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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

HOWARD ORR,)
)
 Petitioner,)
)
 versus)
)
 STATE OF FLORIDA,)
)
 Respondent.)

S.C.T. CASE NO.

79793

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON JURISDICTION

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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COUNSEL FOR PETITIONER

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STATEMENT OF THE CASE

On February 19, 1991, the State filed an Amended Information charging Petitioner, Mr. Howard Orr, with Count I, Attempted First Degree Murder, in violation of Sections 777.04(1), 777.04(4)(b), and 782.04, Florida Statutes (1989); with Count 11, Attempted First Degree Murder, in violation of Sections 777.04(4)(b), 777.04(1), and 782.04, Florida Statutes (1989); and with Count 111, Shooting Into Occupied Dwelling, in violation of Section 790.19, Florida Statutes (1989). (R540-541)

On April 8, 1991, a jury trial was held in the instant case. As to Count I, the jury reached a verdict of guilty of Attempted First Degree Murder with A Firearm; as to Count 11, the jury reached a verdict of guilty of Attempted Second Degree Murder With A Firearm; and as to Count 111, the jury reached a verdict of guilty of Shooting Into An Occupied Dwelling. (R550-552)

On Mr. Orr's Category 1 Sentencing Guidelines Scoresheet, he received a total score of 252 points, which translates into a Recommended Range of 17 to 22 years, and a Permitted Range of 12 to 27 years. (R605)

On May 16, 1991, the trial court adjudicated Mr. Orr guilty of the above three counts. As to Count I, the trial court sentenced Mr. Orr to 17 years in the Department of Corrections. (R598) In addition, the trial court imposed a firearm - three year mandatory minimum. (R598) As to Count 11, the trial court withheld the imposition of sentence and placed Mr. Orr on probation for a period of 30 years. (R599) Count II is consecutive

to Count I, but concurrent with Count 111. (R599) As to Count 111, the trial court withheld imposition of sentence and placed the defendant on probation for period of ten years, which is to run concurrent with Count 11. (R599)

Mr. Orr filed timely Notice of Appeal, and the trial court appointed the Office of the Public Defender to represent Mr. Orr on this appeal. (R610-611,614-615)

On February 25, 1992, the Fifth District Court of Appeal issued a per curiam affirmed decision.

On February 27, 1992, Mr. Orr filed a Motion for Rehearing, which Motion was granted by the Fifth District Court of Appeal on April 3, 1992. On April 3, 1992, Mr. Orr filed a Motion for Certification, which was denied on April 28, 1992.

STATEMENT OF THE FACTS

Petitioner, Mr. Orr, concedes that he shot his wife and his granddaughter. (R421) The sole issue at trial was whether Mr. Orr had premeditated intent to kill his wife and granddaughter. (R223)

SUMMARY OF THE ARGUMENT

The decision of the Fifth District Court of Appeal in the instant case, Orr v. State, DCA Case Number 91-1176 (Fla. 5th DCA April 3, 1992), expressly and directly conflicts with Tarawneh v. State, 588 So.2d 1006 (Fla. 4th DCA 1991). The first sentence of the Orr decision reads: "We grant Appellant's motion for rehearing for the purpose of noting conflict with the Fourth District Court of Appeal." Id. (Emphasis added).

ARGUMENT

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL IN ORR V. STATE, DCA CASE NUMBER 91-1176 (FLA. 5TH DCA APRIL 3, 1992), EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF TARAWNEH V. STATE, 558 SO.2D 1006 (FLA. 4TH DCA 1991).

This Honorable Court should accept jurisdiction, because the decision of the Fifth District Court of Appeal in the instant case, Orr v. State, DCA Case Number 91-1176 (Fla. 5th DCA April 3, 1992), expressly and directly conflicts with Tarawneh v. State, 588 So.2d 1006 (Fla. 4th DCA 1991). The first sentence of the Orr decision reads: "We grant Appellant's motion for rehearing for the purpose of noting conflict with the Fourth District Court of Appeal.!! Id. (Emphasis added).

The Fifth District in the instant case, Orr and the First District in Hayles v. State, 17 F.L.W. 422 (Fla. 1st DCA February 5, 1992), rehearing granted, 17 F.L.W. D960 (Fla. 1st DCA April 13, 1992), hold that Attempted First Degree Murder should be scored under a Category 1, Sentencing Guidelines Scoresheet; whereas, the Fourth District in Tarawneh holds that Attempted First Degree Murder should be scored under a Category 9 Sentencing Guidelines Scoresheet.¹ In the instant case, Petitioner, Mr. Orr, was sentenced pursuant to a Category 1 Scoresheet; if the trial court had sentenced Mr. Orr pursuant to a Category 9 Scoresheet, it would have reduced his sentence by one cell, i.e.,

¹ In Hayles, the First District expressly certified conflict with Tarawneh. —, footnote 1.

from a Recommended Range of 17 to 22 years, and a Permitted Range of 12 to 27 years to a Recommended Range of 12 to 17 years and a Permitted Range of 9 to 22 years.²

This appeal raises the issue on how to score an inchoate offense when the substantive offense (i.e. Capital murder) is excluded from the Sentencing Guidelines. The general rule is that an inchoate offense is scored under the same scoresheet as the substantive offense. See, Committee Note (c) to Rule 3.701, Florida Rules of Criminal Procedure. In the instant case, the substantive offense, Capital Murder, is excluded from the Guidelines. Therefore, under what scoresheet should an inchoate offense be scored in this circumstance? The First and the Fifth District conflict with the Fourth District on how to resolve this issue.

