

IN THE SUPREME COURT OF FLORIDA

CASE NO.

73780

DCA NO. 88-2515

THE STATE OF FLORIDA,

Petitioner,

FILED
SID J. WHITE

vs.

FEB 27 1989

ROBERTO PASTOR,

CLERK, SUPREME COURT
By
Deputy Clerk

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

JURISDICTIONAL BRIEF OF PETITIONER

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7INTRODUCTION

This is a petition for discretionary review by the State of Florida of the January 23, 1989 decision of the Third District Court of Appeal denying rehearing of its December 27, 1988 decision reversing and remanding the Respondent's conviction for attempted first degree murder with a weapon and possession of a firearm during the commission of a felony.

Throughout this brief, the Petitioner/Appellee, the State of Florida, will be referred to as "the State;" the Respondent/Appellee, Roberto Pastor, will be referred to as "the Respondent." Reference to the Exhibits which accompany this brief will be made by citation to the appropriate Exhibit.

STATEMENT OF THE CASE

On August 12, 1986, the Defendant was charged by Information with Attempted First Degree Murder With a Deadly Weapon, a Knife, and Unlawful Possession of a Deadly Weapon While Engaged In a Criminal Offense. (Exhibit A).

The Defendant was tried by jury June 8-9, 1987. The Defendant was the only witness on his own behalf. The jury returned verdicts of Guilty as to both Counts, (Exhibit C) and the Defendant was thereafter adjudicated guilty. (Exhibit D). On August 17, 1987, the Court imposed its sentence after a

guidelines scoresheet was prepared a recommending a sentence of between twelve to seventeen years. (Exhibit E). The Defendant was sentenced to seventeen years as to Court I and five years as to Count II with the sentences to run concurrently. (Exhibit F). The Defendant was thereafter committed to the custody of the State Department of Corrections. (Exhibit G).

The Defendant did not appeal. However, on August 19, 1988, the Defendant filed his first motion for Post-Conviction Relief pursuant to Fla.R.Crim.P. 3.850 alleging, among other things,¹ as grounds therefore, that the Trial Court violated the double jeopardy clauses of both the State and Federal Constitutions by sentencing the Defendant for both Attempted First Degree Murder with a Deadly Weapon and Unlawful Possession of a Deadly Weapon While Engaged in a Criminal Offense. (Exhibit I).

The Defendant's motion was summarily denied by the Honorable Ursula M. Ungaro on September 26, 1988 (Exhibit I) and the Defendant appealed to the Third District Court of Appeal. (Exhibit J). The Third District Court issued an Order to Show Cause (Exhibit K) to which the State Responded. (Exhibit L). Thereafter, that Court entered an Order reversing and remanding the conviction for resentencing pursuant to Carawan v. State, 515 So.2d 161 (Fla. 1987) and Hall v. State, 517 So.2d 678 (Fla.

¹ The State, for the sake of brevity will not address the Defendant's other grounds as the Third District Court of Appeal found them to be without merit. (Exhibit L).

1988) (Exhibit M). The State moved for rehearing and for certification (Exhibit N) and the court denied its motion. (Exhibit O). The State filed a Petition to invoke the discretionary jurisdiction of this Court. (Exhibit P).

STATEMENT OF THE FACTS

On August 10, 1986, Marcos Mera and his common law wife, Nievas Ruiz, went to a park on South Beach. When they became hungry, they walked a nearby store to pick up sandwiches to take back to the park. At the store, they saw the Defendant, a former neighbor, who allegedly stole a car from Mera after being retained to make some repairs to it.

The Defendant attempted to institute an argument. When Mera turned away, the Defendant stabbed him in the back and again in the chest as Mera turned towards him. Mera sustained serious injuries as a result of the attack.

ISSUE PRESENTED FOR REVIEW

DID THE LOWER COURT ERR IN APPLYING CARAWAN AND HALL RETROACTIVELY TO A CONVICTION FOR ATTEMPTED FIRST DEGREE MURDER WITH A WEAPON AND POSSESSION OF A WEAPON DURING THE COMMISSION OF A FELONY WHICH OCCURRED PRIOR TO CARAWAN WHEN THIS COURT DECLINED TO APPLY CARAWAN RETROACTIVELY AND THE LEGISLATURE HAS SINCE MADE CLEAR ITS INTENTION TO AUTHORIZE SEPARATE CONVICTIONS AND SENTENCES FOR LIKE CRIMES?

