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IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,385

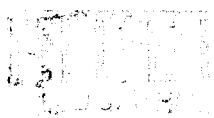
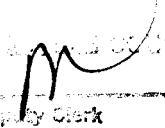
HERVEY LAREAU,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

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ON REVIEW FROM THE DISTRICT COURT OF APPEAL OF THE
FOURTH DISTRICT

RESPONDENT'S 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's Statement of the Case and Facts is acceptable to Respondent to the extent stated. However, for purposes of a proper disposition of this case on review, the following additional facts and/or information are submitted.

Petitioner entered a plea of guilty to aggravated battery causing great bodily harm in violation of 8784.045 (1)(a) 1, Florida Statutes (1989) (R 5-7,15). The agreement was based on a plea to aggravated battery with the availability of enhancement due to the use of a firearm (R 7).

SUMMARY OF ARGUMENT

The trial court properly reclassified Petitioner's conviction for aggravated battery causing great bodily harm, from a second degree felony to a first degree felony, due to his use of a firearm during the commission of the offense. As the weapon is not an essential element of the offense, enhancement is proper.

ARGUMENT

POINT I

THE TRIAL COURT WAS CORRECT IN ENHANCING PETITIONER'S CONVICTION FOR AGGRAVATED BATTERY CAUSING GREAT BODILY HARM, A SECOND DEGREE FELONY, TO A FIRST DEGREE FELONY DUE TO PETITIONER'S USE OF A FIREARM.

Petitioner's sole assertion of error in this certiorari review in the Fourth District's affirmance of the trial court's sentence enhancing his conviction for aggravated battery to a first degree felony for sentencing guidelines purposes. He contends that aggravated battery is already an enhanced penalty offense and, therefore, 9775.087 (1)(d), Florida Statutes, is not applicable. It is the State's position that the use of a firearm is not an essential element of the type of aggravated battery to which Petitioner pled guilty and, accordingly, the reclassification statute does not except such a crime from its application.

The problem arises in this case from the fact that there are two separate and distinct types of aggravated battery, i.e., a battery under section 784.045 (1)(a) 1 which intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement, and a battery under section 784.045

(1)(a) 2 which is committed by one who uses a deadly weapon.¹ Obviously, in a given case, as here, the facts could be that great bodily harm, permanent disability or permanent disfigurement resulted from the use of a deadly weapon. However, the prosecution and defense in this case were especially careful in making and preserving distinctions between these two species of aggravated battery because of the necessity of procedural and substantive consistency between allegations, proof, judgment and punishment in criminal cases. See Bell v. State, 394 So.2d 570, 571 (Fla. 5th DCA 1981).

As recognized by the lower court, it is undisputed that a defendant convicted of an "aggravated battery by using a deadly weapon," under section 784.045 (1)(b), Florida Statutes, may not be subjected to further enhancement of the penalty through the application of section 775.087(1)(b), Florida Statutes, because the weapon is, as defined under that subsection, an essential element of the offense. Lareau v. State, 554 So.2d 638 (Fla. 4th

¹ The statute in effect at the time of Petitioner's offense reads as follows:

784.045 Aggravated battery

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

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

(b) Uses a deadly weapon.

DCA 1989) and cases cited therein. However, as argued below, the aggravated battery in this case is properly subject to reclassification by use of a firearm because the conviction was specifically founded only upon subsection (a) (great bodily harm) of §784.045 (1), and because the use of a firearm was asserted only incidentally and solely for the purpose of enhancement. The judgment of conviction was quite specific in this regard (R 15) as was the plea as understood by the State and accepted by the Court:

THE COURT: I'm in agreement with the State as indicated, in fact, before this plea agreement was finalized based on a plea to Aggravated Battery on the grounds of great bodily harm, that firearm would be available as an enhancement and I believe it to be. (R 7)

The facts could not be any clearer! Petitioner is bound by the plea agreement.

The determination to be made by this Court is whether the specific battery offense to which Petitioner entered his plea can properly be reclassified pursuant to section 775.087 (1)(b), Florida Statutes, as held by the Fourth District.

The lower court's concern over a possible conflict with the Second District's decision in Bradfield v. State, 438 So.2d 1005 (Fla. 2d DCA 1983), is unfounded. While Bradfield did not specifically distinguish between the two types of aggravated battery that the accused could be charged with, the decision was obviously premised on the offense of aggravated battery by use of

a deadly weapon pursuant to 8784.045 (1)(b). The opinion indicates that Bradfield was appealing only the imposition of his sentence "for the offense of aggravated battery with a firearm." *Id.* at 1005. Thus, there was, and still is, no cause for concern. The enhancement statute should be held applicable when the defendant is charged with the alternative means of committing an aggravated battery, i.e., not by use of a deadly weapon.

The courts have agreed with the foregoing in a sexual battery case and in attempted murder cases where the offense is committed with a firearm and the weapon is included in the charge. In Ingraham v. State, 527 So.2d 222 (Fla. 5th DCA), rev. denied, 534 So.2d 400 (Fla. 1988), the defendant was not charged with sexual battery "and in the process thereof uses or threatens to use a deadly weapon" 8794.011 (3). Rather he was charged with using "actual physical force likely to cause serious personal injury," an alternative way of committing the crime. He was also charged, incidentally, with using, threatening to use or carrying a firearm. This was to make the enhancement operative. Ingraham, at 223. The jury found Ingraham guilty of the lesser included offense of sexual battery by the threat of great force, a first degree felony. The Second District affirmed the trial court's reclassification of the offense to a life felony notwithstanding that the statute under which the defendant was charged provided an alternative means by which to commit the crime, namely, "uses or threatens to use a deadly weapon," and notwithstanding that the reclassification statute specifically

excludes felonies in which the use of a weapon or firearm is an essential element, as the defendant was not charged with alternative means under the statute. The same reasoning applies sub judice where Petitioner entered a plea to the lesser included offense of aggravated battery causing great bodily harm. (R 15-17,20). **As** in Ingraham, the incidental charge of using a firearm in the commission of the offense herein was merely to make the enhancement operative and was not an element of Petitioner's plea in this case (R 7).

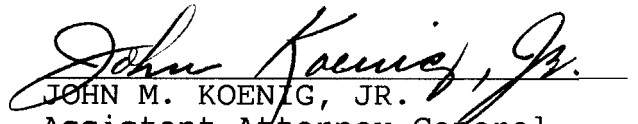
In sum, since Petitioner pled guilty to aggravated battery causing great bodily harm under subsection (1)(a) of the statute, and a deadly weapon was, therefore, not an essential element, the trial court was correct in reclassifying the offense to a first degree felony due to Petitioner's use of a firearm.

CONCLUSION

Wherefore, in light of the foregoing, Respondent respectfully urges this Honorable Court to approve the decision of the Fourth District Court of Appeal in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Brief on the Merits has been furnished by Courier to: TANJA OSTAPOFF, ESQUIRE, Assistant Public Defender, Fifteenth Judicial Circuit of Florida, The Governmental Center/9th Floor, 301 North Olive Avenue, West Palm Beach, Florida, this 18th day of July, 1990.


Of Counsel

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