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IN THE SUPREME COURT OF THE STATE OF FLORIDA

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CASE NO. 75,385

HERVEY LAREAU,
Petitioner.
vs.
STATE OF FLORIDA,
Respondent.

INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and the appellant in the fourth District Court of Appeal. Respondent was the prosecution in the trial court and appellee in the Fourth District Court of Appeal. In the brief, the parties will be referred to as they appear before this Court.

The following symbol will be used:

"R" Record on Appeal

All emphasis has been supplied by Petitioner.

STATEMENT OF THE CASE AND FACTS

Petitioner was informed against for attempted first degree murder with a firearm by shooting Hortense Lareau (Count I). Pursuant to plea negotiations, he pled nolo contendere to aggravated battery causing great bodily harm during which a firearm was used (R5). Petitioner's plea was accepted by the trial court as voluntarily made (R5), and Appellant was accordingly adjudged guilty of that offense on January 30, 1989 (R15).

Part of Petitioner's plea negotiations included an understanding that, contrary to his position that the offense to which he pled nolo contendere was a second degree felony (R6), the State would be arguing that the offense was a first degree felony based on the enhancement of the degree of the crime provided by Section 775.087(1), Florida Statutes (1987), where a firearm is used (R16).

The trial court agreed with the State rather than with Petitioner (R6). This finding brought Petitioner's sentence from a guidelines range of twelve to thirty months for a second degree felony to three and a half to four and a half years in prison for the first degree felony (R6,18).

Petitioner was sentenced on January 30, 1989, within the guidelines as computed for a first degree felony conviction to serve four and a half years in prison with a mandatory three year minimum for the use of the firearm (R19).

On appeal to the Fourth District Court of Appeal, Petitioner's challenge to the propriety of the enhancement of his conviction to a first degree felony was again rejected in a decision rendered December 28, 1989. This Court accepted jurisdiction to review the

conflict thus created with the decision of another district court of appeal on May 8, 1990. This brief on the merits follows.

SUMMARY OF THE ARGUMENT

Where aggravated battery is already an enhanced offense in which every battery committed with the use of a deadly weapon or firearm will also necessarily include injury to the victim, it may not be enhanced by resort to Section 775.087(1), Florida Statutes (1987).

ARGUMENT

THE TRIAL COURT ERRED IN ENHANCING PETITIONER'S CONVICTION FOR AGGRAVATED BATTERY FROM A SECOND DEGREE FELONY TO A FIRST DEGREE FELONY.

Pursuant to an agreement with the State, Petitioner pled nolo contendere to aggravated battery, causing great bodily harm by use of a firearm (R5). Aggravated battery is a second degree felony. Section 784.045, Florida Statutes, yet Petitioner's guidelines sentencing score was based on a conviction for a first degree felony (R18) as a result of the utilization of Section 775.087(1), Florida Statutes, which provides:

Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and during the commission of such felony the defendant carries, displays, uses, threatens, or attempts to use any weapon or firearm, or during the commission of such felony the defendant commits an aggravated battery, the felony for which the person is charged shall be reclassified as follows:

* * *

(b) In the case of a felony of the second degree, to a felony of the first degree.

A person commits an aggravated battery as defined in Section 784.021, Florida Statutes (1987) when he commits a battery upon another and in the course thereof

(a) Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or

(b) Uses a deadly weapon.

A simple battery, without the aggravation of great bodily harm or use of a deadly weapon is a first degree misdemeanor, punishable

by no more than one year in jail. Section 775.083(2), Florida Statutes (1987).

