IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA

Petitioner,

vs.

NICHOLAS VANCE FURR

Respondent.

Case No. 66, 855

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

BRIEF OF RESPONDENT ON JURISDICTION

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

JOHN T. KILCREASE, Jr.
Assistant Public Defender

Hall of Justice Building
455 North Broadway
Bartow, Florida 33830
(813) 533 1184 or 533-0931

ATTORNEYS FOR RESPONDENT

TOPICAL INDEX TO BRIEF

TABLE OF CITATIONS

SUMMARY OF ARGUMENT

There is no basis for discretionary jurisdiction. There is no conflict between the Second and Fifth District Courts of Appeal regarding the propriety of second degree murder instruction as a lesser to first degree felony murder. There is, in fact, agreement on the specific issue. The Second District Court of Appeal's opinion regarding the status of an underlying offense to felony murder was academic and did not vest sufficiently in their decision to warrant discretionary jurisdiction.

ARGUMENT

ISSUE I

IS THERE SUFFICIENT EXPRESS AND DIRECT CONFLICT IN THE INSTANT CASE WITH GREEN V. STATE, 453 So.2d 526 (Fla.5th DCA 1984) TO WARRANT DISCRETIONARY JURISDICTION?

The Second District Court of Appeals found the facts in the instant case sufficient to warrant instruction to the jury on second degree depraved mind murder as a lesser offense of first degree felony murder as per Rule 3.490, Florida Rules of Criminal Procedure (1984). The failure to give the lesser offense instruction warranted reversal for new trial. Furr v. State, ___So.2d___ (Fla.2d DCA opinion filed March 8, 1985).

The potential basis for jurisdiction in this Honorable Court (as asserted by Petitioner) is express and direct conflict with a decision of another district court of appeal on the same question of law. Rule 9.030(2)(A)(iv), Fla.R.Crim.P. (1984). The Fifth District Court of Appeals had ruled that third degree felony murder is not a lesser included offense of first degree premeditated murder. The lower court, therefore, did not err in failing to give the instruction. In that case a second degree murder instruction was given resulting in a second degree murder conviction. Green v. State, 453 So.2d 526 (Fla.5th DCA 1984).

There is no express and direct conflict sufficient to warrant discretionary jurisdiction. Both courts agreed to the necessity of a second degree instruction -- the Fifth District Court of Appeals by affirming such instruction and the Second District Court of Appeals by reversing for failure to give such instruction. In Green, the Fifth District Court of Appeals ruled that third degree murder was not a lesser included. There is no conflict.

ISSUE II

IS THERE SUFFICIENT EXPRESS AND DIRECT CONFLICT IN THE INSTANT CASE WITH HAWKINS V. STATE, 436 So.2d 44 (Fla.1983) TO WARRANT DISCRETIONARY JURISDICTION?

Respondent was indicted for and convicted for first degree felony murder and armed robbery. The trial court vacated the judgment and sentence for the underlying felony, armed robbery. In reversing the trial court's judgment for first degree murder for new trial, the Second District Court of Appeals also reinstated the robbery conviction in provision for the possibility that Respondent is not reconvicted of first degree felony murder. Furr v. State, ___So.2d___ (Fla.2d DCA opinion filed March 8, 1985).

The conflict as stated by Petitioner is potential and academic at this time. The actions of the trial court regarding the underlying offense, should Respondent be reconvicted of first degree felony murder, are subject to subsequent appeal. The conflict is yet potential and has not yet ripened and matured sufficiently to create basis to warrant discretionary jurisdiction.

CONCLUSION

Based on the arguments presented here, Respondent respectfully requests this Honorable Court deny Petitioner's motion for discretionary jurisdiction.

Respectfully submitted,

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

JOHN T. KILCREASE, Jr.
Assistant Public Defender

Hall of Justice Building
455 North Broadway
Bartow, Florida 33830
(813) 533-1184

Counsel for Appellant

APPENDIX

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

NICHOLAS VANCE FURR,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 84-613

Opinion filed March 8, 1985.

Appeal from the Circuit Court for Lee County; Thomas S. Reese, Judge.

