OA 10-7-87 017

IN THE SUPREME COURT OF FLORIDA

SUSAN STATEN, :

Petitioner, :

vs. : Case No. 69,899

STATE OF FLORIDA, :

Respondent. :

:

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

BRIEF OF PETITIONER ON MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Petitioner SUSAN STATEN was charged by indictment with first degree murder, armed robbery and aggravated battery. (R811-813) Petitioner was further charged by information with three counts of accessory after the fact. (R649-651) In Thirteenth Judicial Circuit, Hillsborough County, Judge Harry Lee Coe III presiding, a jury trial was held on March 18 - 20, 1985.

The evidence established that Petitioner, the girlfriend of Larry McPhaul, was present when McPhaul, Rodney "Pojo" Johnson, Michael King, and Ronald Upshaw planned the robbery. (R326-330) McPhaul drove them to the location. (R342) Upshaw went across the street and purchased cocaine from Blue (William Huggins Jr.). (R345,346) He returned to the car, the returned to Blue accompanied by McPhaul. (R348) They took Blue's drugs and money, then fatally shot him. (R349-351,353,445) As they returned to the car, Pojo fired shots wounding a bystander. (R71,353) Petitioner was in the driver's seat of the car at the time and drove the car away. (R354)

The jury found Petitioner guilty of second degree murder and guilty of the other counts as charged. (R634-638,791-793,819-821) Before the same court and judge on May 3, 1985, Petitioner was adjudicated guilty consistent with the jury verdicts and sentenced to a consecutive total of 213 years imprisonment--99 years each for second degree murder and armed robbery to be served consecutively to 15 years for aggravated battery. Petitioner was also sentenced to 5 years each for the

accessory counts to be served concurrently with each other and the aggravated battery sentence. (R795-801,823-829) As per the sentencing guideline scoresheet, Petitioner's convictions warranted sentencing in the 22-to27-year range. (R830-831) Written reasons for departure were filed by the trial court. (R840-842) Subsequent to the denial of a motion for new trial, a timely notice of appeal was filed. (R839,843,866-872) The Public Defender was appointed for the purpose of appeal. (R847)

The Second District Court of Appeal affirmed Petitioner's convictions and remanded the cause for resentencing. Staten v. State, 500 So.2d 297 (Fla. 2d DCA 1986). This Honorable Court accepted discretionary jurisdiction to review the above-styled decision on May 6, 1987.

SUMMARY OF ARGUMENT

Adjudication as both a principal to the crime and an accessory after the fact for the one act of being the getaway driver is contrary to legislative intent and logic. The intent was to punish those with scienter, intent and who aid during offenses as principals and to punish those possessing those elements only subsequent the offense in a lesser crime. The court erred in adjudicating Petitioner as both principal and accessory. Proof as an accessory was well established by the evidence, but proof as a principal was established only by nonconclusive pyramiding of inferences.

SUMMARY OF ARGUMENT

Adjudicating the defendant as a principal and as an accessory after the fact for being the getaway driver is contrary to legislative intent and logic. The Legislature intended to punish, as a principal, only that defendant who possessed scienter and intent during the commission of a crime. While, on the other hand, it intended to punish, as an accessory, that defendant whose scienter and intent followed the commission of a crime. Therefore, the court erred in adjudicating Petitioner as both a principal and as an accessory. Evidence well established proof that Petitioner was an accessory; but that Petitioner was a principal was established only by the nonconclusive pyramiding of inferences.

ARGUMENT

THE TRIAL COURT ERRED IN ADJUDICATING PETITIONER AS BOTH A PRINCIPAL OF THE OFFENSES AND AS AN ACCESSORY AFTER THE FACT.

Petitioner was charged by indictment with first degree murder, armed robbery and aggravated battery. (R811-813) She was further charged by information with three counts of accessory after the fact. (R649-651) All charges resulted from the same criminal episode.

Petitioner, Larry McPhaul's girlfriend, was present when McPhaul, Rodney "Pojo" Johnson, Michael King, and Ronald Upshaw planned the robbery. (R326-330) McPhaul drove them to the location. (R342) Upshaw went across the street and purchased cocaine from Blue (William Huggins Jr.). (R345-346) He returned to the car, then went back to Blue accompanied by McPhaul. (R348) They took Blue's drugs and money, then fatally shot him. (R349-351) As they returned to the car, Pojo fired shots wounding a bystander. (R71,353) Petitioner was in the driver's seat at the time and drove the car away. (R354)

An aider and abetter is a principal and is equally guilty with the actual perpetrator whether he is present at the commission of the offense. §777.011, Fla.Stat. (1986). Generally, whoever assists the perpetrator is escape from justice, knowing that he has committed a felony is an accessory-after-the-fact. §777.03, Fla.Stat. (1986). Petitioner's sole relevant action proven by the State, beyond mere presence, is the fact that Petitioner drove the car when they left the scene of the

crimes. The question at bar is if that driving warrants adjudication as a principal, as an accessory after the fact, or both.

