OIA 9-7-84

IN THE SUPREME COURT OF FLORIDA

MORRIS LEE MILLER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 64,505

FILED
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JUN 6 1984
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BRIEF OF RESPONDENT ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS

(CONTINUED)

PRELIMINARY STATEMENT

The petitioner was the appellant in the District Court of Appeal, Fourth District, and the defendant in the trial court. The respondent was the appellee in the Fourth District and the prosecution in the trial court. In this brief, the parties will be referred to as the State and the defendant. The symbol "R" will be used to designate the record on appeal which includes the transcript of the trial proceedings. All emphasis is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State accepts the defendant's Statement of the Case and Facts as being a substantially true and correct account of the proceedings below with the following additions and exceptions contained below and in the argument portion of the brief:

1. During the charge conference, the State asked that the jury be instructed on attempted second degree murder with a deadly weapon or a firearm as a lesser included charge of second degree murder (R. 177). The State argued that it wanted the charge to be enhanced from a second degree felony to a first degree felony, if the jury should return a verdict of attempted second degree murder (R. 178). The defendant argued that the enhancement would be something that had to be argued and decided at sentencing, he would have to be convicted first (R. 179, 180).

2. During jury instructions, the jury was charged that they could return a verdict of attempted second degree murder and that under the circumstances of this case, it would be a first degree felony punishable by up to thirty (30) years in prison with a minimum of three years (R. 240).

3. At the sentencing hearing, the State asked that the defendant be sentenced to thirty (30) years with a mandatory minimum of three years, noting that the use of a firearm enhance the degree of felony (R. 251). The trial court sentenced the defendant to twenty (20) years with a three year minimum mandatory (R. 251, 272). No objection was made by the defendant or any such sentencing error raised in the motion for new trial (R. 252).

POINT INVOLVED ON APPEAL

The State respectfully rephrases the defendant's point on appeal as follows:

> WHETHER THE DEFENDANT WHO WAS CHARGED IN AN INFORMATION WITH SECOND DEGREE MURDER, AND CONVICTED OF ATTEMPTED SECOND DEGREE MURDER, CAN HAVE HIS SENTENCE ENHANCED UNDER SECTION 775.087(1), FLORIDA STATUTES (1981) WHERE A FIREARM HAS BEEN USED?

ARGUMENT

POINT ON APPEAL

THE DEFENDANT WHO WAS CHARGED IN AN INFORMATION WITH SECOND DEGREE MURDER, AND CONVICTED OF ATTEMPTED SECOND DEGREE MURDER, CAN HAVE HIS SENTENCE ENHANCED UNDER SECTION 775.087(1), FLORIDA STATUTES (1981) WHERE A FIREARM HAS BEEN USED. (RESTATED)

The defendant alleges that under a literal reading of Section 775.087(1)[1], Florida Statutes (1981) a defendant who is not convicted of the felony offense which was expressly charged in the information or indictment, but rather is convicted of a lesser-included offense, cannot have that felony reclassified under Section 775.087(1). The State submits that such a construction is hyper-technical and as the Fourth District found in the instant case "effectively subverts the legislative policy embodied in the reclassification statute." Miller v. State, 438 So. 2d 83, 84 (Fla. 4th DCA 1983).

FOOTNOTE 1

1 Section 775.087(1) provides in the pertinent part:

> 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 in the second degree, to a felony of the first degree.
>
> (c) In the case of a felony of the third degree, to a felony of the second degree.

One of the most fundamental rules of statutory construction is that:

> [L]egislative intent is the polestar by which the court must be guided, and this intent must be given effect even though it may contradict the strict letter of the statute. Furthermore, construction of a statute which would lead to an absurd or unreasonable result or would render a statute purposeless should be avoided. State v. Webb, 398 So. 2d 820, 824 (Fla. 1981).

As this Court stated in Garner v. Ward, 251 So. 2d 252, 256 (Fla. 1971), "a statute should be construed to give effect to the evident legislative intent, even if the result seems contradictory to the rules of construction and the strict letter of the statute; the spirit of the law prevails over the letter." Thus, the State submits that if the interpretation of Section 775.087(1) which the defendant sets forth is adopted[2] by this Court, then the evident

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FOOTNOTE 2

2 The First District in Carroll v. State, 412 So. 2d 972 (Fla. 1st DCA 1982) held that where a defendant who had been charged in an indictment with first degree murder, a capital felony, but plead guilty to second degree murder, a first degree felony, the offense of second degree murder could not be reclassified because the defendant had been charged with a capital felony. The First District in Smith v. State, 445 So. 2d 1050 (Fla. 1st DCA 1984) reaffirmed its holding in Carroll, finding that Section 775.087(1) is applicable only with respect to the crime expressly charged, and not to lesser included offenses. The First District, noting conflict with the Fourth District's decision in the instant case, certified the following as a question of great public importance:

> DO THE RECLASSIFICATION PROVISIONS OF SECTION 775.087(1), FLORIDA STATUTES, APPLY WHERE THE DEFENDANT IS NOT CONVICTED OF THE OFFENSE EXPRESSLY CHARGED IN THE INFORMATION OR INDICTMENT, BUT INSTEAD, IS CONVICTED OF A LESSER INCLUDED OFFENSE?

445 So. 2d at 1051. The case is now pending before this Court in State v. Smith, Case No. 65,157.

legislative intent which is embodied in Section 775.087(1) will be effectively nullified.

