W00A 047

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

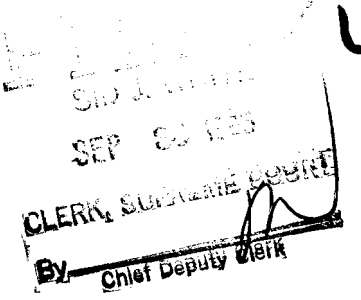
Petitioner,

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 THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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SUMMARY OF ARGUMENT

The appellate court properly ruled that the trial court erred in not giving a second degree, depraved mind, murder instruction as a lesser-included offense in a first degree felony murder trial. So sayeth this Honorable Court. Linehan v. State, 10 F.L.W. 439 (Fla. August 29, 1985).

The appellate court also reinstated a robbery conviction and sentence previously dismissed by the trial court with instructions contingent upon the results of the new murder trial. The appellate court issued instructions referring to its recent decisions on the issue, but specifically noted that those decisions were at that time being reviewed by this Court. Since then the appellate court's referred to opinion has been reversed. State v. Enmund, 10 F.L.W. 441 (Fla. August 29, 1985). The instructions to the trial court were sufficient because the potential reversal was specifically noted. However, the appellate court erred in reinstating the dismissed robbery conviction because the dismissal was not appealed by the Respondent or appealed/cross-appealed by Petitioner. There was no proper appellate format for reinstatment.

ARGUMENT

ISSUE I

THE APPELLATE COURT PROPERLY REVERSED THE TRIAL COURT'S DENIAL OF RESPONDENT'S REQUEST FOR AN INSTRUCTION ON SECOND DEGREE MURDER.

The Second District Court of Appeal reversed the trial court's denial of Respondent NICHOLAS VANCE FURR's request for a jury instruction on second degree murder, specifically citing that court's previous ruling in Linehan v. State, 442 So.2d 244 (Fla.2d DCA 1983); Furr v. State, 464 So.2d 693 (Fla.2d DCA 1985). This Honorable Court affirmed that Court's previous decision that a second degree (depraved mind) murder instruction is necessary, if supported by the evidence, for a charge of first degree felony murder. Linehan v. State, 10 F.L.W. 439 (Fla.August 29, 1985). The Second District Court of Appeal's decision and briefs to invoke discretionary jurisdiction to this Honorable Court in the instant case were filed in the interim between the District Court's decision and this Court's affirmation of Linehan. As affirmation followed in that case, affirmation should also follow in the instant case on the same issue.

In brief on the instant case, Petitioner presented a three-part argument: (1) This Court's decision in Linehan was error; (2) the issue had not been properly preserved for appellate review; and (3) the second degree murder instruction was not supported by the facts. In support of this Court's decision in Linehan, Respondent refers to, rather than repeats, the language of the Second District Court's previous decision on the issue. Linehan, supra at 255-257.

The sole basis for Petitioner's preservation of the issue argument is that Respondent objected to the Court's failure to give a second degree murder instruction without saying specifically it was the second degree, depraved mind,murder instruction that was subject of the objection. (See R758) Petitioner failed to address Respondent's motion for new trial arguing the same error. (R1208-1209) There are two distinctly different forms of second degree murder--depraved mind and felony. It has long been established that second degree felony murder is not a lesser included offense to first degree murder. State v. Jefferson, 347 So.2d 427 (Fla.1977). The only possible question or objection could only have been based upon depraved mind, second degree murder. Allegation that the trial attorney failed to specify the obvious is far distant from possible allegations that he presented only a bare bones objection and motion.

The logic of Petitioner's argument that the facts do not support second degree murder is unfathomable. The Assistant State Attorney involved in this case saw them as doing so. Certified in a written information was that the facts constitute second degree murder. (R811) The Second District Court of Appeal ruled specifically that the facts warranted second degree murder instruction. Furr v. State, supra. The only suggestion of fact alleged by Petitioner suggesting otherwise is that at one point the gun was pointed at the victim and fired. During the spraying of shots about the room, of course that happened. Otherwise, we would not today be arguing degree of murder in this case.

