IN THE SUPREME COURT OF FLORIDA

ANITA MARIE AMLOTTE, Petitioner, vs. STATE OF FLORIDA, Respondent.	CASE NO. 64,107

FILED
OCT 17 1983
SID J. WHITE
CLERK SUPREME COURT
By ______
Chief Deputy Clerk

PETITIONER'S REPLY BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON
ASSISTANT PUBLIC DEFENDER
1012 South Ridgewood Avenue
Daytona Beach, FL 32014-6183
(904) 252-3367

ATTORNEY FOR PETITIONER

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ARGUMENT

IN REPLY TO THE STATE AND IN SUPPORT OF THE CONTENTION THAT THE CRIME OF ATTEMPTED FELONY MURDER DOES NOT EXIST.

Felony murder in Florida is a crime of strict liability. As long as an accused is proven to have been a participant in a felony out of which a homicide occurred, there need be no showing of causation or active participation by him in the homicide. Baker v. State, 377 So. 2d 17 (Fla. 1979). This Honorable Court's recent holding in Gentry v. State, Fla. Case No. 62,973 (September 1, 1983) 8 FLW 315 , does not affect the logical conclusion that there can be no attempt to commit a crime of strict liability. Gentry held that one may be found guilty of attempting to commit a general intent crime, focusing on whether the completed offense is a crime requiring specific intent or general intent. Felony murder is, of course, a "no intent" crime. There is no crime committed, except the underlying felony, unless and until a death occurs. The Indiana Supreme Court wrote in Head v. State, 443 N.E.2d 44 (Ind. 1982):

> . . . Whether the underlying felony has been completed or attempted, the felony-murder rule cannot be applied unless the death of another occurred by virtue of the commission or attempted commission of the underlying felony. In other words, absent death the applicability of the felony-murder rule is never triggered. Id., 443 N.E.2d at 50.

In Head, incidentally, a food store clerk was shot in the head, which should have made confirmation of attempted felony murder as an existent crime all the more inviting. The Indiana Supreme Court, however, cited the elimination of the prosecutor's burden of proving an essential element of murder--intent--as the basis for the widespread disfavor toward felony murder itself and, despite the serious injury in that case, could not stretch the legal fiction to encompass "attempted felony murder." Id., 443 N.E.2d at 50.

The fact that someone could have so easily been killed by Petitioner's companions may be part of what prompted the District Court to find that Petitioner could be guilty of a possibility. If someone had been wounded, the temptation to affirm would no doubt be even greater. Judge Cowart's dissent, however, has already brought to our attention the hazards of relying on the peculiar facts of a particular case such as Fleming v. State, 374 So. 2d 954 (Fla. 1979), as binding precedent for a broad proposition. If Petitioner's conviction is affirmed, and the crime of attempted felony murder found to exist because guns were drawn during the underlying felony, then everyone who participates in any of the enumerated underlying felonies may illogically but legally be found guilty of attempted felony murder. Prosecutors could obtain convictions by convincing jurors of possibilities, as opposed to having to prove elements of intent. And, if they have no other way of enhancing a defendant's sentence, prosecutors need only file an additional count of "attempted felony murder" to promote the provable crime from a third- or second-degree

felony, punishable by five to fifteen years in prison, to a 30-year, first-degree felony. §§782.04(1)(a), 806.01(2), 794.011(5), 812.13(2)(c), 810.02(3), 790.161(1), 775.084, Fla. Stat. (1981).

Respondent argues that it is "highly speculative" to extend this case to cover that of a driver's being guilty of vehicular homicide by being under the influence of alcohol. (Answer Brief, p. 9) Vehicular homicide is distinguishable from felony murder, says Respondent, because there is no underlying felony implying malice in the commission of vehicular homicide. Neither, replies Petitioner, is there any need for the State to prove _any_ intent for either crime. _Baker_, _supra_. Petitioner hopes that Respondent is correct, that it is indeed fantasy to speculate that attempted vehicular homicide occurs whenever a drunk person takes the wheel of a car, or that attempted felony murder is committed every time one of the enumerated felonies is attempted. These bizarre scenarios could be legally permitted realities, however, if the District Court's decision becomes law. Petitioner's conviction must be reversed.

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court reverse the decision of the District Court and remand this cause to the trial court with directions that she be discharged.

Respectfully submitted,

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON, ASSISTANT PUBLIC DEFENDER
1012 South Ridgewood Avenue
Daytona Beach, Florida 32014-6183
904-252-3367

CERTIRFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Jim Smith, Attorney General, 125 N. Ridgewood Avenue, Daytona Beach, Florida 32014, and Ms. Anita Marie Amlotte, P. O. Box 8540, Pembroke Pines, Florida 33024, this 13th day of October, 1983.

ATTORNEY