As the Fourth District noted in the instant case, Section 775.087(1) "reflects the considered responses of the legislature to the violence and tragedy which so often accompany the use of guns and other weapons in the commission of crime." Such concern is reflected throughout the Florida Criminal Code. For example the Legislature has provided for a three year minimum mandatory sentence for a person convicted of having a firearm in his possession during the commission of certain felonies, Section 775.087 (2), Florida Statutes (1981); has made it a second degree felony for a person to display, use, threaten, or attempt to use a firearm or carries a concealed firearm while committing or attempting to commit any felony; Section 790.07, Florida Statutes (1981), has enhanced the nature of the felony for such crimes as sexual battery, burglary, and robbery, when a deadly weapon is used during the commission of such offenses. Sections 794.011(3), 810.02(2)(b); 812.13(2)(a), Florida Statutes (1981). Thus, it is clear that the Legislature did not intend the term "charged" as used in Section 775.087(1), be so literally construed so as to not include persons convicted of lesser included offenses which involved the use of a firearm.

The State submits that the Fourth District's opinion in the instant case is well reasoned and should be adopted by this Court. As the Fourth District noted "it is fundamental that a defendant may not be convicted of an offense for which he is not charged. It is also axiomatic that some offenses contain neces-

sarily included lesser offenses and attempts." Miller v. State, supra, 438 So. 2d at 84. As this Court stated in Brown v. State, 206 So. 2d 377, 381-382 (Fla. 1968), instruction is required on lesser included offenses "necessarily included in the major offense charged by the accusatory pleading. This simply means that the lesser offense must be an essential aspect of the major offense." (emphasis in original). Brown further requires an instruction on an attempt whenever an attempt is an offense under the law, without reference to the charge. 206 So 2d at 381. See also In Re Standard Jury Instructions, 431 So. 2d 594 (Fla. 1981); State v. Bruns, 429 So. 2d 307 (Fla. 1983). Thus, a charge of the greater necessarily includes a charge on the lesser.

An analogy to the instant case, in which the defendant alleges that he was not "charged" with the necessarily included lesser offenses, is that of Jacobs v. State, 184 So. 2d 711 (Fla. 1st DCA 1966) cited with approval by this Court in State v. Roby, 246 So. 2d 566, 571 (Fla. 1971). In Jacobs, the defendant alleged that he could not be found guilty of the substantive offense charged in the information, where he acted as an aider and abetter, unless he was specifically charged with being an aider and abetter in the information. The court rejected this contention finding that the information charging the defendant as a principal, necessarily included aiding and abetting, so as to allow the verdict of guilty as charged to be sustained. 184 So. 2d at 714-715. Thus, as in Jacobs, the defendant in the instant case was "charged with" attempted second degree murder, and it was not necessary for it to

be expressly set forth in the information. To hold otherwise would require the State to charge in an information or indictment, not only the major charge, but every necessarily included lesser charge, in order for Section 775.087(1) to apply to the guilty verdict returned by the jury.

As the Fourth District stated in the instant case:

> To adopt the defendant's restrictive interpretation of the statute would require this Court to ignore an obvious legislative policy and, at the same time, to depart from basic concepts of statutory construction. "One of the fundamental rules of construction is that the legislative intent must be ascertained and effectuated. . .Where two or more interpretations can reasonably be given a statute, the one that will sustain its validity should be given and not the one that will destroy the purpose of the statute." State ex rel Register v. Safer, 368 So. 2d 620, 624 (Fla. 1st DCA 1979). We are also mindful of Justice Holmes observation that
>
> > [t]he legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major promise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.
> > Johnson v. United States, 163 F. 30, 32 (1st Cir. 1980) (Circuit Justice), quoted in United States v. Hutcheson, 312 U.S. 219, 235, 61 S. Ct. 463, 468, 85 L. Ed 788 (1941).
>
> Miller v. State, supra, 438 So. 2d at 85.

The State submits that the Fourth District in the instant case

followed precedent of this Court[3] and well-established rules of statutory construction. This Court should therefore adopt the well-reasoned opinioned of the Fourth District and affirm the enhancement of the defendant's sentence.[4]

FOOTNOTE 3 and 4

3 The defendant's reliance on Palmer v. State, 438 So. 2d 1 (Fla. 1983) is misplaced. Palmer did not involve the same section of Section 775.087, as in the instant case, and futhermore the rule of statutory construction used in Palmer, that criminal statutes be construed strictly in favor of the person against who the penalty operates, does not mean that the interpretation of the statute must be literal when it flies in the face of the obvious legislative intent.

In addition, defendant's reliance on Lewis v. State, 419 So. 2d 337 (Fla. 1982) is misplaced. This Court's opinion in Lewis unlike the lower court decision, did not find that a jury need not be instructed on the maximum and minimum penalties for offenses included within the main offense charged. This Court found that the failure to instruct on the minimum and maximum penalties for the primary offense charged was harmless error where the defendant had been convicted of a lesser offense.

4 The State would only note that the defendant at neither the charge conference, at sentencing or in a motion for new trial, objected to the enhancement of sentence, for the offense of attempted second degree murder (R. 177-180, 251, 252). Furthermore, the trial court instructed the jury that they could return a verdict of attempted second degree murder and that under the circumstances of this case, it would be a first degree felony punishable by up to thirty (30) years in prison with a minimum of three years (R. 240).

CONCLUSION

Based upon the foregoing reasons and citations of authority, the State submits that this Court should AFFIRM the decision in Miller v. State, supra.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief Of Respondent On Merits has been furnished to TATJANA OSTAPOFF, ESQUIRE, Assistant Public Defender, Attorney for Petitioner, 224 Datura Street, 13th Floor, West Palm Beach, Florida 33401 by mail/courier this 4th day of June, 1984.

OF COUNSEL