OA 10-7-87

IN THE SUPREME COURT OF FLORIDA

SUSAN STATEN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent,

Case No. 69,899

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

BRIEF OF RESPONDENT ON THE MERITS

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PRELIMINARY STATEMENT

SUSAN STATEN will be referred to as the "Petitioner" in this brief and the STATE OF FLORIDA will be referred to as the "Respondent". The Record on Appeal will be referenced by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's statement of the case and facts as substantially accurate with such exceptions as appear in the argument portion of this brief.

SUMMARY OF THE ARGUMENT

The crime of Accessory After the Fact is not a lesser included offense to Robbery, and the standard articulated in Blockburger v. United States, infra is appropriate. Where there is more than one perpetrator, conviction as a principal under an aider and abettor theory as well as conviction as an accessory after the fact may be factually and legally appropriate.

ARGUMENT

ISSUE

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

Petitioner cites Ryals v. State, 112 Fla. 4, 150 So. 132 (Fla. 1933) as authority for the proposition that 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. Petitioner admits that "the evidence at bar clearly established that Petitioner knew a crime had been committed by the perpetrators when she drove the car away", but argues "the evidence was insufficient and inconclusive in establishing beyond a reasonable doubt that she had previous knowledge and intended to aid in the crime." (See brief of Petitioner, p.6). Petitioner argues that only after "pyramiding" of inferences are the necessary elements of armed robbery complete. Petitioner then alleges these inferences to be 1) her boyfriend/girlfriend relationship with McPhaul; 2) her presence during the planning of the robbery; and 3) driving the getaway car.

Respondent urges Petitioner is mistaken as to what the evidence at trial showed, and that no inferences need be drawn to determine Petitioner's participation in these crimes. Petitioner actively participated in the plans for the robbery and her role

as the driver was predetermined (R.330, 331, 332, 334). She then carried out the plan and her role in it. These are not inferences that need to be drawn to determine the Petitioner's intent.[1]

Petitioner then argues that if she was sufficiently proven guilty of knowledge and intent to be convicted for the armed robbery she cannot also be convicted as an accessory after the fact, creating in effect, a double punishment for a single action. Petitioner relies on the recent decision of Maquiera v. State, 494 So.2d 292 (Fla. 3d DCA 1986) for her argument. In Maquiera, supra, the Third District Court of Appeal held that a defendant cannot be convicted of attempted robbery and accessory after the fact, stating, "In legal and logical contemplation, as to a single offense of attempted robbery, the principal offender (emphasis added) and the person giving aid to the offender (emphasis added) afterwards cannot be one and the same." Id, at 293.

The Second District Court of Appeals, in its opinion upholding the conviction of Petitioner herein (Staten v. State, 500 So.2d 297 (Fla. 2d DCA 1986)) distinguished the present case from Maquiera, supra by stating "We read Maquiera as involving a situation where there was only one perpetrator involved in the crime." Staten v. State, supra, at 299.

1/ Petitioner now raises the issue of pyramiding inferences toward her conviction for armed robbery, second degree murder and aggravated battery. This was neither raised in the trial court, on direct appeal, or in Petitioner's brief on jurisdiction. No where was the sufficiency of the evidence or the alleged pyramiding of inferences raised before and Respondent would urge this to be an issue improperly before this court.

To prove the offense of armed robbery, the state had to prove Petitioner had the intent that the act be committed and do some act to assist in it. Clearly, the evidence proved this intent in Petitioner's participation in the plans, as well as her assistance in driving the car away.

The evidence established Petitioner as a figure in the plans and her role in its execution (R.330-335). Although unclear whether Petitioner was present during all of the discussions planning the crime, there was discussion at one point of the possibility of shooting if necessary to carry out the plan (R.339). On the night of the crime, the petitioner and the other participants picked Uphsaw up at his house asking if he "was ready." He understood what they were to do and what they meant (R.341). In the car, on the way to the scene of the robbery, with Petitioner in the car, there was discussion of the crime they were about to commit (R.342). Petitioner was a passenger in the car en route to the crime scene (R.342) and behind the wheel when she and her co-perpetrators left the scene (R.354). Petitioner then drove them all to her mother's house (R.354), parked the car in the garage and she, along with McPhaul, King and Pojo went inside. Upshaw was told to wait outside (R.358). McPhaul told Upshaw he was using Petitioner's phone to call a cab (R.358). A cab arrived and McPhaul, King and Pojo left in it. Upshaw walked home, and Petitioner stayed at her mother's house (R.358).

Respondent would urge that the evidence clearly showed

Petitioner's involvement in the planning and execution of the crime. To prove the offense of accessory after the fact, the State had to prove beyond a reasonable doubt that Petitioner maintained, assisted, or gave McPhaul, Pojo, Upshaw and King aid knowing that they had committed the crimes with the intent that they avoid or escape detection, arrest, trial or punishment. §777.03, Fla. Stat. (1985). Schramm v. State, 374 So.2d 1043 (Fla. 3d DCA 1979).[2] Even if Petitioner's aid in escape by driving the "getaway" car is determined to be res gestae to the crimes committed as Petitioner argues, harboring her co-perpetrators at her mother's home, giving them refuge there while they used her phone to summon a cab for their ultimate escape from detection are clearly the acts of an accessory after the fact.

