" was underlined, apparently by the jury foreman.

Petitioner was sentenced to 25 years in prison, concurrently on each felony charge, and to 364 days incarceration concurrently as to the misdemeanor. The obvious sentencing error of imposing a 25 year sentence on a second degree felony has been ordered to be corrected by the District Court, and that sentencing error, the misdemeanor count, and felony count 1 will not be addressed further.

On appeal Petitioner argued that as to the "Miller count" he was wrongfully convicted of aggravated battery by causing great (or serious) bodily harm when he had not been charged with that offense. In an opinion dated April 29, 2009, the District Court held the error was neither preserved nor fundamental and declined to reverse the conviction. A timely motion for rehearing and for rehearing en banc, citing conflict with the Second District's own holding in Sanders v. State, 959 So. 2nd 1232 (Fla. 2nd DCA 2007) and Haley v. State, 315 So. 2nd 525 (Fla. 2nd DCA 1975), was denied on August 12, 2009. This petition followed. This Court accepted jurisdiction by order dated November 19, 2009.

ISSUE

Does Fundamental Error Occur When a Trial Court Uses Jury Instructions and a Jury Verdict Form that Allow a Jury to Render a Verdict of Guilty Against a Criminal Defendant for an Uncharged Theory of Prosecution and Convicts that Defendant of the Crime Under the Uncharged Theory of Prosecution?

SUMMARY OF ARGUMENT

It is fundamental error for a Trial Court to convict a criminal defendant of an offense with which he is not charged. It is also fundamental error for a trial court to convict a criminal defendant under an uncharged theory of prosecution, unless it can be safely assumed the jury did not rely on the uncharged theory in reaching its verdict. In the instant case, not only can it not be assumed the jury did not rely on the uncharged theory, the jury clearly and unequivocally did rely on the uncharged theory in reaching its verdict, and so stated on the verdict form. Furthermore, evidence of the injuries sustained by Miller was presented to the jury, making any assumption the jury did not rely on the uncharged theory even more untenable.

ARGUMENT

The District Court acknowledged that error was committed as to the "Miller count" when the Trial Court instructed the jury on an uncharged theory of prosecution, used an improper verdict form, and allowed Petitioner to be convicted under the uncharged theory of prosecution. However, the District Court also found the error was not fundamental and was not preserved. Petitioner does not dispute the fact that no effort was made by Trial Counsel to preserve this error. However, Petitioner asserts the error is fundamental and therefore requires reversal of the judgment and sentence as to the "Miller" count.

It would be helpful to review the history of the concept of fundamental error in this state, especially as it pertains to instances in which a criminal defendant appears to have been convicted of uncharged conduct. At least as long ago as Young v. State, 195 So. 569 (Fla. 1939) this Court stated it is fundamental that a defendant be acquainted with the charge he must face (emphasis added). In the instant case, Petitioner was not acquainted with the offense of committing an aggravated battery by inflicting great or serious bodily injury on Miller, since he was not charged with that offense. Yet, that is the offense of which he was convicted. In Perkins v. Mayo, 92 So. 2nd 611, 643 (Fla. 1957) it was held that one can not be

indicted for one offense and convicted or sentenced for another, even though the offenses are closely related and may be of the same general character. Again, Petitioner was charged with the admittedly similar offense of aggravated battery by using a deadly weapon, but was not convicted of that offense. He was instead convicted of aggravated battery by causing great or serious bodily injury with which he was not charged.

This Court has consistently defined "fundamental error" as one which had it not occurred, the verdict could not have been reached, Reed v. State, 837 So. 2nd 366 (Fla. 2002), citing Brown v. State, 124 So. 2nd 481 (Fla. 1960). Obviously, since the error in the instant case consisted (at least partly) in allowing the jury to use a verdict form that specifically allowed the jury to reach a guilty verdict for conduct not charged, and also of instructing the jury as to that theory of prosecution, the verdict of guilty as to that uncharged conduct could not have been reached without that error. Under that principle, the error in the Trial Court was therefore fundamental.

Petitioner's position is supported by numerous decisions in both this Court and other District Courts that have held it was fundamental error to allow a jury to be instructed on, and to allow the defendant to be convicted of, an offense not charged: Long v. State, 92 So. 2nd 259

(Fla. 1957), O'Bryan v. State, 692 So. 2nd 291 (Fla. 1st DCA 1997), Moore v. State, 496 So. 2nd 255 (Fla. 5th DCA 1986), and Gaines v. State, 652 So. 2nd 458 (Fla. 4th DCA 1995).

