DA. 6/6/91 047

IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,078

GUADALUPE GONZALEZ,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

****

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT

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RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT

The Petitioner was the Appellant in the Fourth District Court of Appeal and the defendant in a criminal prosecution from the Seventeenth Judicial Circuit, in and for Broward County. The Respondent, State of Florida, was the Appellee and the prosecution, respectively in the lower courts. In this brief, the parties will be referred to as they appear before this Honorable Court.

The symbol "A" will be used to refer to Respondent's Appendix, which is a conformed copy of the appellate court's opinion. Unless otherwise indicated, all emphasis has been supplied by Respondent.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts appearing on pages 2 through 3 of his Brief on the Merits to the extent that it is accurate and nonargumentative.

SUMMARY OF ARGUMENT

The Fourth District's essential decision that the use of a firearm is not an essential element of third-degree murder, the lesser-included offense for which Petitioner was convicted, is in accord with the similar view held by the Third District as announced in Pedrera v. State, 401 So.2d 823 (Fla. 3d DCA 1981) and its progeny, as well as the precedent established by this Court in Strickland v. State, 437 So.2d 150, 152 (Fla. 1983) concerning the proper analysis to be used in determining whether a firearm is an essential element of a particular felony for purposes of sentence enhancement under §775.087(1). Moreover, the decision of the Fourth District sub judice is more consistent with the well established principle that the legislature has the sole power to, and does in fact, establish the essential elements of any particular offense by statute. As a result, the Fourth District's decision was correct. This Court should resolve any conflict in decisions in favor of upholding the decision of the Fourth District.

ARGUMENT

THE TRIAL COURT PROPERLY ENHANCED PETITIONER'S SENTENCE SINCE THE USE OF A FIREARM IS NOT AN ESSENTIAL ELEMENT OF THIRD-DEGREE MURDER.

Section 775.087(1), Fla. Stat. (1989), provides in pertinent part as follows:

> Unless otherwise provided by law, whenever a person is **charged** with a felony, **except a felony in which the use of a weapon or a firearm is an essential element**, and during the commission of such felony, the defendant carries, displays, uses, threatens, or attempts to use any weapon or firearm, or during the commission of such felony the defendant commits an aggravated battery, the felony **for which the person is charged** shall be reclassified as follows:
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> * * *
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> (b) In the case of a felony of the second degree, to a felony of the first degree.

The phrase "except a felony in which ..." contained in the above statute clearly refers to the felony for which a defendant is **"charged"**. Here, Petitioner was charged with the felony offense of second-degree murder. It is indisputable that the use of a firearm is not an essential element of the crime of second-degree murder.[1] Consequently, in view of the plain meaning of

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[1] Under §782.04(2), Fla. Stat. (1989), the crime of second-degree murder is defined as the "unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual."

§775.087(1), Fla. Stat. (1989), enhancement of Petitioner's sentence in the present case was proper.

Notwithstanding, the Fourth District's essential decision that the use of a firearm is not an essential element of third-degree murder, the lesser-included offense for which Petitioner was convicted, is in accord with the similar view held by the Third District as announced in Pedrera v. State, 401 So.2d 823 (Fla. 3d DCA 1981) and its progeny, as well as the precedent established by this Court in Strickland v. State, 437 So.2d 150, 152 (Fla. 1983) concerning the proper analysis to be used in determining whether a firearm is an essential element of a particular felony for purposes of sentence enhancement under §775.087(1). Moreover, the decision of the Fourth District sub judice is more consistent with the well established principle that the legislature has the sole power to, and does in fact, establish the essential elements of any particular offense by statute. See Rusaw v. State, 451 So.2d 469, 470 (Fla. 1984) ("It is well settled that the legislature has the power to define crimes and to set punishments.")

In Pedrera, supra, the Third District specifically held that,"The use of a firearm is not necessarily an element of third degree murder, **as statutorily defined**, and the mere fact that a firearm was used in commission of the crime does not make it a necessary element as in the case of aggravated assault, which is **statutorily defined** to be committed by use of a deadly weapon." Id. at 824. This holding was subsequently reaffirmed

by the Third District in Streeter v. State, 416 So.2d 1203, 1205 (Fla. 3d DCA 1982). Thus, it is clear that in determining whether a firearm is an essential element of third-degree murder , the Third District looked only to the statutory definitions, i.e., statutory elements, of the crime of third-degree murder and the underlying crime upon which the third-degree murder conviction was based.

Similarly, in Strickland v. State, 437 So.2d 150 (Fla. 1983), this Court held that since the use of a firearm is not an essential element of the crime of attempted first-degree murder, the reclassified life sentence imposed upon conviction of such crime was proper. In reaching this conclusion, it is evident that this Court viewed as the determinative factor the **statutory elements** of the crime of attempted first-degree murder. In particular, this Court opined through Justice Ehrlich that:

> In the instant case, **when we look at the statutory elements of the offense**, we find the use of a firearm not to be an essential element of the crime of attempted first-degree murder. Thus, the life sentence in the present case is correct.

