01A 4-11-86

IN THE SUPREME COURT OF FLORIDA

WILLIE LEE MURRAY,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 67,414

PETITIONER'S REPLY BRIEF ON THE MERITS

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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?

The respondent has argued that because petitioner did not file a motion for rehearing in the Fourth District Court of Appeal, that this Court should decline to exercise its jurisdiction in this issue as to which there is direct and express conflict of decisions. Petitioner fully briefed the issue concerning the unlawful imposition of the three year mandatory sentence in the district court of appeal, and reargument by a motion for rehearing is neither permitted nor required by Florida Rule of Appellate Procedure 9.330(a) which states, in pertinent part, that the motion for rehearing "shall not re-argue the merits" of the Court's order or decision.

Respondent also suggests that petitioner may file a motion under Rule 3.800, Florida Rules of Criminal Procedure. However, this only would be a duplication of judicial efforts, and secondly, the decision of the district court below specifically affirming the three year mandatory minimum sentence for a conviction of attempted manslaughter is now law of this case. A motion addressed to the trial court on this issue would be barred by the decision of the district court of appeal. Accordingly,

this Court not only has jurisdiction but should exercise its jurisdiction to resolve this issue because it has been directly ruled upon by the court below.

The respondent, on page 9 of respondent's brief on the merits, acknowledges that the court "could decide the issue" of application of the mandatory minimum sentence for 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?

Respondent on this point agrees that this issue was raised and rejected by the Fourth District Court of Appeal. The district court of appeal affirmed the conviction for attempted manslaughter specifically relying upon Tillman v. State, 471 So.2d 32 (Fla. 1985). However, in Tillman there was sufficient evidence to support a conviction for an intentional act constituting the non-negligent commission of attempted manslaughter. In the present case, as distinguished from Tillman, the instruction was erroneous as well as there being insufficient evidence to convict the petitioner of intentional attempted homicide. Therefore, unlike both Tillman and State v. Sykes, 432 So.2d 325 (Fla. 1983), the conviction for the lesser offense of attempted manslaughter does not constitute a conviction of the elements of the greater crime. In Sykes the jury's verdict of guilt to attempted grand theft as a lesser offense did not operate as an acquittal because the facts showed that "attempted grand theft" as instructed in Sykes did in fact constitute the greater offense of grand theft. Therefore, there was no basis for an acquittal.

In the present case the contested fact before the jury was whether petitioner had an intent to fire the firearm and to shoot the victim. Since that issue was resolved by the jury by a

finding of attempted manslaughter, the jury impliedly acquitted the petitioner of the greater offenses that were instructed upon. Therefore, Tillman v. State, supra, is not direct authority for affirmance of petitioner's conviction for attempted manslaughter.

Since the state was arguing unequivocally to the jury that an intentional act on the part of petitioner would support attempted murder, and since petitioner was arguing unequivocally that the facts showed an accidental discharge of the firearm, and therefore an attempted manslaughter at most, the jury has weighed and resolved the evidence in this manner. Petitioner disagrees with respondent's assertion that a reweighing of the evidence is involved.

The issue is a legal one concerning whether the convoluted instructions to the jury, coupled with the issues of fact contested before that jury, show that the instruction was prejudicially erroneous and that the verdict cannot support a judgment of conviction. It cannot be determined by reference to the verdict and the instructions as to what the jury found petitioner guilty of committing, either the non-existent negligent attempt at manslaughter or the valid intentional crime of attempted manslaughter. By reference to the facts, and arguments of the prosecuting attorney and defense, it is clear that the jury resolved the contested factual issue in favor of a negligent act, and on that basis Ashe v. Swenson, 397 U.S. 436 (1970), operates to prevent relitigation of the factual issue of intent, versus negligence, because the jury's verdict has rejected the

