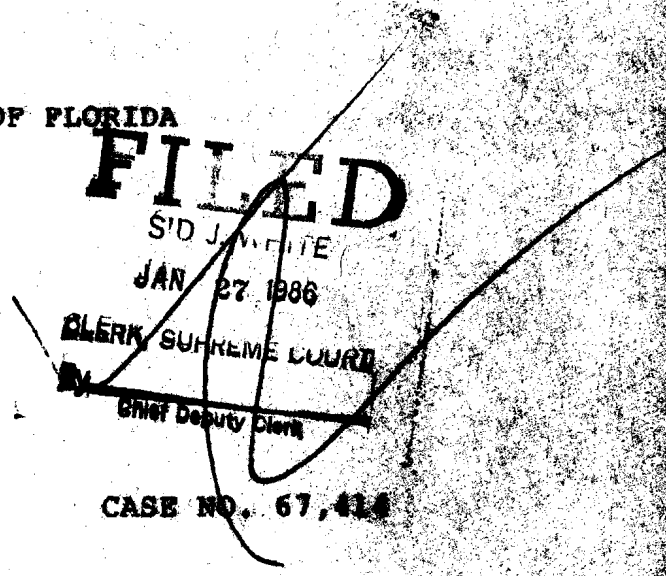
O/A 4-9-86

IN THE SUPREME COURT OF FLORIDA



WILLIE LEE MURRAY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 67,414

PETITIONER'S BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender

LOUIS G. CARRES
Assistant Public Defender
15th Judicial Circuit
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

Counsel for Petitioner.

TABLE OF CONTENTS

AUTHORITIES CITED

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court. He will be referred to as petitioner and by name in this brief.

The record on appeal is bound in six volumes which are consecutively numbered. All references to the record on appeal will be by the symbol "R" followed by the appropriate page number in parentheses.

References to the appendix containing conformed copies of the decision, and decision on rehearing, below will be by the symbol "A" followed by the appendix page number in parentheses.

STATEMENT OF THE CASE

The petitioner was charged in a five count information respectively, with kidnapping, sexual battery, sexual battery, armed robbery, and attempted murder in the first degree (R-859-860). Petitioner Willie Lee Murray was charged in the information jointly with a co-defendant named Henry Charles Ross (R-859). The trial court ordered severance of defendants for separate trial (R-870).

Trial by jury was held at which verdicts were returned of guilty to the crimes of kidnapping without a firearm, sexual battery with a firearm, sexual battery with a firearm, robbery with a firearm, and attempted manslaughter with a firearm (R-877-882).

In the judgment the trial court designated each of the offenses as a "CAP." offense (R-884). Consecutive sentences were imposed of 100 years imprisonment on Count I, 100 years imprisonment on Count II, with retention of jurisdiction for thirty years over parole, 100 years on Count III, 100 years on Count IV, and 15 years on Count V (R-886-890). The trial court imposed the three year minimum mandatory provisions of Section 775.087(2), Florida Statutes on Counts II, III, IV and V, consecutively (R-887-890). At sentencing the trial court retained jurisdiction, stating its justification solely as follows (R-852):

> And, of course, the Court retains jurisdiction for thirty years.

No findings were made at sentencing by the trial court to support a retention of jurisdiction over parole. A written order was entered after sentencing (R-892-893). Petitioner objected to retention of jurisdiction over parole (R-853). Notice of appeal was timely filed from entry of the judgments and sentences (R-894).

The District Court of Appeal, Fourth District, reversed the attempted manslaughter conviction for a new trial in an opinion issued July 5, 1984, on the ground that the instruction had erroneously defined attempted manslaughter (A-2). The district court stated (A-2):

> In the instant case, the trial court instructed the jury that attempted manslaughter could result from the act, procurement or culpable negligence of the defendant. In this instruction, it melded the two forms of manslaughter, one resulting from an intentional act, and the other from culpable negligence. The Florida Supreme Court has recently held that there is no crime of attempted manslaughter where the underlying action is culpable negligence. Taylor v. State, 444 So.2d 931 (Fla. 1983). Because the trial court combined both forms in the attempt instruction, the jury might have convicted appellant of attempted manslaughter through culpable negligence, particularly in view of appellant's closing argument. Therefore, appellant cannot stand convicted of attempted manslaughter, despite counsel's requested instruction.

