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72,482

IN THE SUPREME COURT OF FLORIDA

FILED
SUPREME COURT

MAY 20 1986

~~SUPREME COURT
STATE OF FLORIDA~~

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

Case No.

PETITIONER'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE

The State Attorney of the Seventeenth Judicial Circuit charged petitioner by information with second degree murder. A1. The case was tried to a jury which found petitioner guilty as charged. The trial court adjudged petitioner guilty, A2, and sentenced him to 15 years' imprisonment. A3.

Petitioner appealed his conviction and sentence to the Fourth District Court of Appeal, which entered an opinion on May 11, 1988 affirming the conviction and sentence. The entire opinion of the District Court of Appeal reads as follows:

We affirm the conviction and sentence entered against the appellant. As to the first issue, the trial court did not commit error by failing to give an instruction on third degree murder as requested. In order to support an instruction on a category two lesser offense, the Information must allege the elements of the category two offense. See Brown v. State, 206 So.2d 377 (Fla. 1968); White v. State, 412 So.2d 28 (Fla. 4th DCA 1982). Third degree murder was a category two offense in the instant case. Since the Information did not allege the elements of third degree murder, appellant was not entitled to an instruction on that offense. In all other respects, we affirm.

A4-5. Petitioner now seeks discretionary review in this court.

SUMMARY OF ARGUMENT

This court should grant discretionary review in this case because the opinion of the lower court directly and expressly conflicts with opinions of this Court and of other district courts of appeal on the same question of law. The opinion of the lower court holds that where the charging document does not plead the elements of third degree murder, the defendant is not entitled to an instruction on that offense as a lesser included offense. This decision conflicts with prior decisional law.

ARGUMENT

THIS COURT SHOULD ACCEPT JURISDICTION OF THIS CAUSE IN THE EXERCISE OF ITS CONFLICT TO JURISDICTION.

Article V, Section 3(b)(3), Florida Constitution, confers on this Court the discretionary power to review any decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or of this Court on the same question of law. Petitioner invokes the discretionary jurisdiction of this Court under section 3(b)(3).

The lower court expressly ruled in its opinion that, where the charging document does not allege specifically the elements of third degree murder, the defendant is not entitled to a jury instruction on third degree murder even where it is a category two lesser included offense. A4-5.

In Rodriguez v. State, 443 So.2d 286 (Fla. 3d DCA 1983), the court wrote at page 291:

Where a homicide has in fact occurred, the jury must be instructed on all degrees of murder from the degree charged and below, as well as manslaughter.

See also Johnson v. State, 423 So.2d 614 (Fla. 1st DCA 1982), and Lewis v. State, 377 So.2d 640 (Fla. 1979). In Lewis, this Court set out the reason for the rule that the jury must be instructed on all degrees of homicide, writing at page 646 that if the jury finds that an unlawful homicide has occurred, it must then determine what degree of murder or manslaughter is involved.


In view of the foregoing, the decision of the lower court at bar conflicts with decisions of other district courts of appeal and of this Court on the same question of law. This question of law is not a trivial one for two reasons: first, uncertainty about what instructions should be given on lesser included offenses is a continuing problem in the criminal jurisprudence in this state, and second, in view of the number of homicide prosecutions in this state, and the gravity of the offense itself, it is especially important that the law with regard to homicide be uniform throughout the state. Hence, this an appropriate case for review by this Court in the exercise of its discretionary jurisdiction.

CONCLUSION

This Court should accept jurisdiction over this cause in the exercise of its discretionary jurisdiction.

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 18 day of May, 1988.



Of counsel