IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
Petitioner,	)	
vs.	)	CASE NO. 64,208
ROBERT DALE OVERFELT,	)	
Respondent.	)	

REPSONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the Defendant in the Circuit Court of the Seventeenth Judicial Circuit of Florida, in and for Broward County and the Appellant in the District Court of Appeal, Fourth District. Petitioner was the Prosecution and Appellee in the lower courts. In the brief, Respondent will be referred to as "Appellant" and Petitioner will be referred to as the "State".

The symbol "R" will denote the Record on Appeal.

STATEMENT OF THE CASE AND FACTS

Appellant accepts the State's Statement of the Case and Facts, with the following additions and clarifications:

Appellant was acquitted of second degree felony murder, attempted robbery and of carrying a firearm during the course of a felony (R 1474-1475).

Appellant was not involved in nor charged with causing any injuries to anyone, including Detective Horn and Racciopper, both of whom were shot, received their injuries in the general shoot-out and melee which occurred after Appellant had been shot but before Schlagmuller was killed (R 551-552; 745, 769).

ARGUMENT

THERE IS NO SUCH CRIME AS ATTEMPTED THIRD DEGREE MURDER IN FLORIDA.

The felony murder rule derives from English common law. Its first statement is said to be found in Lord Dacres' case, Moore 86, 72 Eng.Rep. (KB, 1535). Lord Dacres and some companions agreed to enter a park without permission in order to hunt unlawfully, and they further agreed to kill anyone who might resist them. Another member of the group subsequently encountered and killed a gamekeeper about a quarter of a mile away from Lord Dacres. Even though Lord Dacres was not present at the scene of the killing, he was convicted of the murder and hanged, together with the rest of his companions.

This case has been treated as forming the foundation for the felony murder doctrine. Yet, as pointed out in People v. Aaron, 409 Mich. 672, 299 N.W.2d 304, 13 ALR 4th 1180, 1187 (1980), the holding of that case did not turn on the fact that Lord Dacres and the others joined in an unlawful hunt during the course of which someone was killed. Rather, those not actually present were held to be liable as principals under a theory of constructive presence. In addition, it was critical to the result in that case that the group had agreed previously to kill anyone who might resist them. Lord Dacres' case, therefore, involved express malice on the part of those found guilty of the killing. The peculiar idiosyncracy of the felony murder rule as applied in Florida, then, that the commission of the felony dispenses with the need to find an intent to kill before returning a conviction for murder, was simply not present in the seminal legal foundation

for the felony murder rule at common law.

It is the dispensation with the element of an intent to kill, coupled with the imposition of the most severe sanctions for a killing which may have occurred accidentally or incidentally in the course of a felony where the perpetrator and co-perpetrators had no desire to inflict serious injury or death, which has brought the felony murder rule into disrepute. In People v. Aaron, supra, for example, the Michigan Supreme Court determined after extensive historical analysis, that the rule has little intellectual support and was riddled with exceptions and limitations. The Court finally concluded that the rule had never been clearly adopted by either the courts or the legislature of the state, and it therefore clearly abrogated it, since it violates one of the most basic principles of Anglo-Saxon law, the requirement of individual culpability.[1]

Appellant recognizes that this Court has upheld the validity of the felony murder rule to justify convictions for capital,

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[1] It is worthy of note in this connection that England, source of the felony murder rule, has abolished it since 1957, and has evidently not seriously regretted its loss.

In the United States, Kentucky and Hawaii have similarly specifically abolished the felony murder rule, Ky.Rev.Stat. §507.020; Hawaii Rev.Stat. §707-701. Ohio defines as involuntary manslaughter the death of another proximately caused by the offender's commission or attempt to commit a felony. Ohio Rev. Code Ann. §2903.04 (Page). In Alaska, Louisiana, New York, Pennsylvania and Utah, felony murder is punished as second degree murder. Alas.Stat. §11.41.110, 11.41.115; La.Rev.Stat. Ann. §314:30.1; N.Y. Penal Law §125.25 (McKinney); Pa.Cons.Stat. Ann. tit. 18 §2502 (Purdon); Utah Code Ann. §765-203(1). Minnesota classifies felony murder as a third degree murder, unless the killing occurs during a sexual battery, Minn.Stat. Ann. §§609.185, 609.195. And Wisconsin punishes felony murder by imprisonment not to exceed twenty (20) years. Wis.Stat.Ann. §§ 940.02(2), 939.50 (3)(b).

