047

IN THE SUPREME COURT OF FLORIDA

MITCHELL O. LINEHAN, :

Petitioner :

vs. : Case No. 64,609

STATE OF FLORIDA, :

Respondent :

_____ :

PETITIONER'S BRIEF ON MERITS

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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CITATION OF AUTHORITIES

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STATEMENT OF THE CASE

Petitioner, Mitchell O. Linehan, was charged with Arson under Florida Statute 806.01(1) (R3). The grand jury in and for Pinellas County, Florida also filed an indictment charging Petitioner with First Degree Murder pursuant to Florida Statute 782.04(1)(a) (R9-10). Petitioner was tried by jury and found guilty as charged. The jury then recommended to the court that Petitioner be given a life sentence. (R26) At sentencing the Court merged the arson and first degree murder charges (R5-6) and sentenced Petitioner to a life term with a minimum mandatory twenty-five years. (R27-30)

Petitioner appealed his judgment and sentence to the District Court of Appeal, Second District. In a lengthy opinion, the District Court sitting en banc reversed and remanded Petitioner's first degree murder charge for new trial and reinstated Petitioner's arson conviction. The court also certified to the Florida Supreme Court the following questions as being of great public importance:

1. Whether voluntary intoxication is a defense to arson or to any crime.

2. Whether voluntary intoxication is a defense to first degree (felony) murder.

3. Whether a jury instruction on second degree (depraved mind) murder is necessary if supported by the evidence, when defendant is charged with first degree (felony) murder.

Petitioner filed his petition for discretionary review [F.R.A.P. 9.030(2)(B)(i)] with the Florida Supreme Court, while the respondent, State of Florida, filed a cross-petition. Petitioner would address the issues raised by certified questions one and two and the District Court's holdings as to these two questions.

STATEMENT OF THE FACTS

Petitioner was arrested as a suspect for arson and an initial interview was made by a detective and a fire marshal's official. At a second interview conducted by the same persons, the detective and fire marshall confronted Petitioner with contradictions from his initial interview. A few minutes into this interview Petitioner broke down and told them about actually starting the fire himself.

Petitioner stated that on the day the fire occurred he had gone to St. Petersburg looking for his girlfriend. During the afternoon, Petitioner went to several bars and to his girlfriend's apartment trying to locate her. That evening he returned to her apartment. After not finding her there, he went to the back of the apartment building, up the rear fire escape and apparently gained entrance through a window to her apartment. After entering the apartment, Petitioner lighted a cigarette and stood, smoking the cigarette and flicking his lighter. He held the flame of the lighter to curtains in the apartment and then departed. No one witnessed Petitioner starting the fire.

The ensuing fire engulfed the apartment building. All occupants except one managed to escape. He was found a few days later by persons conducting salvage operations at the building in an area virtually untouched by the fire. The unfortunate victim had, unknown to anyone, occupied a storage room for shelter during the night. The victim died from smoke inhalation.

A St. Petersburg Fire Department investigator testified that he found the area of deepest burn by a window in the apartment of Petitioner's girlfriend. He found no basis for the fire having started by accidental means, and he classified the fire as arson. Testimony from another fire investigator was that the fire pattern was consistent with curtains in the girlfriend's apartment having caught on fire and the fire having spread from there.

Two witnesses testified that they had seen Petitioner in an intoxicated state on the day of the fire. One stated she had seen Petitioner trying to open the girlfriend's apartment window earlier in the day. Petitioner was intoxicated at this time and, in fact, she had never seen him when he was not intoxicated. The other witness testified that a few hours before the fire occurred she saw Petitioner at the building and that he was staggering. She also testified that she heard him mumble something about burning the building down. Later that evening, when the witness returned to the apartment building and found it in flames she saw the Petitioner outside the building still staggering. The witness gave her opinion that the Petitioner was very drunk.

Petitioner did not testify at the trial.

I WHETHER VOLUNTARY INTOXICATION IS A DEFENSE TO FIRST DEGREE (FELONY) MURDER?

II WHETHER VOLUNTARY INTOXICATION IS A DEFENSE TO ARSON OR TO ANY CRIME?

Petitioner would address these two issues together for the sake of brevity and logical progression of thought.

