

IN THE SUPREME COURT OF FLORIDA

FILED

OCT 17 1988

Clerk of the Court
By _____
Clerk

JAMES OTIS HERRINGTON,)
)
 Petitioner,)
)
 vs.)
)
 STATE OF FLORIDA,)
)
 Respondent.)
 _____)

Case No. 72,452

INITIAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit and appellant in the District Court of Appeal, Fourth District. Respondent was the prosecution in the trial court and the appellee in the Fourth District Court of Appeal.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbol will be used:

R = Record on Appeal

STATEMENT OF THE CASE

The state charged petitioner by information with second degree murder in the death of Calvin Williams. R832. The case was tried to a jury, which found petitioner guilty as charged. R838. During the trial, the court refused to instruct the jury on third-degree murder as a lesser-included offense. R586-91. The trial court adjudged petitioner guilty, R839, and sentenced him to fifteen years of imprisonment. R846.

Petitioner sought appellate review in the Fourth District Court of Appeal, arguing three grounds for reversal: that the trial court erred by refusing to instruct the jury on the lesser-included offense of third-degree murder; that the trial court erred in denying the motion to suppress; and that the trial court erred by permitting the prosecution to introduce into evidence cumulative and prejudicial photographs of the decedent. That court affirmed the conviction and sentence, addressing only the jury instruction issue in its written opinion. It wrote that, since the information did not allege the elements of third-degree murder, petitioner was not entitled to an instruction on that offense. Petitioner then instituted the present proceedings in this Court.

STATEMENT OF THE FACTS

On the evening of August 13, 1986, Calvin Williams was shot and killed at an apartment house in Deerfield Beach while visiting Esau Brown. The two men had been drinking quite a bit, R331-33, and Mr. Williams was on a second-story balcony shouting at female passers-by. R337-42. After unsuccessfully trying to stop this behavior, Mr. Brown went downstairs. R340-44, 321. He heard a gunshot, went upstairs and found Mr. Williams bleeding and nearly falling over the balcony. R322-23.

The only eyewitness to the shooting was petitioner himself, who gave the following version of events. Petitioner, his wife, and their six children were celebrating petitioner's birthday when Mr. Williams shouted insulting remarks about petitioner's wife. R663-64. Petitioner went upstairs and was attacked by Mr. Williams and a fist fight ensued. R669-71. Petitioner pushed Mr. Williams away, and then Mr. Williams "came again, but at this time he [was] reaching for something." R671. Thinking that Mr. Williams was reaching for a weapon, R672-73, petitioner pulled out a pistol from his own pocket and fired once in self-defense. R672-75. He then dropped the gun, went downstairs, and had someone call the police. R676. He waited for the police to arrive and admitted to the shooting. R677.

SUMMARY OF ARGUMENT

The evidence at bar supported the proposition that petitioner was engaged in the commission of a felony when he killed Mr. Williams. Hence the trial court erred by refusing to instruct the jury on third-degree murder as a lesser-included offense.

ARGUMENT

Under section 782.04(4), Florida Statutes, third degree murder is the unlawful killing of a human being by one engaged in a felony other than one which would underlie first degree felony murder.

The evidence showed that petitioner and Mr. Williams were engaged in an altercation, and that petitioner pulled a gun from his pocket and shot Mr. Williams. Thus petitioner committed three felonies at the time of the homicide: aggravated assault on Mr. Williams; aggravated battery on him; and carrying a concealed firearm. As respondent successfully argued in Doyle v. State, 513 So.2d 188 (Fla. 4th DCA 1987), rev. den. 520 So.2d 583 (Fla. 1988), aggravated battery may constitute the underlying felony for a third-degree murder conviction. Logic dictates that the same reasoning should apply for the other two felonies mentioned above. Hence, the evidence supported a charge of third-degree murder.

In Green v. State, 475 So.2d 235 (Fla. 1985) this Court wrote that the trial court must instruct the jury on third-degree murder where the defendant is charged with first-degree murder and the evidence establishes an underlying felony. There the claim was that the underlying felony was discharging a firearm into an occupied vehicle. The evidence showed that the defendant did not commit this felony, and this Court therefore held that an

instruction on third-degree murder was not required. Green was based on rule 3.490, Florida Rules of Criminal Procedure, which provides:

If the indictment or information charges an offense divided into degrees, the jury may find the defendant guilty of the offense charged or any lesser degree supported by the evidence. The judge shall not instruct on any degree as to which there is no evidence.

See also Rodriguez v. State, 443 So.2d 286 (Fla. 3d DCA 1983) and Johnson v. State, 423 So.2d 614 (Fla. 1st DCA 1982). The decision of the lower court at bar directly conflicts with these cases, since it holds that a defendant charged with second-degree murder is not entitled to an instruction on third-degree murder regardless of whether the evidence supports such an instruction.


Under Green, the trial court erred by refusing to instruct the jury on third-degree murder where there was evidence to support the charge. Hence petitioner's conviction and sentence should be reversed.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, petitioner respectfully requests this Court to reverse the decision of the lower court and remand this cause with proper directions.

Respectfully Submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Amy Lynn Diem, Assistant Attorney General, 111 Georgia Avenue, Elisha Newton Dimick Building, West Palm Beach, Florida 33401 this 14 day of October, 1988.



Of counsel