IN THE SUPREME COURT OF FLORIDA

THOMAS HIGGINS,

Petitioner,

v. CASE NO. 75,110

STATE OF FLORIDA,

Respondent.

_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

ANSWER BRIEF OF RESPONDENT

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ANSWER BRIEF OF APPELLEE

PRELIMINARY STATEMENT

Petitioner, Thomas Higgins, appellant/defendant below, will be referred to herein as "Petitioner." Respondent, the State of Florida, will be referred to herein as "the State." References to the record on appeal will be by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Appellee is in substantial agreement with Appellant's version of the case and facts.

SUMMARY OF ARGUMENT

Respondent asserts that this Court should answer the certified question as follows; second degree arson is not a necessarily lesser included offense of first degree arson because each requires an element to be proved that the other does not. For first degree arson, the unique element is that the structure must be a dwelling or other occupied type of structure. For second degree arson, the unique element is that damage to the structure must be proven.

ARGUMENT

ISSUE I

THE DISTRICT COURT OF APPEAL DID NOT ERR IN DETERMINING THAT SECOND DEGREE ARSON IS NOT A NECESSARILY LESSER INCLUDED OFFENSE OF FIRST DEGREE ARSON.

In its decision below the First District Court of Appeal determined that second degree arson was not a necessarily lesser included offense of 1st degree arson. However, it certified the question because of an error that exists in the schedule of lesser included offenses.

Respondent acknowledges this court's position that a jury must be instructed on all necessarily included lesser offenses. State v. Wimberly, 498 So.2d 929 (Fla. 1986). However, Appellee asserts that a trial court is not required to blindly follow the table of lesser included offenses but is to exercise its judicial discretion in determining what is a lesser offense. Mastro v. State, 448 So.2d 626 (Fla. 2nd DCA 1984); Linehan v. State, 442 So.2d 244 (Fla. 2nd DCA 1983); modified 476 So.2d 1262 (Fla. 1985).

Respondent asserts that in its opinion the lower court set out the proper test for determining when offenses are lesser included. It said a lesser included offense is an offense which when the greater is proved the lesser is also necessarily proved.

In articulating this test the court was not plowing new legal ground, but reiterating what this and other courts have said. The Fifth District Court of Appeal articulated the same test in Benjamin v. State, 462 So.2d 110 (Fla. 5th DCA 1985), and defined a necessarily lesser included offense as one whose constituent elements are included within the elements of the greater offense; all the statutory elements of necessarily lesser offenses are proved in proving the major offense. Id. at 111. This court has repeatedly reaffirmed the correctness of this interpretation, State v. Edmunds, 476 So.2d 165 (Fla. 1985); Bell v. State, 437 So.2d 1058 (Fla. 1983), limited State v. Baker, 456 So.2d 419 (Fla. 1984).

Further in Larkins v. State, 476 So.2d 1383 (Fla. 1st DCA 1985), the 1st District set out the proper way to analyze this issue when it held that the statutory elements of the offenses must be compared to determine if each can be committed without committing the other. Id. at 1384.

The correctness of this approach is shown by this courts use of the exact same technique in Rotenberry v. State, 468 So.2d 971 (Fla. 1985) and in Daophin v. State, 533 So.2d 761 (Fla. 1988).

In conducting the comparison we find that the first degree arson statute reads as follows:

> (1) Any person who willfully and unlawfully, by fire or explosion, damages or causes to be damaged:
> (a) Any dwelling, whether occupied or not, or its contents;
> (b) Any structure, or contents thereof, where persons are normally present, such as: Jail, prisons, or detention centers; hospitals, nursing homes, or other health buildings, business establishments, churches, or educational institutions during normal hours of occupancy; or other similar structures; or
> (c) Any other structure that he knew or had reasonable grounds to believe was occupied by human being,
> is guilty of arson in the first degree, which constitutes a felony of the first degree, punishable as provided in **s. 775.082, s. 775.083,** or **s. 775.084.**

Section 806.01(2), Florida Statutes, now reads:

> (2) Any person who willfully and unlawfully, by fire or explosion, damages or causes to be damaged any structure, whether the property of himself or another, under the circumstances not referred to in subsection (1), is guilty of arson in the second degree, which constitutes a felony of the second degree, punishable as provided in **s. 775.082, s. 775.083,** or **s. 775.084.**

The first element of these offenses is the same, you have to willfully by fire or explosion cause damage, the second is quite different. The second element of second degree arson requires damage to the structure itself. The second degree arson section of the statute is unchanged from the old statute, and has been interpreted to require actual damage to the structure or its fixtures. K.R.M. v. State, **360** So.2d **806** (Fla. 1st DCA 1978).