second degree and third degree murder under Florida's penal system. The instant case is, however, not one where death has occurred, so that prosecution for first degree, second degree, and third degree murder could be instituted.[2] Rather in the instant case, Appellant was prosecuted for attempted first degree murder as a result of the police officers' testimony that he pointed a gun at two (2) of them (R 868, 875), and fired at one of them (R 955). He was found guilty of attempted third degree murder, which by definition is an attempted felony murder. See, Fla.Stat. §782.04(4).[3] But application of the felony murder doctrine to an attempt, where no death has occurred—and in this case, not even an injury!—amounts to an extension of the felony murder doctrine which is neither specifically authorized by statute nor justified by the somewhat checkered history of the rule.

There is no question that the clear trend of the courts in this nation has been to limit, rather than to extend the operation of the felony murder rule. See generally, "Felony Murder Doctrine", 13 ALR 4th 1226. Thus, in People v. Phillips, 64 Cal.2d 274, 51 Cal.Rptr. 225, 414 P.2d 353 (1966), the court noted that the felony murder doctrine expresses a highly artificial

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[2]The only death which resulted from the shoot-out at the mall was that of Konrad Schlagmuller, a co-perpetrator, and Appellant was acquitted of a charge of second degree felony murder in connection with his death (R 1474). Moreover, Appellant was also acquitted of committing robbery, which would have been the underlying felony in any felony murder convictions (R 1474-1475).

[3]"The unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than any arson, sexual battery, robbery, burglary, kidnapping... shall be murder in the third degree.

concept that deserves no extension beyond its required application. See also, Smith v. Myers, 438 Pa. 218, 261 A.2d 550, 56 ALR.2d 217 (1970); People v. Aaron, supra, 13 ALR 4th at 1192-1198.

In Head v. State, 443 N.E.2d 44, 47-51 (Ind. 1982)[4] the Indiana Supreme Court recently addressed the precise issue presented by the instant cause, and held that

> "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. at 50.

In so holding, the Supreme Court joined that of Illinois, which reached the same result in People v. Viser, 62 Ill.2d 568, 581, 343 N.E.2d 903, 910 (1975):

> "There can be no felony murder where there has been no death, and the felony murder ingredient of the offense of murder cannot be made the basis of an indictment charging attempted murder."

This Court's decision in Fleming v. State, 374 So.2d 954, 956 (Fla. 1979) does not suggest that this State has ignored the prevailing legal interpretation on this matter, as erroneously found by a majority of the Fifth District Court of Appeal in Amlotte v. State, 435 So.2d 249 (Fla. 5th DCA 1983). The precise issue herein raised was, after all, never addressed in Fleming, which arose as a result of a challenge to the sufficiency of a factual basis to support a plea of guilty to attempted first degree murder. See, Amlotte v. State, supra, at 256, Judge Cowart dissenting.

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[4] A copy of the decision is attached to this brief as an Appendix.

Consequently, since third degree murder is exclusively defined as a felony murder, there can be no crime of attempted third degree murder, since such a crime would require extending the doctrine of felony murder beyond its justifiable perimeters. This being so, there can be no doubt that conviction for such a non-existent offense is fundamental error. Jordan v. State, 416 So.2d 1161 (Fla. 2d DCA 1982); Achin v. State, ___So.2d___ (Fla. opinion filed January 21, 1982) Case No. 59,840 [7 F.L.W. S.C.O. 32]. Moreover, it is obvious that, regardless of defense counsel's action in requesting instruction for attempted second and third degree murder, jeopardy considerations bar retrial for any offense higher than that for which Appellant was convicted, since his conviction of the lesser charge amounts to an acquittal of the major charge. H.L.A. v. State, 395 So.2d 250 (Fla. 1st DCA 1981). Finally, retrial on any potential lesser charge than attempted third degree murder is barred, since no such offense is included within the language of the charge laid against Appellant. See, Borges v. State, 415 So.2d 1265 (Fla. 1982). Therefore, the district court of appeal below correctly determined that Appellant is entitled to discharge. Pagano v. State, 387 So.2d 349 (Fla. 1980); McAbee v. State, 391 So.2d 373 (Fla. 2d DCA 1980).