Thus, aggravated battery is a felony which has already been substantially enhanced by virtue of the use of a deadly weapon, and it is thus excluded from the operation of Section 775.087(1)(b). Petitioner objected to the reclassification of his aggravated battery conviction on these grounds, citing Bradfield v. State, 438 So.2d 1005 (Fla. 2nd DCA 1983), which states:

The appellant appeals only the imposition of his sentence of thirty years imprisonment for the offense of aggravated battery with a firearm. Utilizing section 774.087(1), Florida Statutes (1981), the trial judge enhanced the appellant's aggravated battery conviction because of his use of a firearm from a felony of the second degree, punishable by a maximum sentence of fifteen years imprisonment, to a felony of the first degree, punishable by a maximum sentence of thirty years imprisonment.

We agree with all of our sister courts in holding that aggravated battery is already an enhanced penalty offense not subject to being further enhanced by the use of section 775.087(1). Webb v. State, 410 So.2d 944 (Fla. 1st DCA 1982); Reeder v. State, 399 So.2d 445 (Fla. 5th DCA 1981); Blanton v. State, 388 So.2d 1271 (Fla. 4th DCA 1980); Knight v. State, 374 So.2d 1065 (Fla. 3rd DCA 1979).

Accordingly, we reverse the appellant's sentence to thirty years imprisonment and remand to the trial court to impose a sentence not to exceed fifteen years for the aggravated battery. The imposition of the minimum mandatory three years pursuant to section 775.087(1) was proper.

REVERSED AND REMANDED.

Nevertheless, the Fourth District Court of Appeal declined to reverse the trial court's enhancement of Petitioner's sentence, based on its characterization of the instant charge as having been

made under subsection (a) of Section 784.045, which aggravates a battery where the perpetrator causes "great bodily harm, permanent disability, or permanent disfigurement," even though the allegation to which Petitioner pled also included the charge that a firearm was used in its commission. The district court relied for its distinction on the analysis made in Inaraham v. State, 527 So.2d 222 (Fla. 5th DCA 1987), rev. denied, 534 So.2d 400 (Fla. 1988).

Inaraham, however, discussed the applicability of the firearm enhancement statute to prosecutions for sexual battery under Section 794.011(3), Florida Statutes (1987), which punishes as a life felony sexual batteries committed where the perpetrator

in the process thereof uses or threatens to use a deadly weapon or uses actual physical force likely to cause serious personal injury

...

The Fifth District Court of Appeal reasoned that because a sexual battery charge under this statute could be committed in alternative ways, an information which alleged both methods did not make alternative allegations of how the crime was committed,¹ but in effect charged that the defendant committed the crime in two ways, so that not only could he be convicted of the enhanced felony by way of the allegation that he used actual physical force, but that enhanced felony could be enhanced again with the jury's finding that he did each of the alternative acts in which the offense could be committed.

¹An information may allege alternative means of committing a crime which the statute denounces in the disjunctive. Bell v. State, 369 So.2d 932 (Fla. 1979).

What was ignored by the Inaraham court and again by the Fourth District Court of Appeal in the present case is that sexual battery by use of great force or the threat to use a firearm is already a life felony: the legislature has made enhancement of that offense an impossibility, since it is already the most serious category of offense a person may commit without subjecting himself to the death penalty. The defendant in Inaraham was convicted of the lesser included offense of sexual battery by the threat of great force, an offense which does not contain any alternative means of committing it with a deadly weapon. Thus, the jury found the defendant guilty of an offense which did not have as an essential element the use of a firearm, and its finding that the defendant used a firearm in committing it did not raise any question about the applicability of the exception to the enhancement statute at issue here. Ingraham's analysis based on the alternative methods of committing the life felony with which the defendant was charged but for which he was not convicted was thus unnecessary to the holding of the case² and cannot be viewed as dispositive to the quite different circumstances presented in the present appeal.

Moreover, the rationale stated in Ingraham is legally indefensible. In order to support enhancement, the factfinder must make a specific finding that the firearm or deadly weapon was used in the commission of the felony. State v. Overfelt, 457 So.2d 1385 (Fla. 1984). So an offense which could be committed in one way without a weapon would still also have to be charged in the way

²This Court may well have recognized this fact when it denied review of that decision.

which involved a weapon in order to even arguably bring the enhancement statute into play. By duplicatively charging both alternative ways of committing the crime, the State seeks to have its cake and eat it, too.