The second element of 1st degree arson requires that damage be to a dwelling or occupied structure or structure of a type normally occupied. Thus first degree arson requires proof of an element (dwelling) second degree does not. This statutory change was made in 1979 because of the inherent danger of fires in certain types of buildings. See Florida Arson Law Evolution, 1979 amendments 8 FSU L. Rev. 81 (1980).

Further, to prove first degree arson all that is required is proof of damage to the contents, State v. Tomblin, 400 So.2d 1012 (Fla. 5th DCA 1981); Lofton v. State, 416 So.2d 572 (Fla. 4th DCA 1982) second degree arson requires proof of damage to the structure. K.R.M., supra. As emphasized in Rotenberry, supra. at 976, the critical term is requires. Each of these statutory sections requires proof of an element the other does not. First degree arson requires the type of structure to be occupied (dwelling). Second degree arson requires damage to the structure. Thus under the test articulated by this court second degree arson is not a lesser included offense of first degree arson.

Further as found by the 1st District the statute contains an exclusion clause. The legislature specifically stated that second degree arson is damage to a structure under circumstances not referred to in subsection (1) (1st degree arson). Clearly the legislature intended there to be separate offenses with separate fields of operation. Appellee asserts this expressed

intent must be read in conjunction with §775.021(4) in which the legislature defined the interrelationship of offenses. State v. Barritt, 531 So.2d 338 (Fla. 1988) (Shaw concurring). This buttresses the conclusion that second degree arson is not a necessarily lesser included offense of first degree arson.

The instant case and the Tomblin case are perfect examples of arson situations where the greater offense was proven but not the lesser. In each case, no damage to the structure occurred. Since, in order for a lesser offense to be a necessarily included lesser offense, the lesser must always be proven when proving the greater, it follows that arson in the second degree is not a necessarily included lesser offense of arson in the first degree.

To give the instruction in this case would result in a ludicrous scenario. The jury would be instructed that they could convict on arson in the second degree. Then, if they did convict on the lesser, the verdict would be subject to a Rule 3.380, Fla.R.Crim.P. post trial motion for a judgment of acquittal, because the State failed to prove an essential element, damage to the structure. The end result would be that the convicted defendant would walk free, and not be subject to retrial, due to double jeopardy considerations. This would be a "gotcha" the ultimate sandbag and a perversion of our jury system.

Therefore, this court should affirm he ruling of the lower court because second degree arson is not a necessarily lesser included offense of first degree arson and should correct the table of lesser included offenses.

Petitioner asserts that an affirmance of the lower courts ruling would result in an ex post facto application to him. Petitioner is wrong. The table of necessarily lesser included offenses placed in the Jury Instruction Manual neither grants nor taken away any rights from the appellant. It alters no penalty the appellant is subject to. In fact, it is merely a guide for trial courts in their application of Rules 3.490 Fla.R.Crim.P. and Rule 3.510 Fla.R.Crim.P.; and although it has been held to be presumptively correct it has also been found to be incorrect. Linehan v. State, 476 So.2d 1262 (Fla. 1985). Hidqon v. State, 490 So.2d 1252 (Fla. 1986).

The correctness of this position is established by the language used by this court when it adopted the standard jury instruction. It stated that a trial judge retains the responsibility to correctly charge the jury. In the matter of the case of the Standard Jury Instructions, 431 So.2d 594, 598 (Fla. 1981).

The court emphasized this discretion that the trial court retains in Wimberly, supra. p. 932 where it said, "Once the trial judge determines that the offense is a necessarily included offense he must give the instruction."

The law defining lesser included offenses has not changed, thus there could be no ex post facto application. Therefore, this court should reject petitioners ex post facto argument.

CONCLUSION

Based on the above cited legal authorities, Appellee prays this Honorable Court answer the certified question in the negative and affirm the lower tribunal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Nancy L. Showalter, Assistant Public Defender, Leon County Courthouse, Fourth Floor North, 301 South Monroe Street, Tallahassee, Florida, 32301, this 30th day of January, 1990.

EDWARD C. HILL, JR.
Assistant Attorney General