In evaluating a claim of double punishment, this Court has recognized the proper test in analyzing the issue to be the standard articulated in Blockburger v. United States, 284 So.2d 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932). See, Baker v. State, 456 So.2d 419 (Fla. 1984).

In Mormon v. State, 458 So.2d 88 (Fla. 5th DCA 1984) the

2/ If there is any doubt as to the correctness of the number of accessory convictions sub judice, Ellis v. State, 298 So.2d 524 (Fla. 2d DCA 1974) provides a lawful basis therefor. In Ellis, two officers were shot by two individuals with separate guns during the same criminal episode. The defendant, hid both guns for the perpetrators. The court held that conviction for two counts of accessory after the fact was appropriate because there were two separate offenses. Respondent would urge that Petitioner's co-perpetrators, involved in the same criminal episode each provided separate acts for the Petitioner to aid in avoidance thereafter.

court, citing Blockburger v. United States, supra, specifically found that the defendant could in fact be convicted of robbery as well as accessory after the fact and that a due process violation would occur only if he were the sole perpetrator of the crime. In Mormon, the defendant's motion for post-conviction relief was denied and the Fifth District Court of Appeals affirmed without prejudice to the defendant to bring another motion including a sufficient record for the appellate court to determine whether or not Mormon was the sole perpetrator of the crime. The court stated however, "Conceivably if there were 2 robbers, and if Mormon later aided his co-robber to escape or avoid detection, he could be convicted for both (emphasis supplied by the court) robbery and for being an accessory after the fact." Id. at 89 citing State v. Gibson, 452 So.2d 853 (Fla. 1984).

Petitioner argues the decision of the Third District Court of Appeals in Maquiera, supra, is correct because any other view would require legislative intent to be construed as illogical. (Brief of Petitioner at p.7).

Respondent would assert that the legislative intent is neither illogical, nor does the Third District Court of Appeal prohibit what Petitioner seeks to avoid.

In A. Y. G. v. State, 414 So.2d 1158 (Fla. 3d DCA 1982), the Third District Court of Appeals opined that the State should have initially charged the defendant as a principal under §777.011, Fla. Stat. and as an accessory after the fact pursuant to §777.03, Fla. Stat. The court did not express an opinion as to

whether or not A.Y.G. could have been convicted as a principal as well as an accessory after the fact, but the opinion obviously doesn't preclude it.

In Newkirk v. State, 222 So.2d 435 (Fla. 3d DCA 1969), the defendant was charged with robbery and convicted of being an accessory after the fact. The Third District Court of Appeals held that where the information charging robbery did not allege facts constituting the separate offense of accessory after the fact, conviction for being an accessory would be reversed without prejudice to the State to proceed with a new information charging the defendant accordingly. The court held that accessory after the fact is not a lesser included of robbery. Id. at 436. See also, Mackey v. State, 223 So.2d 380 (Fla. 3d DCA 1969) holding that accessory after the fact is not a lesser included of robbery.

Respondent would urge that in light of the other cases cited herein above from the Third District Court of Appeals, that the interpretation of Maquiera, supra by the Second District Court of Apepal in Staten v. State, supra, that Maquiera was the sole perpetrator of the robbery and therefore could not be an accessory to himself is correct.

The petitioner finally argues the legislative intent should not be interpreted or construed as illogical and giving §777.03, Fla. Stat. any other construction other than what she urges would be illogical.

The legislature abolished the distinction between accessory

before the fact and principals in the first and second degree in 1957. See, Ch. 57-310 Laws of Florida, Acts of 1957. No changes were made in the statutory provision for accessory after the fact. Respondent would assert no such change was made because of the legislative wisdom in its intention to include circumstances as those in the instant case and recognized in Mormon, supra. (See, Chaudoin v. State, 118 So.2d 569 (Fla. 2d DCA 1960) where the court noted the 1957 revisions removing technical distinctions and relied on their abolition in that decision).

Respondent therefore urges that the facts of the instant case clearly support the Petitioner's convcition for armed robbery, second degree murder, aggravated battery, and 3 counts of accessory after the fact.

CONCLUSION

Wherefore, based on the foregoing arguments, citations of authority and references to the record, Respondent respectfully requests that the judgment and sentence of the trial court and the decision of the Second District Court of Appeal should be affirmed.

Respectfully submitted,

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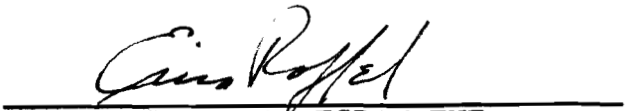
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to John T. Kilcrease, Jr., Assistant Public Defender, Hall of Justice Building, Post Office Box 1640, Bartow, Florida 33830, this 9th day of June, 1987.



OF COUNSEL FOR RESPONDENT