IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

LESTER HACKLEY,

Respondent.

CASE NO. SC10-2316

PETITIONER'S INITIAL BRIEF

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellant in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, LESTER HACKLEY, the Appellee in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or his proper name.

The record on appeal consists of three (3) volumes, which will be referenced as "RI," "RII," and "RIII," respectively, followed by any appropriate page number.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

On October 4, 2006, following a jury trial, Respondent was convicted of Burglary of a Conveyance with Person Assaulted (RI 45). On October 30, 2006, Respondent was sentenced as a Prison Releasee Reoffender to a term of Life incarceration (RI 49,51). On June 2, 2009, Respondent filed a Motion to Correct Illegal Sentence (RI 63-64). In his Motion, Respondent alleged his life sentence was illegal, asserting his conviction for Burglary of a Conveyance with person Assaulted did not qualify for enhancement sentencing as a Prison Releasee Reoffender (RI 63). On July 23, 2009, the trial court granted Respondent's Motion, setting the

case for resentencing (RI 71-74). On December 29, 2009, Respondent was re-sentenced to a term of seventy-five months incarceration (RI 96). On January 6, 2010, Petitioner filed a Notice of Appeal challenging the trial court granting of Respondent's Motion to Correct Illegal Sentence (RI 104). On October 29, 2010, the First District Court of Appeal, through a written Opinion, affirmed the trial court's grant of Respondent's Motion to Correct Illegal Sentence, certifying conflict with the Fifth District Court of Appeal's decision in *Shaw v. State*, 26 So. 3d 51 (Fla. 5th DCA 2009). *See State v. Hackley*, 35 Fla. L. Weekly D2436a (Fla. 1st DCA Oct. 29, 2010).

SUMMARY OF ARGUMENT

ISSUE

The First District Court of Appeal erred in affirming the trial court's holding that Respondent's Prison Releasee Reoffender (PRR) sentence based on his conviction for Burglary of a Conveyance with Assault was improper. The offense of Burglary of a Conveyance with Assault, though not listed as an enumerated offense under section 775.082, does qualify for PRR sentencing under subsection (o), the "catch-all" provision. Subsection (o) provides that any felony involving the use or threatened use of physical force or violence against another constitutes a PRR offense. As the Fifth District Court of Appeal held in *Shaw v. State*, 26 So.3d 51 (Fla. 5th DCA 2009), upholding a PRR sentence based on Burglary of a Conveyance with an Assault, Burglary is a felony, and Assault always involves an intentional threat by word or act to do violence to another. Thus, pursuant to the clear language of section 775.082, Respondent's conviction qualifies for sentencing as a PRR. Accordingly, the First District's decision in the instant case should be disapproved, the decision in *Shaw* approved, and the case remanded back to the trial court to resentence Respondent as a Prison Releasee Reoffender.

ARGUMENT

ISSUE

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

Standard of Review

A pure question of law is reviewed de novo. *See Sutton v. State*, 975 So. 2d 1073, 1076 (Fla. 2008).

Merits

The State asserts the First District Court of Appeal erred in holding Respondent's sentence as a Prison Releasee Reoffender (PRR), based on his conviction for Burglary of a Conveyance with Assault, was improper. Although not listed as an enumerated offense under section 775.082(9)(a)1, Florida Statutes, the State argues that Burglary of a Conveyance with Assault falls under subsection (o) of the PRR statute, the so-called "catch-all" provision. Specifically, section 775.082(9)(a)1.o., provides that a defendant, who commits or attempts to commit, "any felony that involves the use or threat of physical force or violence against an individual," qualifies for enhanced sentencing as a Prison Releasee Reoffender. In contrast to the First District's holding, the Fifth District Court of Appeal, in *Shaw v. State*, 26 So. 3d 51 (Fla. 5th DCA 2009), held that Burglary with an Assault does fall under the catch-all provision

since an Assault, "always involves an 'intentional, unlawful threat by word or act to d violence to the person of another, coupled with an apparent ability to do so." *Id.* at 53 (citing § 784.011(1), Fla. Stat. (2007)). Accordingly, the State requests this Court quash the decision of the First District in the instant case, approve the decision in *Shaw*, and remand this case back to the trial court with instructions for Respondent to be resentenced as a PRR.

