

IN THE SUPREME COURT OF FLORIDA

State of Florida
Petitioner

V.

CASE NO. SC10-2316

LESTER HACKLEY
RESPONDENT.

_____ /

RESPONDENT'S ANSWER BRIEF
ORIGINAL

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PRELIMINARY STATEMENT

Respondent, Lester Hackley, was the defendant in the trial court and the Appellant in the First District Court of Appeal and will be referred to as Respondent, or by proper name, Appellee, the State of Florida, was the prosecution in the trial court and the Appellee in the First District Court of Appeal and will be referred herein as Petitioner and as the State.

The record on appeal consists of three volumes, which will be referenced as "RI," "RII", and "RIII" respectively followed by any appropriate page number.

All bold type emphasis is supplied, and all other emphasis, is contained within original quotations unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

Respondent adopts the State's Statement of the Case and Facts and incorporated them herein by reference.

SUMMARY OF ARGUMENT

The First District Court of Appeal was correct in affirming the trial court's holding that Respondent's Prison Releasee Reoffender (PRR) sentence based on his conviction for burglary of conveyance with person assaulted was improper.

ISSUE PRESENTED

WHETHER BURGLARY OF CONVEYANCE WITH PERSON
ASSAULTED QUALIFIES FOR ENHANCED SENTENCING
AS A PRISON RELEASE REOFFENDER?

STANDARD OF REVIEW

A pure question of law is reviewed de novo. Sutton v. State, 975 So.2d 1073, 1075 (Fla. 2008).

MERIT

SUMMARY OF ARGUMENT

a.

BURGLARY OF CONVEYANCE WITH PERSON ASSAULTED WAS NOT INTENDED BY THE LEGISLATURE TO BE INCLUDED AS QUALIFYING OFFENSE FOR SENTENCING AS A PRISON RELEASSEE REOFFENDER.

Section 775.082, Florida Statutes requires a defendant to be sentenced as a prison releasee reoffender (PRR) if the defendant is convicted of committing a qualifying offense enumerated in the provision and the offense was committed within three (3) years of the defendant being released from prison. The offense, burglary of conveyance with person assaulted, upon which the Respondent was convicted is not specifically enumerated as a qualifying offense.

Although argued conversely by the State, burglary of conveyance with person assaulted should not be included as a qualifying offense under Section 775.082(9)(a)1. The

Florida legislature did not intend a simple assault couple with a felony to be included in the "catch all" provision because the provision does not included the language or definition of a simple assault. The elements of an assault are defined in Section 784.011, Florida Statutes:

An "assault" is an intentional, unlawful threat **by word** or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well founded fear in such other person that such violence is imminent.

An assault under Section 784.011 therefore can be committed by simple words or by an act. The language "unlawful threat by word" is not included in the "catch all" provision of Section 775.082 which necessarily distinguishes the kind of threat or use of physical force or violence intended by the Legislature to form the basis for enhanced sentencing. The inclusion by the Legislature the offense of aggravated assault in Section 775.082(9) (a)1(1) makes the point imminently clear.

Section 784.021, Florida Statutes defines aggravated assault as an assault:

- (a) **With** a deadly weapon without intent to kill; or
- (b) **With** an intent to commit a felony.

It is clear that construing the enhancement statute in pari materia with Sections 784.021 and 784.011, Florida Statutes, the Legislature did not intend to

criminalize mere words but acts that involve the use of or threat of physical force or violence. The Legislature intended acts such as that required for an aggravated assault, an assault **with a deadly weapon**. If the Legislature had intended simple assault with mere words to be included in the enhancement statute it would have included the specific language of simple assault in the "catch all" provision instead a portion thereof. The Legislature not including the specific language or elements of simple assault in the "catch-all provision" of Section 775.082(9(a)1.0 and not including the offense of burglary of conveyance as an enumerated qualifying offense leads to but one conclusion that burglary of conveyance with person assaulted is not a qualifying offense for which the Respondent can be sentenced as a prison release reoffender.

b.

UNDER THIS COURT'S ANALYSIS IN STATE V. HEARNS, 961 So. 2d 211 (Fla. 2007) BURGLARY OF CONVEYANCE WITH PERSON ASSAULTED SHOULD NOT BE INCLUDED AS QUALIFYING OFFENSE FOR SENTENCING AS A PRISON RELEASEE REOFFENDER.

This Court in State v. Hearns, held that Battery on a Law Enforcement Officer (BOLEO) was not a qualifying offense under the Violent Career Statute. This Court determined that BOLEO was nothing more than a misdemeanor simple battery made a third degree felony only because of

the status of the alleged victim, to wit law enforcement officer.

The same analysis this Court did in Hearns is instructive to analyzing the PRR statute in this case. First, this Court looked to the Section 775.084(1)(d)(1) to see if the BOLEO was listed as an enumerated qualifying offense. This Court concluded BOLEO was not enumerated qualifying offense.

Second, this Court determined whether BOLEO was a forcible felony under Section 776.08, Florida Statutes. Forcible felonies under Section 776.08 and the PRR statute contain identical language.

Section 776.08, Florida Statutes, defines a forcible felony as:

treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary; arson; kidnapping; aggravated assault; aggravated battery; aggravated stalking; aircraft piracy; unlawful throwing, 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 an individual.

As in the instant case, this Court in Hearn was left with having to determine whether BOLEO was a forcible felony under the "catch all" provision of "any other felony which involves the use or threat of physical force or

violence against an individual. This Court determined that BOLEO did not constitute a forcible felony because it could include intentional touching ever so slight.

This Court should also find that simple assault coupled with burglary of conveyance should not be included as a forcible felony because it could include even less violent conduct than a simple battery. It could include **"mere words"** and absolutely no physical act on the part of the defendant as would not be the case of aggravated assault which require the threat to included use of a deadly weapon. Surely, if this Court does not believe that a simple battery should not be included as a forcible felony then an assault with "mere words" should not be included as a qualifying offense for purpose of PRR.

c.

BURGLARY OF CONVEYANCE WITH PERSON ASSAULTED SHOULD NOT BE INCLUDED AS QUALIFYING OFFENSE FOR SENTENCING UNDER PRR TO AVOID AN INTERPETATION OF THE PRR STATUTES THAT IS UNREASONABLE, HARSH OR HAS ABSURD CONSEQUENCES.

As noted by the First District Court of Appeal in State of Florida v. Hackley, 35 Fla. L Weekly D2436a (Fla. 1st DCA Oct. 29, 2010),

a basic tenet of statutory construction compels a court to interpret a statute so as to avoid a construction that would result in unreasonable, harsh or absurd consequences. Thus to avoid the absurd consequences of encouraging a defendant

who has already committed burglary with an assault to put the victim in physical danger by committing a battery to avoid the possibility of PRR sentencing, [it) affirm the trial court's order.

It seems absolutely absurd to subject a Defendant to life in prison for threatening someone with "mere words" while committing a burglary of a conveyance and at the same time subjecting a Defendant to only 15 years of incarceration if the Defendant hits or actually does violence to a victim during the course of the burglary.

The most logical interpretation of the PRR statute is that burglary of conveyance person assaulted is not a qualifying offense for PRR as is burglary with person battered.

CONCLUSION

Based on the foregoing, the Respondent respectfully request this Court affirms the First District Court of Appeal's decision at State v. Hackley, 35 Fla. L. Weekly D2436a (Fla. 1st DCA Oct. 29, 2010).

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to the Office of the Attorney General, PL 01, the Capitol, Tallahassee, Florida 32399-1050 by US mail this 9th day of May, 2011.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font
requirement of Fla.R.App.P.9.210.

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