

IN THE SUPREME COURT OF FLORIDA

JOHNNY WILMER
CLARK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC00-43

RESPONDENT'S ANSWER BRIEF

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

SHERRI TOLAR ROLLISON
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 128635

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300 Ext. 4576

COUNSEL FOR RESPONDENT

TABLE OF CONTENTS

	<u>PAGE(S)</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
PRELIMINARY STATEMENT	1
CERTIFICATE OF FONT AND TYPE SIZE	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF ARGUMENT	4
ARGUMENT	6

ISSUE I

DID THE DISTRICT COURT ERR IN AFFIRMING PETITIONER'S CONVICTION FOR AGGRAVATED BATTERY BY HOLDING THAT WHETHER OR NOT A VEHICLE COULD BE CONSIDERED AN EXTENSION OF THE PERSON WAS A QUESTION OF FACT FOR THE JURY TO DETERMINE AND THAT THERE WAS SUFFICIENT COMPETENT EVIDENCE TO WITHSTAND A JUDGMENT OF ACQUITTAL? (Restated)	6
CONCLUSION	15
CERTIFICATE OF SERVICE	15

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE(S)</u>
<u>Ady v. American Honda Finance Corp.</u> , 675 So. 2d 577 (Fla.1996)	4,7
<u>Carlile v. Game & Fresh Water Fish Commission</u> , 354 So. 2d 362 (Fla.1977)	4,7
<u>Clark v. State</u> , No. 98-1960 (Fla. 1st DCA December 29, 1999)	4,6
<u>Dale v. State</u> , 703 So. 2d 1045 (Fla. 1997)	8
<u>Gooch v. State</u> , 652 So. 2d 1189 (Fla. 1st DCA), <u>review</u> <u>denied</u> , 659 So. 2d 1086 (Fla.1995)	8
<u>Harger v. Structural Services, Inc.</u> , 121 N.M. 657, 916 P.2d 1324 (1996)	4,7
<u>Jackson v. State</u> , 736 So. 2d 77 (Fla. 4th DCA 1999)	7
<u>Malczewski v. State</u> , 444 So. 2d 1096 (Fla. 2d DCA 1984)	9,10,11,12
<u>Mitchell v. State</u> , 698 So. 2d 555 (Fla. 2d DCA 1997)	8
<u>Morris v. State</u> , 722 So. 2d 849 (Fla. 1st DCA 1998)	3,8
<u>People v. Moore</u> , 3 N.Y.S. 159 (N.Y. Sup.Ct. 1888)	13
<u>Peters v. Weatherwax</u> , 69 Haw. 21, 731 P.2d 157 (1987)	4,7
<u>Respublica v. DeLongchamps</u> , 1 U.S. 111 (1784)(Dall.) 1 L. Ed.	11
<u>Savino v. State</u> , 447 So. 2d 411 (Fla. 5th DCA 1984)	4,7
<u>State v. Townsend</u> , 865 P.2d 972 (Idaho 1993)	13
<u>Stokes v. State</u> , 233 Ind. 10, 115 N.E.2d 442 (1953)	11
<u>Williamson v. State</u> , 510 So. 2d 335 (Fla. 4th DCA 1987) <i>passim</i>	

FLORIDA STATUTES

Fla. Stat. 784.03. (1997)	8
Fla. Stat. 784.045 (1997)	7
§ 812.022(2)	7

OTHER

6A C.J.S. Assault and Battery, Sec. 70 at 440-41, cited by		11
6 Am.Jur.2d Assault and Battery Sec. 37 at 38	10

PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Johnny Wilmer Clark, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The record on appeal consists of two volumes, which will be referenced according to the respective number designated in the Index to the Record on Appeal, followed by any appropriate page number. "IB" will designate Petitioner's Initial Brief, followed by any appropriate page number.

All emphasis through bold lettering is supplied unless the contrary is indicated.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

STATEMENT OF THE CASE AND FACTS

The State agrees with Petitioner's statement of the case and facts, except.

1. Victim Cecil Lynn described the Petitioner's use of his vehicle as a weapon in his attempt to get away with the stolen materials:

I got back in my truck. I looked and he [Petitioner] was coming at us probably 25 to 30 miles an hour and wasn't letting up. And I said oh, lord, here we go. He hit the right rear of the truck on a pretty fair angle and spun me.