In conclusion, this Honorable Court should accept jurisdiction, because the Fifth District directly and expressly conflicts with the Fourth District on how to resolve this issue and because the resolution of this apparent byzantine issue directly determines Petitioner's Guideline cell.

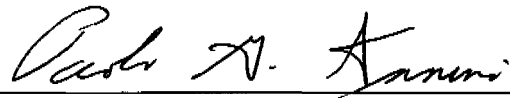
² Pursuant to a Category 9 Scoresheet, Mr. Orr's total score would have been 338 points.

CONCLUSION

BASED UPON the reasons expressed herein, Petitioner respectfully requests that this Honorable Court exercise its discretionary jurisdiction and review the decision of the Fifth District Court of Appeal herein.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

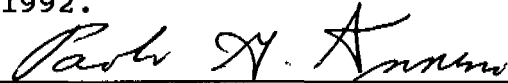


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert E. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, in his basket at the Fifth District Court of Appeal; and mailed to Howard Orr, Inmate No. 139666, #G-97, Walton Corr. Inst., P.O. Box 1386, DeFuniak Springs, Florida 32433-1386, on this 8th day of May, 1992.



PAOLO G. ANNINO
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF FLORIDA

HOWARD ORR,)	
)	
Petitioner,)	
)	
vs .)	SUPREME COURT CASE NO.
)	
STATE OF FLORIDA,)	
)	
Respondent.)	

A P P E N D I X

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JANUARY TERM 1992

✓ 91-575
PA

HOWARD ORR,

Appellant,

v.

CASE NO. 91-1176 ✓

STATE OF FLORIDA,

Appellee.

Opinion filed April 3, 1992 ✓

Appeal from the Circuit Court
for Brevard County,
Martin Budnick, Judge.

James B. Gibson, Public Defender,
and Paolo G. Annino,
Assistant Public Defender,
Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and Myra J. Fried,
Assistant Attorney General,
Daytona Beach, for Appellee.

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PUBLIC DEFENDER'S OFFICE
7th CIR. APP. DIV.

ON MOTION FOR REHEARING

SHARP, W., J.

We grant appellant's motion for rehearing for the purpose of noting conflict with the Fourth District Court of Appeal. Appellant was convicted of attempted first degree murder with a firearm and two other offenses. The attempted first degree murder was the primary offense on the sentencing guideline scoresheet. A category one scoresheet was prepared, which reflected

a recommended range of 17-22 years. Appellant was sentenced to 17 years incarceration for the attempted first degree murder, with a three year mandatory minimum term.

Florida Rule of Criminal Procedure 3.988(a) states that homicide offenses under Chapter 782 should be scored as primary offenses under category one "except subsection 782.04(1)(a) - capital murder." Appellant argues that attempted first degree murder is a crime under section 782.04(1)(a) and section 777.04, Florida Statutes (1991), and should likewise be excluded from category one.

In *Turawneh v. State*, 588 So.2d 1006 (Fla. 4th DCA 1991), Tarawneh was convicted of four inchoate offenses, solicitation to commit first degree murder and three counts of conspiracy to commit first degree murder. The fourth district noted that Florida Rule of Criminal Procedure 3.701(c) (Committee Note) states that inchoate offenses are included within the category of the "offense attempted, solicited, or conspired to, as modified by Chapter 777..." The fourth district held that since category one expressly excludes capital murder, the only remaining category that could be applicable for the related inchoate offenses is category nine, which is designated for "all other felony offenses."

We agree with the opinion in *Hayles v. State*, 17 F.L.W. 422 (Fla. 1st DCA February 5, 1992), which rejects the analysis in *Tarawneh*. First degree murder is excluded from category one because the guidelines do not apply to capital felonies. See Fla.R.Crim.P. 3.701(c) (Committee Note). Since first degree murder cannot be scored as a primary offense under the guidelines, does that exclude the related inchoate offenses from the guidelines as well? We think not, since the inchoate offenses are not capital felonies. Attempted

first degree murder is a felony of the first degree, and in this case was enhanced to a life felony since appellant made the attempt with a firearm. See §§ 775.087(1)(a) and 777.04(4)(a), Fla. Stat. (1991). The category one scoresheet applicable to non-capital murders and attempted murders should be used when attempted first degree murder is scored as the primary offense. The trial court correctly used the category one scoresheet in determining appellant's presumptive sentencing range.

AFFIRMED.

GOSHORN, C.J. and GRIFFIN, J., concur.