ISSUE I

CAN VOLUNTARY INTOXICATION BE DEFENSE TO ANY CRIME?

The great English jurists, Coke and Blackstone took the position that to be intoxicated during the commission of a crime was a matter of aggravation. Their view goes back to the ancient Greeks, with Aristotle advocating double punishment for crimes committed while one was intoxicated. Wharton, Criminal Law Section 108 (14th ed. 1978). In modern times the view toward voluntary intoxication has moderated. In the vast majority of states the law is that voluntary intoxication can be an affirmative defense to a crime of specific intent. 8 ALR 3d 1239 (1966).

For conduct to be criminal it must consist of something more than mere action; some sort of bad state of mind is required as well. LeFave & Scott, Criminal Law Hornbook Section 24 (1972). "Actus not facit reum nisi mens sit rea" (an act does not make one guilty unless his mind is guilty). LeFave & Scott, Section 27. Intoxication relieves the actor from liability for his crime because it negates his mental capacity to commit the crime. LeFave & Scott, Section 28. The intoxication defense is not that the defendant would not have committed the crime if he had been sober. Nor does it excuse him. It is not the same as insanity, because there is no mental disease or defect involved. LeFave &

Scott, Section 45. Instead intoxication negates an essential element of the crime, specific intent. In essence this means the crime was never committed.

Voluntary intoxication has been recognized as a defense in Arkansas, California, Colorado, Connecticut, Idaho, Maine, Minnesota, Montana, New Hampshire, New York, Utah, Washington and in the American Law Institute's Model Penal Code. Alabama, Alaska, Arizona, Delaware, District of Columbia, Florida, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Maryland, Michigan, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, West Virginia and Wisconsin courts have also recognized intoxication as a defense to specific intent crimes at some time. Only Georgia, Missouri, Texas, Vermont and Virginia have seemingly never recognized the defense. Wharton, Criminal Law Section 108.

Florida first recognized intoxication as a defense in Garner v. State, 28 Fla. 113, 9 So. 835 (1891). In Garner the Florida Supreme Court held that in cases where specific intent is an essential or a constituent element of the offense charged, voluntary intoxication becomes relevant as to the defendant's ability to form such intent. If the defendant is too intoxicated to form such intent, the intent can not exist and consequently the offense of which it is a necessary part can not be

perpetrated. This holding has been followed in Russell v. State, 372 So.2d 97 (2d DCA 1979), Fouts v. State, 374 So.2d 22 (2d DCA 1979), Mellins v. State, 395 So.2d 1207 (4th DCA 1981), Circeck v. State, 201 So.2d 706 (Fla. 1967) and Edwards v. State, 428 So.2d 357 (3d DCA 1983).

ISSUE II

CAN VOLUNTARY INTOXICATION BE A DEFENSE TO FIRST DEGREE (FELONY) MURDER?

According to the authorities, voluntary intoxication is a valid defense to a charge of felony murder when it negatives the specific intent necessary to prove the underlying felony. LeFave & Scott, Section 45 & Perkins Criminal Law 901 (2d ed. 1969). The Florida Supreme Court's holding in Jacobs v. State, 396 So.2d 1113 (Fla. 1981) is clearly consistent with this position.

> "a defendant charged with first degree felony murder on account of a killing during the commission of a robbery may defend himself on the ground he was too intoxicated to entertain the intent to rob."

The Second District's holding has either completely ignored or convaluted this statement to reach its conclusion that voluntary intoxication can never be a defense to felony murder.

In first degree murder premeditation is a necessary element. In enacting the felony murder statute the legislature has substituted the commission of the underlying felony for the necessary proof of premeditation. Adams v. State, 341 So.2d 765 (Fla. 1976). If the underlying felony is a specific intent crime, then one is entitled to use intoxication as a defense to felony murder. The reasoning goes that if there is no specific intent then there is no underlying felony; if there is no felony

there is no premeditation; if there is no premeditation then there is no first degree murder. However, under this rationale the defendant could still be found guilty of second degree murder or manslaughter which require no premeditation and are crimes of recklessness or gross negligence. Intoxication, therefore, lowers the degree of the crime, but does not absolve the defendant of all criminal responsibility.

ISSUE III

CAN VOLUNTARY INTOXICATION BE A DEFENSE TO THE CRIME OF ARSON?

