IN THE SUPREME COURT OF FLORIDA

WILSON TILLMAN,

Petitioner,

v. CASE NO. 64,653

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

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STATE OF FLORIDA,	:	
Respondent.	:	
	:	

PETITIONER'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

WILSON TILLMAN was the defendant in the trial court, appellant before the District Court of Appeal, First District, and will be referred to in this brief as "petitioner," "defendant," or by his proper name. Reference to the record on appeal will be by use of the symbol "R" followed by the appropriate page number in parentheses.

II STATEMENT OF THE CASE AND FACTS

Count I of an indictment charging four offenses alleged that petitioner, on July 4, 1982, with premeditation, killed Brenda Green by shooting her with a pistol, contrary to Sections 775.087(2) and 782.04, Florida Statutes (1981). Count II alleged that petitioner, on July 4, 1982, with premeditation, attempted to kill Linda Lewis by shooting her with a pistol, contrary to Sections 782.04 and 775.087(2), Florida Statutes (1981). Count III alleged that petitioner, on July 4, 1982, carried a concealed firearm, contrary to Section 790.01, Florida Statutes (1981). Count IV alleged that petitioner, on July 4, 1982, having been previously convicted of a felony, was in possession of a firearm, contrary to Section 790.23, Florida Statutes (1981) (R-385).

Petitioner moved to sever Count IV of the indictment, charging him with possession of a firearm by a convicted felon, from the remaining three counts (R-418-419), which motion was granted (R-437). Thus, petitioner proceeded to trial on the first three counts of the indictment.

Karen Jordan, the first state witness, testified that on July 4, 1982, she was a patrol officer employed by the Escambia County Sheriff's Department, working the midnight shift. At 10:49 p.m. she was dispatched to an apartment located at Truman Arms Apartments located in Pensacola, Escambia County, Florida, in response to a report of a shooting. She arrived in a couple of minutes and there

observed Brenda Green, who had been shot and was unconscious. Another person present, Linda Lewis, had received a flesh wound. Officer Jordan observed and seized a small brass shell casing. In addition to Green and Lewis, Green's brother, Richard Harris, and two other black males were present. Jordan assisted the emergency medical technicians who had arrived in their efforts to revive Brenda Green (R-134-140).

Linda Lewis, the next state witness, testified that Brenda Green was her cousin. On July 4, 1982, Green had a cookout in her yard which was attended by Green, the witness, petitioner, and several other persons. Some of those present at the party were drinking beer. A severe storm entered the area, which forced the party guests to go inside Green's apartment. The witness sat on one end of a sofa, and Green sat on the other end. Petitioner sat in a chair.

Petitioner, who lived with Green at the apartment along with Green's daughter, Georgia Green, became engaged in an argument with Green involving the propriety of having allowed Georgia to visit others during the holiday, and who was responsible for getting an automobile repaired. Green then said to petitioner: "I'll tell you what, Wilson. Get your mother fuckin' shit and get out of my house." To the witness Green stated: "Linda, I am so sick and tired of Wilson. Every day it's the same old thing."

Petitioner reached into his pocket. Green then stated to petitioner: "If you have plans on clicking that sucker,

you better use it." Shortly thereafter petitioner began shooting. Lewis and the others present ran into the hallway. Just before she left the room Lewis heard Green, who was slumped on the floor, tell petitioner: "Damn, Wilson, man, what you call yourself doing."

Once in the hallway Lewis then realized she herself had been shot in the arm. After a while, she and the others re-entered the room. At that point Brenda Green was stretched out on the floor, petitioner was standing in the doorway. Someone present advised petitioner to leave, which he did. Emergency medical personnel and the police soon arrived (R-140-159).

During cross-examination of Lewis the defendant proffered testimony that Green and another person once told her at a liquor store two or three weeks before the shooting that she, Green, hit petitioner with a mug, cutting him, which required stitches to close. Defense counsel contended such evidence was admissible to show the reasonableness of petitioner's apprehension or fear of Green, and thus was relevant to the defense of self defense. The prosecutor contended that the evidence was inadmissible hearsay. The trial court agreed with the prosecutor and accordingly would not permit the jury to hear the proffered testimony (R-140-166).