SUMMARY OF THE ARGUMENT

The Third District Court of Appeal erred by applying Carawan and Hall retroactively to reverse and remand the Defendant's convictions for attempted first degree murder with a weapon and possession of a weapon during the commission of a felony when this Court declined to make its decision in Carawan retroactive to convictions occurring prior thereto.

The lower court's ruling is therefore in conflict with this Court's decision and also directly conflicts with the decisions of other District Courts of Appeal on like issues. Furthermore, it stands in direct opposition to the intent of the Florida Legislature which recently made clear its intention to authorize such convictions by amending F.S. 775.021.

ARGUMENT

THE LOWER COURT ERRED IN APPLYING CARAWAN AND HALL RETROACTIVELY TO A CONVICTION FOR ATTEMPTED FIRST DEGREE MURDER WITH A WEAPON AND POSSESSION OF A WEAPON DURING THE COMMISSION OF A FELONY WHICH OCCURRED PRIOR TO CARAWAN, WHEN THIS COURT DECLINED TO APPLY CARAWAN RETROACTIVELY AND THE LEGISLATURE HAS SINCE MADE CLEAR ITS INTENTION TO AUTHORIZE SEPARATE CONVICTIONS AND SENTENCES FOR LIKE CRIMES.

Florida Rule of Appellate Procedure 9.030(a)(2)(ib) expressly provides for discretionary review by this Court of decisions of district courts of appeal which are in direct conflict with decisions of either this Court or other district courts of appeal on the same question of law.

In this case, the Third District Court of Appeal overturned the Defendant's conviction for both attempted first degree murder with a weapon and unlawful possession of a weapon during the commission of a felony pursuant to a retroactive application of Carawan v. State, supra, and Hall v. State, supra. However, at the time the Defendant was sentenced, separate convictions for both offenses were proper. See: State v. Marshall, 455 So.2d 355 (Fla. 1984) and State v.

Gibson, 452 So.2d 553 (Fla. 1984). It is firmly established that statutes in effect at the time an offense is committed control as to the offenses for which a defendant may be convicted, as well as, the punishments which may be imposed. 14 Fla. Jur. 2d, Criminal Law §18; Article 10, §9 Florida Constitution, Heath v. State, 13 F.L.W. 2325 (Fla. 2d DCA October 21, 1988).

Carawan v. State, was decided by this Court September 3, 1987, after the Defendant was sentenced. Significantly, this Court, in deciding Carawan did not chose to find it specifically retroactive to cases decided prior to September 3, 1987, although it clearly could have done so. As stated by the Fifth District of Appeal in Clark v. State, 13 F.L.W. 2098 (September 16, 1988), "nothing in Carawan makes it applicable to this case...because it was not specifically retroactive to prior convictions...and the legislature has spoken to make clear its intent in Section 775.021(4), Florida Statues."

The First District Court of Appeal in Harris v. State, 520 So.2d 639 (Fla. 1st DCA 1988) and the Fourth District Court of Appeal in Love v. State, 13 F.L.W. 2387 (Fla. 4th DCA 1988) have also declined to apply Hall and Carawan on a retroactive basis. In this case, the result reached by the lower court is in direct conflict with the aforementioned decisions because the First, Fourth, and Fifth District Courts recognized that the Legislature's recent enactment of the amendment to F.S.775.021

was merely a clarification of its intention to authorize separate convictions and sentences in this instance. Keyes Investors v. Department of State, 487 So.2d 59 (Fla. 1st. DCA 1986), State v. Lanier, 464 So.2d 1192 (Fla. 1985), Lowry v. Parole and Probation Commission, 473 So.2d 1248 (Fla. 1985). Therefore, the amended version of the statute should have retroactive effect and the Defendant's convictions should be affirmed.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court exercise its discretionary jurisdiction to coincide this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing JURISDICTIONAL BRIEF OF PETITIONER was furnished by mail to ROBERTO PASTOR, B-Dorm., D.C. #181293, Glades Correctional Institution, 500 Orange Avenue Circle, Belle Glade, Florida 33430, on this 24th day of February, 1989.

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/gp