

IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,990

MARCUS PERKINS
and
RODNEY GUY,

Petitioners,

v.

THE STATE OF FLORIDA,

Respondent.

FILED
JUL 28 1990
CLERK, SUPREME COURT
By _____
Deputy Clerk

ON APPLICATION FOR DISCRETIONARY REVIEW

RESPONDENT'S BRIEF ON THE MERITS

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I.

INTRODUCTION

The Respondent, the State of Florida, was the prosecution in the trial court and the appellant in the court below, the Third District Court of Appeal and will be referred to as the "Respondent." The Petitioners, Marcus Perkins and Rodney Guy, were the defendants in the trial court, the appellees in the court below, and will be referred to as the "Petitioners."

II.

STATEMENT OF THE CASE

The Respondent accepts Petitioners' recitation of both the proceedings below and the facts as being accurate and complete.

III.

SUMMARY OF ARGUMENT

The opinion of the Third District Court of Appeal barring the claim of self-defense in a felony murder prosecution was eminently correct. Logic and jurisprudence compelled the result reached.

IV.

ARGUMENT

Respondent can add little to the particularly trenchant opinion of the court below. Every assertion of the Petitioners, in the trial court, the court below, and in this Court has been met and disposed of by the cogent reasoning and ineluctable conclusion of Judge Nesbitt. Petitioners have offered nothing to this Court which in any way detracts from or calls into question the holding of the Third District. Nevertheless, Respondent would make two observations relating to the argument presented to this Court.

Firstly, Petitioners persist in suggesting that the case of Bowes v. State, 500 So.2d 290 (Fla. 3d DCA 1986), is somehow apposite. It is not. Bowes addresses the defense of excusable homicide set forth in Section 782.03, Fla. Stat., the legislatively delimited defense of self-defense. Mislabeling the defense as "excusable self defense" cannot help.

Secondly, there surfaces the contention that ejusdem generis, a rule of statutory construction, is somehow violated by the holding below. Petitioners' argument is simply put. Sections 776.012 and 776.041 together preclude a claim of self-defense when a defendant is committing a forcible felony. Forcible felony is further defined in Section 776.08 to include twelve specifically enumerated crimes and a catch-all provision: "any other felony which involves the use or threat of physical force or violence against any individual." The holding of the Third District to the contrary, Petitioners suggest that drug trafficking is so different from the enumerated felonies that it cannot be contemplated by the catch-all provision. Aside from the fact that Petitioners' major premise is

incorrect, the argument is also flawed in that it proves too much. On the one hand, it is clear that treason and burglary, especially under a "remaining in" theory, do not necessarily involve violence against an individual. Thus, drug trafficking presents no less of a threat of violence than these two felonies. On the other hand, Petitioners have neglected or are unable to propose another felony that would be contemplated by the catch-all provision. If there are none, then the provision is mere surplusage and that construction would be absurd. If there are any, then surely at the top of the list is drug trafficking; the body count alone is sufficient proof.

V.

CONCLUSION

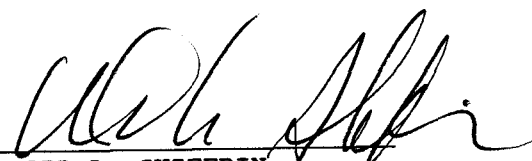
Based upon the foregoing reasons and analysis, Respondent respectfully requests that the decision of the Third District Court of Appeal be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the above and foregoing was forwarded to Marti Rothenberg, Assistant Public Defender, on this the 25 day of July, 1990.



RICHARD L. SHIFFRIN
Assistant State Attorney