IN THE SUPREME COURT OF FLORIDA

WILLIE F. VAUSE,

Petitioner,

-vs-

STATE OF FLORIDA,

Respondent.

Case No. 63,107

ON DISCRETIONARY REVIEW FROM
THE FIRST DISTRICT COURT OF APPEAL

PETITIONERS' JURISDICTIONAL BRIEF

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STATEMENT OF THE CASE AND FACTS

The Petitioner, Willie F. Vause, contends that the decision of the First District Court of Appeal below expressly and directly conflicts on one issue with a decision of the Third District Court of Appeal and that it expressly and directly conflicts on another issue with a decision of this Court.

A conformed copy of the opinion sought to be reviewed is contained in the appendix to this brief pursuant to the provisions of Fla.R.App.P. 9.120(d). Except as otherwise indicated, the statement of facts made by the District Court is adopted here.

STATEMENT OF JURISDICTION

The discretionary jurisdiction of this Court is invoked under Art. V Sec. 3(b)(3), Fla. Const. (1980).

POINT ONE

THE DECISION OF THE DISTRICT COURT THAT IT WAS PROPER TO ALLOW A RADIOLOGIST TO TESTIFY AS TO THE MANNER IN WHICH THE FATAL BULLET BECAME FRAGMENTED EXPRESSLY CONLFICTS WITH A DECISION OF THE THIRD DISTRICT COURT OF APPEAL

The District Court held that it was proper to allow a radiologist to testify as to the manner in which the fatal bullet became fragmented,[1] rejecting the Petitioner's claim that such testimony should have been within the exclusive expertise of a ballistics specialist. That conclusion expressly conflicts with the opinion of the Third District Court of Appeal in Salinetro v. Nystrom, 341 So.2d 1059 (Fla. 3rd DCA 1977) wherein the Court held that a medical witness is not qualified to give "expert testimony" outside his particular field of medical expertise.

Part of the reason for the failure to apply the correct rule of law was the Court's apparent misunderstanding of the issue. For example, the Court stated that "contrary to Defendant's argument, a ballistics expert is not qualified to

[1] An explanation as to the materiality of the factual question relating to the manner in which the bullet became fragmented is omitted here in view of the limited function of this jurisdictional brief.

interpret x-rays." That erroneous characterization of Petitioner's contention undermines the force of the argument. The Petitioner did not, at any time, suggest that a ballistics expert could usurp the obvious function of a radiologist by reading and interpreting x-rays.

The Petitioner would concede that a radiologist is the only qualified person to read and interpret x-rays, but the point of the argument here was that the factual issue of how the bullet became fragmented was not a radiological subject to begin with. Questions relating to the manner in which a projectile discharged from a firearm changes its composition upon impact with an object are questions which are solely within the province of a ballistics expert.

Another reason for the failure to apply the correct rule of law was that the Court apparently had an incorrect or incomplete understanding of the applicable facts. For example, the Court stated that the radiologist had testified "hundreds of times" in cases involving gunshot wounds. While this would seem to support the Court's opinion, it is evident that the Court overlooked the portion of the radiologists testimony wherein he conceded that he had never given testimony of this nature before. (R-296)

A radiologist is one who is trained to use x-rays for the diagnosis and treatment of diseases.[2] This type of training

[2]Webster's New Collegiate Dictionary p. 952 (1977)

and experience does not qualify one to venture an opinion as to why a shot fired from a gun has taken a certain course or why it has come to its resting place in a certain condition. The testimony of the radiologist in that regard would have been more properly given by an expert in the field of ballistics. That discipline is defined as the science of the motion of projectiles in flight.[3]

In Salinetro v. Nystrom, supra, the Court held that it was error to allow a doctor who was a specialist in obstetrics and gynecology to testify that a radiologist was negligent in failing to determine that his female patient was pregnant before giving her x-rays. Although the permissible range of subjects upon which an expert can testify is a matter of discretion with the trial judge under Mills v. Redwing Carriers Inc., 217 So.2d 453 (Fla. 2d DCA 1961) the Court in Salinetro had little difficulty in determining that it was reversible error to allow the Plaintiff's doctor to give that particular medical opinion.

The Petitioner's argument for reversal in this case is even stronger than the one which was accepted by the Court in Salinetro, for in the latter case the witness was at least confining his testimony to the general subject of medicine. If a doctor can not properly testify about something which is outside his chosen field of medical specialization, he surely should not be permitted

[3]Id. at p. 85

to testify about something which is not even within the general field of medicine.

This Court would probably have very little difficulty with the proposition that an FBI ballistics specialist is not qualified to establish a cause of death or the nature of an injury to the human body. The reverse situation presented by this case is no more complex. A doctor trained in the healing arts simply should not be permitted, because of his wisdom in that field, to give opinions as to how and why a bullet travels the way it does.

For these reasons the Petitioner respectfully submits that the opinion of the Court below is in conflict with the opinion of the Third District Court of Appeal in Salinetro, supra. Judges and lawyers who must apply the Evidence Code daily should not be faced with one case which says that a doctor cannot testify outside his field or medical specialization, and another which says that a doctor's expert testimony is not strictly limited to the field of medicine.