POINT II

IN ORDER TO SUPPORT ENHANCEMENT OF SENTENCE OR A MANDATORY MINIMUM SENTENCE UNDER THE PROVISIONS OF FLORIDA STATUTE §775.087, THE JURY MUST FIND THAT A FIREARM WAS USED.

Appellant was charged with, inter alia, two (2) counts of attempted first degree murder with a firearm. He was not convicted as charged, however, but for the lesser included offenses of attempted third degree murder and aggravated assault (R 1474-1475). The verdict forms submitted to the jury did not specify that those offenses were committed with a firearm, and the jury did not so find. Nevertheless, the trial court utilized the enhancement provision of Fla.Stat. §775.087(1)[5] in order to reclassify attempted third degree murder into a second degree felony based on the use of a firearm in that offense,[6] and also imposed three year mandatory minimums for both the attempted third degree murder and the aggravated assault charges, on the basis of Fla.Stat. §775.087(2)[7] (R 14, 15). Appellant objected to this action at his sentencing (R 1487-1488).

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[5](1)"Unless otherwise provided by law, whenever a person is charged with a felony, except a felony in which the use of a weapon or firearm is an essential element, and during the commission of such felony the defendant carries, displays, uses, threatens, or attempts to use any weapon or firearm, or during the commission of such felony the defendant commits an aggravated battery, the felony for which the person is charged shall be reclassified as follows: (a) In the case of a felony of the first degree, to a life felony; (b) In the case of a felony of the second degree, to a felony of the first degree; (c) In the case of a felony to the third degree, to a felony of the second degree."

[6]Although the sentencing order reflects that Appellant was sentenced to an enhanced term as an habitual offender (R 14), this was clearly a clerical error, since the trial court made absolutely no findings to support such a determination. Instead, the trial court specifically referred to Fla.Stat. §775.087(1) when it enhanced the offense for which Appellant was convicted,(continued)

It is a fundamental principle of statutory construction that criminal statutes are to be construed strictly, in a light most favorable to the accused. This principle has recently been applied by this Court in Palmer v. State, ___So.2d___ (Fla. opinion filed September 1, 1983) Case No. 62,449 [8 F.L.W. S.C.O. 324]. That case construed Fla.Stat. §775.087(2), and this Court held that where multiple convictions are returned as a result of acts occurring during the course of a single criminal episode, the mandatory minimum penalties may not be stacked, that is, a defendant may receive no more than a single, mandatory minimum for each criminal episode in which he uses a firearm. The basis for that holding was this Court's inability to find, in any portion of the applicable statute, any express authority for the imposition of more than one mandatory minimum therm as the result of a single criminal episode.

This adherence to the principle of strict construction of penal statutes is consistent with the approach taken to interpretation of Fla.Stat. §775.087(1) by the district court of appeal in Carroll v. State, 412 So.2d 972 (Fla. 1st DCA 1982). In that case, the defendant had been charged with first degree murder, but pled guilty to second degree murder. The appellate court

(Footnote 6 continued)
not to Fla.Stat. §724.084(a), the habitual offender statute (R 1486)

[7] (2) "Any person who is convicted of:
(a) Any murder, sexual battery, robbery, burglary, arson, aggravated assault, aggravated battery, kidnapping, escape, breaking and entering with intent to commit a felony, or aircraft piracy, or any attempt to commit the aforementioned crimes; or
(b) Any battery upon a law enforcement officer or firefighter while the officer or firefighter is engaged in the lawful performance of his duties
And who had in his possession a "firearm"...shall be sentenced to a minimum term of imprisonment of three (3) calendar years..."

held that enhancement of the second degree murder offense category would be improper. Its ruling was grounded on the specific language of Fla.Stat. §775.087(1) which limits its operation to allow enhancement for "the felony for which the person is charged." Because the offense enhanced in Carroll was not "the felony for which the person is charged," it could not be enhanced under the statute.