Id. at 152. See also Strickland v. State, 415 So.2d 808 (Fla. 1st DCA 1982); Williams v. State, 476 So.2d 286 (Fla. 1st DCA 1985); Williams v. State, 407 So.2d 223 (Fla. 2d DCA 1981). Moreover, it is important to note that in Strickland, supra, Strickland was charged with attempted first-degree murder by shooting the victim with a shotgun. The jury returned a verdict finding Strickland guilty of "attempted first-degree murder with a firearm." Strickland, supra

This Court's holding in Strickland, supra, was recently followed by the First District in Lentz v. State, 567 So.2d 997 (Fla. 1st DCA 1990). In Lentz, the court rejected the appellant's contention, similar to Petitioner's here, that since the charge against him was worded as "attempted first-degree murder with a firearm," the use of a firearm was an essential element so that the offense could not be reclassified pursuant to §775.087(1), Fla. Stat. The First District also rejected Lentz' claim that since his only "act toward commission of the murder" was the firing of a gun, the use of a firearm was an essential element of his offense. In doing so, the court reasoned that:

> ..., a conviction of attempted first-degree murder does not require that the act be committed with a firearm, or in any other specific way, so long as the accused takes action beyond mere preparation. Therefore, **that the accused happens to commit the particular act with a firearm does not render the use of that firearm an essential element of the crime.**

Id. at 998. See also Ortagus v. State, 500 So.2d 1367, 1371 (Fla. 1st DCA 1987). The Lentz court obviously recognized that murder could be attempted in many ways other than with a firearm.

Likewise, in the instant case, the State asserts that the use of a firearm is clearly not an essential element of the crime of third-degree murder. Indeed, as evidenced by the statutory definition of third-degree murder[2], third-degree murder

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[2] Third-degree murder is statutorily defined in §782.04(4), Fla. Stat. (1989) as, "The unlawful killing of a human being, when perpetrated without any design to effect death, by a person

may be committed in a variety of ways which do not involve the use of a firearm, e.g., poisoning, asphyxiation, motor vehicle [Jones v. State, 502 So.2d 1375 (Fla. 4th DCA 1987)], cocaine injection [Howard v. State, 545 So.2d 352 (Fla. 1st DCA 1989)], etc. In this regard, as Justice Shaw recognized in Vause v. State, 476 So.2d 141 (Fla. 1985), there are "various potentially lethal criminal acts that can result in a homicide." Id. at 143.

Based upon the rationale of the foregoing precedents, the State maintains that for sentence enhancement purposes under §775.087(1), Fla. Stat., the essential elements of an offense are determined by statute, i.e., the legislature, and not by the charging document, proof adduced at trial, jury instructions, or a special verdict form as Petitioner suggests. For sentence enhancement purposes, there is no need to resort in each case to reviewing the charging document, proof adduced at trial, jury instructions, or a special verdict form, if any, to determine what the elements are. Contrary to Petitioner's inescapable contention and the reasoning of the Second District in Franklin v. State, 541 So.2d 1227 (Fla. 2d DCA 1989), the essential elements of an offense cannot be created or altered by the charging document, proof, jury instructions, or a special verdict form. Indeed, the purpose of inserting the word "firearm" in the information and the special verdict form in the case at bar was

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engaged in the perpetration of, or in the attempt to perpetrate, **any felony** other than any ...(certain enumerated exceptions omitted)."

merely for sentence enhancement and merely incidental to any determination of guilt or whether a firearm was an essential element of Petitioner's crime. See Ingraham v. State, 527 So.2d 222, 223 (Fla. 5th DCA 1988).

As to the jury instruction wherein the jury was instructed that an element of the lesser-included offense of third-degree murder was that the death occurred while Petitioner was engaged in the commission of the crime of unlawfully discharging a "destructive device" (R 534) rather than a "firearm," the State points out that the terms "weapon", "firearm" and "destructive device" are separately listed and defined in §790.001(4), (6) and (13) respectively. Moreover, it cannot be disputed that §775.087, Fla. Stat., does not prohibit reclassification of a felony where the use of a "destructive device" is an essential element of the crime. Certainly, if the legislature had intended to include a firearm in the definition of "destructive device" it would have done so, instead of separately defining the term "firearm." Consistent with settled principles of statutory construction, the State submits that the separate statutory definitions of "destructive device" and "firearm" obviously indicate that the legislature intended separate meanings and uses for each term. See 49 Fla. Jur.2d. Statutes §133. As a result, the reclassification of Petitioner's offense and the attendant enhancement of his sentence for use of a "firearm" was clearly proper.

Contrary to Petitioner's inevitable assertion, §775.087(1), Fla. Stat., should not be applied in such a way as to give the the trial courts the unenviable task of reviewing the charging document, proof adduced at trial, jury instructions, and any special verdict form in each individual case to determine whether the use of a firearm is an essential element of the crime charged. The State ventures to say that this is not what the legislature could have reasonably had in mind when enacting this statute. Rather, all that need be done is to look at the statute under which a defendant is charged. If the statutory offense charged is a felony in which the use of a firearm is not an essential element, then the defendant's sentence can be enhanced, as was the case here.

Lastly, the State submits that Petitioner's reliance on this Court's decision in Lareau v. State, 16 FLW S71 (Fla. January 10, 1991) is misplaced. In Lareau, this Court approved the decision of the Fourth District in Lareau v. State, 554 So.2d 638 (Fla. 4th DCA 1989). Unlike the instant case, Lareau dealt with a defendant who entered a negotiated plea to aggravated battery under subsection (a) of §784.045(1), Fla. Stat. (i.e., great bodily harm), not under subsection (b) of §784.045(1) (i.e., use of a deadly weapon). Indeed, in its holding, the Fourth District was careful to note the distinctions between these two species of aggravated battery.

CONCLUSION

WHEREFORE, based upon the foregoing argument and authorities cited herein, Respondent respectfully requests this Honorable Court to **AFFIRM** the judgment and sentence of the Fourth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief has been furnished by U.S. Mail to: ELLEN MORRIS, Counsel for Petitioner, Public Defender's Office, Fifteenth Judicial Circuit of Florida, The Governmental Center/9th Floor, 301 North Olive Avenue, West Palm Beach, Florida, this 12th day of April, 1991.

Of Counsel