IN THE SUPREME COURT OF THE STATE OF FLORIDA

SC CASE NO. SC11-690

DCA CASE NO.4D09-2255
L.T. No. 02-8513 CF10A

CHARLES PAUL,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

[1] The petitioner has broken the argument into multiple sub-issues, however for purposes of clarity undersigned has combined the claims into a single issue as they are interrelated.

TABLE OF AUTHORITIES

Cases

Statutes

PRELIMINARY STATEMENT

In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that Respondent may also be referred to as the State. In this brief, the symbol "A" will be used to denote the Fourth District's opinion below.

STATEMENT OF THE CASE AND FACTS

Petitioner was convicted under section 790.19, Florida Statutes (2001), of shooting into an occupied vehicle and was sentenced as a prison releasee reoffender (PRR). Petitioner filed a Rule 3.850 motion in the trial court, attacking, *inter alia,* his sentence. The trial court denied Petitioner's motion as being untimely and successive. Petitioner appealed the denial of the Rule 3.850 motion. On appeal, Petitioner alleged that his offense did not qualify under the forcible felony catch-all provision of the prison releasee reoffender statute, Florida Statute section 775.082(9)(a)1.o, Fla. Stat. (2001).

First, the Fourth District Court of Appeal, affirmed the trial court order summarily denying the claims as well as found that even had the claim been raised in a 3.800(a), it lacked merit and had already been raised and decided on direct appeal. Paul v. State, 59 So. 3d 193 (Fla. 4th DCA 2011).

Secondly, the Fourth District Court of Appeal addressed the merits of petitioner's claim and found as follows:

> Applying the strict statutory elements analysis required by State v. Hearns, 961 So.2d 211 (Fla. 2007), this offense necessarily includes the use of force or violence against an individual. To commit a violation of section 790.19, a vehicle *must be occupied*. This case is distinguishable from Paul v. State, 958 So.2d 1135, 1136-38 (Fla. 4th DCA 2007), and Hudson v. State, 800 So.2d 627 (Fla. 3d DCA 2001), which involved shooting into a building. Under section 790.19, a building may be occupied or unoccupied. A conviction under that aspect of the statute does not necessarily require the use of force against an individual.
>
> When conducting the statutory elements analysis required by Hearns, although a court may not look to the facts of the case in deciding whether the use of force is involved, a court is not required to ignore the elements of the particular provision of the statute under which appellant is charged. Appellant's PRR sentence is not illegal on this ground because his offense necessarily required the use of force or violence against an individual. We recognize and certify that this decision directly conflicts with the decision in Crapps v. State, 968 So.2d 627 (Fla. 1st DCA 2007).

Paul v. State, 59 So.3d at 194.

Based on the Fourth DCA's certification of conflict with Crapps v. State, 968 So.2d 627 (Fla. 1st DCA 2007), Petitioner sought review with this Honorable Court.

SUMMARY OF THE ARGUMENT

The Fourth District Court of Appeals properly determined that shooting a firearm into an **occupied** vehicle (section 790.19, Florida Statutes (2001)) is a forcible felony pursuant to the prison releasee reoffender statute, section 775.082(9)(a)1, Florida Statutes (2001)(emphasis added). This Court should affirm the Fourth District's decision.

ARGUMENT

THE FOURTH DISTRICT COURT OF APPEAL PROPERLY FOUND THAT SHOOTING INTO AN OCCUPIED VEHICLE IS A FORCIBLE FELONY PURSUANT TO THE PRISON RELEASEE REOFFENDER STATUTE'S CATCH-ALL PROVISION(RESTATED)

I. Standard of review

The standard of review of a case dealing with certified conflict is de novo. Nelson v. State, 875 So. 2d 579, 581 (Fla. 2004). Questions of statutory interpretation are subject to de novo review. Mendenhall v. State, 48 So.3d 740 (Fla. 2010).