In the instant case, Appellant was similarly convicted of a lesser offense than the offense for which he was originally charged. The rationale of Carroll v. State, then, precludes enhancement of his sentence as attempted by the trial court. But see, Miller v. State, ___So.2d___ (Fla. 4th DCA opinion filed September 7, 1983)(Case No. 82-962) [8 F.L.W. 2167].

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[8] In Miller, the Fourth District Court of Appeal chose to ignore the requirement for strict construction of penal statutes and instead relied upon its own interpretation of legislative intent to justify upholding the enhancement of sentence for a lesser included offense in the face of the express statutory language limiting its operation which Carroll found dispositive. In order to support its result, the Fourth District opined that the words "the felony for which the person is charged" include lesser included offenses. However, this Court has recently rejected such an expansive reading of the term "offense charged" by its rejection of a defendant's contention that he was entitled to jury instruction on penalties for the lesser offenses included within the "offense for which the accused is then on trial." Delap v. State, ___So.2d___ (Fla. opinion filed September 15, 1983) Case No. 56,235 [8 F.L.W. S.C.O. 369]. See, Fla.R.Cr.P. 3.390(1). Moreover, the District Court's reliance on the fact that a verdict may be returned for a proper lesser included offense even if it is not specifically mentioned in the charging document, ignores the existence of express procedural justification therfore in Fla.R.Cr.P. 3.510. Obviously, no such legislative definition has been included to expand the commonly understood definition of "offense charged" as used in Fla.Stat. §775.087(2).

The instant case presents, in addition, other grounds for reversing the enhancement of the attempted third degree murder charge for which Appellant was convicted. Because the jury's verdicts did not specify that a firearm was used, the same error is presented here as in Streeter v. State, 416 So.2d 1203 (Fla. 3d DCA 1982). There, the appellate court held that the finding that a firearm was used, necessary to support enhancement of the offense under Fla.Stat. §775.087(1), "must be made by the jury beyond a reasonable doubt." Id. at 1206. This finding is supported by the Florida Standard Jury Instructions in Criminal Cases (1981 ed.), which provide that the jury be instructed that "if you find that (defendant) committed (felony, as identified by F.S. §775.087(1)) and you also find that during the commission of the crime he [carried a firearm], you should find him guilty of (felony) with a firearm." Id. at 46. See also, Streeter v. State, supra, at 1205. These jury instructions also clarify what the State seeks to obscure in its brief. For Fla.Stat. §775.087(1) is not a sentencing statute. It does not reclassify the sentence which is to be imposed on conviction. Rather, it reclassifies the degree of the offense for which conviction is entered. The use of the firearm therefor becomes an element of the new reclassified offense, and must consequently be proven beyond a reasonable doubt, as reflected by the jury's verdict, just as for any other element.

No specific finding with respect to use of a firearm was made by the jury in the present case. Thus, the trial court's enhancement of the attempted third degree murder charge to a second degree felony was erroneous.

Similar reasoning operates to bar imposition of the mandatory three year minimum as well. Thus, it is now wellestablished that the mandatory three year minimum prison term is not applicable where the defendant has only vicarious possession of a firearm, as where a co-felon uses a gun but the defendant himself does not. Earnest v. State, 351 So.2d 957 (Fla. 1977); Johnson v. State, 349 So.2d 1190 (Fla. 1977). Moreover, actual possession of the firearm by the defendant must be proven: inconclusive evidence that the defendant was the one of several felons who had the gun is not sufficient to justify imposition of the mandatory minimum. Johnson v. State,399 So.2d 108 (Fla. 1st DCA 1981). See also, Brown v. State, 358 So.2d 92 (Fla. 4th DCA 1978).

Moreover, the proof and predicate justifying such a sentence must in all respects be satisfactorily and unequivocally established. Mere implication or inference of a predicate is not enough. In Jones v. State, 356 So.2d 4 (Fla. 4th DCA 1977), for instance, the appellate court held, in line with requirement of this strict interpretation, that a mandatory minimum term cannot be imposed upon conviction for manslaughter, since that offense is not one of the enumerated felonies for which a mandatory term is specified. In so holding, the court rejected the State's argument that because manslaughter is a necessarily included lesser offense of murder, which is among the enumerated class of offenses requiring a mandatory minimum upon conviction, it, too, requires imposition of the three year minimum. This is simply not specific enough to trigger operation of the statute. After all,

> "The rule is that such [penal] statutes must be strictly construed, and when the language is susceptible of differing constructions it must be construed most favorably to the accused." Id. at 5.