It is clearly the rule in Florida and the majority of jurisdictions that voluntary intoxication is a valid defense to a specific intent crime and to a felony murder charge where the underlying felony is a specific intent crime. Obviously, for these rules to apply to the instant case it must be established that, arson, the underlying felony of the felony murder charge is a specific intent crime. No Florida court has decided whether arson is a crime of specific intent. Reference to cases from other jurisdictions is not particularly helpful because the question is one of how the crime is defined and arson statutes vary from state to state.

Specific intent means the mental state required above and beyond any mental state required with respect to the "actus reus" of the crime. LeFave & Scott, Section 28, and Garner, supra. The statute in question reads as follows:

> "(1) any person who willfully and unlawfully, by fire or explosion, damages or causes to be damaged:
> (a) any dwelling, whether occupied or not, or its contents; ..." Florida Statute 806.01 (1979).

C.J.S., section 31(4) (1961) states that use of the words willfully, willfulness, or willful in a statute can mean more

than mere voluntariness and imply a purposeful design to do a thing with evil or illegal design. Black's Law Dictionary, 5th ed. (1979) defines willful by stating:

> "An act or omission is "willfully" done if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or disregard the law."

From these definitions it is evident that arson is a specific intent crime. The use of the word "willfully" clearly makes a defendant's intent to set fire to or explode something an essential element of the crime. See also Russell v. State, 372 So.2d 97 (2d DCA 1979).

ISSUE IV

POLICY CONSIDERATIONS

Alcohol acts as a depressant on the brain and central nervous system. It causes mental deterioration by blunting perception, judgment and control; and it appears to act as a stimulant in that inhibitions are removed. Aggressive and antisocial conduct may result. Wharton section 107. Although alcohol does rob one of reason and exasperate passions, because one voluntarily brings it upon himself it can not be used as an excuse for committing a crime. 8 ALR 3d, supra. Petitioner agrees with the proposition that voluntary intoxication should not completely excuse criminal wrongdoing. However, the Second District's apparent desire to eliminate the defense completely because of inconsistencies in its application and the difficulty in ascertaining what is a specific intent crime, is to quote an old homily, "throwing out the baby with the bath water".

It is a fundamental principle of criminal law that for an act to be criminal it must be voluntary. The deterrent function of criminal law would not be served by imposing sanctions for involuntary action, as such action can not be deterred. Likewise, assuming that revenge or retribution is a legitimate purpose of punishment, there would appear to be no basis to impose punishment on those whose actions were not voluntary. Restraint or rehabilitation might be deemed appropriate purposes,

however, where individuals are likely to constitute a continuing threat to others because of their involuntary actions, it is probably best to deal with this problem outside the law. LeFave & Scott, Section 25.

Perhaps to avoid the problems now present with the intoxication defense it would be best to do away with the current distinctions between general and specific intent crimes and instead ask what intent, if any, does the crime require. Then if it requires some intent, did the defendant, in fact, entertain the intent required. LeFave & Scott, Section 45. If this were the case, in crimes of recklessness, gross negligence and strict liability voluntary intoxication could not be a defense. As to the crimes where the defense would apply, it would still be for the trier of fact to be convinced that the defendant was intoxicated to a sufficient degree to preclude his capacity to form the type of intent required, from merely intending the act he committed all the way to intending to bring about certain results.

One who commits a crime while intoxicated that he would never have considered if he had been sober, is not on the same scale of moral culpability, even if his intoxication is voluntary, as a person who commits the same crime while stone-cold sober. Perkins, 905. Considering that the criminal law should be fair and just, as well as strict and protective, voluntary intoxication should remain a viable defense in Florida.

CONCLUSION

In light of the foregoing arguments and authorities, Petitioner asks this court to answer certified questions 1 and 2 in the affirmative and to reverse the holdings of the lower court as to these issues.

Respectfully submitted,

Allyn Giambalvo

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to William I. Munsey, Jr., Assistant Attorney General Park Trammell Bldg., 8th Floor, 1313 Tampa Street, Tampa, FL 33602, and to Mitchell Linehan, No. 085498, PO Box 221, Raiford, FL 32083, this 22nd day of December, 1983.

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