(II-47). The victim testified that when Petitioner hit his truck, it spun him. (II-47). Mr. Lynn added that Petitioner had torn the bumper off of the company's 1990 Ford Pickup truck Mr. Lynn had been driving. Mr. Lynn, upset and scared, made a frantic phone call to the police. (II-47).

2. Mr. Lynn described the damages to the truck as a result of Petitioner's barrage: "It wiped out the radiator, the grille, and the quarter -- rear right quarter panel and the bumper and the tailgate." He added, "you couldn't drive it because the radiator pushed through." (II-50).

3. Keith Frost, a Northwestern, Inc. employee, who witnessed the incident, testified to the damage Petitioner inflicted on the truck driven by Cecil Lynn: "Cecil's front bumper was caved in. The hood was dented. The back bumper was ... bent totally backwards. It was messed up pretty good." (II-34).

4. Mark Burk, a crime scene investigator took several pictures of the damaged trucks. The pictures were admitted and published to the jury. (II-64-68).

5. Petitioner appealed his convictions for aggravated battery and criminal mischief. On appeal, Petitioner argued that

the trial court had a duty to follow Williamson v. State, 510 So.2d 335 (Fla. 4th DCA 1987), which held that under the facts of that case the automobile was not an extension of the person.

6. The First District Court in affirming Petitioner's Aggravated Battery conviction held:

We do not agree with the Williamson Court that, as a matter of law, a motor vehicle cannot have such a sufficiently close connection with its occupant that intentionally striking the vehicle may never constitute a battery on the person of the occupant.

Relying on the Restatement of Torts, the lower court added:

Thus, just as the question of whether an object can be considered a "deadly weapon," see Morris v. State, 722 So.2d 849, 850 (Fla. 1st DCA 1998), whether an object is sufficiently closely connected to a person such that touching or striking the object would be a battery on that person will depend upon the circumstances of each case. As a result, generally it is a question of fact for the jury. (See attached.)

SUMMARY OF ARGUMENT

The First District Court, Clark v. State, No. 98-1960 (Fla. 1st DCA December 29, 1999), certifying conflict with Williamson v. State, 510 So.2d 335, 338 (Fla. 4th DCA 1987), overruled on other grounds, Florida v. Sanborn, 533 So.2d 1169 (Fla. 1997), held that whether or not an automobile is an extension of a person, in the battery context, is a question of fact to be decided by the jury based on the evidence of each case.

It is well settled that words and phrases having well-defined meanings in the common law are interpreted as having the same meanings when used in statutes dealing with the same or similar subject matter. See Savino v. State, 447 So.2d 411, 413 n. 3 (Fla. 5th DCA 1984) (Cowart, J., concurring); Peters v. Weatherwax, 69 Haw. 21, 731 P.2d 157, 161 (1987); Harger v. Structural Servs., Inc., 121 N.M. 657, 916 P.2d 1324, 1329-30 (1996). A court will presume that a statute "was not intended to alter the common law other than by what was clearly and plainly specified in the statute." Ady v. American Honda Fin. Corp., 675 So.2d 577, 581 (Fla.1996); see Carlile v. Game & Fresh Water Fish Comm'n, 354 So.2d 362, 364 (Fla.1977).

Whether or not someone has been touched via an extension of their person must be a factual determination and not an inflexible matter of law. Assuming arguendo, that the determination of whether or not an automobile is an

extension of the person is a question of law, logic defies the reasoning of the Williamson court. Common sense says that if objects which can be held by two fingers possess the requisite intimate connection to be ruled an extension of the person then, certainly, there is an even greater connection between an automobile and its occupant, who is confined within the vehicle and necessarily subject to the same forces striking the vehicle. By law, an automobile occupant must be strapped to the vehicle.

In the present case, the victim testified that when Petitioner hit his truck, it spun him and his truck. (II-47). Thus, the direct contact between Petitioner's truck and the victim's vehicle was so severe that the force of it not only damaged the victim's truck, but actually propelled the victim into a spin relocating both him and his truck. Hence, to understate the matter, the victim was touched by Petitioner and his vehicle. This case further illustrates that the determination of whether or not an automobile constitutes an extension of the person in the context of "touching" must depend of the facts of each case. Accordingly, the lower court decision should be affirmed.