This analysis is, of course, the same which prompted this Court's decision in Palmer v. State, supra.

The State's suggestion that, because Fla.Stat. §775.087(1) is in the nature of a sentencing statute, the trial court rather than the jury is automatically authorized to make the necessary findings is without merit. The habitual offender statute, Fla.Stat. §775.084 specifically provides that the trial court may impose an enhanced sentence "if it finds" that the defendant meets the requirements for such treatment. Fla.Stat. Ch. 958 also clearly states that it is for the court to determine whether a defendant may be classified as a youthful offender. Finally, this court certainly needs no reminder as to the carefully delineated roles assigned to the jury and the trial court in capital sentencing cases under Fla.Stat. §921.141.

The reasons for the trial court's ultimate responsibilities in the sentencing classifications referred to, supra, are self evident: each of those situations involves consideration of matters not properly before a jury, which must determine a defendant's guilt or innocence in an atmosphere purged of all extraneous, potentially prejudicial factors. Thus, whether a young defendant has prior convictions or not has no relevance to the criminal charge for which he is standing trial. It would obviously be unfair to allow a jury to consider such facts in the course of its deliberations or the defendant's guilt or

innocence. By the same token, since the jury in our State normally has no input into the trial court's sentencing decision, it would be absurd for it to be asked to consider the existence of these factors after it has completed its proper function, the guilt determination process.

The contrast to the operation of Fla.Stat. §775.087(2) is readily apparent. That statute does not designate the trial court as the factfinder with respect to whether the defendant had a firearm or not. Such a designation would be improper, since it would involve the trial court in the factfinding function with respect to the nature and degree of the criminal offense which is the sole role of the jury. Whether a firearm was used is patently one of the factual issues in a case which the jury will necessarily be called upon to determine. Any different approach, such as that suggested by the State, would make possible such anomalous results as the trial court finding that a firearm had been used after the jury returned its verdict finding that no firearm, but only, e.g., a "weapon" was used. The legislature cannot have intended to authorize such a judicial invasion of the jury's legitimate fact-finding role.

This position is buttressed by the fact that it must, by now, be beyond dispute that, in order to justify imposition of a mandatory minimum term, the charging document must specify that the offense was committed with a firearm. See, e.g., Lawson v. State, 400 So.2d 1053 (Fla. 2d DCA 1981). On the other hand, it is equally beyond dispute that the predicate elements to support youthful or habitual offender treatment or capital sentencing need not be alleged in the charging document.

This fact alone would distinguish a firearm mandatory minimum from the other sentencing alternatives [9] mentioned by the State.

In short, a cogent, internally consistent application of Fla.Stat. §775.087(2) coupled with the concern for strict interpretation of penal statutes which this Court recognized in Palmer v. State, supra, mandate that the rationale of Streeter v. State, supra, be applied to require that a jury finding that a firearm was used be entered in order to trigger operation of the trial court's duty to impose the mandatory minimum therm for such use of a firearm. Furthermore, since if the State seeks to invoke operation of Fla.Stat. §775.087, to the defendant's detriment, it is the State which must be charged with the duty to ensure that such a finding is made. Consequently, the enhancement of Appellant's attempted third degree murder conviction and imposition of the mandatory three year minimum terms in his case, without specific jury verdicts which found that he used a firearm, must be stricken, as the district court of appeal correctly decided below.

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[9] A further distinction, of course, is that the mandatory minimum is not a sentencing alternative at all but a legislative deprivation of the trial court's sentencing alternatives. To have the trial court deciding this issue unilaterally would in effect return to the court discretion that the legislature intended to take away, since the court could then simply find that no firearm was used in order to obviate the necessity of imposing the mandatory minimum.

CONCLUSION

Based upon the foregoing Arguments and the authorities cites therein, Appellant respectfully requests this Honorable Court to affirm the decision of the District Court of Appeal, Fourth District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to JOAN FOWLER ROSSIN, Assistant Attorney General, 111 Georgia Avenue, West Palm Beach, Florida, by courier, this 19th day of OCTOBER, L983.

Of Counsel