On respondent's motion for rehearing, the district court on June 26, 1985, affirmed the attempted manslaughter conviction and affirmed a three-year minimum mandatory sentence on that conviction (A-6). The district court affirmed three consecutive three-year mandatory minimum sentences. One on the robbery

count, one for the sexual battery counts and one for the attempted manslaughter (A-3-4). The result was three consecutive and one concurrent three-year minimum sentences. The district court vacated the reclassification of the offenses as "Cap." (A-4-5). The court affirmed retention of jurisdiction over parole for 30 years on Count II.

Notice of review was timely filed to invoke the Court's discretionary jurisdiction based upon express and direct conflict of decisions. Review was granted by an Order issued December 18, 1985.

STATEMENT OF THE FACTS

The facts shown by the state at trial, and conceded by the appellant during trial, were that on January 19, 1983, the victim was washing her car at a self-service car was at Atlantic Boulevard in Pompano Beach at about five minutes to 9:00 p.m. when two black males approached her. One of them, identified as Henry Charles Ross, had a pistol which he pointed at the victim (R-308-314). The petitioner, who was the taller of the two males, instructed her to unlock the door and to let them in the car (R-314). While Ross, the shorter of the two, held the pistol and threatened the victim, the petitioner drove the vehicle while being directed by Ross (R-318-322). After reaching a location in a warehouse area, the car was parked behind a tanker truck where the petitioner and Ross each committed a sexual battery upon the victim (R-322-323,326,329). The car was then driven a short distance away to a neighborhood park where the car was stopped and the victim was told to get out of the car and was taken by the petitioner, who threw a sweater to her, to the back of the car where the trunk was opened (R-333-334). Petitioner looked into the trunk and touched a CB unit and asked the victim what it was (R-334). Then petitioner walked with the victim back into a wooded area while carrying the pistol in his right hand swinging it down by his side (R-334). The petitioner put his left arm around the victim's shoulders, kissed her and said good-bye (R-335). As the victim turned and began walking away she felt a buzzing in her head as she was shot (R-335). After a few

minutes, realizing that she had enough energy to get up and get some help, she began screaming and people nearby found her and called for help (R-336). A necklace which the victim was wearing was taken by Ross during the episode (R-341). A locket which had been in the victim's purse was taken from petitioner's pocket after his arrest (R-434). A latent fingerprint was removed from the CB antennae base in the trunk of the victim's car and it was matched to the petitioner (R-521-522).

A treating physician testified that the gunshot suffered by the victim damaged the left eye and perforated the right eye (R-673-674). The victim testified that she lost sight in her right eye and retained partial vision in her left eye (R-368-369).

An expert in microscopic analysis examined certain hairs obtained from the combings taken from the victim during the initial medical examination as indistinguishable from sample hairs taken from Henry Charles Ross and from petitioner, respectively (R-715-720).

Both Ross and petitioner were arrested approximately three hours after the crimes occurred. Ross was arrested after the victim's car was observed by a Pompano Beach police officer. He was arrested hiding in the woods nearby (R-408-410). The petitioner was arrested on the second floor walkway of an apartment building approximately two or three blocks from where Ross had been arrested (R-431).

At trial the petitioner conceded the facts, but petitioner consistently asserted that he did not intend to fire the weapon when leaving the victim (R-295-298,789-791).

At trial it was shown through the testimony of the victim that Henry Charles Ross was the one who carried the firearm initially, although petitioner held it during some of the time, and that Ross threatened several times to shoot the victim while the petitioner told the victim that he would not let Ross hurt her; she stated that she had believed petitioner (R-372-375,383-385).

Petitioner rested without presenting any evidence, and his motions for judgment of acquittal were denied (R-725-726). The jury returned verdicts finding petitioner guilty of two counts of sexual battery with a firearm as charged and guilty of robbery with a firearm as charged on Counts II, III and IV (R-878-880). The jury found petitioner guilty of kidnapping without a firearm as a lesser included offense under Count I and guilty of attempted manslaughter with a firearm as a lesser included offense under Count V (R-877-882). The trial court adjudicated petitioner to be guilty on each count and sentenced him as stated above.

SUMMARY OF ARGUMENT

Petitioner was given a three-year mandatory minimum sentence for attempted manslaughter with a firearm. This is not provided for in the statute. See Section 775.087(2).

