IN THE SUPREME COURT OF FLORIDA

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

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the prosecution, and Respondent was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida.

In the brief, the parties will be referred to as they appear before this Honorable Court, except that Petitioner may be referred to as the State.

The symbol "R" will be used to denote the Record on Appeal.

STATEMENT OF THE CASE

Respondent, together with co-defendants Cary Crawford and Alan Avera, was charged by information with attempted robbery (Count IV) and with committing second degree murder when an alleged co-perpetrator, Konrad Schlagmuller, was killed by police in the course of an attempted robbery (Count I). Respondent was additionally charged with two counts of attempted first degree murder with a firearm of Detective Roberts (Count II) and Officer Mattingly (Count III), carrying a concealed firearm in the course of a felony (Count VI), and with carrying a concealed firearm (Count VII) (R 1-2).

Respondent was tried by jury together with his co-defendant Crawford. (See, 4th DCA Case No. 81-1954). On conclusion of the State's case, the trial court granted Respondent's motion for judgment of acquittal as to Count VI, carrying a concealed firearm (R 1139). Respondent's motions for judgment of acquittal as to the other counts were denied at the same time and when renewed at the close of all the evidence (R 1138, 1231). After duly deliberating, the jury returned its verdicts finding Respondent not guilty of attempted robbery (second degree murder) and the remaining firearms charge (R 1474-1475), but guilty of attempted murder in the third degree as to Count II (R 8) and guilty of aggravated assault as to Count III (R 9).

He was adjudged guilty of those offenses the

same day (R 13).

Respondent's motion for a new trial (R 11) was denied November 23, 1981 (R 17), and he was thereupon sentenced as a habitual offender to serve fifteen years in prison, with a mandatory three year minimum and credit for time served, on Count II (R 14). A consecutive five year prison term, again with a mandatory three year minimum, was imposed as to Count III (R 15).

Notice of Appeal to the Fourth District Court of Appeal from the judgments of conviction and sentences was subsequently filed. (R 18). The Fourth District Court of Appeal granted Respondent's motion to join in co-defendant Crawford's trial transcript. After the filing of briefs, including supplemental briefs, and hearing oral argument in the case, the Fourth District Court of Appeal vacated Respondent's conviction and sentence for attempted third degree murder and affirmed Respondent's conviction for aggravated assault, but vacated the three-year mandatory minimum on his five-year sentence. In its opinion, the court certified conflict between the instant case and Gentry v. State, 422 So.2d 1072 (Fla. 2d DCA 1982). The State moved for rehearing, and the Fourth District Court of Appeal, after hearing additional oral argument, denied the motion for rehearing. The court, in its final opinion certified conflict also with Amlotte v. State, ___ So.2d ____ (Fla. 5th DCA 1983) [8 FLW 1330]. On

motion by the State, the Fourth District Court of Appeal stayed mandate pending final disposition of this case in this court.

This proceeding follows.

STATEMENT OF THE FACTS

As a result of contacts made through an informant, undercover agents James Harn and William Mattingly of the Hollywood Police Department made arrangements to sell over a pound of cocaine to "Konrad" for $28,500 (R 517, 591-592, 596-597, 857-858). A meeting was arranged at the Hollywood Fashion Center (R 530).

"Konrad" was later determined to be Konrad Schlagmuller. He arrived at the shopping mall in a silver Ford LTD driven by Respondent (R 683, 860). Schlagmuller got out of the LTD and went to a brown van where Harn was waiting for him (R 537). Mattingly left his white Cadillac and went to the LTD to wait for Harn to deliver the drugs to Schlagmuller (R 858). Schlagmuller and Harn then drove around the parking lot in the van so that Schlagmuller could check the cocaine. (R 866).

Mattingly was in the LTD with Respondent, and was supposed to be counting the money to make sure the full amount was there. Mattingly asked Respondent to be allowed to count the money, but Respondent denied the request. (R 865-866). When Schlagmuller and Harn came back around and signalled that the cocaine was okay, Mattingly again asked Respondent to allow him to count the money. (R 547, 867). At that point, Respondent blocked Mattingly's efforts to do so by pulling a gun and telling Mattingly that, "it is time to die now, mother fucker." (R 868).