POINT TWO

THE DECISION OF THE DISTRICT COURT APPROVING THE IMPOSITION OF AN ENHANCED PENALTY FOR THE USE OF A FIREARM EVEN THOUGH THE FIREARM WAS AN ESSENTIAL ELEMENT OF THE OFFENSE EXPRESSLY CONFLICTS WITH A DECISION OF THIS COURT

This District Court below held that it was not error for the trial judge to impose a three year mandatory minimum sentence under Section 775.087(2) Fla. Stat. (1979) for the use of a firearm even though the firearm was a necessary element of the crime of shooting into an occupied vehicle which was in turn the predicate felony for the Petitioner's conviction of third degree felony murder. This conclusion is directly contrary to the rule of law established by this Court in State v. Hegstrom, 401 So.2d 1343 (Fla. 1981).

In Hegstrom the Court concluded that a criminal defendant could not be separately punished for both felony murder, and the underlying felony. The decision was based upon the recent double jeopardy precedents set by the United States Supreme Court in Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980) and Albernaz v. United States, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981), and the intent of the Florida Legislature in enacting Section 775.021(4) Fla. Stat. (1979).

The District Court in this case agreed that the predicate felony (shooting into an occupied vehicle) cannot be committed unless the offender uses a firearm, and that the firearm was

therefore an essential element of the offense in this case. The Court avoided the Rule in Hegstrom, however, by concluding that the penalty is not actually increased by the imposition of the three year mandatory minimum provisions of Section 775.087(2). That erroneous conclusion demonstrates that the opinions are in conflict.

The law requiring the mandatory minimum sentence for certain offenses committed with the use of a firearm was obviously intended to provide a form of aggravated penalty for the additional fact that the crime was committed with a gun. The purpose of the law is not served in a case such as this where the use of the gun is an essential element of the offense. Nor can the minimum sentence be applied legally in such a situation.

The same District Court held in Harper v. State, 386 So.2d 80 (Fla. 1st DCA 1979) that the use of a firearm cannot double as an element of the crime and as a means of increasing the maximum term of the sentence under the enhancement provisions of Section 775.087(1). If that is true then it follows logically that the use of a firearm cannot double as an element of a crime and as a means of enhancing the sentence by imposing a mandatory minimum sentence. The result does not turn upon the form of the enhancement. Rather it should turn upon the prohibition against using an element of the crime as means of aggravating the penalty.

The Blockburger[4] test applies to this case just as it applied

[4]Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)

to Whalen and Hegstrom, supra. All of the elements of using a firearm in the commission of a felony must have been proven in order to prove the crime of shooting into an occupied vehicle. Likewise, all of the elements of the crime of shooting into an occupied vehicle must have been proven in order to prove the crime of third degree murder.[5] It cannot be said that each of the crimes contains an element not required to prove one of the others.

The Petitioner recognizes that the conflict in the decisions does not alone require this Court to accept jurisdiction over this case for it is clear that Art. V. Sec. 3(b)(3), Fla. Const. (1980) provides that the Court may consider such a case in its discretion. The conflict presented here should be resolved, however, because it appears that the lower courts have had difficulty in uniformly applying the applicable legal principles.

The present confusion in this area of the law is evidenced by the fact that the Court below had to recede from one of its

[5]The shooting charge and the weapon charge are completely subsumed within the charge of third degree felony murder. This is not merely a "single transaction" case where similar but discrete crimes are proven upon overlapping evidence. Compare State v. Cantrell, 417 So.2d 260 (Fla. 1982) and Borges v. State, 415 So.2d 1265 (Fla. 1982).

prior opinions[6] to reach the result achieved here. The Court specifically held:

> The distinction between paragraphs (1) and (2) of Section 775.087 was not argued in Skipper v. State, 400 So.2d 797 (Fla. 1st DCA 1981), re'd on other grounds, 7 F.L.W. 464 (Fla., Oct. 7, 1982). To the extent that Skipper is inconsistent with Blanton [v. State, 388 So.2d 1271 (Fla. 4th DCA 1980)] and this opinion, we hereby recede from Skipper. (Slip at. p.7).

The panel of judges in this case held that the imposition of the mandatory minimum does not increase the penalty, yet Judge Ervin of the same Court held in an opinion released several weeks earlier that it does. See Stacey v. State, ___So.2d ___, 7 F.L.W. 485 (Fla. 1st DCA Nov. 17, 1982) Ervin J. dissenting.

The lack of consistency which was the subject of Mr. Justice England's concern in Hegstrom, evidently has not been cured. This Court should accept review to resolve the conflict and to provide a definitive answer to the question involving the applicability of the three year mandatory minimum provisions of Section 775.087(2) Fla. Stat. (1979).

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[6]The apparent conflict within the First District is not relied upon as a basis for jurisdiction but only to demonstrate a need for an opinion by this Court.

CONCLUSION

This Court should find that it has jurisdiction and give full consideration to the issues presented by this case.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Honorable Jim Smith, Attorney General, Attention: Carolyn M. Snurkowski, Esquire, The Capitol, Tallahassee, Fl 32304 by U.S. Mail this 31st day of January, 1982.

PHILIP J. PADOVANO