Petitioner asserted lack of intent to fire the weapon and defended on this ground against a charge of attempted first degree murder. The jury found attempted manslaughter. The jury instruction charged that attempted manslaughter could be based on an intentional or negligent act. The intent was not established and a new trial is required. Tillman v. State, 471 So.2d 32 (Fla. 1985), differs in that an intentional act was proven. Achin v. State, 436 So.2d 30 (Fla. 1982), requires a new trial because the petitioner has been convicted of a non-existent crime. Moreover, the courts have held that when an essential element is erroneously instructed it is fundamental error when it concerns a material contested fact to be proven. Such is the case sub judice.

The incorrect jury instruction on the contested factual issue has been held to violate due process of law as does conviction for a non-existent crime. The cause should be reversed for a new trial on attempted manslaughter.

Three consecutive mandatory minimum sentences for crimes occurring during a single criminal episode are erroneous under the decisions from this Court, and the affirmance of those consecutive sentences should be quashed.

The retention of jurisdiction over parole was imposed at sentencing with no justification given for retention. The later written order is ineffective since petitioner had no opportunity to dispute the purported justification. Since no justification was given at sentencing, the district court erred in remanding for the trial court to enter new post-sentencing justification.

ARGUMENT

POINT I

WHETHER THE MINIMUM MANDATORY SENTENCING PROVISIONS OF SECTION 775.087(2)(a), FLORIDA STATUTES, APPLY TO A CONVICTION FOR ATTEMPTED MANSLAUGHTER COMMITTED WITH A FIREARM?

Petitioner Murray was convicted of attempted manslaughter upon a charge alleging attempted murder in the first degree (R-860,882). The verdict found petitioner guilty of the lesser-included crime of attempted manslaughter with a firearm (R-882).

The trial court sentenced petitioner by utilizing the minimum mandatory three-year sentence provision of Section 775.087(2)(a), Florida Statutes (1981). This section does not list manslaughter or attempted manslaughter as one of the enumerated offenses to which the three-year minimum mandatory sentencing provision applies.

In its initial decision in this case issued July 5, 1984, the district court of appeal reversed the conviction for attempted manslaughter for a new trial and, therefore, found that since the conviction must be reversed any sentencing error with regard to it "need not be pursued at this time." (A-3). In its decision on rehearing issued June 26, 1985, the district court affirmed the conviction for attempted manslaughter and also affirmed the separate consecutive three-year minimum sentencing provision under Section 775.087(2), Florida Statutes. (A-6).

The decision affirming imposition of the three-year minimum mandatory sentencing provision to the conviction for attempted

manslaughter directly and expressly conflicts with decisions of other district courts of appeal on the same issue of law. In Strahorn v. State, 436 So.2d 447 (Fla. 2d DCA 1983), the court held that it was error to impose the three-year mandatory minimum sentence for a conviction for attempted manslaughter. The court held that because manslaughter is not included within the category of "any murder," the three-year mandatory minimum provision does not apply to a conviction for attempted manslaughter. Strahorn is factually on point as well as legally on point with the present case.

In Jones v. State, 356 So.2d 4 (Fla. 4th DCA 1977), the court reversed imposition of the three-year minimum mandatory sentence for a conviction for manslaughter finding that "any murder," listed in the statute, does not include manslaughter. In Jones the court also found that pursuant to State v. Buchanan, 191 So.2d 33 (Fla. 1966), any ambiguity in the wording of the statute must be strictly construed when susceptible of different constructions, and that the statute must be construed favorably to the accused. Likewise, in Rozier v. State, 353 So.2d 193 (Fla. 3d DCA 1977), it was held that a conviction for manslaughter does not require or permit imposition of a three-year minimum mandatory sentence because manslaughter is not listed as an offense in the statute to which the three-year mandatory minimum sentence applies. The Fourth District Court of Appeal in Biles v. State, 349 So.2d 662 (Fla. 4th DCA 1977), and in Brewer v. State, 343 So.2d 628 (Fla. 4th DCA 1977), also held that the

three-year minimum sentencing provision is not proper when applied to an offense not specifically listed in the statute. In Brewer the conviction was shooting into an occupied dwelling, and the court held that since the offense was not listed in the statute, a defendant convicted of a crime not set forth in the statute may not be sentenced under the provisions of the statute.