James Marion Moorman, Public Defender, and John T. Kilcrease, Jr., Assistant Public Defender, Bartow, for Appellant.

Jim Smith, Attorney General, Tallahassee, and Ann Garrison Paschall, Assistant Attorney General, Tampa, for Appellee.

DANAHY, Judge.

Appellant was indicted for first degree (felony) murder (Count 1) and armed robbery (Count 2). Following a jury trial, he was convicted as charged and sentenced to consecutive terms of life imprisonment without parole for twenty-five years as to Count 1 and fifty years imprisonment as to Count 2. The trial court

subsequently denied appellant's motion for new trial but granted his motion to correct sentence and vacated the judgment and sentence as to Count 2, the underlying felony. We reverse.

Appellant first contends that the trial judge erred by failing to make inquiry following his statement, first given when he appeared before the court for sentencing, that he had been denied his right to testify. We find this contention to be without merit. Cutter v. State, 460 So.2d 538 (Fla. 2d DCA 1984).

Appellant's second contention is that the trial court erred by failing to instruct the jury on second degree (depraved mind) murder. We agree. In a prosecution for first degree murder the trial court must instruct on the offense charged and on all offenses that are lesser in degree if there is evidence in the record to support a finding of guilt for that offense. Fla.R.Crim.P. 3.490. Obviously, second degree (depraved mind) murder is an offense lesser in degree than first degree (felony) murder under section 782.04, Florida Statutes (1983). In the case before us the evidence adduced at trial demonstrated that appellant entered the apartment with a loaded rifle and, while inside, sprayed shots around a room in which several people known to him were located. One of the shots struck the victim. Under these facts, the jury, if so instructed, could have exercised its inherent power of pardon and found appellant guilty of "an act imminently dangerous to another and evincing a depraved mind regardless of human life," i.e., that appellant's actions fit the statutory definition of second degree (depraved mind) murder provided in section 782.04(2), Florida Statutes (1983).

Consequently, we conclude that the evidence in the case before us warrants submission of an instruction permitting the jury to find appellant guilty of second degree (depraved mind) murder, the degree of offense immediately less than the degree of conviction. Because such an instruction was requested and mandated by rule 3.490, the trial court's failure to give the instruction is reversible and not harmless error. Therefore, appellant is entitled to a new trial on first degree (felony) murder. Linehan v. State, 442 So.2d 244 (Fla. 2d DCA 1983). See State v. Abreau, 363 So.2d 1063 (Fla. 1978); Johnson v. State, 423 So.2d 614 (Fla. 1st DCA 1982); Hunter v. State, 389 So.2d 661 (Fla. 4th DCA 1980).

On retrial for first degree (felony) murder, the conviction for armed robbery (the underlying felony) shall be reinstated. On retrial, should appellant be acquitted of first degree (felony) murder, he shall be sentenced on the armed robbery conviction. However, if, on retrial, appellant is again convicted on first degree (felony) murder, he shall be sentenced on that conviction and, as we have held in Enmund v. State, 459 So.2d 1160 (Fla. 2d DCA 1984), and Dixon v. State, No. 84-477 (Fla. 2d DCA Jan. 9, 1985) [10 F.L.W. 168], the conviction for armed robbery shall be vacated.[1]

REVERSED AND REMANDED FOR A NEW TRIAL WITH DIRECTIONS.

GRIMES, A.C.J., and SCHOONOVER, J., Concur.

---

1. We note that the supreme court has accepted jurisdiction to review the question we first certified in Enmund, and again in Dixon. Dixon v. State, No. 84-477 (Fla. 2d DCA Jan. 9, 1985), review granted, No. 66,405 (Fla. Jan. 21, 1985); Enmund v. State, 459 So.2d 1160 (Fla. 2d DCA), review granted, No. 66,264 (Fla. Dec. 12, 1984).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the Attorney General, Park Trammell Building, Eighth Floor, 1313 Tampa Street, Tampa, Florida, 33602, this 24th day of April, 1985.

John T. Kilcrease

JOHN T. KILCREASE, Jr.