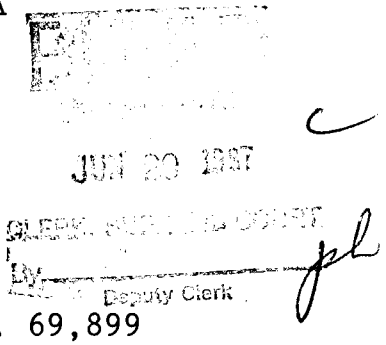
O/G 10-7-87

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

REPLY BRIEF OF THE PETITIONER ON MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

JOHN T. KILCREASE JR.
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PRELIMINARY STATEMENT

This brief is filed on behalf of the Petitioner, SUSAN STATEN, in reply to the Respondent's Answer Brief, and in support of the arguments presented in Petitioner's Initial Brief.

SUMMARY OF ARGUMENT

Principal and accessory after the fact are separate crimes. The legislative intent, however, was clearly not to double punish the getaway drivers based upon the timing of their role in the offense. With the concurrent intent to participate in the crime, the getaway driver is a principal and the instant escape is part of the perpetration of the crime (res gestae). Absent that intent to participate, the driver is an accessory after the fact based upon the intent to knowingly aid the perpetrators to escape justice. The timing and nature of the getaway driver determines which crime is committed. The crimes do not overlap in such a manner as to double punish the getaway driver. A principal can also be an accessory after the fact, but the accessory conviction must be based upon a separate act committed subsequent to the perpetration of the crime with the intent to aid a co-perpetrator in the escape from justice. Otherwise, another act in perpetration of the crime only affirms the principal status. Double adjudication of a getaway driver is erroneous.

ARGUMENT

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

The singular act committed by Petitioner which is properly considered before the bar is the fact that Petitioner drove the car away from the scene of the crime. In his Answer Brief, Respondent asserts "Petitioner actively participated in the plans for the robbery and her role as the driver was predetermined (R.330,331,332,334)." (Answer Brief, pp.4,5) An examination of the record pages cited by Respondent merely offer proof that Petitioner was present during the planning sessions. She, the sole female, was there with her boyfriend, Larry McPhaul, with whom the co-perpetrator/State's witness had grown up and known all his life. (R326,327) The evidence does establish that the perpetrators planned for Petitioner to drive (R334), but the evidence does not establish that Petitioner volunteered, agreed, or even knew ahead of time that she was to be the driver. She did not drive to the scene (R342), but was behind the wheel afterwards and drove away. (R354)

In his Answer Brief, Respondent emphasises the fact that Petitioner drove to her mother's home where the perpetrators used the phone to summon a cab. (Answer Brief, pp.6,7) The alleged harboring and assistance in the mother's home are attributable to the mother, but the record does not contain facts relating to her knowledge or culpability. Petitioner's only wrong act, aside from

the driving, was possibly her failure to report or disclose the crime.

The issue at bar is whether that singular act of driving away constitutes both guilt as a principal to the crime and as an accessory after the fact. Respondent's cited cases clearly establish that principal and accessory after the fact are separate crimes. Petitioner's argument, however, goes beyond the double jeopardy question controlled by Blockurger v. United States, 284 U.S. 299 (1932), and into the realm of basic logic and obvious legislative intent.

Respondent's cited cases support Petitioner's argument. A defendant can be convicted of both robbery and accessory after the fact if he is principal to the robbery, then "later aided his co-robber to avoid or escape detection." (emphasis added) Morman v. State, 458 So.2d 88,89 (Fla. 5th DCA 1984) Petitioner agrees that a robber who aids in the robbery, then later aids a co-robber is guilty of both crimes.

More illustrative of Petitioner's argument is another case cited by Respondent. In A.Y.G. v. State, 414 So.2d 1158 (Fla. 3d DCA 1982), that court found that principal and accessory after the fact should be alleged in the alternative. Much like the instant case, a female sat in a car, perpetrators entered the car after the crime and she drove away. "It is well-established that to be convicted as an aider and abetter, the State must show an intent to participate in the perpetration of the crime." If she intended to participate, she was a principal. If she did not have the previous intent, then it is obvious that she knew of the

crime afterwards and was in the alternative an accessory after the fact. A.Y.G. v State, supra. Respondent's cited case clearly illustrates and supports Petitioner's argument.

Those with the requisite intent to participate and who commit an affirmative act in furtherance of a crime are clearly principals to the crime. §777.011, Fla.Stat. (1985) Those knowingly giving aid in escape to a perpetrator after the fact, whether it be co-perpetrator or other person, is clearly an accessory after the fact. §777.03, Fla.Stat. (1985) The ride away from the crime scene is either one crime or the other. There is no overlap. The prosecutor does not get two birds with one stone. The getaway driver "waiting to help the robbers escape" with requisite intent to participate is a principal. Enmund v. State, 399 So.2d 1362,1370 (Fla. 1981). Some one not intentionally participating in a crime, who then becomes aware of the crime and knowingly aid the perpetrators in escape, is an accessory after the fact. A.Y.G. v. State, supra.

The legislature obviously intended to create two separate crimes distinguishing them by the timeliness of attachment and nature of the intent. Acts done in furtherance of a crime with intent to participate coinciding with the perpetration are punishable as a principal. Such intent incorporates the instant escape or getaway as part (res gestae) of the perpetration. See Hornbeck v. State, 77 So.2d 876 (Fla. 1955) Subsequent acts committed with the knowing intent to aid in the perpetrator's escape, which are not so incorporated, are punishable as an accessory after the fact.

The escape is the cutting edge between the two crimes. If the escape is of the instant or getaway nature, and is aided with convincing intent to participate, it is part of the perpetration and is punishable accordingly. If the aid in escape lacks intent to participate in the perpetration or is a separate act by a perpetrator done subsequent to the perpetration, it is punishable as an accessory after the fact. The legislature's obvious intent in the accessory after the fact statute was to criminalize aid knowingly given subsequent to a crime for the purpose of thwarting justice. The legislative intent was not to double punish the getaway drivers because of the timing of their role as principals.

A single act, driving away from the scene of the crime, is not punishable as both principal and accessory after the fact. Petitioner could not be adjudicated and sentenced for both crimes. Petitioners knowing aid after the fact is established by the evidence, but intent to participate was not sufficiently established. Petitioner's adjudications as a principal were not proper.

Note: Both the Respondent in the Answer Brief and the Second District Court of Appeal in Staten v. State, 500 So.2d 297 (Fla. 2d DCA 1986), incorrectly refer to Masquiera v. State, 494 So.2d 292 (Fla. 3d DCA 1986), as a sole perpetrator case. That case involved multiple perpetrators. See the Statement of Facts in the Initial Brief of Appellant filed in Masquiera v. State, supra, and also filed as an appendix to the Brief of the Petitioner on Jurisdiction in the instant case pending before this Honorable Court, pages A14 through A19.

CONCLUSION

Based upon the cases cited and arguments presented both herein and in Petitioner's Initial Brief, 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 judgments and sentences for proper readjudication and resentencing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the Attorney General, Park Trammell Bldg. 8th Floor, 1313 Tampa Street, Tampa, FL 33602, this 24th day of June, 1987.

JOHN T. KILCREASE JR.

JTK:ddv