Section 775.087(2), Florida Statutes (1981), provides as follows:

> (2) Any person who is convicted of:
> (a) Any murder, sexual battery, robbery, burglary, arson, aggravated assault, aggravated battery, kidnapping, escape, breaking and entering with intent to commit a felony, or aircraft piracy, or any attempt to commit the aforementioned crimes; or
> (b) Any battery upon a law enforcement officer or firefighter while the officer or firefighter is engaged in the lawful performance of his duties and who had in his possession a "firearm" as defined in s. 790.001(6), or "destructive device," as defined in s. 790.001(4), shall be sentenced to a minimum term of imprisonment of 3 calendar years. Notwithstanding the provisions of s. 948.01, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall the defendant be eligible for parole or statutory gain-time under s. 944.275, prior to serving such minimum sentence.

The above quoted statutory provision specifies the three-year mandatory minimum sentence for a person convicted of "any murder." The crime of manslaughter is not murder as Section 782.087, Florida Statutes (1981), defines manslaughter as follows:

> **782.07 Manslaughter.** -- The killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification according to the provisions of chapter

> 776 and in cases in which such killing shall not be excusable homicide or murder, according to the provisions of this chapter, shall be deemed manslaughter and shall constitute a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Manslaughter is defined in the above section as an unjustified killing of another in cases where the "killing shall not be excusable homicide or murder." Therefore, the Legislature has expressly provided that manslaughter is a separate form of unlawful homicide from murder.

Petitioner submits that the District Court of Appeal has erroneously affirmed imposition of the three-year minimum mandatory sentence to petitioner for a conviction for attempted manslaughter because the statute may not be applied beyond its terms. Petitioner fully briefed this issue on direct appeal. In Earnest v. State, 351 So.2d 957 (Fla. 1977), this Court cited and relied upon the decision in Ex Parte Amos, 93 Fla. 5, 112 So. 289 (1927), where it was held that the minimum mandatory three-year sentencing provision does not apply except where clearly provided by the terms of the statute.

Accordingly, this Court should quash the affirmance of the three-year minimum mandatory sentence for petitioner's conviction of attempted manslaughter.

POINT II

WHETHER A CONVICTION FOR ATTEMPTED MANSLAUGHTER CAN LIE WHEN THE EVIDENCE IS NOT SUFFICIENT TO ESTABLISH AN INTENTIONAL ACT OR PROCUREMENT BY THE ACCUSED AND WHERE THE JURY INSTRUCTION ERRONEOUSLY COMBINES INTENTIONAL ACTS AND NEGLIGENT ACTS IN DEFINING ATTEMPTED MANSLAUGHTER?

The petitioner was charged in Count V of the information with attempted murder in the first degree by shooting the victim with a firearm and "having intended to commit murder" (R-860). The petitioner consistently asserted in defending this charge at trial that he did not intend to fire the weapon when leaving the victim (R-295-298,789-791). In his opening statement petitioner conceded and admitted that he was present and that he committed several of the crimes charged against him (R-295-298). However, the petitioner maintained in his opening statement, and throughout the trial, that Ross had threatened harm or death to the victim while the petitioner, as the victim also testified at trial, continually assured her not to worry about what Ross was threatening that he "wouldn't let him shoot me" (R-296,320). After sexual batteries had been completed the victim was driven to a warehouse area where the vehicle was stopped (R-332-333). As the victim was told to get out of the car the petitioner threw her sweater to her (R-333). This occurred on January 19, 1983 (R-303). Petitioner then began walking the victim into a wooded area behind the warehouse, and as they were walking she asked petitioner if he was going to let her go, and he said "yes" (R-334). Petitioner had the gun in his right hand and was

swinging it down by his side (R-334). He flung his left arm over shoulders and walked her to a clump of trees while the co-defendant Ross remained back by the car (R-334-335). Upon reaching the trees petitioner turned the victim to face him, placed one or both of his hands on her shoulders, kissed her on the mouth and said "good-bye," she started to turn and walk away and the next thing she knew was that she had been shot (R-335). In closing argument the petitioner urged the jury to conclude that the petitioner did not deliberately shoot the victim (R-791). Petitioner argued that something happened "that caused the accidental firing of that bullet." As a factual basis for that conclusion, petitioner urged the jury to consider that if he had intended to shoot her he would not have given her a sweater to keep the chill off her that night (R-791):

> Was there a deliberate attempt to shoot Tracey Van Dusen or did something out there in the woods happen such as Tracey Van Dusen grabbing an arm or grabbing for a gun that caused the accidental firing of that bullet, because I still cannot understand if he is a vicious, cold blooded killer and he knew and he wanted to shoot her, then why give her a sweater to keep the chill off her that night?
>
> That is a question that maybe none of us will ever know the answer to, but it is a fact and it is a fact that is totally out of character to what the State is presenting as to attempted premeditated murder and like I said, it does bother me and I'm sure it is going to come up in your deliberations.