Section 775.082(9)(a)1, Florida Statutes, provides that a Prison Releasee Reoffender means any defendant who commits, or attempts to commit:

> a. Treason;
> b. Murder;
> c. Manslaughter;
> d. Sexual battery;
> e. Carjacking;
> f. Home-invasion robbery;
> g. Robbery;
> h. Arson;
> i. Kidnapping;
> j. Aggravated assault with a deadly weapon;
> k. Aggravated battery;
> l. Aggravated stalking;
> m. Aircraft piracy;
> n. Unlawful throwing, placing, or discharging of a destructive device or bomb;
> *o.* ***Any felony that involves the use or threat of physical force or violence against an individual;***
> p. Armed burglary;
> q. Burglary of a dwelling or burglary of an occupied structure; or
> r. Any felony violation of s. 790.07, s. 800.04, s. 827.03, s. 827.071, or s. 847.0135(5).
>
> (emphasis added).

An Assault is defined as:

> 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.

§ 784.011(1), Fla. Stat. The State asserts that based on the clear language of both sections 775.082 and 784.011, a Burglary with an Assault constitutes a felony involving the use or threat of physical force or violence. Specifically, the fact that there must be a showing of threat by word or act to do violence to another provides the "necessary" involvement of the "use or threat of physical force or violence as required by subsection (o). Thus, unlike a Battery which can involve mere touching, a Burglary with an Assault necessarily involves a threat to do violence to another.

In the instant case, the First District affirmed the trial court's ruling, asserting that to do otherwise would result in an "absurd consequence," whereby defendants committing a burglary with an assault would then be motivated to commit a battery in order to avoid PRR sentencing. *See State v. Hackley*, 35 Fla. L. Weekly D2436a (Fla. 1st DCA Oct. 29, 2010). As a basis for its decision, the First District cites this Court's decision in *Thompson v. State*, 695 So.2d 691 (Fla. 1997), which asserted that a statute must be interpreted in such a way as to

avoid a construction that would result in unreasonable, harsh, or absurd consequences. The State, however, notes that where a statute is clear and unambiguous, "courts will not look behind the statute's plain language for legislative intent or resort to rules of statutory construction to ascertain intent." *Borden v. East-European Ins. Co.*, 921 So.2d 587, 595 (Fla. 2006). Moreover, the First District's decision is based solely upon conjecture, imparts an advanced level of understanding as to Florida sentencing law on all defendants, and fails to address how a Burglary coupled with an unlawful threat by word or act to do violence to another does not constitute a felony that involves the use or threat of physical force or violence against another. Beyond stating that the Legislature could not have intended for an offense involving an Assault to be punished greater than an offense involving a Battery, the First District failed to make any determination, nor conduct any analysis, as to whether Respondent's offense falls under the "catch-all" provision of the PRR statute.

The trial court held that Respondent's PRR sentence was improper based primarily on the holdings in *Tumblin v. State*, 965 So.2d 354 (Fla. 4th DCA 2007) and *Spradlin v. State*, 967 So.2d 376 (Fla. 4th DCA 2007), both of which merely applied this Court's decision in *State v. Hearns*, 961 So.2d 211 (Fla. 2007)

in ruling that a PRR sentence based on simple battery is improper. None of these cases, however, including *Hearns*, assert or intimate that a felony involving an Assault does not qualify for enhanced sentencing under the PRR statute.

In *Hearns*, this Court held that Battery on a Law Enforcement Officer (BOLEO) did not qualify for enhanced sentencing under the Violent Career Criminal (VCC) Statute. This Court determined that BOLEO, essentially, is simple battery with the only difference between the two offenses being the status of the victim and penalty imposed, converting a first degree misdemeanor into a third-degree felony. Thus, in analyzing whether simple battery/BOLEO qualified for enhanced sentencing under the VCC statute, this Court first looked at whether the offense was listed as one of the enumerated offenses in the VCC statute, section 775.084(1)(d)(1), Florida Statutes (2000). Noting that simple battery/BOLEO was not listed, this Court then determined whether simple battery/BOLEO constitutes a forcible felony, as described in section 776.08, Florida Statutes[1]. Section 776.08, defines a forcible felony as:

> treason; murder; manslaughter; sexual battery; carjacking; home-invasion robbery; robbery; burglary;

[1] This Court noted that, in discussing what constitutes a "forcible felony," section 776.08 and section 775.082(9)(a)(1) use identical language in terms of what qualifies as a requisite felony for purposes of the forcible felony statute and the PRR statute.

