

IN THE SUPREME COURT OF FLORIDA

CASE NO.

70,333

HORACE BROWN,

Petitioner,

APR 18 1987

vs.

CLERK, SUPREME COURT

THE STATE OF FLORIDA,

Deputy Clerk

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON JURISDICTION

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INTRODUCTION

Petitioner, Horace Brown, was the defendant in the trial court and the appellant in the Third District Court of Appeal, Respondent, the State of Florida, was the prosecution in the trial court and the appellee in the District Court of Appeal. In this brief, the parties will be referred to as they stood in the trial court. All references are to the defendant's appendix, paginated separately and identified as "A".

STATEMENT OF THE CASE AND FACTS

A jury found the defendant guilty of first degree murder and, on the defendant's motion, the trial judge ruled that the death penalty was inapplicable to this case and sentenced the defendant to life imprisonment. The defendant appealed his conviction to the Third District Court of Appeal and the prosecution cross-appealed from the trial court's finding that the death penalty was inapplicable (A. 1). The District Court affirmed the conviction but reversed the life sentence and directed the trial court to submit this case to a properly death - qualified jury for a determination of the penalty to be imposed. In so doing, the Court ruled as follows:

After the jury returned its verdict of guilty as to first-degree murder, the trial court refused to submit the case to the jury for the penalty phase, holding that the death penalty was inapplicable due to the United States Supreme Court's decision in Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). We agree with the state's contention that this case is not controlled by Enmund. In Enmund, the defendant was convicted of felony-murder. The

United States Supreme Court held that the defendant could not be subjected to the death penalty since he neither took a life, intended to take a life, nor intended that lethal force be used. In the present case, the evidence demonstrates that Brown fully intended the use of deadly force in either ordering or committing the shooting of the victim. Therefore, the trial court should have submitted this case to the jury for the penalty phase of the trial following Brown's conviction for first-degree murder, pursuant to section 921.141, Florida Statutes (1985).
(A. 4)

A timely motion for rehearing was denied by the District Court of Appeal on March 4, 1987. Notice of invocation of this Court's discretionary jurisdiction to review the decision of the District Court of Appeal was filed April 2, 1987.

SUMMARY OF ARGUMENT

In reversing the defendant's life sentence and in remanding this case to the trial court for the possible imposition of a death penalty, the District Court has in effect pronounced the following rule of law:

Where a defendant has been given a lawful life sentence and it is reversed, a trial court on remand can lawfully increase the sentence to death.

This rule directly conflicts with two decisions from this Court which hold that once a defendant has been sentenced, double jeopardy attaches and a court may not thereafter on remand increase the severity of the sentence.

ARGUMENT

THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN THIS CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISIONS OF THIS COURT IN FASENMYER V. STATE, 457 So.2d 1361 (Fla. 1984) AND TROUPE V. ROWE, 283 So.2d 857 (Fla. 1973).

This Court's jurisdiction to review decisions of District Courts of Appeal because of alleged conflict is invoked by (1) the announcement of a rule of law which conflicts with a rule previously announced in a district court or Supreme Court decision, or (2) the application of a rule of law to produce a different result in a case which involved substantially the same facts as a prior district court or Supreme Court decision. Nielson v. City of Sarasota, 117 So.2d 731 (Fla. 1960). In the case at bar, the Third District Court of Appeal announced a rule of law which conflicts with a rule previously announced by this Court in Fasenmyer v. State, 457 So.2d 1361 (Fla. 1984) and Troupe v. Rowe, 283 So.2d 857 (Fla. 1973). Accordingly, this Court's exercise of its discretionary jurisdiction to review the decision in question is warranted.

In the instant case, a jury found the defendant guilty of first degree murder and the defendant moved the trial court to forego seeking a jury recommendation as to the possible penalty. The trial court agreed and sentenced the defendant to life imprisonment.

In reversing the life sentence and in remanding the cause to be submitted to a death qualified jury to determine if death be the appropriate penalty, the Third District Court of Appeal in

effect announced the following rule of law.

When a defendant has been given a lawful life sentence and it is reversed, a trial court on remand can lawfully increase the sentence to death.

This rule of law directly conflicts with the decisions in Fasenmyer v. State, supra, and Troupe v. Rowe, supra, for in each of those decisions this Court held that once a defendant has been lawfully sentenced, double jeopardy attaches and the trial court may not thereafter on remand increase the severity of the sentence.

It is significant to note that the foregoing rule of law has been specifically applied to capital cases by the United States Supreme Court. In Arizona v. Rumsey, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984), the Court ruled that where a trial court finds that the circumstances only justify a life sentence, this finding and sentence amounts to an acquittal on the merits of defendant's eligibility for the death sentence, thereby barring the possibility of an enhanced sentence upon resentencing by virtue of the Double Jeopardy Clause of the United States Constitution. In so ruling, the Supreme Court reasoned as follows:

"Reliance on an error of law, however, does not change the double jeopardy effects of a judgment that amounts to an acquittal on the merits. 'The facts that the acquittal may result from erroneous evidentiary rulings or erroneous interpretations of governing legal principles...affects the accuracy of that determination but it does not alter its essential character.'"

It is also important to note that the opinion in question conflicts with this Court's decision in State v. Carr, 336 So.2d 358 (Fla. 1976). In the case at bar, the trial court took the penalty phase away from the jury upon motion of the defendant. The latter motion constituted a waiver of the jury recommendation by the defendant and therefore, the ensuing life sentence was lawful. As this Court said in Carr:

" We find that the trial judge, upon a finding of a voluntary and intelligent waiver, may in his or her discretion either require an advisory jury recommendation, or may proceed to sentence the defendant without such advisory jury recommendation."

CONCLUSION

Based on the foregoing argument and authorities cited, petitioner requests this Court to exercise its discretionary jurisdiction to review the decision of the Third District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Office of the Attorney General, 401 Northwest 2nd Avenue, Miami, Florida, this 9th day of April, 1987.

N. Joseph Durant, Jr.
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