Richard Harris, Brenda Green's brother, testified that on July 4, 1982, he lived in the apartment with Green, petitioner, and Georgia Green. His testimony with respect

to the events leading up to the shooting and the shooting itself essentially corroborated that of his cousin, Linda Lewis, the previous witness. Harris added that, earlier in the day, he saw the imprint of a gun in petitioner's front pants pocket. Just prior to the shooting, he heard petitioner remark to Green that he, petitioner, was not going to allow himself to be cut by Green again. Several days or weeks before the shooting, Harris discovered a pistol while cleaning out a car owned by either the defendant or Green. He gave it to his sister (R-167-198).

Kenneth Harlan, who lives immediately below the apartment where the shooting occurred, testified he heard the sound of five or six shots being fired, followed five minutes later by the sound of someone running down the stairs (R-199-202).

Jeanie Grice, a resident of Truman Arms Apartments, testified she was looking at a fireworks show on July 4, 1982. From her apartment Grice could view Brenda Green's apartment. While looking at the fireworks, Grice heard four gunshots and then saw Brenda Green's body fall, with petitioner standing over it. Shortly thereafter she saw petitioner put a gun in his pants and leave the apartment. Although at trial Grice's identification of petitioner was certain, she admitted testifying on deposition that she doubted her ability to identify the person she saw in the apartment (R-203-212).

Officer Albert Mezza, an investigator employed by the Escambia County Sheriff's Office, testified that he conducted an investigation of the shooting, which included the interviewing of witnesses and the collection of evidence (R-212-217).

Officer Jerry Bradshaw, an identification officer employed by the Escambia County Sheriff's Office, testified that he participated in the investigation of the shooting. He observed and seized six or seven shell casings, one slug, and also saw several bullet holes. He also took several photographs of these objects and these pictures, as well as the casings and the spent slug, were introduced into evidence (R-217-236).

Robert Taylor, employed by the Escambia County Sheriff's Office, testified that he attended the autopsy conducted by Dr. Bell upon the body of Brenda Green. He identified three photographs as depicting three separate gunshot wounds, and testified that he seized three .25 caliber slugs, removed by Bell from the body of Green (R-236-241).

Dr. William Bell, M.D., a pathologist, expressed the opinion that Green died as a result of her three gunshot wounds. Two of the three wounds would have independently caused death, since they penetrated vital organs. One of the three clearly entered the body in a downward trajectory, which would indicate either that Green was leaning forward when she was shot, or that she was sitting while the person

shooting was standing (R-244-255).

James Henderson, the next state witness, testified that on the morning of July 4, 1982, petitioner told him that he was going to hurt Brenda Green because Green had been messing over petitioner and his money (R-256-263).

At this point in the proceedings the state rested. Petitioner's motions for judgments of acquittal were denied (R-264-265).

Petitioner took the stand on his own behalf and testified that he lived with Green, and was extremely fond of her children. Approximately a week prior to July 4, 1982, at a liquor store, Green cut petitioner's hand with a broken glass or beer mug. Approximately 40 stitches were required to close this wound and, on July 4, 1982, petitioner's hand was still painful and it was virtually immobile.

An argument between two party guests had occurred at the cookout. Brenda told petitioner to get the gun in an effort to break up the argument. Petitioner retrieved the gun, stopped the argument, and instructed one of the guests to leave, which he did.

After the rain chased everyone inside of the apartment, petitioner and Green had a slight argument over who was responsible for having a car repaired, and the wisdom of allowing Green's child to go with another person over the holiday. Petitioner decided to leave the apartment, and proceeded toward the door. Threatening to kick petitioner,

Green got up and, armed with a piece of glass, came toward petitioner. Petitioner's ability to physically defend himself was greatly hampered due to the condition of his hand. The defendant therefore fired the gun in an effort to clear a path to the doorway. Green walked into the line of fire. Petitioner did not intend to hurt Green and was acting in self defense. After petitioner's testimony the defense rested (R-269-292).