ARGUMENT

ISSUE I

DID THE DISTRICT COURT ERR IN AFFIRMING
PETITIONER'S CONVICTION FOR AGGRAVATED BATTERY
BY HOLDING THAT WHETHER OR NOT A VEHICLE COULD
BE CONSIDERED AN EXTENSION OF THE PERSON WAS A
QUESTION OF FACT FOR THE JURY TO DETERMINE AND
THAT THERE WAS SUFFICIENT COMPETENT EVIDENCE
TO WITHSTAND A JUDGMENT OF ACQUITTAL ?
(Restated)

The First District Court, Clark v. State, No. 98-1960 (Fla. 1st DCA December 29, 1999), certifying conflict with Williamson v. State, 510 So.2d 335, 338 (Fla. 4th DCA 1987), overruled on other grounds, Florida v. Sanborn, 533 So.2d 1169 (Fla. 1997), held that whether or not an automobile is an extension of a person, in the battery context, is a question of fact to be decided by the jury based on the evidence of each case. Petitioner argues, in accordance with Williamson, that, as a matter of law, an automobile does not have such an intimate connection with the person as to be regarded as a part or extension of the person, such as clothing or an object held by the victim. Additionally, Petitioner challenges the lower court's referral to the Restatement of Torts arguing that tort law should not be used to define criminal conduct because "Tort law is largely common law; criminal law is largely codified" and therefore, "Grafting principles of one onto the other does violence to these distinctions." [IB 15-16]. Petitioner's argument is

based on manufactured principles rather than established precedent and the common meaning of statutory language.

PRESERVATION:

This issue was properly preserved.

STATUTORY INTERPRETATION:

In holding that Chapter 812 theft cases, § 812.022(2), adopts the terminology of the common law rule, the court in Jackson v. State, 736 So.2d 77, 83 (Fla. 4th DCA 1999), reiterated settled precedent:

A well established principle of statutory construction is that words and phrases having well-defined meanings in the common law are interpreted as having the same meanings when used in statutes dealing with the same or similar subject matter. See Savino v. State, 447 So.2d 411, 413 n. 3 (Fla. 5th DCA 1984) (Cowart, J., concurring); Peters v. Weatherwax, 69 Haw. 21, 731 P.2d 157, 161 (1987); Harger v. Structural Servs., Inc., 121 N.M. 657, 916 P.2d 1324, 1329-30 (1996). Another rule of statutory construction is that a court will presume that a statute "was not intended to alter the common law other than by what was clearly and plainly specified in the statute." Ady v. American Honda Fin. Corp., 675 So.2d 577, 581 (Fla.1996); see Carlile v. Game & Fresh Water Fish Comm'n, 354 So.2d 362, 364 (Fla.1977).

Jackson v. State, 736 So.2d 77, 83 (Fla. 4th DCA 1999).

Thus, Petitioner's claim that the District Court improperly considered the Restatement of Torts is contrary to controlling case law.

RELEVANT STATUTES:

Fla. Stat. 784.045 (1997), states in pertinent part:

Aggravated battery:

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

1. Intentionally or knowingly causes great bodily harm, permanent disability, or permanent disfigurement; or

2. Uses a deadly weapon.

Fla. Stat. 784.03. (1997), states in pertinent part:

Battery; felony battery:

(1)(a) The offense of battery occurs when a person:

1. Actually and intentionally touches or strikes another person against the will of the other; or

2. Intentionally causes bodily harm to another person.

MERITS:

The First District Court in affirming Petitioner's

Aggravated Battery conviction held:

We do not agree with the Williamson Court that, as a matter of law, a motor vehicle cannot have such a sufficiently close connection with its occupant that intentionally striking the vehicle may never constitute a battery on the person of the occupant.

Relying on the Restatement of Torts, the lower court added:

Thus, just as the question of whether an object can be considered a "deadly weapon," see Morris v. State, 722 So.2d 849, 850 (Fla. 1st DCA 1998), whether an object is sufficiently closely connected to a person such that touching or striking the object would be a battery on that person will depend upon the circumstances of each case. As a result, generally it is a question of fact for the jury. (See attached.)

It is well settled that whether or not a device is deadly is a question of fact to be decided by a jury. Dale v.

State, 703 So.2d 1045 (Fla. 1997). Mitchell v. State, 698 So.2d 555 (Fla. 2d DCA 1997) Gooch v. State, 652 So.2d 1189 (Fla. 1st DCA), review denied, 659 So.2d 1086 (Fla.1995).

It follows that whether a device constitutes an extension of the person is a factual determination based on the evidence adduced in the particular case at bar.

