

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
FIFTH DISTRICT

JANUARY TERM 2007

SHERMAN LEONARD ATKINS,

Appellant,

v.

Case No. 5D06-3635

STATE OF FLORIDA,

Appellee.

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Opinion filed July 6, 2007

Appeal from the Circuit Court  
for Volusia County,  
William A. Parsons, Judge.

James S. Purdy, Public Defender, and  
Nancy Ryan, Assistant Public Defender,  
Daytona Beach, for Appellant.

Bill McCollum, Attorney General,  
Tallahassee, and Allison Leigh Morris,  
Assistant Attorney General, Daytona  
Beach, for Appellee.

MONACO, J.

The appellant, Sherman Leonard Atkins, raises a number of issues in this appeal from his judgment and sentence, only one of which merits discussion. We conclude that the motion made by Mr. Atkins for judgment of acquittal with respect to the misdemeanor charge of resisting an officer without violence<sup>1</sup> should have been granted

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<sup>1</sup> See § 843.02, Fla. Stat. (2006).

in accordance with the holding of *A.A.R. v. State*, 926 So. 2d 463 (Fla. 4th DCA 2006). See also *Steele v. State*, 537 So. 2d 711 (Fla. 5th DCA 1989). Compare *State v. Townsend*, 585 So. 2d 495 (Fla. 5th DCA 1991). We note that this matter was not raised before the trial court except by an unparticularized motion for judgment of acquittal. The error, however, was fundamental because it affirmatively appears from the case put on by the State that the charged violation of section 843.02, Florida Statutes (2006), was not committed by Mr. Atkins. See *F.B. v. State*, 852 So. 2d 226, 230-31 (Fla. 2003); *Troedel v. State*, 462 So. 2d 392, 399 (Fla. 1984); *Williams v. State*, 516 So. 2d 975 (Fla. 5th DCA 1987)(en banc), *review denied*, 525 So. 2d 881 (Fla. 1988). We, therefore, reverse the conviction of Mr. Atkins of resisting an officer without violence, and remand this case to the trial court to amend the judgment and sentence to assure that his record will not reflect a conviction of this offense.

Having reviewed the record, we conclude that there is no reason to require Mr. Atkins to be resentenced by the trial court as a result of our holding. Thus, we otherwise affirm the judgment with respect to all other charged crimes of which Mr. Atkins was convicted, as well as the sentence awarded by the trial court.

AFFIRMED in part, REVERSED in part, and REMANDED.

THOMPSON, J. and SMITH T., Associate Judge., concur.