Earlier in his closing the petitioner had recited the factual sequence that preceeded the shooting and argued that

certain facts appeared inconsistent with the intent to shoot the victim (R-785):

> There is something that bothers me. The testimony of Tracey Van Dusen of what happens in the park just before she is told to get out of the car and walk those twenty or thirty feet into the woods and get shot and that is, before she gets out of the car, Willie Lee Murray, by her testimony, tells her, come out of the car, but before he lets her out of the car he throws her a sweater that was in the car and tells her to put it on.
>
> Now, it bothers me. If he is a cold blooded murderer, if he planned and premeditated the killing of Tracey Van Dusen twenty feet from that car, why give her a sweater? What is the purpose of giving her a sweater? That's what is bothering me.

This Court held in Taylor v. State, 444 So.2d 931 (Fla. 1983), that attempted manslaughter exists as a crime in the State of Florida when the act is voluntary or intentional. The Court held that attempted manslaughter does not include an act committed as a result of culpable negligence. The District Court of Appeal found in its initial decision, issued July 5, 1984, that the trial court had melded voluntary and involuntary manslaughter into a single instruction, resulting in an incorrect instruction, and based upon the argument made by petitioner to the jury the instruction was prejudicial. On rehearing the District Court of Appeal affirmed on the basis of this Court's decision in Tillman v. State, 471 So.2d 32 (Fla. 1985). The Court found that in Tillman there had been sufficient evidence to support the

conclusion that the shooting was the result of an act "done with the requisite criminal intent and not mere culpable negligence." Tillman v. State, 471 So.2d at 35.

This is a clear distinction between Tillman and the present case. Petitioner Murray defended on the claim that the facts did not show an intentional or voluntary discharge of the firearm. To the contrary was Tillman where evidence showed that the firearm was discharged voluntarily and intentionally. That is the difference between attempted manslaughter as defined by this Court in Taylor and the non-existent crime of negligent attempted manslaughter. Since the petitioner raised intent to discharge the weapon as the material issue for the jury, and since the jury rejected attempted murder, there is no basis sub judice to find that the jury verdict could have rested upon a finding that petitioner intended shooting the firearm.

In this circumstance the decision in Achin v. State, 436 So.2d 30 (Fla. 1982), would apply. This Court held that one "may never be convicted of a non-existent crime, "but the remedy when defense counsel has invited the error is a new trial rather than a discharge. In Cronin v. State, 470 So.2d 802 (Fla. 4th DCA 1985), determination of whether the conviction should be affirmed or reversed due to erroneous jury instruction, depends upon whether there is a "reasonable possibility" that the jury could have been misled. To the same effect is Hair v. State, 428 So.2d 760 (Fla. 3d DCA 1983), where it was contended that error occurred in a trial court's refusal to inform the jury that a

principal instruction would apply only to the co-defendant who was being jointly tried. The court held that under the facts of the case, at 763, "the jury instruction misled the jury and prejudiced Hair's right to a fair trial." This rule has been applied both to civil and to criminal cases. See I.T.T.-Nesbitt, Inc. v. Valle's Steak House, Etc., 395 So.2d 217 (Fla. 4th DCA 1981), where the test was stated as being whether the instructions that were erroneous could have misled the jury or prejudiced the party's right to a fair trial.