There is no dispute that a hand-held object or clothing can be considered an extension of the person in the context of the battery statute. See Malczewski v. State, 444 So.2d 1096, 1096-1099 (Fla. 2d DCA 1984). Likewise, there is no dispute that an automobile can be used as a deadly weapon. There is also no dispute that the Petitioner intentionally rammed his truck into the victim's truck spinning it around and its occupant, and that as a result, the victim's truck sustained considerable damages: The front bumper was torn off; the rear bumper was bent totally backwards; the hood was dented; and the truck was inoperable because the radiator had pushed through the body. (II-47-48).

Petitioner champions the Fourth District case, Williamson v. State, 510 So.2d 335, 338 (Fla. 4th DCA 1987), overruled on other grounds, Florida v. Sanborn, 533 So.2d 1169 (Fla. 1997), to support his argument that, as a matter of law, an automobile is not an extension of the person, in the battery context.

In Williamson, the defendant intentionally rammed a state trooper's vehicle containing a state trooper. The trooper

was not injured. In holding that the trooper's car was not an extension of the person the court reasoned: "Although a battery may be found as a result of the touching or striking of something other than the actual body of the person, that object must have such an intimate connection with the person as to be regarded as a part or extension of the person, such as clothing or an object held by the victim. (Cite omitted)." Id. at 338. The court concluded as a matter of law that the trooper's vehicle "did not have such an intimate connection with the person of the trooper so as to conclude that a battery had occurred." Id. at 338. This reasoning, and the use of intimate, suggests the court saw the issue as mostly privacy. The reasoning would be logical if applied to an unoccupied vehicle. It is illogical when applied to an occupied vehicle.

In deciphering the defects inherent in the Williamson holding, we must first go back to basics. The Williamson, court cited Malczewski v. State, 444 So.2d 1096, 1096-1099 (Fla. 2d DCA 1984), in its analysis of the issue. In Malczewski, the Second District, finding no cases on point, perused other resources including hornbook law to help resolve the issue of whether an attack on an object held by a person constitutes touching or striking in the context of Florida's battery statute:

Turning to hornbook law, Dean William Prosser wrote: The protection [afforded a plaintiff by an action for the tort of battery] **extends to any part**

of the body, or to anything which is attached to it and practically identified with it. Thus contact with the plaintiff's clothing, or with a cane, a paper, or any other object held in his hand, will be sufficient.... His interest in the integrity of his person includes all those things which are in contact or connected with it. Prosser, Law on Torts Sec. 9 at 34 (4th ed. 1971).

Commentators have stated that the above common law rule with respect to the tort of battery applies as well to the crime of battery. In 6 Am.Jur.2d Assault and Battery Sec. 37 at 38, it is stated: The rules that to be held liable for a battery the offender need not directly effect the unlawful contact with the person of the victim, and that a battery need not be committed directly against the person of the victim, but may be committed against anything so intimately connected with the person of the victim as in law to be regarded as a part of that person, are applicable in criminal prosecutions for battery, as are the principles that there may be a battery in the legal sense of the term even though no physical harm resulted therefrom.... (Footnotes omitted.) Similarly, in 6A C.J.S. Assault and Battery, Sec. 70 at 440-41, cited by the state, it is said: "It is essential to the [criminal] offense of battery ... that there be a touching of the person of the prosecutor, or something so intimately associated with, or attached to, his person as to be regarded as a part thereof.... The contact may have been ... with something carried by him." (Footnotes omitted.)

The eighteenth century criminal case cited by the state, Respublica v. DeLongchamps, 1 U.S. 111 (1784), lends support to the logical and reasonable proposition of criminal law that there need not be an actual touching of the victim's person in order for a battery to occur, but only a touching of something intimately connected with the victim's body. See also Stokes v. State, 233 Ind. 10, 115 N.E.2d 442 (1953).

In Respublica v. DeLongchamps, which is almost directly on point, the defendant struck the victim's cane. In affirming his conviction for assault and battery, the **Supreme Court of Pennsylvania said that the assault and battery is, perhaps, one of that kind, in which the insult is more to be considered, than the actual damage;**

for, though no great bodily pain is suffered by a blow on the palm of the hand, or the skirt of the coat, yet these are clearly within the legal definition of assault and battery.... [T]herefore, any thing attached to the person, partakes of its inviolability.... 1 U.S. 111 (Dall.) at 114, 1 L.Ed. 59 at 61.

(Emphasis added.)