Although there was supposed to be $28,500, the amount of money turned out to be only $1,299 since there were $100 bills on top of the packets of money. (R 780-781, 863).

Mattingly struggled with Respondent and succeeded in getting out of the vehicle (R 869-870). He saw Respondent point his gun at another officer, present as a backup, Detective Roberts (R 875). Roberts said that Respondent fired two shots at him (R 955). Roberts returned fire (R 956) as did Mattingly (R 874). Respondent, hit by two shots, fell back into the car and was subsequently placed under arrest (R 875). Detective Harn and Detective Racciopi were both wounded during the fracas. Schlagmuller was also killed. (R 1032-1033).

POINTS ON APPEAL

POINT I

WHETHER THERE IS A CRIME IN FLORIDA OF ATTEMPTED THIRD DEGREE MURDER?

POINT II

WHETHER THERE IS ANY REQUIREMENT THAT THE JURY SPECIFICALLY MAKE A FINDING OF THE USE OF A FIREARM TO INVOKE THE FELONY RECLASSIFICATION AND MINIMUM MANDATORY SENTENCE PROVISIONS OF §775.087 FLA. STAT. (1981)?

ARGUMENT

POINT I

THERE IS A CRIME IN FLORIDA OF ATTEMPTED THIRD DEGREE MURDER.

Respondent was convicted, pursuant to Count II, of attempted third degree murder. Third degree murder is defined as follows, under Section 782.04(4), Fla. Stat. (1981):

> 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, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in Section 775.082, Section 775.083, or Section 775.084.

Hypothetically speaking, one can indeed attempt to commit the aforementioned crime. If one perpetrates, or attempts to perpetrate, any of the enumerated felonies contained within the third degree murder statute and, while engaged in that perpetration or attempt to perpetrate, the person shoots at the victim, in furtherance of the commission of the felony, and without any design to kill the victim, and he strikes and wounds the victim, then the crime of attempted third degree murder has been committed. The enumerated felony was perpetrated or attempted to be perpetrated. There was no design to effect death. Yet

the victim was shot at and struck. Consequently, since the victim did not die (in which case, it would have been third degree murder), the crime of attempted third degree murder remains.

It cannot be said that the definition of third degree murder already includes an attempt, thereby vitiating the existence of the separate crime of "attempt." See Ervin v. State, 410 So.2d 510 (Fla. 2DCA 1981). This is so because the only attempt mentioned in the third degree murder statute is the attempt to commit the underlying felony. However, third degree murder is a residual statute. If a killing results from the commission or the attempt to commit one of the enumerated felonies, then the crime of third degree murder is made out. If the victim lives (after being shot, without any design to effect his death, but in furtherance of the perpetration or the attempted perpetration of the felony), then the fact that the victim survives renders the perpetrator liable only for attempted third degree murder. In other words, if the victim survives, in a situation where, had he died, the crime would have been third degree murder, then the victim's survival simply reduces the charge to attempted third degree murder.

The above reasoning is not unlike the reasoning in Taylor v. State, 401 So.2d 812 (Fla. 5DCA 1981), wherein the Fifth District Court of Appeal held that the crime of attempted manslaughter (also a non-intentional type of crime) exists in Florida.

In Amlotte v. State, 435 So.2d 249 (Fla. 5th DCA 1983), certified by the Fourth District Court of Appeal in its final opinion in the instant case as being in direct conflict with the case at bar, the Fifth District Court of Appeal held that there is a crime of attempted felony murder. That court cited Fleming v. State, 374 So.2d 954 (Fla. 1979) as precedent which stated that where an alleged attempt occurs during the commission of a felony, the law presumes the existence of premeditation.

