

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,
v.
NANCY STELLE DENE,
Respondent.

CASE NO. 71,232

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

BRIEF OF PETITIONER ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the STATE OF FLORIDA, was the prosecution in the trial court and the Appellant in the Second District Court of Appeal. Respondent, NANCY STELLE DENE, was the defendant before the trial court and the Appellee in the Second District Court of Appeal. The parties will be referred to by their proper names or as they stood before the trial court. The record on appeal will be designated by the letter "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

On March 25, 1986, the Respondent/Appellee, Nancy Dene, was charged with Murder in the Second Degree, contrary to Section 812.13(2)(c), Florida Statutes (1985), in the killing of Geneva Kane (R. 4). Dene entered a plea of not guilty on March 31, 1986 (R. 5).

On April 9, 1986, the State of Florida filed an Indictment for Murder in the First Degree, charging Dene with the premeditated murder of Geneva Kane (R. 6-7). Dene subsequently filed several various motions, including six motions to dismiss; motion for additional peremptory challenges or to declare Florida Statute 913.08(1)(a) unconstitutional; demurrer to the indictment; motion to consolidate; and motion to preclude removing for cause or as matter of right, jurors who are not death qualified (R. 9-10, 11-12, 13-14, 15-16, 17-18, 19-20, 21-22, 23-55-56, 57-86). On April 17, 1986, Dene entered a plea of not guilty to the Indictment charge of first degree murder (R. 87, 92).

A jury was selected on June 17, 1986, and the trial began the following day (R. 151-152). Dene's trial continued until June 20, 1986 (R. 153-152). The trial judge granted a directed verdict as to First Degree Felony Murder (R. 164). The jury was instructed on First Degree Premeditated Murder and, over objection by defense counsel, of Second Degree Felony Murder. (R. 164). The jury returned a verdict of Guilty of Second Degree Felony Murder (R. 155).

Dene subsequently filed a motion for new trial and a motion for judgment of acquittal (R. 156-160, 161-162).

On June 25, 1986, defense counsel filed a motion for arrest of judgment pursuant to Rule 3.610, Fla.R.Crim.P. (R. 163). The undisputed factual basis for Dene's motion was:

" . . . 1. The Defendant, Nancy S. Dene, was not present at the scene of the murder.

2. The murder was committed by a person or persons engaged in the perpetration of a robbery to wit: Michael Sorrentino and/or Kasia Dudley. . ."

(R. 164).

The defendant, Nancy Dene, was not present at the scene when her confederates murdered Geneva Kane. At the time of the murder, Mrs. Kane was an elderly invalid who lived alone and Dene was the victim's former companion and housekeeper.

Dene told her daughter, Kasia Dudley, that the elderly lady had an expensive ring and large amounts of cash in the house (R. 413, 414). Dene and Kasia discussed stealing the ring and Kasia suggested a commando-type raid involving Kasia's friend, Mike Sorrentino (R. 419, 422). Kasia even suggested that they make Dene lay down on the floor, too, in order to make it look good; however, Dene was fired by Mrs. Kane a few days before they carried out the robbery and murder. (R. 419, 401). Dene was not at the scene when Kasia Dudley and Michael Sorrentino went into Mrs. Kane's home, slashed Mrs. Kane's throat and strangled her to death. (R. 358). Sorrentino's fingerprints were located inside the victim's home and a small gold ring belonging to Kasia was found underneath the victim's body. (R. 307, 368-369, 375, 507). The victim's purse was taken and the emerald and diamond ring was missing from the victim's hand.

On September 26, 1986, the trial court held a hearing on Dene's motion for arrest of judgment (R. 175-193). At the conclusion of the hearing, the trial judge reluctantly granted Dene's motion on the authority of State v. Oliver, 490 So.2d 1372 (Fla.2DCA 1986) (R. 192-193, 169).

The State of Florida filed a Notice of Appeal on October 8, 1986 (R. 171). Thereafter, the trial court entered an Order extending speedy trial time until 90 days after the conclusion of the appeal (R. 170). On September 25, 1987, the Second District Court entered its opinion, certifying the following question:

IS A CONVICTION UNDER SECTION 782.04(3), FLORIDA STATUTES, THE SECOND-DEGREE FELONY MURDER SECTION, LIMITED TO ONLY THOSE SITUATIONS WHERE THE PERSON WHO ACTUALLY KILLS THE INNOCENT VICTIM IS NOT ONE OF THE PRINCIPALS IN THE COMMISSION OF THE FELONY SUCH AS A BYSTANDER OR LAW ENFORCEMENT OFFICER, BUT RATHER SOMEONE ELSE?

State v. Dene, 12 F.L.W. 2327 (Fla. 2d DCA 1987)

SUMMARY OF THE ARGUMENT

The facts in the case at bar are parallel to those in Lowery v. State, 375 So.2d at 1075 (Fla. 4th DCA 1979) quashed 419 So.2d 621 (Fla. 1982). Under this authority, it is not required that an accessory before the fact be present at the scene of a crime for a person before the fact be guilty of second-degree felony-murder. There is no illegal indictment or verdict. The trial court has erred in law by granting the motion in arrest of judgment.

