

IN THE SUPREME COURT OF FLORIDA

MORRIS LEE MILLER,)
)
Petitioner,)
)
v.)
)
STATE OF FLORIDA,)
)
Respondent.)
)
)
)
)

CASE NO. 54,505

FILED
SID J. WHITE
DEC 12 1983
CLERK, SUPREME COURT
By _____
Clerk

RESPONDENT'S BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the Defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida and the Appellant in the District Court of Appeal, Fourth District. Respondent was the Prosecution and Appellee in the lower courts.

In the brief the parties will be referred to as they appear before this Honorable Court.

STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Petitioner's statement of the case and facts.

POINT ON APPEAL

WHETHER ALTHOUGH THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL SUB JUDICE DIRECTLY AND EXPRESSLY CONFLICTS WITH A DECISION OF THE FIRST DISTRICT COURT OF APPEAL ON THE QUESTION OF WHETHER A LESSER INCLUDED OFFENSE MAY BE RE-CLASSIFIED UNDER SECTION 775.087(1), FLORIDA STATUTES, THIS COURT SHOULD EXERCISE ITS DISCRETION AND DECLINE TO ACCEPT JURISDICTION?

ARGUMENT

POINT ON APPEAL

ALTHOUGH THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL SUB JUDICE DIRECTLY AND EXPRESSLY CONFLICTS WITH A DECISION OF THE FIRST DISTRICT COURT OF APPEAL ON THE QUESTION OF WHETHER A LESSER INCLUDED OFFENSE MAY BE RE-CLASSIFIED UNDER SECTION 775.087(1), FLORIDA STATUTES, THIS COURT SHOULD EXERCISE ITS DISCRETION AND DECLINE TO ACCEPT JURISDICTION.

The Respondent submits that the decision below is based on sound legal reasoning and precedent of this Court, Brown v. State, 206 So. 2d 377 (Fla. 1968); Borges v. State, 415 So. 2d 1265 (Fla. 1982); see also, In re Standard Jury Instructions, 431 So. 2d 594 (Fla. 1981); State v. Bruns, 429 So. 2d 307 (Fla. 1983). Therefore, although said opinion states that it disagrees with the hypertechnical construction of the term "charged" given in Carroll v. State, 412 So. 2d 972 (Fla. 1st DCA 1982), this Court should exercise its discretion and decline to accept jurisdiction of the cause. Fla. R. App. P. 9.030(a)(2). The court in Carroll held, in essence, that a defendant, when charged with a felony, is not charged with necessarily lesser included offenses. The Fourth District Court of Appeal held, and correctly so, that a charge of the greater necessarily includes a charge of the lesser.

The cases on this point are legion and require no further citation. So well-developed is the case law on this subject that we would reject out-of-hand any suggestion that a defendant could not be convicted of a lesser included

offense unless it were charged expressly in the information. Yet, in essence, that is what the defendant contends in this case. He claims that he was not "charged with" attempted second degree murder because it was not expressly set forth in the information.

(A. 3).

The Petitioner has alleged that the instant opinion is in conflict with Palmer v. State, No. 62,449 (8 FLW 324) [Sept. 1, 1983]. Such is just not the case, however. In Palmer, this Court utilized one rule of statutory construction, i.e., that criminal statutes shall be construed strictly in favor of the person against whom a penalty is to be imposed. The Court in the instant case utilized another well-established rule of statutory construction, i.e., that the legislative intent must be ascertained and effectuated. Under the Petitioner's analysis of Palmer, a court may only use one specific rule of statutory construction in dealing with criminal statutes which, the Respondent submits, is not what was intended in Palmer.


Since the opinion below followed precedent of this Court and well-established rules of statutory construction, the Respondent respectfully requests that this Court decline to exercise its discretionary jurisdiction.

CONCLUSION

BASED upon the foregoing argument and authorities cited therein, the Respondent respectfully requests that this Honorable Court decline to accept jurisdiction of the cause.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on Jurisdiction (and Appendix) has been furnished to TATJANA OSTAPOFF, ESQUIRE, Assistant Public Defender, 224 Datura Street, 13th Floor, West Palm Beach, Florida 33401 by mail/courier this 8TH day of December, 1983.


OF COUNSEL