Similarly, this Court in an opinion dated September 1, 1983, affirmed the Second District Court of Appeal's opinion in Gentry v. State, 422 So.2d 1072 (Fla. 2d DCA 1982) which held that there is a crime of attempted second-degree murder even without the finding of specific intent. Gentry v. State, ___So.2d ___(Fla. September 1, 1983) [8 FLW 315]. In its opinion in the instant case the Fourth District Court of Appeal also certified conflict with the Second District Court of Appeal's opinion in Gentry. This court stated: "There are offenses that may be successfully prosecuted as an attempt without proof of a specific intent to commit the relevant completed offense." Id. Where, as in the instant case, there is no requirement to show specific intent to successfully prosecute the completed crime (third degree murder), the State will not be required to show specific intent to successfully prosecute an attempt to commit that crime. The reasoning in Gentry is completely applicable to the case presently before this Court.

Therefore, the Fourth District Court of Appeal's vacating of Respondent's conviction and sentence for attempted third degree murder should be reversed.

Moreover, if it were to be held that there exists no crime of attempted third degree murder in the State of Florida, then a conviction thereunder would constitute fundamental error. Achin v. State, 1982 FLW 32, FSC No. 59,840, opinion filed January 21, 1982, holds that one may never be convicted of a non-existent crime. However, in the case sub judice, both the prosecution and Appellant's co-defendant specifically refrained from requesting any lesser included offenses to be given to the jury (R 1242). On the other hand, Appellant did request lessers (R 1236). Specifically, Appellant requested lessers on the attempted murder charges (one of which resulted in the attempted third degree murder conviction) (R 1411). Even more specifically, when questioned by the trial court as to whether or not Appellant wanted an instruction on the lesser included offenses of attempted murder two and attempted murder three, Appellant responded in the affirmative (R 1412). This was again clarified by the trial court with defense counsel further on (R 1416-1417). Under these circumstances, the Florida Supreme Court, in Achin, supra, has held that while the conviction of a non-existent offense cannot stand, a new trial would be ordered because defense counsel invited the error. Double jeopardy considerations, under these circumstances, do

not impede the legality of a retrial, inasmuch as the retrial would not be for any offense greater than that which would hypothetically encompass all the elements of an attempted third degree murder. Achin, supra.

Therefore, the Fourth District Court of Appeal's vacating of Respondent's conviction and sentence for attempted third degree murder should be reversed, and the provisions of mandatory minimum sentence and felony reclassification should be reinstated as shown in Point II. However, should this Court not reverse the action of the Fourth District Court of Appeal, then this Court should expressly overrule the dicta regarding the prohibition against retrial of Respondent on a lesser charge supported by the evidence.

POINT II

THERE IS NO REQUIREMENT THAT THE JURY SPECIFICALLY MAKE A FINDING OF THE USE OF A FIREARM TO INVOKE THE FELONY RE-CLASSIFICATION AND MINIMUM MANDATORY SENTENCE PROVISIONS OF §775.087 FLA. STAT. (1981).

There was no requirement for a specific jury finding on the use of a firearm in the instant case to allow the judge to invoke the three-year mandatory minimum sentence and felony reclassification provisions of §775.087 Fla. Stat. (1981).

Streeter v. State, 416 So.2d 1203 (Fla. 3d DCA 1982) presents an incorrect analysis. Streeter says, essentially, that,

> Under the pertinent provision of Section 775.087, a determination that during the commission of the felony the defendant carried, displayed, used, threatened or attempted to use any weapon or firearm is a predicate to re-classification. That determination, as the trial court recognized in its instruction to the jury, is one, even as the felony itself, which must be made by the jury beyond a reasonable doubt. Id. at 1205-1206.

While this is true with reference to the elements of a crime in order to support a conviction, it is not true with reference to the findings which must be made in order to support an enhanced sentence, whether that enhanced sentence be in the form of a reclassification pursuant to §775.087(1), Fla. Stat. (1981), or in the form of a mandatory minimum sentence pursuant to §775.087(2), Fla. Stat. (1981), The appropriate sentence

to be meted out upon a conviction is for the trial judge, who is the sentencer, to determine within the confines of the law.

Section 775.087, Fla. Stat. (1981) is part of the "general penalties" chapter. Clearly, this statute is a sentencing tool for the sentencer. It does not add elements to a crime thereby necessitating a jury finding in order to support the judgment of conviction for that crime. Once the jury renders its verdict, the trial judge adjudicates the defendant pursuant to that verdict. Only then (or possibly before the adjudication) must the finding be made on the part of the judge, who is the sentencer, as to whether or not a firearm was used so as to support the mandatory minimum penalties or an enhanced sentence. Of course, a defendant can object to the judge's finding in this regard, and certainly appeal raising the issue.