After argument of counsel and the trial court's instructions on the law, and after deliberation, the jury returned verdicts finding petitioner guilty of second degree murder, a lesser offense of first degree murder as charged in Count I; guilty of attempted manslaughter, a lesser offense of attempted first degree murder as charged in Count II; and, guilty as charged in Count III of carrying a concealed firearm (R-427).

At sentencing, defense counsel contended that petitioner could not be either adjudicated guilty or sentenced for attempted manslaughter, and that the judgment should be set aside, since that offense does not exist under Florida law. The trial court disagreed.

For second degree murder petitioner was adjudicated guilty and sentenced to life imprisonment, with 235 days credit, with the requirement that petitioner serve three years before being considered for parole. For attempted manslaughter petitioner was adjudicated guilty and sentenced

to five years imprisonment. For carrying a concealed firearm, petitioner was adjudicated guilty and sentenced to five years imprisonment. All three sentences are to be served consecutively to one another (R-440-446).

Notice of taking an appeal to the District Court of Appeal, First District, was timely filed (R-447), petitioner was adjudged insolvent (R-451), and the Public Defender of the Second Judicial Circuit was designated to handle the appeal. On appeal petitioner raised the following issues for the district court's review:

> ISSUE I
>
> THE TRIAL COURT ERRED IN SUSTAINING THE STATE'S HEARSAY OBJECTION TO APPELLANT'S PROFFERED TESTIMONY TO THE EFFECT THAT THE VICTIM HAD CUT APPELLANT TWO OR THREE WEEKS PRIOR TO THE TIME THE ALLEGED MURDER OCCURRED, SINCE SUCH EVIDENCE WAS NOT INADMISSIBLE HEARSAY AND WAS RELEVANT TO APPELLANT'S DEFENSE OF SELF DEFENSE IN THAT IT SHOWED THE REASONABLENESS OF APPELLANT'S FEAR OF THE VICTIM.
>
> ISSUE II
>
> THE TRIAL COURT ERRED IN ADJUDGING AND SENTENCING APPELLANT FOR THE OFFENSE OF ATTEMPTED MANSLAUGHTER, SINCE THAT OFFENSE DOES NOT EXIST IN FLORIDA.

On November 18, 1983, the District Court of Appeal, First District, filed an opinion affirming the judgments and sentences appealed from, thus rejecting the two issues set out above. Tillman v. State, __So.2d__ (Fla. 1st DCA No. AS-6, opinion filed November 18, 1983) (1983 FLW 2756).

The district court did, however, certify the following issue to this Court as involving a question of great public importance:

IS THERE A CRIME OF ATTEMPTED MANSLAUGHTER UNDER THE STATUTES OF THE STATE OF FLORIDA?

Notice of seeking this Court's discretionary review was timely filed December 19, 1983. This brief on the merits follows.

III ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN SUSTAINING THE STATE'S OBJECTION TO PETITIONER'S PROFFERED TESTIMONY TO THE EFFECT THAT THE VICTIM HAD CUT PETITIONER TWO OR THREE WEEKS PRIOR TO THE TIME THE ALLEGED MURDER OCCURRED, SINCE SUCH EVIDENCE WAS NOT INADMISSIBLE HEARSAY AND WAS RELEVANT TO PETITIONER'S DEFENSE OF SELF DEFENSE IN THAT IT SHOWED THE REASONABLENESS OF APPELLANT'S FEAR OF THE VICTIM.

[Note: Although this argument relates to an issue other than that for which jurisdiction in this Court was originally conferred, petitioner relies upon Trushin v. State, 425 So.2d 1126 (Fla. 1983) for the proposition that this Court can and should rule on this issue.]

