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IN THE SUPREME COURT OF FLORIDA

JESSE SKINNER,)
Petitioner,)
vs.) CASE NO. 65,510
STATE OF FLORIDA,)
Respondent.)
)

RESPONDENT'S BRIEF ON THE MERITS

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AUTHORITIES CITED

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SUMMARY OF ARGUMENT

Respondent respectfully suggests that this honorable court no longer has jurisdiction to entertain this cause on the basis of express and direct conflict because the case which conflicted with this case has recently been receded from by the same court. Since all the courts of the state are now in harmony on this issue, no basis exists for this court to further review this cause.

Due to the inherent danger in shooting into an occupied dwelling or vehicle, section 790.19, Florida Statutes (1981), is violated regardless of whether the defendant intended to shoot at the building itself or intended to shoot at a person inside the building.

ISSUE

WHETHER SECTION 790.19, FLORIDA STATUTES (1981), REQUIRES A SPECIFIC INTENT TO SHOOT AT THE STRUCTURE PER SE, OR WHETHER INTENTIONALLY SHOOTING AT AN INDIVIDUAL WITHIN THE STRUCTURE ALSO VIOLATES THE STATUTE?

ARGUMENT

On December 18, 1984, this honorable court accepted jurisdiction to review this cause on the basis of express and direct conflict with Golden v. State, 120 So.2d 651 (Fla. 1st DCA 1960). Four days earlier, an opinion was first published in the Florida Law Weekly, in which the First District expressly receded from Golden, supra. Carter v. State, 9 F.L.W. 2545 (Fla. 1st DCA Dec. 6, 1984). By joining in the unanimous abandonment of Golden, the First District has eliminated any conflict. Respondent understands that this honorable court has already exercised its certiorari jurisdiction. However, in light of the unusual sequence of events resulting in the evisceration of the case providing the foundation for jurisdiction, respondent respectfully requests this honorable court to reconsider. Lipke v. Cowart, 238 So.2d 645 (Fla. 1970). There is no longer disharmony or inconsistency in the law such that this court should exercise its jurisdiction. Kincaid v. World Insurance Co., 157 So.2d 517 (Fla. 1963).

The evidence presented by the state in the instant case established that the victim was sitting in front of a window in the kitchen of his home with his nine year old daughter

(R 40).[1] Petitioner approached the window, pressed a sawed-off shotgun against the window screen, and shot the victim in the head (R 47-48). Petitioner was charged with and convicted of both first degree murder and shooting into a building in violation of section 790.19, Florida Statutes (1981) (R 447, 463). Petitioner assails only his latter conviction due to the lack of the alleged element of the specific intent. He argues that the intent to shoot at a person inside the building which is necessary to support first degree murder is inconsistent with the specific intent to shoot at the building per se. This erroneously presupposes that section 790.19 requires the malicious or wanton conduct to be directed at the building.

The one and only case to support this proposition is Golden, supra. The facts in Golden were that he and his victim became embroiled in a bitter and heated controversy while outside the victim's home. During the dispute, the victim fled into his house with Golden in hot putsuit. Golden fired several shots into the house. The First District determined that the intent of section 790.19, Florida Statutes, was to preserve the life and safety of anyone occupying a dwelling or house. Since Golden's shots were directed toward the victim and not at the house per se, the court determined that the statute was not intended to apply to that factual situation.

Each and every case since Golden has either limited or rejected the reasoning and result of that decision. The

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[1](R) refers to record on appeal; (PB) refers to Petitioner's brief on the merits.

first limitation of Golden's holding occurred in Polite v. State, 454 So.2d 769 (Fla. 1st DCA 1984), wherein the court held that the statute was violated if the evidence indicated that the intended harm was directed at either the structure or an individual therein. Shortly after Polite, the First District expressly rejected Golden in full in Carter v. State, supra, using the following analysis:

> (Golden is) a case which seems to require that, for a conviction under Section 790.19, the party throwing the object must have intended to hit the building rather than an individual. If that is in fact the holding of the Golden case, it is a case from which this court now recedes . . .
>
> We hold that Section 790.19 should not, and need not, be interpreted to reverse a conviction under that statute because of evidence that defendant aimed a missile at, and intended to hit, the (security) guard.