II. Discussion on the merits

As a preliminary matter, below, the Fourth District Court of Appeal, affirmed the trial court order summarily denying the claims as untimely and successive. Paul v. State, 59 So. 3d 193 (Fla. 4th DCA 2011). The Court also found that had the sentencing claim been raised in a 3.800(a) motion, it lacked merit and had already been raised and decided on direct appeal. Id. Thus, the claims raised herein are procedurally barred and the decision of the Fourth District Court of Appeal should be affirmed.

Turning to the merits of the conflict claim, the Petitioner was convicted under section 790.19, Florida Statutes (2001), of shooting into an occupied vehicle and was sentenced as a prison releasee reoffender (PRR) pursuant to section 775.082(9)(a), Florida Statutes (2001). Petitioner alleges that shooting into

an occupied vehicle does not qualify under the forcible felony catch-all provision of the PRR statute. See Crapps v. State, 968 So. 2d 627 (Fla. 1st DCA 2007)(finding that the offense of throwing a deadly missile into an occupied vehicle is not a qualifying offense under the PRR catch-all provision).

Petitioner also argues that the Fourth District Court of Appeal misapplied the strict statutory elements analysis, required by this Honorable Court in State v. Hearns, 961 So.2d 211 (Fla. 2007), when it found that shooting into an occupied vehicle necessarily includes the use of force.

Contrary to petitioner's claims, the Fourth District Court of Appeal properly applied the Hearns analysis and found the offense for which the Petitioner was convicted, shooting into an occupied vehicle, necessarily includes the use of force or violence against an individual. Thus, the Court properly found that the petitioner qualified as a prison release reoffender for purposes of sentencing

The pertinent portion of the Prison Releasee Reoffender Act is section 775.082(9)(a)1.o, Florida Statutes (2001), the catch-all section, which states that a prison releasee reoffender means any defendant who commits, or attempts to commit... "o. Any felony that involves the use or threat of physical force or violence against an individual..."

The meaning of this phrase for the determination of whether an offense qualifies for certain enhanced sentence was addressed by this Court in State v. Hearns, 961 So.2d 211 (Fla. 2007). This Court construed identical language found in the definition of "forcible felony" used for purposes of imposing a violent career criminal ("VCC") designation. See §§ 775.084(1)(d) and 776.08, Fla. Stat. The court specifically found that for this purpose, the analysis for determining whether a non-listed offense (i.e., a "forcible felony") qualifies for VCC sentencing is the same as for PRR designation for non-listed offenses.

In Hearns, this Court applied the rule set forth in Perkins v. State, 576 So.2d 1310, 1313 (Fla. 1991), which addressed whether an offense was a "forcible felony" under section 776.08 (the statute used to determine non-listed offense for VCC designation). Under Perkins, "for an offense to be a forcible felony under section 776.08, the 'use or threat of physical force or violence' must be a necessary element of the crime. If an offense may be committed without the use or threat of physical force or violence, then it is not a forcible felony." Hearns, supra (emphasis in original). Because the determination requires analysis of the "**necessary elements of the crime**" only, the court may not "analyze the evidence in a particular case" to determine whether the use or threat of physical force or

violence is an element of the offense. Id.(emphasis added). This court summarized its holding as follows:

> We reiterate that the only relevant consideration is the statutory elements of the offense. If "the use or threat of physical force or violence against any individual" is not a necessary element of the crime, "then the crime is not a forcible felony within the meaning of the final clause of section 776.08."

Id.

In order to apply the Hearns analysis to the case at bar, it must first be determined what are the "statutory elements" of the offense. Unlike most criminal statutes, section 790.19 encompasses several separate acts that constitute a violation in a single sentence, rather than separating them into different subsections and subparagraphs. Most significantly, the statute encompasses at least two particular criminal acts with completely unrelated, and in fact contradictory, elements. The first criminal act involves a structure (occupied or unoccupied) and the second criminal act involves a vehicle (while being used or occupied).

With regard to shooting or throwing certain objects into a structure, the statute states that whoever "wantonly or maliciously, shoots at, within, or into, or throws any missile or hurls or projects a stone or other hard substance which would produce death or great bodily harm, at, within, or in any public

or private building, occupied or unoccupied" violates this statute. Section 790.19, Fla. Stat. (2001)(emphasis added).

