

IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,385

HERVEY LAREAU,

Petitioner,

vs .

STATE OF FLORIDA.

Respondent.

FILED
1980 A. V. 1000

FEB 26 1980

CLERK, SUPREME COURT
By _____
Deputy Clerk

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Respondent was the appellee in the Fourth District Court of Appeal and the prosecution in the trial court and Petitioner, Hervey Lareau, was the appellant in the Fourth District Court of Appeal and the defendant in the trial court.

In the brief, the parties will be referred to as they appear before this Honorable Court.

All emphasis has been added by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts as being substantially true and correct.

SUMMARY OF ARGUMENT

This Court should not exercise its discretionary jurisdiction in this cause. The opinion of the Fourth District Court of Appeal in Lareau does not conflict with that of the Second District Court of Appeal in Bradfield on the issue of enhancement of an aggravated battery. Rather, the Fourth District opinion goes into the fine detail that the Second District omitted.

ARGUMENT

POINT

THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL DOES NOT CONFLICT WITH A DECISION OF THE SECOND DISTRICT COURT OF APPEAL ON THE ISSUE OF ENHANCING APPELLANT'S CONVICTION OF AGGRAVATED BATTERY CAUSING GREAT BODILY HARM, A SECOND-DEGREE FELONY, TO A FIRST-DEGREE FELONY BECAUSE OF USE OF A FIREARM.

The petitioner contends that the decision in Lareau v. State, 15 F.L.W. 61, (Fla. 4th DCA December 28, 1989), conflicts with that of Bradfield v. State, 438 So.2d 1005 (Fla. 2d DCA 1983). Thus petitioner claims that the trial court erred in enhancing his conviction of aggravated battery to a first-degree felony because it is already an enhanced penalty offense. While the State would agree that if petitioner pled to aggravated battery with the use of a deadly weapon pursuant to Section 784.045(1)(b), Florida Statutes (1989), enhancement would not be proper and there would be direct conflict with Bradfield, that is not the situation here.

Section 784.045 provides, in part, as follows:

(1)(a) A person commits aggravated battery who, in committing battery:

1. Intentionally or knowingly causes great bodily harm, permanent disability, permanent disfigurement; or
2. Uses a deadly weapon.

(2) Whoever commits aggravated battery shall be guilty of a felony of the second-degree, punishable as

provided in 8775.082, 8775.083, or
8775.084.

Petitioner pled guilty to aggravated battery causing great bodily harm pursuant to 8784.045 (1)(a), supra. This offense was then correctly enhanced pursuant to petitioner's possession of a gun. Section 775.087 (1)(b). The gun was not part of the original offense and, therefore, not an essential element of the crime. Accordingly, petitioner was not charged with aggravated battery with use of a deadly weapon under subsection (b), but rather under subsection (a).

Petitioner's reliance on Bradfield, supra, is too broad and its claim of direct and express conflict is thus incorrect. While Bradfield did not specifically distinguish between the two types of aggravated battery that the accused could be charged under, Bradfield was obviously premised on the offense of aggravated battery by a deadly weapon pursuant to 8784.045 (1)(b). The Second District's three paragraph opinion merely states that "...aggravated battery is already an enhanced penalty offense ..." Lareau does not conflict with Bradfield. Rather, Lareau goes into the fine detail that Bradfield omitted.

Accordingly, as petitioner pled guilty to aggravated battery causing great bodily harm, under the first subsection and a gun was, therefore, not an essential element, the trial court was correct in enhancing the offense due to the petitioner's possession of a gun. Therefore, there is neither express nor

direct conflict between the decisions of the Fourth District Court of Appeal in Lareau and the Second District Court of Appeal in Bradfield.

CONCLUSION

Based upon the foregoing reasons and citations of authority, it is respectfully requested that this Honorable Court not exercise its discretionary jurisdiction as there is no conflict among the districts concerning the above matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing "Respondent's Brief on Jurisdiction" has been furnished by courier to: TANJA OSTAPOFF, ESQUIRE, Assistant Public Defender, The Governmental Center, 301 N. Olive Avenue, Ninth Floor, West Palm Beach, Florida 33401, this 22nd day of February, 1990.



Of Counsel

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