Id. at 2546 (emphasis in original)

Carter effectively obliterates Golden as precendential authority With all due respect to Judge Ervin's special opinion in Carter, the First District could not have granted rehearing en banc in the Carter case because their jurisdiction over the case ended when the term ended on the second Tuesday in January. State Farm Mutual Automobile Insurance Co. v. Judges of the District Court of Appeal, Fifth District, 405 So.2d 980 (Fla. 1981); § 35.10, Fla. Stat. (1983). Furthermore, en banc rehearings are discretionary, so it logically follows that it is not the only avenue by which a district court can reverse itself. Fla. R. App. P. 9.331(c).

By repudiating Golden, the First District aligned

itself with the Second, Third and Fifth Districts on this issue. The courts of this state all agree that section 790.19 is violated when a person wantonly or maliciously shoots at a structue, whether he intends to shoot the building or its occupants, or both.

In Ballard v. State, 447 So.2d 1040 (Fla. 2d DCA 1984), the Second District held that the scienter of "wantonly" does not require that the building be the target. The court upheld the denial of a motion to dismiss which was based upon the fact that the defendant shot at a man in front of a building rather than at a building.

The Third District began distinguishing Golden in Mead v. State, 214 So.2d 514 (Fla. 3d DCA 1968). In that case, the evidence established that the appellant deliberately fired two shots from a sawed-off shotgun through a plate glass window into a bar. The defendant's claim that he intended to shoot one of the people inside the bar was to no avail. See also, Delaughter v. State, 341 So.2d 235 (Fla. 3d DCA 1976).

In State v. Heisterman, 343 So.2d 1272 (Fla. 1977), this court found that separate convictions for assault with intent to murder and shooting into an occupied structure are not mutually exclusive. Since assault with intent to kill requires the intent to injure the victim, arguably this decision is authority for the proposition that the specific intent to shoot an occupant of a building is consistent with an intent to shoot at the building. A single criminal act could have a dual purpose.

In Johnson v. State, 436 So.2d 248 (Fla. 5th DCA

1983), in a special concurring opinion to a per curiam affirmance, Judge Cowart presented a well reasoned argument for rejecting the impotent rule of Golden.

> Inanimate objects, such as houses and cars, seldom so offend a person as to become the subject of a malicious and wanton attitude and of a wrath such as would cause one to shoot the object per se. Such rare occurrences could hardly have been what the statute was intended to proscribe. Yet that is what Golden holds.

Id. at 250.

In response to this argument, Petitioner claims that "common experience teaches that it is not uncommon for a person to lash out at inanimate objects in response to other stimuli even though the object per se is wholly inoffensive . . . Other stimuli may provoke the response, but the inanimate object is nonetheless the target of the attack" (PB 8). Respondent agrees that if a person shoots at a building intending to hit a person inside, the building is nonetheless the target of the attack and hence the conduct is proscribed by section 790.19.

Because of the danger inherent in shooting into an occupied dwelling or vehicle, the statute is applicable regardless of whether the defendant intended solely to shoot at a targeted victim within the dwelling. By shooting into an occupied dwelling, the defendant imperils not only his intended victim but all others inside the structure as well. In the instant case, the shots through the window placed the victim's nine year old daughter in immediate danger; she was sitting at the kitchen table doing her homework with her father when he was murdered. It is these unintended victims that this

statute is designed to protect. To hold otherwise is contrary to both logic and the terms of the statute.

CONCLUSION

Based on the arguments and authorities presented herein, respondent respectfully prays this honorable court affirm the decision of the District Court of Appeal of the State of Florida, Fifth District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Respondent's Brief on the Merits has been furnished, by mail, to Lucinda H. Young, Assistant Public Defender for petitioner, at 1012 S. Ridgewood Avenue, Daytona Beach, Florida 32014-6183, this 24th day of January, 1985.

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