With regard to shooting or throwing certain objects into a vehicle, the statute states that whoever "wantonly or maliciously, shoots at, within, or into, or throws any missile or hurls or projects a stone or other hard substance which would produce death or great bodily harm, at, within, or in ... any ... vehicle of any kind which is being used or occupied by any person," violates this statute. Id.(emphasis added).

These are obviously two distinct and separate offenses with different elements. The first crime requires throwing an object at, within, or in a building, and makes it irrelevant whether the building is occupied. The second crime, which Appellant committed, requires throwing an object at, within, or in a vehicle, and does not apply unless the vehicle is being "used or occupied by any person."

In applying the strict statutory elements analysis of Hearns and Perkins, one must look to the elements of the offense the petitioner was charged with and convicted of, and not to each and every crime listed in section 790.19. In this case, the petitioner was charged with and convicted of shooting into an occupied vehicle pursuant to Florida Statute section 790.19, in order to be convicted of this crime, the vehicle **must be used or occupied**. Thus, the use of force is a necessary element of

shooting into a vehicle that is being used or occupied. Therefore, petitioner's conviction properly falls within the catch-all provision of the PRR statute.

Petitioner relies on Peterson Paul v. State[2], 958 So.2d 1135 (Fla. 4th DCA 2007), and Hudson v. State, 800 So.2d 627 (Fla. 3d DCA 2001), for authority to support the claim that the PRR statute does not apply to his sentence. As the Fourth District correctly pointed out, Peterson Paul and Hudson are factually distinguishable from the instant case. In Peterson Paul and Hudson, the offenses involved shooting into a building, which by statutory definition may be occupied or unoccupied, thus they do not necessarily include the use of force.

Moreover, Hudson specifically addressed the crime of throwing a missile into an occupied or unoccupied building, and premised its conclusion that such crime does not qualify for VCC sentencing on the fact that the crime could include throwing missiles into an unoccupied building. In fact, in Judge Schwarz's concurring opinion, which was later adopted as the court's opinion, the citation to the statute specifically *excludes* the vehicles section of section 790.19. Hudson at 628, n.2.

[2]Undersigned is using the first name to distinguish the opinion from the instant case.

Additionally, it is notable that in Peterson Paul, the Fourth District Court of Appeal held that the offense of throwing missiles into an occupied or unoccupied building does not qualify for PRR sentencing, however, the citation to section 790.19 explicitly excludes the alternative offense of shooting into an occupied vehicle from its analysis. Thus, it is clear from the analyses that since section 790.19 is an alternative crime statute, the crimes must be viewed as separate and distinct crimes for purposes of PRR sentencing.

Finally, here, the Fourth DCA certified conflict with Crapps v. State, 968 So.2d 627 (Fla. 1st DCA 2007). That case holds that the offense of throwing a missile into an occupied vehicle was not a forcible felony, for purposes of sentencing the defendant as a prison release reoffender. Crapps was wrongly decided. For the reasons cited above, the Court in Crapps wrongly relied on Hudson, supra and Peterson Paul, supra, as those defendants were convicted of crimes which statutorily do not necessarily include the use of force. Thus, this Court should affirm the decision of the Fourth District Court of appeal and quash the decision in Crapps.

CONCLUSION

Wherefore, Petitioner respectfully requests that this Honorable Court affirm the Fourth District's ruling in this matter, and hold that shooting a firearm into an occupied

vehicle is a forcible felony pursuant to the prison releasee reoffender statute.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Respondent's Merits Brief" has been furnished by U.S. Mail to: Kerry C. Collins, Esq., counsel for Petitioner, One Independent Drive, Suite 2902, Jacksonville, Florida 32202, on November ____, 2011.

MELANIE DALE SURBER

CERTIFICATE OF TYPE SIZE AND STYLE

The undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not proportionately spaced, on November ___, 2011.

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MELANIE DALE SURBER