> In order for one to be guilty of a crime physically committed by another, he must not only have the conscious intent that the criminal act be committed, but he must also do some act to assist the other person to actually commit the crime. Ryals v. State, 112 Fla. 4, 150 So. 132 (1933); (citation omitted). Mere knowledge that an offense is being committed is not the same as participation with criminal intent, and mere presence at the scene, including driving the perpetrator to and from the scene or a display of questionable behavior after the fact, is no sufficient to establish participation. (Citations omitted).

Collins v. State, 438 So.2d 1036,1038 (Fla. 2d DCA 1983). Petitioner's knowledge that a crime was to be committed that night when McPhaul drove them to the scene must be inferred from Petitioner's mere presence during planning sessions and discussions of the crime. Interest or intent regarding the crime and proceeds thereof can possibly be drawn from the boyfriend/girlfriend relationship between Petitioner and McPhaul. An intent to drive the car away from the scene can be inferred from her presence behind the wheel of the car when the perpetrators returned. Only when these inferences are considered together and pyramided are the necessary elements complete. However, such evidence formed by the pyramiding of inferences lacks the conclusive nature to support a conviction. See Gustine v. State, 97 So. 207 (1923) and Collins v. State, supra. at 1038.

This Court has long recognized that the aid in the escape is aiding and abetting the perpetrator. See Hornbeck v. State, 77 So.2d 876,878,879 (Fla. 1955), and relevant cases

cited therein. Enmund v. State, 399 So.2d 1362,1370 (Fla. 1981). "The escape of the robbers with the loot...necessarily is as important to the execution of the plan as gaining possession of the property." Hornbeck v. State, supra, at 879. In the above-cited cases, the persons who aided and abetted by assisting the escape had knowledge during the perpetration of the crime and had intent to aid and abet such crime.

The evidence at bar clearly established that Petitioner knew a crime had been committed by the perpetrators when she drove the car away. However, the evidence was insufficient and inconclusive in establishing beyond a reasonable doubt that she had previous knowledge and intended to aid during the crime. (See R455) The timing and placement of knowledge, intent and action are critical in specifically which crime was committed. Those without scienter and intent for commission of the original crimes commit a separate crime by knowingly aiding the perpetrators after the fact. Those with scienter, intent, and action which exist instant to the original crime do not commit a separate crime by the aid in escape. Their aid in escape is res gestae to the original crime.

Even if, in arguendo, Petitioner were sufficiently proven guilty of scienter and intent instant to the offense, she cannot be adjudicated guilty as both principal to the offenses and accessory after the fact. The legislature obviously did not intend to overlap the res gestae aid of a principal with the subsequent aid of as accessory creating double punishment for a single action. Though the offenses are technically separate offenses, when measured by the Blockburger v. United States, 284

U.S. 299 (1932) standard, legislative intent controls in determining whether separate adjudication and sentence is warranted. See Mills v. State, 476 So.2d 172,177 (Fla. 1985); State v. Boivin, 487 So.2d 1037,1038 (Fla. 1986).

The trial court erred in adjudicating Petitioner guilty as both principal to the original offenses and as accessory after the fact. The evidence clearly establishes that Petitioner knew of the crimes after the offense and does not conclusively show scienter and intent instant to the offense. Even if both were proven, double adjudication is contrary to obvious legislative intent.

The Second District Court of Appeal in Staten v. State, 500 So.2d 297 (Fla. 2d DCA 1986) affirmed the lower court's adjudication as both principal and accessory finding the charges to be separate crimes contrary to the finding of the Third District Court of Appeal in Masquiera v. State, 494 So.2d 292 (Fla. 3d DCA 1986). Masquiera found the proposition that the principal and accessory after the fact are one in the same to be illogical. Petitioner agrees with Masquiera because the illogical cannot be construed as the legislative intent. The Second District Court of Appeal erred in affirming the lower court's adjudication.

CONCLUSION

Based upon the cases cited and arguments presented herein, Petitioner respectfully requests this Honorable Court reverse the decision of the Second District Court of Appeal and remand this cause for reversal of the trial court's judgment and sentence for readjudication and resentencing.

Respectfully submitted,

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