state's claim of proof of an intentional act. Petitioner has thus been convicted of a non-existent crime. The question of remedy is whether petitioner must undergo a new trial on the charge of attempted manslaughter or whether he should be discharged by virtue of the fact that the contested trial issue concerned whether the act was intentional or negligent, and having been resolved in the favor of negligence there is no basis for a retrial. However, due to the fact that the instructions were fundamentally erroneous, a new trial is the minimum relief required. Collateral estoppel is not barred by a defendant's assertion or claim of defense. Grass v. State, 429 So.2d 1204 (Fla. 1983). Also, the question is not whether factual resolution of the issue inheres in the verdict. The Court in Grass held, id. at 1206-1207, that the court must limit the inquiry to whether there was a factual basis for the jury's verdict, i.e. was the factual issue "actually decided by the jury in reaching its verdict." Ashe v. Swenson, supra, held that collateral estoppel is incorporated as a part of the double jeopardy protection of the Constitution. Double jeopardy is a fundamental bar that is not impliedly waived. State v. Johnson, 11 F.L.W. 49 (Fla. February 6, 1986). See also, Bizzell v. State, 71 So.2d 735 (Fla. 1954) (jeopardy protection as basic as right to a fair trial.)

POINT III

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

The issue presented here concerning the single, continuous criminal episode requires that the consecutive three year mandatory minimum sentences be made concurrent. This question has been substantially decided by this Court's decisions in Wilson v. State, 467 So.2d 996 (Fla. 1985), and State v. Ames, 467 So.2d 994 (Fla. 1985), both based upon the decision in Palmer v. State, 438 So.2d 1 (Fla. 1983). This determination of statutory construction does not permit the extension of the legislation concerning minimum mandatory sentences by the Court since the Legislature has the exclusive authority to amend and to extend the penalties for criminal acts. Although respondent argues that the imposition of consecutive mandatory minimums "would further" the legislative intent, such is a determination for the Legislature to make. State v. Wershow, 343 So.2d 605 (Fla. 1977); Watson v. State, 4 So.2d 700 (Fla. 1941), and Snowden v. Brown, 60 Fla. 212, 53 So.548 (1910), (statutes prescribing penalties should not be extended further than their terms reasonably justify).

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?

This issue concerns a question of basic fairness in the procedural imposition, as well as the substantive justifications, for retention of jurisdiction over parole by the sentencing court. As petitioner has shown in his initial brief on the merits, an order retaining jurisdiction is reviewable on appeal, Moore v. State, 392 So.2d 277 (Fla. 1980), and the "individual particularity" required by the statute has not been met in this case. The trial court's statement at sentencing does not contain individual justification, and a later preparation and entry of a written order to which the defendant has been denied an opportunity to respond and be heard requires that the retention of jurisdiction be vacated. The determination to retain jurisdiction is not a "pure" exercise of discretion as is shown by this Court's footnote reference in Wilson v. State, 414 So.2d 512 (Fla. 1982), at 513, that although the constitutionality of the retention of jurisdiction statute had been upheld, "this section should be used sparingly and carefully." In Albritton v. State, 10 F.L.W. 426 (Fla. August 30, 1985), this Court referred to its decision in Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980), for a full discussion of abuse of discretion standard in reviewing reasonableness of discretionary decisions. The Court said

that review of an act involving "true" discretion requires deference to the decision below if reasonable persons may differ as to the propriety of the action taken. However, when the trial court exercises discretionary power that is subject to specific standards then a test of reasonableness is involved. A determination by the reviewing court must be made as to whether there is "logic and justification for the result." Since discretion is a power not intended to be exercised by whim, caprice, "nor in an inconsistent manner" involving substantially the same facts from case to case, the trial court's failure to supply specific justification at the sentencing hearing does not comply with the standard requiring justification and logic for the result. The retention of jurisdiction, as noted by this Court in Wilson v. State, supra, is an exercise of discretion that must be carefully exercised. Accordingly, the failure of the trial court to permit the petitioner to know specifically the basis for retention of jurisdiction at the sentencing hearing has prevented the petitioner from being heard concerning the sentence to be ultimately imposed. See Florida Rule of Criminal Procedure 3.720(b) which requires the sentencing court to "entertain submissions" as well as evidence by the parties relevant to the sentence.

Accordingly, the trial court invalidly retained jurisdiction over parole in this case.

Respectfully submitted,

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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 11th day of March, 1986.

LOUIS G. CARRES
Assistant Public Defender