Thus, a judicial finding that a firearm was used is analogous to judicial findings supporting a defendant's classification as an habitual offender or a youthful offender. Even the capital punishment statute does not require notice of the aggravating factors the prosecution might rely upon, or specific jury findings as to the existence of individual aggravating factors. The findings are made by the sentencer, thereby supporting the death penalty. Clark v. State, 379 So.2d 97 (Fla. 1979); Menendez v. State, 368 So.2d 1278 (Fla. 1979); Tafero v. State, 403 So.2d 355 (Fla. 1981).

Thus, in Scott v. State, 369 So.2d 330 (Fla. 1979), the defendant was found guilty of attempted murder in the second degree. The opinion does not indicate that the guilty

verdict reflected the use of a firearm. Nonetheless, the defendant received the three-year mandatory minimum sentence. He claimed he had not been placed on notice that a conviction for this crime would subject him to that penalty provision. This Court rejected that contention. See also, Bryant v. State, 386 So.2d 237 (Fla. 1980). Therein, this Court stated that, while criminal defendants have a right to notice of the specific charges against them, there is no requirement that a defendant be advised of any mandatory minimum sentence. But see, Florida Standard Jury Instructions in Criminal Cases, 3.05(a); Bell v. State, 394 So.2d 570 (Fla. 5th DCA 1981), footnote 3; Streeter v. State, supra.

In any event, since Respondent neither requested a jury instruction regarding the finding of his use of a firearm, not did he object to the omission of such an instruction, it can only be concluded that he waived the issue regarding the failure of the jury to make such a finding. As mentioned before, there was overwhelming and uncontested evidence as to Respondent's use of a firearm on the day in question. Andrews v. State, 343 So.2d 844 (Fla. 1st DCA 1976) is somewhat analogous. In that case, the Information charged the defendant with assault with intent to commit murder, but did not allege use of a deadly weapon. The defendant sought to plead guilty to the "lesser included offense of aggravated assault" and admitted use of a baseball bat. Consequently, any error in the acceptance of the plea on the ground that the Information failed to allege an

element of the offense pleaded to was induced by Respondent and was harmless. In the case sub judice, Respondent was certainly charged with having used the weapon. The jury came back with a lesser included offense of the offense charged in the Information. There was overwhelming evidence of his use of a firearm, and Respondent never requested an instruction which would give the jury the option of finding he did not use a firearm. Consequently, when the jury rendered its verdict for the lesser included offense, the verdict, read in the context of the Information, the evidence, and Respondent's omissions in requesting the jury instruction, contemplated that Respondent did indeed use a firearm. The jury did not have to make an express finding of such, for the use of a firearm is not an element of the crime. Absent his request for the instruction on the use of a firearm, Respondent waived a jury finding that he did not use a firearm. Indeed, the lesser included offense that the jury came back with did not relate to any firearm allegation, but to the attempted first degree murder allegation.

Accordingly, the Fourth District Court of Appeal's vacating of the three-year mandatory minimum sentence on Respondent's aggravated assault (and by inference on the attempted third degree murder, should the conviction stand) should be reversed. Should the Fourth District Court of Appeal's vacating of Respondent's conviction and sentence for attempted third degree murder be reversed by this Honorable Court, the felony reclassification and three-year mandatory minimum sentence should be reinstated.

CONCLUSION

Petitioner would respectfully request that this Honorable Court reverse the vacating of the three-year minimum mandatory sentence for aggravated assault and reverse the vacating of Respondent's conviction and sentence for attempted third degree murder, and reinstate the three-year mandatory minimum sentence and felony reclassification for that conviction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petitioner's Brief on the Merits has been furnished, by courier/ mail, to TATJANA OSTAPOFF, ESQUIRE, Assistant Public Defender, 224 Datura Street - 13th Floor, West Palm Beach, Florida, 33401, this 22nd day of September, 1983.

Joan Fowler Rossin
Of Counsel