

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT  
IN AND FOR PALM BEACH COUNTY, FLORIDA.

SHARIF EL-MAAYERGY,

Appellant,

APPELLATE DIVISION (CRIMINAL)

Case No.: 502007AP900035AXXXMB

Co. Court Case No.: 502007MM007767AXXXMB

STATE OF FLORIDA,

Appellee.

\_\_\_\_\_ /

Opinion filed: Feb. 7, 2008

Appeal from Judge Richard Wennet,  
County Court in and for Palm Beach County.

For Appellant, Christine Geraghty, Esq., Office of the Public Defender, Criminal Justice  
Building, 421 Third Street/6th Floor, West Palm Beach, FL 33401.

For Appellee, Michelle Zieba, Esq., Office of the State Attorney, 401 N. Dixie Highway, West  
Palm Beach, FL 33401.

Appellant, Sharif El-Maayergy, appeals his judgment and sentence after a jury found him guilty of Resisting Officer Without Violence and not guilty of Trespass of a Conveyance or Structure. Appellant was at Bradley's Bar and Saloon and was involved in an argument with another patron. Appellant proceeded to bother other patrons in the restaurant. The manager asked Appellant repeatedly to leave the premises and informed him that the police had been called. The manager and a bartender then attempted to escort Appellant outside and Appellant flailed his arms and resisted. As Appellant was being escorted out of the restaurant the police arrived. The police requested that Appellant stop resisting and leave the premises. Appellant

continued to resist and both officers were needed to arrest Appellant because of his attempts to resist being handcuffed.

Appellant's defense during the trial was that he did not commit a trespass and therefore the officers were not executing a legal duty when they arrested him and the arrest was illegal. During the trial, defense counsel objected to the standard jury instruction for Resisting Arrest Without Violence. Defense counsel argued that the instruction is "circular" because it directs the jury to find that an arrest is a lawful execution of a legal duty even though the lawfulness of the arrest was challenged. The trial court denied defense counsel's objection and stated that it would read the standard jury instruction.

Appellant argues on appeal that he was entitled to have the jury instructed on the law that was applicable to his theory of the defense. Appellant raises an additional issue on appeal, however because reversal is warranted based upon the trial court's refusal to allow the instruction, the remaining point will not be addressed herein. Appellant contends that the legality of the arrest is one of the elements that the State is required to prove in order to convict him of Resisting Arrest Without Violence and that the jury instruction took away part of the State's burden to prove each and every element beyond a reasonable doubt.

"The decision of the trial court to give or withhold a proposed jury instruction is reviewed under an abuse of discretion standard." Campbell v. State, 812 So. 2d 540, 543 (Fla. 4th DCA 2002). A defendant is entitled to resist an unlawful arrest as a matter of law. Livinnston v. State, 610 So. 2d 696,697 (Fla. 3d DCA 1992). A defendant is entitled to have the jury instructed on the theory of his or her defense if there is any evidence supporting the theory. Lanaston v. State, 789 So. 2d 1024, 1026 (Fla. 1st DCA 2001).

The Florida Standard Jury Instruction (Criminal) Resisting Officer Without Violence contains a generic and correct statement of law and the instruction does not take the issue of the lawfulness of the arrest from the jury. See State v. Anderson, 639 So. 2d 609,610 (Fla. 1994). However, in those cases where the defendant maintains the arrest was unlawful and requests that the jury be instructed on that defense, an instruction should be given to insure that the jury understands that it must decide the issue. Id.

The trial court abused its discretion in failing to give Appellant the requested instruction as Appellant maintained the arrest was unlawful and requested that the jury be instructed on that defense.

Accordingly the judgment and sentence under review is therefore REVERSED and the cause REMANDED for further proceedings.

GARRISON, MILLER and LABARGA, JJ. concur.