Following this detailed analysis, the Malczewski court concluded: "[W]e hold that the word "person" in our state's battery statute, section 784.03(1)(a), means person or anything intimately connected with the person." Id. at 1096-1099.

In the present case, the First District Court concurred with the analysis and holding in Malczewski but rejected the faulty reasoning of Williamson. The Williamson court illogically reasoned that an automobile is not intimately connected to its driver [or passengers]. Thus, according to the Williamson rationale, a piece of paper -- as discussed in Malczewski -- which can be held by two fingers, would be more intimately connected to the holder than an automobile is connected to its occupant, despite that the seated occupant's entire body is making contact with the automobile interior and who, by law, **must be strapped to the vehicle**. See § 316.614, Fla. Stat.(1997). Moreover, according to National Highway Safety Administration statistics, in 1997, there were 3,450,000 injuries and 42,000 fatalities due to motor vehicle crashes in the United States. Ezio C. Cerrelli, 1997 Traffic Crashes, Injuries and Fatalities -

Preliminary Report, National Highway Traffic Safety Administration

[<http://www.bts.gov/ntl/data/dotHS808695.pdf>]. This statistic alone confirms the intimate nexus between human beings and the vehicles encasing them. Yet, according to the holding in Williamson, catching a piece of paper with the point of a knife and pulling it out of the holder's hand would constitute an aggravated battery whereas intentionally ramming an occupied vehicle with a ton of accelerating metal would not constitute an offensive touching. Consequently, the Williamson Court's rationale is flawed and should be rejected.

Although there are no other cases directly on point in Florida, other jurisdictions have long followed the common sense approach recognizing that, in the battery context, an automobile can be an extension of its occupants. See generally, State v. Townsend, 865 P.2d 972 (Idaho 1993).

Petitioner argues that Townsend is distinguishable because the victim in that case was "jostled around" as a result of the defendant's driving his truck into the victim's car. In the instant case, the victim, Cecil Lynn testified, " He [petitioner] hit the tight rear of the truck on a pretty fair angle and spun me." [II 47]. Thus, Petitioner is grasping at semantics. There is no such distinction in Townsend.

Likewise, in New York State, there is historical precedent declaring that a vehicle of any sort can be an extension of its occupant:

Defendant urges that this was no assault, for the reason that there was no intention to hurt Snyder [occupant], and that he did not lay his hands upon him. It is plain, however, that the force which he applied to the horses and sleigh just as effectually touched the person of Snyder [occupant] as if he had taken him by his ears or shoulders and turned him right about face. The horses and sleigh were the instruments with which he directed and augmented his personal and physical force against and upon the body of Snyder. Snyder did receive bodily harm. One receives bodily harm, in a legal sense, when another touches his person against his will with physical force intentionally hostile and aggressive, or projects such force against his person. Here, for the moment, Snyder was deprived by the defendant of his own control of his own person, and he was controlled, intimidated, and coerced by the hostile, aggressive, physical force of the defendant.

People v. Moore, 3 N.Y.S. 159, 160 (N.Y. Sup.Ct. 1888).

In the present case, the victim testified that when Petitioner hit his truck, it spun him. (II-47). Thus, the direct contact between Petitioner's truck and the victim's vehicle was so severe that the force of it not only damaged the victim's truck, but actually propelled the victim into a spin relocating both him and his truck. Hence, to greatly understate the matter, the victim was touched by Petitioner and his vehicle.

CONCLUSION

The decision below should be approved and that of Williamson disapproved.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JAMES W. ROGERS
TALLAHASSEE BUREAU CHIEF,
CRIMINAL APPEALS
FLORIDA BAR NO. 325791

SHERRI TOLAR ROLLISON
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 128635

OFFICE OF THE ATTORNEY GENERAL
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(850) 414-3300 Ext. 4576

COUNSEL FOR RESPONDENT
[AGO# L00-1-1236]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER BRIEF ON THE MERITS has been furnished by U.S. Mail to P. Douglas Brinkmeyer, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this ____ day of February, 2000.

Sherri Tolar Rollison
Attorney for State of Florida

IN THE SUPREME COURT OF FLORIDA

JOHNNY WILMER
CLARK,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC00-43

APPENDIX

Johnnie Wilmer Clark v. State, 1st DCA opinion dated
December 29, 1999.

[C:\test\2Convert\00-43ans.wpd --- 9/7/00,10:03 AM]