At trial the state presented testimony from the victim's cousin, Linda Lewis, who essentially testified that she saw petitioner shoot the victim with a firearm, as the victim was seated on a sofa (R-140-159). On cross-examination defense counsel proffered certain testimony. Lewis stated that the victim told her that two or three weeks before the victim was shot, the victim cut petitioner with a mug, with the result that petitioner had to receive stitches. This incident allegedly occurred at a liquor store. The trial court excluded the jury from hearing this testimony on hearsay grounds, thus sustaining the prosecutor's objection and rejecting defense counsel's argument that the proffered evidence was admissible to show the reasonableness of the defendant's fear of the victim (R-163-166).

Petitioner contends the trial court erred in sustaining the state's hearsay objection, since such evidence was not inadmissible hearsay and was relevant to petitioner's defense of self defense. Petitioner will first demonstrate that the proffered evidence was not inadmissible hearsay, and then demonstrate its relevance to the defense of self defense.

Petitioner asserts the proffered evidence falls within a well established exception to the hearsay rule, the exception relating to statements against interest. See generally Baker v. State, 336 So.2d 364 (Fla. 1976) and Brinson v. State, 382 So.2d 322 (Fla. 2d DCA 1979). This exception is codified in Section 90.804(2)(c), Florida Statutes (1981), which provides:

> (c) Statement against interest.—A statement which, at the time of its making, was so far contrary to the declarant's pecuniary or proprietary interest or tended to subject him to liability or to render invalid a claim by him against another, so that a person in the declarant's position would not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is inadmissible, unless corroborating circumstances show the trustworthiness of the statement. A statement or confession which is offered against the accused in a criminal action, and which is made by a codefendant or other person implicating both himself and the accused, is not within this exception.

Petitioner contends the proffered testimony falls both within the first and second sentences of the statute quoted above.

Specifically, the victim's act of cutting the defendant unquestionably constitutes the intentional torts of battery or assault, which would have subjected the victim to a civil lawsuit for such torts, and thus was contrary to the victim's pecuniary interest. See McDonald v. Ford, 223 So.2d 553 (Fla. 2d DCA 1969). In this manner the victim's statements fit within the first sentence of the statute quoted above.

Not only did the proffered evidence satisfy the first sentence, but also the second, relating to statements against penal interests. The victim's actions here constituted either the crime of battery or that of aggravated battery. Sections 784.03 and 784.045, Florida Statutes (1981). The "corroborating circumstances" requirement of the second sentence was satisfied below since, even at the time of trial, evidence of the cuts received by petitioner from the victim were displayed at trial (R-274).

Based upon the foregoing petitioner argues the proffered evidence was not inadmissible hearsay. Petitioner further argues that the proffered evidence was relevant to his defense of self defense.

In White v. State, 59 Fla. 53, 52 So. 805 (1910) the defendant, on trial for the homicide of one Alexander, introduced evidence that, at about an hour before the victim was shot by the defendant, the defendant and Alexander had a meeting at which time the defendant struck Alexander. Excluded from trial was evidence that the defendant told

Alexander that he would "publish" Alexander to the town's citizens the next morning, and that Alexander then asked the defendant not to do so, for it would ruin Alexander's reputation. In reversing the defendant's conviction and ordering a new trial because the trial court erred in excluding the evidence described above, this Court stated the applicable rule of law as follows:

> [W]here a homicide is shown and an issue of self-defense is made, evidence is admissible as to the fact of a hostile meeting between the defendant and the deceased shortly before the fatal encounter, and also as to the apparent feeling of the parties towards each other when they separated, since such circumstances may tend to show the probable attitude of friendliness or hostility of each toward the other when the fatal meeting occurred. See Sylvester v. State, supra 4 Elliott on Ev., Paragraph 3036; 21 Cyc. 894, 915; 21 Am. & Eng. Ency. Law (2nd Ed.) 217; White v. State, 30 Tex.App. 652, 18 S.W. Rep. 462; see also, Lester v. State, 37 Fla. 382, 20 South. Rep. 232.
>
> * * *
>
> This proffered testimony does not go to the merits of the altercation at the prior meeting. It does not disclose why the intention to publish was formed, or whether such action was justified; but it tended to show the feeling of the parties towards each other at the close of the previous interview, and was admissible as tending to explain the attitude of each at the fatal meeting as to which the defendant testified.
>
> 59 Fla. at 55-56.

