IN THE SUPREME COURT OF FLORIDA

WILLIE LEE MURRAY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Case No. 67,414

BRIEF OF RESPONDENT ON JURISDICTION

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PRELIMINARY STATEMENT

Petitioner was the Appellee in the District Court of Appeal and the Defendant in the trial court. Respondent, the State of Florida, was the Appellant in the District Court of Appeal and the prosecution in the trial court. The parties will be referred to as they appear before this Court. The symbol "A" will be used to refer to the Respondent's Appendix. All emphasis has been supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Petitioner's Statement of the Case and Facts as being a substantially true and correct account of the proceedings below.

QUESTIONS PRESENTED

I

WHETHER THIS COURT SHOULD DECLINE TO EXERCISE ITS DISCRETION AND ACCEPT JURISDICTION WHERE THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE PRESENT CASE IS CORRECT?

II

WHETHER THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE PRESENT CASE IS IN EXPRESS AND DIRECT CONFLICT WITH ANY OPINION OF THIS COURT OR ANOTHER DISTRICT COURT OF APPEAL ON THE ISSUE OF THE JURY INSTRUCTION FOR ATTEMPTED MANSLAUGHTER?

SUMMARY OF THE ARGUMENT

This Court should decline to exercise its discretion and accept jurisdiction in the present case, where the Fourth District's opinion although in conflict with other decisions on the issue of the propriety of imposing a three year mandatory minimum sentence on a conviction for attempted manslaughter, is a correct decision where offenses that are lesser included offenses of attempted manslaughter are subject to the provisions of Section 775.087(2), Florida Statutes. Regardless of whether this Court accepts jurisdiction on the sentencing issue, it should decline jurisdiction over the issue of the propriety of the jury instruction on attempted manslaughter, where the issue has been recently decided contrary to Petitioner's position, by this Court in Tillman v. State, 471 So.2d 32 (Fla. 1985).

ARGUMENT

I

THIS COURT SHOULD DECLINE TO EXERCISE ITS DISCRETION AND ACCEPT JURISDICTION WHERE THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE PRESENT CASE IS CORRECT.

The Respondent recognizes that the decision of the Fourth District Court of Appeal in the present case affirming a three year mandatory minimum sentence for attempted manslaughter is in conflict with the decision of the Second District Court of Appeal in Strahorn v. State, 436 So.2d 447 (Fla. 2d DCA 1983), and the Third District Court of Appeal in Rozier v. State, 353 So.2d 193 (Fla. 3d DCA 1977). However, the Respondent would submit that this Court should decline to exercise its discretion and accept jurisdiction where the decision in the instant case is correct.

Initially, it should be noted that Petitioner never filed a motion for rehearing after the Fourth District's opinion on the Respondent's motion for rehearing reinstated Petitioner's conviction and sentence for attempted manslaughter. If Petitioner had done so, the Fourth District would have been able to address the issue and its prior opinion in Jones v. State, 356 So.2d 4 (Fla. 4th DCA 1977).

Respondent submits that attempted manslaughter, although not specifically enumerated under Section 775.087(2), Florida Statutes, is included as one of the crimes for which a defendant may be subject to the three year mandatory minimum sentence.

Respondent contends that if a crime enumerated in Section 775.087 (2) is a lesser included offense of attempted manslaughter, then manslaughter is included within the provisions of that statute. In the present case, the Respondent, having been convicted of attempted manslaughter, is also guilty of aggravated assault or aggravated battery, necessarily lesser included offenses of attempted manslaughter. See Carter v. State, 464 So.2d 1227 (Fla. 4th DCA 1985); Kimbrough v. State, 356 So.2d 1294 (Fla. 4th DCA 1978). Thus, because aggravated assault or aggravated battery are enumerated crimes in Section 775.087(2), the minimum three year mandatory sentence is applicable to an attempted manslaughter conviction. Cf. Miller v. State, 438 So.2d 83 (Fla. 4th DCA 1983) affd. 460 So.2d 373 (Fla. 1984).

This Court should therefore decline to exercise its discretion and accept jurisdiction in the instant case.

II

THE OPINION OF THE FOURTH DISTRICT COURT OF APPEAL IN THE PRESENT CASE IS NOT IN EXPRESS AND DIRECT CONFLICT WITH ANY OPINION OF THIS COURT OR ANOTHER DISTRICT COURT OF APPEAL ON THE ISSUE OF THE JURY INSTRUCTION FOR ATTEMPTED MANSLAUGHTER.

