

IN THE SUPREME COURT OF FLORIDA

WILLIE PERRY,)	
)	
Petitioner,)	
)	
vs.)	CASE NO.: SC03-1291
)	Lower Tribunal No.: 4D01-2049
STATE OF FLORIDA,)	
)	
Respondent.)	
_____)	

PETITIONER’S REPLY BRIEF
ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Circuit Court of the Seventeenth Judicial Circuit and the appellant in the Fourth District Court of Appeal. Respondent was the prosecution and appellee in the lower courts. In this brief the parties will be referred to as they appear before this Court.

The symbol “R” will denote the one-volume record on appeal, which includes relevant documents filed below.

The symbol “SR” will denote the one-volume supplemental record on appeal, which includes additional relevant documents filed below.

The symbol “ST” will denote the four-volume supplemental transcript, which is a transcript of the trial.

The symbol “H” will denote the motion to suppress hearing held on August 11, 2000.

The symbol “S” will denote the sentencing hearing held on May 18, 2001.

STATEMENT OF THE CASE

Petitioner will rely upon the statement of the case as submitted in his initial brief.

STATEMENT OF THE FACTS

Petitioner will rely upon the statement of the facts as submitted in his initial brief.

SUMMARY OF THE ARGUMENT

POINT I

Petitioner will rely upon the summary of the argument as submitted in his initial brief.

POINT II

Petitioner will rely upon the summary of the argument as submitted in his initial brief.

ARGUMENT

POINT I

PETITIONER'S MOTION FOR A JUDGMENT OF ACQUITTAL TO THE CHARGE OF RESISTING AN OFFICER WITH VIOLENCE SHOULD HAVE BEEN GRANTED WHERE THE EVIDENCE FAILED TO ESTABLISH THAT THE LEGAL DUTY FORCEFULLY OBSTRUCTED OR OPPOSED, AN ATTEMPTED STRIP SEARCH, WAS EXECUTED LAWFULLY.

Petitioner's position can be summarized as follows:

1. Section 776.051(1), *Florida Statutes* (1997) prohibits one charged with violating section 843.01, *Florida Statutes* (1997) from asserting self-defense, it does not eliminate *lawful* execution of a legal duty as an element of section 843.01.
2. Even if section 776.051(1) eliminates *lawful* execution of a legal duty as an element of section 843.01, it does so only in those cases where an arrest is violently resisted, obstructed, or opposed; *lawful* execution of a legal duty remains an element of section 843.01 where a legal duty other than an arrest is violently resisted, obstructed, or opposed.
3. No one has a right to violently resist, obstruct, or oppose a law enforcement officer in the execution, *lawful* or *unlawful*, of his or her duties, unless excessive force is employed by the officer.
4. Violently resisting, obstructing, or opposing a law enforcement officer who is *unlawfully* executing a legal duty may well constitute assault, battery, aggravated assault, aggravated battery, attempted murder, or any number of other crimes, but it does not constitute a violation of section 843.01.

5. The evidence introduced at trial failed to establish that the detention petitioner was charged with violently obstructing or opposing was being *lawfully* executed because he was subjected to an *unlawful* strip search.

6. Because the strip search was *unlawful*, the detention deputies were not *lawfully* executing a legal duty when petitioner obstructed or opposed them with violence and, as a result, he did not violate section 843.01.

In its answer brief, respondent questioned this Court's jurisdiction and argued that petitioner's conviction should be affirmed.

I

Based upon its view that the two cases are factually different, respondent initially contends that this Court is without jurisdiction to review *Perry v. State*, 846 So. 2d 584 (Fla. 4th DCA 2003) because it is not in express and direct conflict with *Taylor v. State*, 740 So. 2d 89 (Fla. 1st DCA 1999). While the cases do involve different factual scenarios, they take conflicting positions on the same legal issue. In *Taylor*, the First District ruled that lawful execution of a legal duty is an element of section 843.01, *Florida Statutes* where the defendant is accused of violently resisting, obstructing, or opposing a law enforcement officer in the execution of a legal duty other than an arrest and, as a result, vacated the appellant's convictions for battery on a law enforcement officer and resisting an officer

with violence based upon his striking a law enforcement officer who was unlawfully entering his home to investigate a noise complaint. 740 So. 2d at 91-92. In *Perry*, the Fourth District, while recognizing the contrary holding in *Taylor*, rejected a sufficiency of the evidence challenge to a conviction for resisting an officer with violence, holding that it matters not whether the legal duty was being executed lawfully or unlawfully even in those cases where the defendant is accused of violently resisting, obstructing, or opposing a law enforcement officer in the execution of a legal duty other than an arrest. 846 So. 2d at 587-588. *Taylor* requires the State to prove lawful execution of a legal duty when the legal duty resisted, obstructed, or opposed is other than an arrest; *Perry* does not. Accordingly, express and direct conflict exists between the two cases. See *Mancini v. State*, 312 So. 2d 732, 733 (Fla. 1975); *Kincaid v. World Insurance Co.*, 157 So. 2d 517, 518 (Fla. 1963); *Nielson v. City of Sarasota*, 117 So. 2d 731, 734 (Fla. 1960).

