IN THE SUPREME COURT OF FLORIDA

JOSH GREEN,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 65,804

RESPONDENT'S BRIEF ON JURISDICTION

JIM SMITH
ATTORNEY GENERAL

W. BRIAN BAYLY
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR RESPONDENT

TOPICAL INDEX

AUTHORITIES CITED

STATEMENT OF THE CASE AND OF THE FACTS

Petitioner was charged with first degree premeditated murder as follows:

> THAT JOSH GREEN did, on the 7th day of May, 1981, in Osceola County, Florida, in violation of Florida Statute 782.04(1), from a premeditated design to effect the death of a human being kill and murder Kristy Media Starling, in said County, by shooting her with a rifle. (R 325).

Petitioner was ultimately found guilty of the lessor included offense of second degree murder (R 306). During the charge conference at trial the defense counsel for Petitioner requested that the jury be instructed on third degree murder as follows:

> Now, what I think the felony that has been shown in this is discharging a firearm into an occupied dwelling, therefore, or at an occupied vehicle. (R 244).

The third degree murder instruction request predicated upon § 790.19, Fla. Stat. (1981) was denied by the trial court. The evidence was uncontroverted that the victim was shot while standing by a truck. No evidence was adduced showing the victim or anyone else was inside a truck. (R 27).

The Petitioner took a timely direct appeal which resulted in the challenge to the opinion in the case at bar, Green v. State, ___ So.2d. ___ (1984) (App. 1-3). The opinion in Green stated that the defense counsel below argued that proof at trial established the underlying felony of discharging a firearm into an occupied dwelling or at an occupied vehicle.

The opinion also maintained that the allegations in the indictment and proof at trial established that the victim was killed while she was standing near a truck. (emphasis supplied). (App. 2). The Fifth District ultimately affirmed the conviction and concluded that the specific underlying felony urged by defense counsel (that is firing at an occupied dwelling or into an occupied vehicle) contained different statutory elements than simple first degree murder.

Upon affirmance Petitioner sought to invoke this Honorable Court's discretionary review.

ARGUMENT

THERE IS NO EXPRESS AND DIRECT CONFLICT BETWEEN GREEN V. STATE, ___ SO. 2D ___ (FLA. 5TH DCA AUGUST 2, 1984) [9 FLW 1698] AND THE CASES OF BROWN V. STATE, 124 SO.2D. 41 (FLA. 1960), JOHNSON V. STATE, 423 SO.2D 614 (FLA.1ST DCA 1982), HUNTER V. STATE, 389 SO.2D 661 (FLA. 4TH DCA 1980) AND ROLLINS V. STATE, 369 SO. 2D (FLA. 3D DCA).

The opinion in Green v. State, ___ So.2d ___ (Fla. 1984) [9 FLW 1698] correctly states that defense counsel argued that the proof at trial established the underlying felony of discharging a firearm into an occupied dwelling or at an occupied vehicle pursuant to § 790.19, Fla. Stat. (1981) (R 244) (App. 2). Again the opinion correctly stated that the proof at trial established that the victim was killed by a bullet while she was standing near a truck (emphasis supplied) (R 27). The opinion also quoted Fla. R. Crim. P. 3.510(b) (App. 3) which states:

> Upon an indictment...upon which the defendant is to be tried for any offense the jury may convict the defendant of:
>
> (b)Any offense which as a matter of law is a necessarily included offense or a lessor included offense of the offense charged in the indictment ... and is supported by the evidence. The judge shall not instruct on any lessor included offense as to which there is no evidence.

The Fifth District went on to explain that the third degree felony murder instruction was correctly denied because it was not a lessor included offense of the premeditated first degree murder (App. 2).

But Petitoner's characterization of this opinion is misleading. The opinion deals exclusively with the facts in the case at bar and does not stand for the broad proposition that third degree felony murder can never be a lessor included of premeditated first degree murder. The Fifth District was careful to explain:

> The underlying felony urged by defense counsel -- firing at an occupied dwelling or into an occupied car -- contains different statutory elements than simple first degree murder (App. 2).

It is clear that looking at the indictment (App. 2, footnote 6) that the Fifth District has come to a correct conclusion; indeed there are no elements of § 790.19, Fla. Stat. (1981) alleged in the indictment. If the State had alleged the elements in the indictment then under Fla. R. Crim. P. 3.510(b) the trial court would have been obligated to instruct the jury on that lessor included offense upon timely request by the defense.[1] But this was not the case. Since the requested instruction is what would be additionally labelled a "Brown category four lessor included", it would be incumbent upon the Petitioner to show that the elements of this optional les-

---

[1] In Shrum v. Florida, 401 So.2d 941 (Fla. 5th DCA 1981) where the defendant was charged with first degree murder, convicted of second degree murder and appealed based upon the trial court's failure to instruct on third degree murder, the reveiw court held the lack of request by defense counsel below waived the issue and such an error was not fundamental. Likewise, in the case at bar the issue is not of a fundamental nature.

sor included offense were alleged in the indictment. The Fifth District Court correctly pointed out that such elements were not alleged. The Fifth District opinion in Green is only reiterating what is established law.

Johnson v. State, 423 So.2d 614 (Fla. 1st DCA 1982), Hunter v. State, 389 So.2d 661 (Fla. 4th DCA 1980) do not conflict with Green. Both Johnson and Hunter were cases where the State conceded that third degree murder was a lessor degree of the crime charged. In Green the State never did concede that third degree murder was a lessor included charge and indeed was duty bound not to concede since, as the Fifth District correctly noted, the elements of shooting at or into an occupied vehicle or a building were not alleged in the indictment. In Rollins v. State, 369 So.2d 950 (Fla. 3d DCA 1978) the defendant was charged with second degree murder and he requested a lessor included offense of third degree murder but the trial court specifically refused this instruction. Rollins is distinguishible because the defense requested the correct third degree murder charge while in the Green case the Petitioner failed to make such a request.

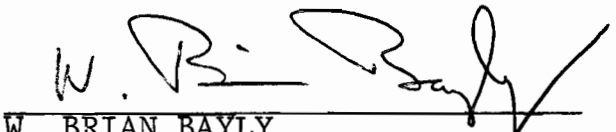
Looking at the opinion in Green in its total context, it is clear that the Fifth District has not directly or impliedly overruled the reasoning of the cases cited by the Petitioner.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully prays this Honorable Court decline to exercise its discretionary jurisdiction in this cause.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

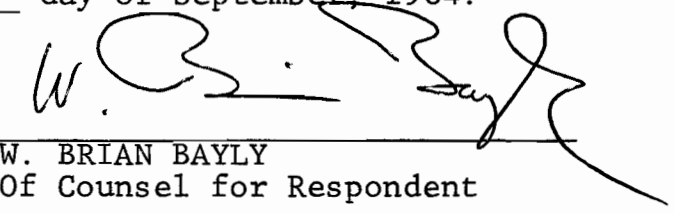


W. BRIAN BAYLY
ASSISTANT ATTORNEY GENERAL
125 N. Ridgewood Avenue
Fourth Floor
Daytona Beach, Florida 32014
(904) 252-2005

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Respondent's Brief on Jurisdiction has been furnished, by mail, to Larry B. Henderson, Assistant Public Defender, Counsel for Respondent, this 12th day of September, 1984.



W. BRIAN BAYLY
Of Counsel for Respondent