> 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.*** (emphasis added).

Although some types of battery are listed as forcible felonies, there was no such listing for BOLEO/simple battery. *Id.* at 217. Thus, this Court determined that in order to qualify as a forcible felony it must fall within the "catch-all" provision relating to "any other felony which involves the use or threat of physical force or violence against an individual."

Ultimately holding that BOLEO/simple battery does not constitute a forcible felony, this Court noted that "any intentional touching, no matter how slight," constitutes a battery. *Id.* at 218-19. As a result, the offense lacked the requisite use or threatened use of physical force or violence necessary to be considered a "forcible felony." *Id.* at 219.

In *Tumblin*, the defendant was convicted of Burglary of a Dwelling with an Assault *or* Battery, and was sentenced as a PRR. Applying *Hearns*, the Fourth District Court of Appeal reversed the defendant's sentence, holding that since Battery can be committed by an unlawful "touching," it did not "necessarily include the threat or use of physical force or violence." *Id*. at 356. In *Spradlin*, the defendant was convicted of simple

battery, which became punishable as a felony since it was the defendant's second battery conviction, and was sentenced as a PRR. As in *Tumblin*, the Fourth District simply applied *Hearns* in holding that simple battery does not qualify as a PRR offense.

The primary difference between the cases cited by the trial court and the instant case is the offense upon which the PRR sentence was based. Clearly, this Court's decision in *Hearns* does not permit a PRR sentence based on simple battery, which was involved in *Hearns*, *Tumblin* and *Spradlin*. Further, none of these cases hold that a felony with an Assault cannot qualify as a PRR offense. Although *Tumblin* involved a conviction for Burglary with an Assault *or* Battery, the fact that the conviction could have been based on the commission of the Battery, which could in turn involve a simple touching, makes it a non-qualifying offense for PRR sentencing. It is the ambiguity in the nature of the conviction, i.e., Assault *or* Battery, that provides the basis for an application of *Hearns*. In other words, since the conviction could be based on the Battery, it lacks the clear determination that the offense was "necessarily" committed with the threat or use of physical force or violence," since, as *Hearns* clearly provides, simple battery can occur through mere touching.

In *Shaw v. State*, 26 So.3d 51 (Fla. 5th DCA 2009), on the other hand, the Fifth District Court of Appeal affirmed a PRR sentence based on a conviction for Burglary of a Conveyance with Assault. Distinguishing the case from those cited by the defendant pertaining to convictions for a felony with a simple battery, the Fifth District held:

> Undisputedly, burglary is a felony. By definition, an assault always involves an "intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so...." § 784.011(1), Fla. Stat. (2007). Consequently, under the statutory elements test, burglary of an occupied conveyance with an assault qualifies as an offense under the catch-all provision of the PRR statute, and Shaw was properly sentenced as one.

Id. at 53. *See also Harris v. State*, 5 So.3d 750, 751 (Fla. 1st DCA 2009)(holding resisting an officer with violence to his or he person qualifies as a PRR offense, since "[o]ffering to do violence plainly involves the 'threat of physical force or violence' while actually doing violence plainly involves the 'use...of physical force or violence.'")(quoting § 775.082(9)(a)1.o., Fla. Stat. (2006)).

The State argues that the analysis, rationale, and ultimate holding of the Fifth District in *Shaw* was correct and should be approved by this Court. For an Assault to occur, there must be a showing of an intentional threat by word or act to do violence to another. Thus, Burglary of a Conveyance with Assault becomes

a felony that necessarily involves the use or threat of physical force or violence against another. Accordingly, based on the clear language of the PRR statute, as well as the requirements for an Assault, the State avers Respondent was properly sentenced originally as a Prison Releasee Reoffender, and this Court should remand to reinstate that original sentence.

CONCLUSION

Based on the foregoing, the State respectfully submits the decision of the First District Court of Appeal at *State v. Hackley*, 35 Fla. L. Weekly D2436a (Fla. 1st DCA Oct. 29, 2010) should be disapproved, the opinion in *Shaw v. State*, 26 So. 3d 51 (Fla. 5th DCA 2009) approved, and the instant case remanded to the trial court for resentencing Respondent as a Prison Releasee Reoffender.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Barbara Kaye Hobbs, Cummings Hobbs & Wallace, 462 West Brevard Street, Tallahassee, Florida 32301 by MAIL on this 24th day of March, 2011.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

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

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