This Court has approved in Stewart v. State, 420 So.2d 862 (Fla. 1982), the principle which controls this issue. In Stewart it was claimed that fundamental error occurred in the trial court's failure in that case to instruct the jury on intent. In Stewart, at 863, the Court appeared to approve the rule applied by the district courts of appeal "that fundamental error occurs only when the omission is pertinent or material to what the jury must consider in order to convict." In Stewart intent was not an issue due to a factual admission made by the accused at trial, and therefore it did not constitute fundamental error in that case. The analogous decisions concerning intent under Florida's theft statute have uniformly held that, when intent to steal is omitted from the jury instruction, that it is fundamental when the intent to steal is a disputed issue at trial. But when intent to steal is not contested at such a trial for theft, an omission to instruct on the element, which is not objected to, has been held to not be fundamental error in such

circumstance. See McMurtroy v. State, 400 So.2d 547 (Fla. 3d DCA 1981); Lewis v. State, 411 So.2d 880 (Fla. 3d DCA 1981); Henderson v. State, 429 So.2d 1284 (Fla. 3d DCA 1983).

This Court held in State v. Sykes, 434 So.2d 325 (Fla. 1983), that lack of objection to a jury instruction permitting conviction of a non-existent crime, in that case attempted grand theft as a lesser offense, could not constitute a waiver of such fundamental defect. In Motley v. State, 155 Fla. 545, 20 So.2d 798 (1945), it was held that an omission from an instruction of the elements of self-defense is error which, according to the issue raised in that case concerning the perception by the accused of the situation, "goes to the essence and entirety of the defense."

In the present case as in Austin v. Wainwright, 305 So.2d 845 (Fla. 4th DCA 1975), the defense was a lack of intent. In that case the alleged theft was testified to have been in jest, thus an instruction which failed to include the element of intent to deprive the owner of property constituted fundamental error on such facts. In Boatwright v. State, 272 So.2d 137 (Fla. 1973), this Court similarly held that the failure of a defendant to object at trial to the giving of an instruction does not preclude review on appeal where the error constitutes a denial of due process.

Since conviction of a non-existent crime violates due process, see State v. Sykes, supra at 328, holding it to be "a fundamental matter of due process that the state may only punish

one who has committed an offense," the error in the present case is fundamental because the issue of whether discharge of the weapon was intentional, or accidental thus negligent, was factually at issue. It was legally determinative of whether petitioner committed the existent crime of attempted manslaughter or was found guilty by the jury through the instruction on culpable negligence of a non-existent crime.

For the reason that this issue was the determinative jury question, and since the instruction melded attempted manslaughter with non-existent culpable negligence, it cannot be determined if the jury convicted petitioner of an intentional act or of a negligent act. Thus McGahagin v. State, 17 Fla. 665 (1880), is on point as is Bashans v. State, 388 So.2d 1303 (Fla. 1st DCA 1980), both holding that when two or more distinct "offenses" are joined into one, and it is impossible to determine whether the jury intended to find the defendant guilty of one or the other, the verdict is fundamentally defective and no judgment can be entered thereon.

The claim of a due process violation, which this Court noted in State v. Sykes, supra, is well-founded. In Sandstrom v. Montana, 442 U.S. 510 (1979), at 526, it was stated:

> [I]t has long been settled that when a case has been submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside.

Quoting Leary v. United States, 395 U.S. 6, at 31-32 (1969).

In conclusion, the petitioner submits that the verdict and judgment for attempted manslaughter are defective on the fundamental basis that the factual and legal issue drawn at this trial between whether the act was intentional or negligent was erroneously set forth in the jury instructions. In view of the fact, as noted by the district court of appeal, that petitioner's argument to the jury would have made this error prejudicial, fundamental error is presented and the petitioner should have been afforded a new trial.

POINT III

WHETHER THE CONSECUTIVE IMPOSITION OF THREE-YEAR MINIMUM MANDATORY SENTENCES IS VALID FOR THE OFFENSES COMMITTED DURING THE CRIMINAL EPISODE?

The trial court imposed consecutive three-year mandatory minimum sentences, and the district court of appeal approved consecutive three-year mandatory minimum sentences for sexual battery, robbery and attempted manslaughter. As discussed in Point I above, the minimum mandatory sentencing provisions of Section 775.087(2), do not apply to attempted manslaughter.