This rationale is, of course, precisely what defense counsel

unsuccessfully contended to the trial court.

Similarly, in Deeb v. State, 131 Fla. 362, 179 So. 894 (1938) this Court held the trial court had erred in sustaining the state objections to the testimony of the accused, who was relying upon the defense of self defense, as to the nature of an encounter the defendant had with the victim a day prior to the day the victim was killed, and showing efforts on the part of the accused to settle the difficulty.

White and Deeb, supra, are admittedly old decisions. More recently, however, in Barnes v. State, 406 So.2d 539 (Fla. 1st DCA 1981), the defendant defended against a charge of murdering her husband by claiming self defense. State objections were sustained when the defense sought to introduce evidence regarding an argument between the deceased and the accused during the week before the victim was shot, and evidence of a fight between the victim and another man for which the deceased was facing charges at the time of his death. The district court reversed Barnes' conviction, noting that the excluded evidence could have very well been relevant to show a violent nature on the part of the deceased, threats toward the accused, and the accused's fear of the victim. See also Hawthorne v. State, 377 So.2d 780 (Fla. 1st DCA 1979) (error to exclude evidence of the deceased's threats and acts of violence to his wife, the defendant, accused of murdering her husband, since fear and apprehension in the mind of the defendant and the reasonableness of that fear were

jury questions as bearing upon the defendant's claim of self defense).

Therefore, based on these authorities, petitioner contends the trial court erred in precluding the defense from presenting to the jury the proffered evidence of the incident occurring at the liquor store between petitioner and the victim.

Petitioner would lastly contend that the error is not harmless. To a large extent this case boiled down to a credibility contest. The most damaging testimony came from Lewis, the victim's cousin, and from Richard Harris, the victim's brother. They each testified that petitioner shot the victim while she was seated. Petitioner, on the other hand, testified that the victim was approaching him with a piece of glass and that he acted in self defense. While the defendant related the facts of the liquor store incident during his testimony, and while Harris did recall that defendant told the victim that he was not going to let her cut him like she did before just prior to the time the victim was shot, no other state witnesses but Lewis knew of the facts of the liquor store incident. Therefore, petitioner's self defense claim could have likely faired better with the jury if the jury had heard the liquor store incident testified to by petitioner was corroborated by a state witness.

For these reasons petitioner requests this Court to reverse the judgments and sentences appealed from and remand

the cause to the trial court with directions to conduct a new trial.

ISSUE II

PETITIONER IS ENTITLED TO A NEW TRIAL AS TO THE OFFENSE OF ATTEMPTED MANSLAUGHTER.

Count II of the indictment charged petitioner with the attempted premeditated murder by shooting of Linda Lewis (R-385). As a lesser offense, the jury returned a verdict as to Count II for attempted manslaughter (R-427). At sentencing, defense counsel in effect contended that petitioner could not be either adjudged guilty or sentenced for attempted manslaughter, and that the judgment should be set aside, since that offense does not exist in Florida. Disagreeing, the trial court adjudged petitioner guilty and imposed a prison sentence for the offense of attempted manslaughter (R-431-439).

On appeal before the District Court of Appeal, First District, the following issue was raised:

> THE TRIAL COURT ERRED IN ADJUDGING AND SENTENCING APPELLANT FOR THE OFFENSE OF ATTEMPTED MANSLAUGHTER, SINCE THAT OFFENSE DOES NOT EXIST IN FLORIDA.

Although rejecting this argument and affirming, the district court, by opinion issued November 18, 1983, certified the following issue to this Court as involving a question of great public importance:

> IS THERE A CRIME OF ATTEMPTED MANSLAUGHTER UNDER THE STATUTES OF THE STATE OF FLORIDA?