QUESTION PRESENTED

IS A CONVICTION UNDER SECTION 782.04(3),
FLORIDA STATUTES, THE SECOND-DEGREE FELONY
MURDER SECTION, LIMITED TO ONLY THOSE SITUA-
TIONS WHERE THE PERSON WHO ACTUALLY KILLS
THE INNOCENT VICTIM IS NOT ONE OF THE PRIN-
CIPALS IN THE COMMISSION OF THE FELONY, BUT
RATHER SOMEONE ELSE, SUCH AS A BYSTANDER OR
LAW ENFORCEMENT OFFICER?¹

The defendant, Nancy Dene, was not present at the scene when her confederates, Kaysie Dudley and Michael Sorrentino, carried out the robbery and murder of Dene's former employer, Mrs. Geneva Kane. The Second District Court, relying on its prior opinion in State v. Oliver, 490 So.2d 1372 (Fla. 2d DCA 1986), upheld the trial court's reluctant order in Arrest of Judgment. According to the rationale expressed by the Second District Court in Oliver, the defendant, Nancy Dene, could not be convicted of second-degree felony murder because one, or both, of the defendant's co-felons committed the murder of the victim. See e.g. Oliver, 490 So.2d 1372. The State respectfully submits that the Second District Court has misconstrued this Court's holding in State v. Lowery, 419 So.2d 621 (Fla. 1982) and the Second District's conclusion is incorrect for the following reasons.

¹ This is the question originally certified in State v. Oliver, 490 So.2d 1372 (Fla. 2d DCA 1986), untimely appeal/cause dismissed 496 So.2d 143 (Fla. 1986). In Dene, 12 F.L.W. 2327 (2DCA Case #86-2569, opinion filed September 25, 1987), the phrase "but rather someone else" was apparently inadvertently transposed when the question was phrased.

Section 782.04(3), Florida Statutes, provides, in pertinent part,

"When a person is killed in the perpetration of, or in the attempt to perpetrate, any

* * *

(d) Robbery

* * *

by a person other than the person engaged in the perpetration of or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony is guilty of murder in the second degree. . . "

In State v. Lowery, 419 So.2d 621 (Fla. 1982), this court affirmed the defendant's judgment and sentence for second-degree murder. The facts adduced at trial revealed that Lowery and a companion, Greg Sizemore, planned the robbery of Leroy Moss. Sizemore committed the robbery during which Moss was killed. Lowery was not at the scene of the crimes during their commission. In Lowery, this court stated:

"Although Lowery was not personally present during the commission of the robbery, he was an accessory before the fact. Section 776.011, Florida Statutes (1971), makes an accessory before the fact to the robbery (Lowery) a principal in the first degree or a perpetrator of the robbery. During the perpetration of the robbery, Moss was killed by a person other than Lowery (the person engaged in the perpetration or attempting to perpetrate the robbery). Under the statute, he may be found guilty of murder in the second degree. (emphasis added)

We overrule Hite v. State, [364 So.2d 771 (Fla. 2d DCA 1978)] to the extent that it requires presence at the scene of a crime for a person to be guilty of second-degree felony-murder."

419 So.2d at 624

In Jefferson v. State, 347 So.2d 427 (Fla. 1977), this court held that "[o]nly an accessory before the fact who was not personally present during the commission of the underlying felony can be found guilty of second-degree murder under the applicable statute." 347 So.2d at 429. Accord, Adams v. State, 341 So.2d 765 , 768 (Fla. 1976), cert. denied, 434 U.S. 878, 98 S.Ct. 232, 54 L.Ed.2d 158 (1977) [Liability for second degree murder occurs when the individual perpetrates the underlying felony as an accessory before the fact but does not personally engage in it.]

Under Lowery, the jury may return a verdict of second-degree murder even though the defendant was not present at the scene of the crime. The evidence at bar showed Dene to be an accessory. Here, as in Lowery, the defendant was not at the scene when the victim was killed by a person other than the defendant. Therefore, as in Lowery, 419 So.2d at 624, the defendant may be found guilty of murder in the second degree. Dene was charged with first degree premeditated murder and she properly stands convicted of any offense for which she can be convicted under the accusatory pleading. See, Rule 3.610, Florida Rule of Criminal Procedure. Having already benefited from an apparent jury pardon, Lowery does not allow Dene to escape all liability under §782.04(3) for the murder committed by her co-felons.

CONCLUSION

Based on the foregoing reasons, arguments and authorities, this Honorable Court should answer the certified question in the negative, quash the decision of the District Court and, on the authority of Lowery, remand this case with instructions to affirm the original judgment of the trial court and enable the trial court to sentence Dene accordingly.

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 Public Defender's Office, Criminal Court Complex, 5100 - 144th Avenue North, Clearwater, Florida 33520 this 2nd day of November, 1987.

K. Blanco

OF COUNSEL FOR RESPONDENT