

IN THE SUPREME COURT OF FLORIDA

ROBERT FENNELL,)	
)	
Petitioner,)	
)	
v.)	CASE NO. 72,841
)	
STATE OF FLORIDA,)	
)	
Respondent.)	
_____)	

PETITIONER'S REPLY BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner was the Appellant in the court below and the defendant in the trial court. Respondent was the Appellee in the court below and the prosecution in the trial court. A copy of the district court's opinion is attached to this brief as part of the Appendix.

The following symbols will be used in this brief:

"R" Record on Appeal

"A" Appendix

ARGUMENT

POINT INVOLVED

IT WAS ERROR TO SCORE POINTS FOR VICTIM INJURY
WHERE VICTIM INJURY WAS NOT AN ELEMENT OF THE
OFFENSES OF ATTEMPTED SECOND DEGREE MURDER OR
TRESPASS.

In essence, Respondent argues that there are two types of attempted second degree murder -- the statutory offense without victim injury as an element and some other attempted second degree murder with victim injury as a requisite element. However, attempted second degree murder simply does not have victim injury as an element.

Respondent's argument is based on the claim that the state was required to prove victim injury by stabbing as an element for a conviction to result. However, the following instruction given to the jury on attempted second degree murder did not include victim injury as an element of attempted second degree murder:

THE COURT: * * * Before you can find the defendant guilty of an attempt to commit second degree murder as to Count I, the State must prove the following elements beyond a reasonable doubt.

First, that Mr. Fennell did some act towards committing the crime of second degree murder that went beyond just thinking or talking about it.

Second, he would've committed that crime except that someone prevented him from committing the crime of second degree murder or that he failed.

(R201-202) (emphasis added). The instruction merely required an attempt to commit the offense, but not a resulting death or injury. Thus, victim injury was not an element of attempted second degree murder.

In addition, Respondent claims that the guideline committee intended "victim injury be scored if it was committed as part of the offense." Respondent's brief at 6. However, if the committee had such an intention Rule 3.701(d)(7) of the Florida Rules of Criminal Procedure, would not require victim injury to be an element of the offense. Nor would the rule have to be changed, to allow scoring of victim injury where it is present during the criminal transaction, but is not an element of the crime, if Respondent's claims were true. See Florida Rules of Criminal Procedure Re: Sentencing Guidelines (Rules 3.701 and 3.988), 509 So.2d 1088 (Fla. 1987).

As this Court noted for victim injury to be scored it must not only be present factually, it must be an element of the scored offense at conviction. State v. Whitfield, 487 So.2d 1045 (Fla. 1986) (error to score 36 points for victim injury where victim injury is not an element of aggravated assault). It was error to score points for victim injury where victim injury is not an element of attempted murder. Smith v. State, 501 So.2d 139 (Fla. 2d DCA 1987). Petitioner relies on his brief on the merits for further argument on this point.

CONCLUSION

Based on the foregoing argument and authorities cited therein, Petitioner would request this Honorable Court to reverse the decision of the district court with directions that Petitioner's sentence be reversed and this cause remanded for resentencing without computation of points for victim injury.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to CELIA A. TERENCE, Assistant Attorney General, Elisha Newton Dimick Building, Suite 204, 111 Georgia Avenue, West Palm Beach, Florida, 33401 by courier this 12th day of October, 1988.


Of Counsel