The discretionary jurisdiction of this Court may be invoked to review decisions of district courts of appeal that expressly and directly conflict with a decision of another district court of appeal. Article V, Section 3(b)(3), Florida Constitution, Rule 9.030(a)(2)(A)(iv), Florida Rules of Appellate Procedure. The conflict jurisdiction of the Florida Supreme Court to review decisions of the District Courts of Appeal is limited to cases where there is a real and embarrassing conflict of opinion and authority between decisions. Ansin v. Thursten, 101 So.2d 808 (Fla. 1958).

This Court has also made it clear that in order to consider a petition for discretionary review based upon conflict jurisdiction, a petitioner must establish that the decision of the appellate court is in obvious and patent conflict with other decisions. In the case of Trustees of Internal Improvement Fund v. Lobean, 127 So.2d 98 (Fla. 1961), this Court stated:

> ...[I]n in order to invoke the jurisdiction of this Court under Section 4(2), Article V of the Constitution, F.S.A., antagonistic principles of law must have been announced in a case or cases by the lower court based on practically the same facts. The conflict must be obvious and patently reflected in the decisions relied on. The conflict must

> result from an application of law to facts which are in essence on all fours, without any issue as to the quantum and character of proof. 127 So.2d at 100-101 (emphasis added).

This direction that the conflict be obvious and patent has been reaffirmed by this Court in its decision following the 1980 amendment to the Florida Constitution. In Jenkins v. State, 385 So.2d 1356, 1359 (Fla. 1980), this Court made it clear that its jurisdiction was limited to express, facial conflict in the decisions. See also Quevedo v. State, 436 So.2d 87, 88 (Fla. 1983); St. Paul Title Ins. Corp. v. Davis, 392 So.2d 1304 (Fla. 1980); Dodi Publishing Co. v. Editorial, S.A., 385 So.2d 1369 (Fla. 1980).

Respondent respectfully submits that the Petitioner has failed to establish that the opinion in the present case is in express and direct conflict with any opinion of this Court or any other district court of appeal on the issue of the jury instruction for attempted manslaughter. Thus, Petitioner has not established the requisite express and direct conflict that is required for this Court's discretionary jurisdiction.

As the Fourth District recognized in its opinion on rehearing, the issue on the "flawed" jury instruction for attempted manslaughter is controlled by this Court's recent opinion in Tillman v. State, 471 So.2d 32 (Fla. 1985). In Tillman, this Court was confronted with the same issue as Petitioner presents in this brief. Tillman argued that he should have been given a new trial on the charge of attempted manslaughter because it was unclear

whether the jury found its verdict on the ground of an act or procurement or culpable negligence. If it was the latter, then the conviction for attempted manslaughter could not stand because there would be no such crime. This Court rejected Tillman's argument both procedurally and on the merits. This Court held that Tillman's failure to object to the jury instruction precluded appellate review, and furthermore the conviction would be affirmed where there was sufficient evidence to support the conclusion that the act was done with the requisite criminal intent and not mere culpable negligence . 471 So.2d at 35.

In the instant case, Petitioner like the defendant in Tillman failed to object to the jury instruction on attempted manslaughter. Furthermore, the Fourth District Court found the evidence as to the Petitioner's intent to kill to be overwhelming. (A 3). Petitioner's reliance on Achin v. State, 431 So.2d 30 (Fla. 1982) is misplaced because unlike Achin, the jury in the instant case did not convict Petitioner of a non-existent crime. Furthermore, the instant case unlike McGahagin v. State, 17 Fla. 665 (1880) and Bashans v. State, 388 So.2d 1303 (Fla. 1st DCA 1980) in that the information did not charge two or more distinct offenses in one court.

Petitioner has failed to establish that the Fourth District's opinion in the present case on the issue of the jury instruction for attempted manslaughter is in express or direct conflict with any other court decision. This Court should therefore exercise its discretion and decline to accept the present case for review.

CONCLUSION

Based upon the foregoing argument and citations of authority, the Respondent would respectfully urge that the Petitioner's Petitioner for Discretionary Review be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent on Jurisdiction has been furnished to Louis G. Carres, Assistant Public Defender, Attorney for Petitioner, 224 Datura Street, 13th Floor, West Palm Beach, Florida 33401 by mail/courier this 21 day of August 1985.

Penny H. Brill

Of Counsel