Subsequent to the time the issue was certified in the instant case, this Court answered it with a "qualified guess." Specifically, in Taylor v. State, __So.2d__ (Fla.S.Ct. No. 61,143, opinion filed December 22, 1983) (1983 FLW 509), the

Court held the crime of attempted manslaughter does exist when the crime attempted is "manslaughter by act or procurement," but also that the crime of attempted manslaughter does not exist when the crime attempted is "manslaughter by culpable negligence." Accord: Rodriguez v. State, __So.2d__ (Fla. 3d DCA No. 82-1373, opinion filed December 22, 1983) (1984 FLW 73). It should be noted that both forms of manslaughter are contained within the same statute, Section 784.07, Florida Statutes (1981), which provides:

> Manslaughter.—The killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification according to the provisions of chapter 776 and in cases in which such killing shall not be excusable homicide or murder, according to the provisions of this chapter, shall be deemed manslaughter and shall constitute a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Although Taylor answers the certified question, an issue remains as to the proper treatment that should be given by this Court's to the instant case, in light of Taylor. For the reasons to follow, petitioner contends he should be given a new trial as to the attempted manslaughter charge.

The jury verdict here does not specify which form of manslaughter the jury found petitioner attempted to commit. The jury could have been persuaded by the state's witnesses who suggested that defendant intentionally fired a gun at his girlfriend, and one of the bullets happened to strike Lewis

(R-140-159). These facts would amount to aggravated assault or battery, which would in turn constitute attempted "manslaughter by act or procurement," an offense which does exist under Taylor v. State, supra.

On the other hand, the jury could have been persuaded by petitioner's testimony to the effect that he fired a gun to "clear a path" to the door of the apartment so that petitioner could leave the apartment (R-269-292). The jury could have fully believed the truth of this testimony yet nevertheless properly deemed such conduct as "culpable negligence." It would seem that to discharge a firearm in an apartment known to be occupied by several persons would amount to "culpable negligence." Under Taylor, attempted "manslaughter by culpable negligence" does not exist.

Whatever view the jury took of the evidence, it seems reasonably apparent that the jury did not fully believe or disbelieve either the state's evidence or the defendant's testimony, as the jury rendered verdicts for lesser offenses as to both Counts I and II of the indictment. The jury instruction given here simply tracks the statute (R-357,361-362).

A conviction of a non-existent crime amounts to such a constitutional due process deprivation as to amount to fundamental error. State v. Sykes, 434 So.2d 325 (Fla. 1983) and Vogel v. State, 365 So.2d 1079 (Fla. 1st DCA 1979). In Stromberg v. California, 283 U.S. 359 (1931) it was held that

where a verdict does not specify the ground upon which it rests, and the jury was instructed that their verdict might be given with respect to any one of two or more clauses of a statute, and one of the clauses is unconstitutional, the conviction must be set aside and a new trial ordered.

In the instant case, since for the reasons advanced herein the jury's verdict does not specify which clause of the manslaughter statute (act or procurement v. culpable negligence) upon which it rests, and because the jury was instructed on both clauses, and one of the clauses is unconstitutional as applied to attempts since an attempt to commit manslaughter by culpable negligence amounts to a due process violation since attempted manslaughter by culpable negligence is a non-existent crime, the verdict as to attempted manslaughter must be set aside and a new trial ordered. Stromberg v. California, supra.

IV CONCLUSION

Based upon the preceding analysis and authorities petitioner contends reversible error has been demonstrated. As a result of the error discussed under Issue I, supra, petitioner requests this Court to reverse all judgments and sentences appealed from, quash the decision of the District Court of Appeal, First District, and remand the cause to the trial court with instructions to conduct a new trial. As a result of the error discussed in Issue II, supra, petitioner requests this Court to reverse the judgment and sentence imposed for attempted manslaughter, and remand the cause to the trial court with directions to conduct a new trial as to that charge.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petitioner's Brief on the Merits has been furnished by hand to Mr. Lawrence Kaden, Assistant Attorney General, The Capitol, Tallahassee, Florida, Attorney for Respondent; and a copy has been mailed to petitioner, Mr. Wilson Tillman, Jr., #059652, 02-156, Post Office Box 628, Lake Butler, Florida, 32054, this 11th day of January, 1984.

Carl S. McGinnes

CARL S. McGINNES