But this tactic flies in the face of this Court's own holdings that, although an information is not subject to attack because it alleges that a crime has been committed in alternative ways, conviction may not be entered for two offenses where only one offense has occurred. Thus, a defendant may be charged with armed burglary and burglary with an assault, both alternative ways of committing a first degree burglary, Section 810.02(2), Florida Statutes (1987), but he may not be convicted of two crimes for a single burglary. Troedel v. State, 462 So.2d 392 (Fla. 1984). By the same token, a defendant may be charged with both premeditated murder and first degree felony murder, both ways of committing a capital homicide, but only one conviction may be rendered for a single death. Sims v. State, 444 So.2d 922 (Fla. 1983); see also, Houser v. State, 474 So.2d 1193 (Fla. 1985).

The legal fiction the State seeks to apply in the present case would allow an end run around these decisions of this Court in cases where an offense may be committed in alternative ways, one of which contains as an essential element the use of a firearm or deadly weapon, since it would enable the State to have the benefit of two entirely separate sanctions, enhancement and enhancement of the enhancement, even though the defendant has committed only a single offense.

This defect in the State's position is even more palpable with respect to the offense of aggravated battery, wherein the weapon alternative requires the use of the deadly weapon, rather than a mere threat. Obviously, in any case where a deadly weapon is used and an injury results thereby, the injury will be substantive, capable of being characterized as either "great" or as causing some sort of "permanent disability" or, failing all else, as leaving the "permanent disfigurement" represented by a scar. Thus, the practical effect of a holding such as that of the Fourth District Court of Appeal's below will be that virtually every aggravated battery committed with a deadly weapon will be subject to being charged in the alternative, alleging both use of a deadly weapon and injury, with the consequent implication of Section **775.087(1)**, the enhancement statute. Such a result would negate the special status of the enhancement statute, at least with respect to the offense of aggravated battery, every instance of which would be enhanced or at least enhanceable depending on the charging decision of the prosecutor.

The enhancement statute itself presents compelling evidence that the legislature cannot have intended its application to the offense of aggravated battery. For the statute applies not just to offenses where a deadly weapon is used, but also if "during the commission of such felony the defendant commits an aggravated battery." Section **775.087(1)**. Thus, the commission of an aggravated battery during an offense is itself grounds for enhancement to a higher degree of felony. But an aggravated battery is committed during every aggravated battery. Clearly, the

legislature did not intend that every aggravated battery would be subject to enhancement. Had it so intended, there would be no point in designating that offense as a second degree felony in the first place. Nor, since the enhancement statute is couched in mandatory terms ("the felony for which the person is charged shall be reclassified ..."), could a conviction for any aggravated battery be treated as one for a second degree felony; it would automatically be reclassified to a first degree felony. Such a result comports with neither logic, law, or historical fact. Consequently, the legislature must have intended that an aggravated battery committed during another felony would trigger the enhancement provisions of Section **775.087(1)**, but an aggravated battery standing alone would not be subject to such enhancement.


Therefore, the decision of the Second District Court of Appeal in Bradfield v. State, supra, is correct in its statement of the principle that because any battery committed with a firearm is already subject to an enhanced penalty, further enhancement through the operation of Section **775.087(1)** is prohibited. The Fourth District Court of Appeal erred in rejecting that principle in the present case, and the decision of that court must consequently be reversed by this Court with directions that this cause be remanded so that Petitioner may be resentenced for a second degree felony.

CONCLUSION

Based on the foregoing argument and the authorities cited, Petitioner requests that this Court reverse the judgment of the Fourth District Court of Appeal below and remand this cause with directions that Petitioner be resentenced for a second degree felony.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to PATRICIA G. LAMPERT, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, by courier this 4TH day of JUNE, 1990.



Of Counsel