Based on Linehan v. State, supra, this Court should affirm the lower court's decision.

THE APPELLATE COURT PROPERLY MADE THE ARMED ROBBERY CONVICTION CONDITIONAL, PENDING THE OUTCOME OF THE NEW TRIAL AND NOTING THAT THE BASIS FOR FUTURE ACTION WAS CURRENTLY PENDING BEFORE THIS HONORABLE COURT; NEVERTHELESS, THEY IMPROPERLY REINSTATED SAID CONVICTION.

On remand for new trial for fisrt degree felony murder, the Second District Court of Appeal also reinstated a robbery conviction, the underlying offense, which had been dismissed in a post-trial motion. The appellate court instructed that the robbery conviction stood if Respondent was convicted of second degree murder. The Court instructed that if Respondent was again convicted of first degree murder, the handling of the robbery conviction was to be per Enmund v. State, 459 So.2d 1160 (Fla.2d DCA 1984), and Dixon v. State, 10 F.L.W. 168 (Fla.2d DCA January 9, 1985)--noting specifically in the written decision that those cases were at that time under review by this Honorable Court. Furr v. State, 464 So.2d 693 (Fla.2d DCA 1985).

The reinstatement itself was not proper. Respondent's appeal, per the Notice of Appeal (R1211) was specifically of final judgment of the first degree murder conviction and sentence. The former robbery conviction and sentence were referenced only in explanation of the consecutive nature of the first degree murder sentence. See, Fla.R.App.P. 9.110(d). There was no cross-appeal by Petitioner regarding the dismissed robbery conviction and sentence. The appellate court did not have proper format to address the order dismissing the robbery conviction and sentence which had not been appealed.

Petitioner now argues that the instructions accompanying the reinstatement were error. There is no question regarding the first contingency instructed--if Respondent is convicted of second degree murder, the robbery conviction stands. The second contingency instructed involved if Appellant should be again convicted of first degree murder. (Note: the contingency of acquittal was not addressed). The Court instructed the trial court to then handle the reinstated conviction per the recent decisions on the issue with specific written note that the cases were under review at that time.

Since that time this Honorable Court has reviewed and reversed the position taken by the Second District Court of Appeal on the handling of an underlying offense to felony murder. State v. Enmund, 10 F.L.W. 441 (Fla. August 29, 1985). In reviewing the appellate court's decision in a light favorable to the legality of the instructions, it appears the appellate court instructed the trial court to act in accordance with Enmund which was reversed. A note called attention to pending further review of that decision. Per the appellate court's instructions, including the note, the trial court would now know to act in accordance with State v. Enmund, supra which reversed Enmund v. State, supra.

Respondent contends that the reinstatement itself was error. The issue which Petitioner addresses is pruely academic. Should the trial court find Respondent guilty of first degree felony murder and dismiss the robbery conviction per Enmund v. State, while ignoring the note which would direct that court to State v. Enmund, Petitioner can then appeal the trial court's error resulting from

the new trial. The purpose of appeal is to correct error, not prevent possible potential error. The appellate court's instructions were the most accurate and precise for that situation--do as the case law says, but note it is now being reviewed.

Accordingly, Respondent asks this Honorable Court to affirm the instructions as given at that time (with the note), but go one step further and rule that there was not proper basis for the reinstatement upon which the instructions were predicated.

CONCLUSION

Based upon the cases cited and arguments presented herein, Respondent respectfully requests this Honorable Court to affirm the Second District Court of Appeal's reversal of the first degree murder conviction and sentence, and remand this cause for a new trial. It is further requested that this Court reverse the reinstatement of the armed robbery conviction, while affirming the appropriateness of the instructions issued with that reinstatement.

Respectfully submitted,

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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, FL 33602, by mail on this 27th day of September, 1985.

John T. Kilcrease

JOHN T. KILCREASE, JR.