Of course, Petitioner is aware in State v. Weaver, 957 So. 2nd 586 (Fla. 2007) this Court has fairly recently addressed the fundamental error concept as it applies to a jury being instructed on a theory of prosecution not charged. The essential holding in Weaver is that where a general verdict form is used, and the prosecution neither presents evidence of, nor makes argument on, the theory of prosecution not charged, it can be safely assumed the jury did not base its verdict on the uncharged conduct. Under those conditions any error in instructing the jury on an uncharged theory of prosecution is not fundamental. Those conditions are not present in the instant case. A specific verdict form was used, removing any question that the jury based its verdict on the uncharged conduct. Also, although undersigned counsel has not detected any argument made by the prosecution on the uncharged conduct, evidence as to the serious nature of Miller's wounds was presented to the jury from at least two witnesses. Apparently the jury was affected by that testimony because the word "serious" was underlined on the verdict form. Therefore Weaver does not dictate a holding against Petitioner in the instant case.

Indeed, it is submitted a thorough reading of Weaver supports Petitioner's position. As stated above, the crux of Weaver is the notion that (assuming the jury is otherwise correctly instructed) the jury will not return a verdict of guilty as to uncharged conduct. In order for that the assumption to be valid, this Court stated the jury could not have been exposed to evidence or argument applicable to the uncharged theory. It is also obvious this Court's ruling in Weaver was based on the fact that in that case a general verdict form was used which did not clearly indicate which theory of prosecution was relied on by the jury. The clear implication of the holding in Weaver is that if those factors are not present, the assumption the jury did not rely on the uncharged theory can not be made. As described above, the factors relied on by this Court in Weaver, especially the use of a specific verdict form, are not present in this case. Since Weaver appears to be creating a very limited set of circumstances under which a conviction of conduct not charged is not fundamental error, it is submitted that any set of circumstances not conforming with that specific set of circumstances is fundamental error. Put another way, Weaver states that the error in instructing a jury on an uncharged theory of prosecution is not fundamental if, and only if, it can be safely assumed the jury did not rely on the uncharged theory in reaching its verdict. If that assumption can not be made, the error is, as it has traditionally been, fundamental.

The Second District analyzed Weaver in its own decision of Sanders v. State, 959 So. 2nd 1232 (Fla. 2nd DCA 2007). That analysis is the same analysis advocated by Petitioner herein. Sanders held that if the circumstances of the case revealed that it could not be safely assumed the jury did not rely on an uncharged theory of prosecution, then there was fundamental error in allowing the jury to be instructed on that uncharged theory. The circumstances in Sanders that caused that panel to be unable to assume the jury did not convict based on uncharged conduct were the evidence presented and the arguments of counsel. Although counsel for the prosecution in the trial herein did not argue the uncharged theory, there was certainly evidence to support it, since the fact that Miller was taken to the hospital, had a long and deep gash, and needed staples to close the wound, was presented. More importantly, the jury was given a very specific verdict form. That form indicated not only that the jury rejected the charged theory of committing an aggravated battery by using a deadly weapon, but also, beyond any question whatever, that they relied on the uncharged theory of committing an aggravated battery by causing serious (or great) bodily injury. Under Weaver and Sanders it can not be assumed the jury in the instant case did not rely on an uncharged theory of prosecution. The error in instructing the jury on that uncharged theory, using a verdict form that included the uncharged theory, and

convicting Petitioner under the uncharged theory was therefore fundamental.

A word needs to be said about the decisions cited by the District Court in support of its holding. None of those cases discuss a situation in which the defendant was convicted of a crime or theory of prosecution that was uncharged. They all address instances in which the elements of the crime charged were poorly or even inaccurately described. However, none of them resulted in convictions for uncharged conduct. Again, there is a tradition of recognizing a distinction between faulty jury instructions that do not result in conviction of an uncharged crime, and those that do have such a result, Haley v. State, 315 So. 2nd 525 (Fla. 2nd DCA 1975) and Johnson v. State, 226 So. 2nd 884 (Fla. 2nd DCA 1969). The District Court was correct in holding the issue of faulty jury instructions is not fundamental, at least in most cases. However, it becomes fundamental error when the faulty instructions and faulty verdict forms result in a conviction for conduct that was not merely poorly described to the jury, but was not part of the charging document in the first place. It is in failing to recognize that distinction that the District Court erred.

The only remaining issue is what remedy should be applied. By not checking the "deadly weapon" box, the jury acquitted Petitioner of that theory of prosecution, Priester v. State, 294 So. 2nd 421 (Fla. 4th DCA 1974). The next most serious offense which the language of the charging document supports as to the "Miller Count", Count 4, is a simple battery.

CONCLUSION

This Court should reverse the decision of the Second District and order that Petitioner's conviction of aggravated battery in the "Miller Count", Count 4, be reduced to a conviction of simple battery. He should be resentenced accordingly as to that count.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the Office of the Attorney General at 3507 East Frontage Rd. Ste. 200 Tampa, Fl. 33607 on this the _____ day of December, 2009 by regular U.S. Mail.

CERTIFICATE OF COMPLIANCE

Petitioner's Brief is prepared in "Courier New" 12 point type.

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APPENDIX