II

The issue presented by this case is whether *lawful* execution of a legal duty is an element of the crime of resisting, obstructing, or opposing a law enforcement officer with violence, proscribed by section 843.01, *Florida Statutes* (1997). In response to petitioner's assertion that *lawful* execution of

a legal duty is an element of the offense, which must be proven beyond a reasonable doubt, respondent states, “[p]etitioner’s position is that he can justifiably resist and batter a law enforcement officer if the officer’s interactions with him are later found by a court to be illegal.” Respondent misunderstands petitioner’s argument.

As summarized above, petitioner does not contend that he could assert self-defense, based upon the officer’s *unlawful* execution of a legal duty, in a prosecution for violating section 843.01, thereby acknowledging violent resistance but seeking to avoid conviction on the ground that his actions were justified. Petitioner simply argues that the State is required to prove all elements of a crime beyond a reasonable doubt and the legislature has chosen to make *lawful* execution of a legal duty an element of resisting, obstructing, or opposing a law enforcement officer with violence. Petitioner contends that his argument should apply to the execution of any legal duty, including arrests, but that even if it does not apply to situations involving arrests, it should apply to situations involving the execution of other legal duties. While respondent addressed why persons should be prohibited from violently resisting officers who are *unlawfully* executing legal duties, and made citation to many cases supporting that argument, it failed to explain

how a statute that specifically prohibits violently resisting, obstructing, or opposing a law enforcement officer in the *lawful* execution of any legal duty can be read, consistent with due process, not to require a showing that the legal duty was *lawfully* executed. The language employed in section 843.01 “is clear and unambiguous, and this Court ‘may not modify it or shade it out of any consideration of policy or regard for untoward consequences.’” *Baker v. State*, 636 So. 2d 1342, 1344 (Fla. 1994)(citation omitted).

B

Based upon section 951.061, *Florida Statutes*, respondent contends that the attempted strip search of petitioner was lawfully performed because Deputy Enrique testified that written county jail policies enacted by Sheriff Jenne authorized him to perform the strip search. Section 951.061 states, in part:

- (1) Upon adoption of an ordinance by a majority of the county commission, the sheriff may be designated the chief correctional officer of the county correctional system, and the sheriff shall appoint such officers as he or she deems necessary.
- (2) If designated, the sheriff or his or her designee shall enforce all existing state law concerning the operation and maintenance of county jails.

The appellate record fails to reflect that the Broward County Commission adopted an ordinance designating Sheriff Jenne as the chief correctional

officer of the county jail system. In addition, even if such an ordinance was adopted, section 951.061(2) required Sheriff Jenne to operate the county jail in compliance with existing state law. Section 901.211(5), *Florida Statutes* (1997) requires the on-duty supervising officer to authorize strip searches in writing. “A strip search conducted in violation of the statutory requirements set forth in section 901.211, in essence, establishes police misconduct and constitutes a Fourth Amendment violation.” *State v. Augustine*, 724 So. 2d 580, 581 (Fla. 2d DCA 1998). Respondent failed to establish that the on-duty supervising officer gave written authorization, or even oral authorization, for the detention deputies to perform a strip search upon petitioner. Accordingly, the lawfulness of the strip search was not proven.

III

Requiring the State to prove *lawful* execution of a legal duty in a prosecution for violating section 843.01 will not allow people to violently resist officers *unlawfully* executing their duties with impunity. The State has many other charging options at its disposal that do not include *lawful* execution of a legal duty as an element. Ruling in petitioner’s favor will do no more than require the State to prove each and every element that the legislature saw fit to include in section 843.01. Accordingly, this Court

should hold that *lawful* execution of a legal duty is an element of section 843.01 and that it was not established by competent, substantial evidence in this case.

POINT II

REVERSIBLE ERROR OCCURRED WHEN THE TRIAL COURT DENIED PETITIONER'S REQUEST TO INCORPORATE THE STRIP SEARCH STATUTE INTO THE JURY CHARGE AND OVERRULED HIS OBJECTION TO INSTRUCTING THE JURY THAT THE DETENTION OF A DEFENDANT CONSTITUTES LAWFUL EXECUTION OF A LEGAL DUTY.

Petitioner will rely upon the argument as submitted in his initial brief.

CONCLUSION

Based upon the foregoing arguments and the authorities cited therein, petitioner respectfully requests this Honorable Court to quash the decision of the Fourth District Court of Appeal and vacate the judgment of conviction and sentence imposed below and remand this cause with directions to discharge or, in the alternative, for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Ms. Myra J. Fried, Assistant Attorney General, 1515 N. Flagler Drive, Ninth Floor, West Palm Beach, Florida 33401-3432 this ____ day of June, 2005.

Attorney for Petitioner

CERTIFICATE OF FONT COMPLIANCE

Counsel hereby certifies that the instant brief has been prepared with Times New Roman 14-point font.

David John McPherrin
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