As to the consecutive mandatory minimum sentences for sexual battery and robbery, these consecutive minimum mandatory sentences are improper pursuant to Palmer v. State, 438 So.2d 1 (Fla. 1983), where this Court held that the statute did not permit imposition of multiple consecutive three-year minimum mandatory sentences upon convictions for separate offenses occurring during a single criminal episode. As construed by this Court in Wilson v. State, 467 So.2d 996 (Fla. 1985), and State v. Ames, 467 So.2d 994 (Fla. 1985), the affirmance by the district court of consecutive minimum mandatory sentences in this case is erroneous. In Wilson the accused was found guilty of sexual battery and kidnapping, both committed with a firearm. Wilson forced his victim into a car and then drove some distance where the sexual battery was committed. This Court held those offenses occurred during a single continuous episode for which consecutive mandatory minimum sentences were not authorized. In Ames, the Court

concluded that sexual battery and robbery, during commission of a burglary, were also a single criminal episode to which consecutive minimum mandatory sentences could not be imposed. In Thomas v. State, 472 So.2d 1221 (Fla. 1st DCA 1985), the above decisions were applied to prohibit consecutive mandatory minimum sentences for a series of offenses, occurring during a criminal episode, committed against two persons after the first victim attempted to flee and another came to her aid.

In the present case there was no break in the course of the criminal episode, and the crimes were allegedly committed during the course of a continuous episode so as to have been tried together under Florida Rule of Criminal Procedure 3.150, permitting joinder of offenses based on the same act or transaction or two or more connected acts or transactions. The present case is one in which according to the above authorities, the district court should have ordered that the consecutive mandatory minimum three-year sentences be vacated and made to run concurrently.

POINT IV

WHETHER IT WAS ERROR TO RETAIN JURISDICTION OVER PAROLE WITHOUT ENTERING AN ORDER JUSTIFYING RETENTION OF JURISDICTION ON THE GROUNDS PROVIDED BY THE STATUTE?

The trial court at sentencing retained jurisdiction over one-third of a 100 year sentence (R-852). Petitioner objected to retention of jurisdiction over parole (R-853). The justification given by the trial court was stated orally at sentencing as follows (R-852):

> And, of course, the Court retains jurisdiction for 30 years.

In the later filed written order entered to retain jurisdiction (R-892-893), the court reiterated the basic facts of the crimes and concluded that the court "believes that it is in the best interest of society and the public that the Defendant remain incarcerated for a minimum of thirty (30) years on the sentence imposed . . . ." (R-893).

The above finding does not comply with the requirements of Section 947.16(3)(a) which requires the following justification:

> (a) In retaining jurisdiction for the purposes of this act, the trial court judge shall state the justification with individual particularity, and such justification shall be made a part of the court record. A copy of such justification shall be delivered to the department together with the commitment issued by the court pursuant to s. 944.16.

The failure of the trial court at sentencing to express grounds for retention of jurisdiction requires that the retention of jurisdiction be vacated. Petitioner had no opportunity to

respond and contest any grounds for retention of jurisdiction. Since in this case there were no sufficient grounds given at sentencing to retain jurisdiction, as opposed to an instance where both valid and invalid reasons were given, there was no basis for the district court to have affirmed retention of jurisdiction over parole.

The issue concerning retention of jurisdiction over parole, as with the other issues presented in this brief, were raised before the district court of appeal in the briefs filed in that court and ruled upon by the district court of appeal in its decision below. Accordingly, this Court has jurisdiction. An order retaining jurisdiction is reviewable on appeal, Moore v. State, 392 So.2d 277 (Fla. 5th DCA 1980). See also Adams v. State, 376 So.2d 47 (Fla. 1st DCA 1979), concerning imposition of an enhanced penalty. Petitioner had no prior criminal history. He had at most a juvenile adjudication regarding petty theft (R-846). The background of the petitioner does not support a determination that retention of jurisdiction can be justified in this case "with individual particularity." The trial court's retention should not have been affirmed when no justification at all was stated at the sentencing hearing. The petitioner prays that this Court will vacate retention of jurisdiction and will disapprove of permitting any new "justification" to be created on remand.

CONCLUSION

The Court should approve in part and quash in part the decision below. The attempted manslaughter conviction should be reversed. The three-year mandatory minimum for attempted manslaughter should be vacated as being statutorily unauthorized.

The other consecutive mandatory sentences should be directed to be made concurrent. The retention of jurisdiction should be vacated.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender

LOUIS G. CARRES
Assistant Public Defender
15th Judicial Circuit
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to PENNY H. BRILL, Assistant Attorney General, Counsel for Respondent, Elisha Newton Dimick Building, Room 204, 111 Georgia Avenue, West Palm Beach, FL 33401, this 24th day of January, 1986.

LOUIS G. CARRES
Assistant Public Defender