IN THE SUPREME COURT OF FLORIDA

HOWARD ORR,

Petitioner,

v. **CASE NO. 79,793**

STATE OF **FLORIDA,**

Respondent.

ON DISCRETIONARY REVIEW OF **A DECISION**
OF **THE FIFTH DISTRICT COURT** OF **APPEAL**

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Respondent accepts the Petitioner's Statement of the Case and Facts..

SUMMARY OF ARGUMENT

The trial court properly employed a Category 1 Sentencing Guidelines Scoresheet where the primary offense at sentencing was Attempted First Degree Murder. Florida Rule of Criminal Procedure 3.988(a) excludes capital murder from Category 1 because the guidelines do not apply to capital felonies. However, Attempted First Degree Murder is not a capital felony. The Committee Notes to Florida Rule of Criminal Procedure 3.701(c) specify that such inchoate offenses are included within the category of the offense attempted and that Category 9 should be employed only when the primary offense is not included in another, more specific category. Because First Degree Murder is excluded from the guidelines does not mean that attempts to commit First Degree Murder should also be excluded. Category 1, "Murder, manslaughter" was the appropriate, more specific category to be employed in sentencing for attempting to commit First Degree Murder.

Since Petitioner was sentenced within the recommended range under either scoresheet, this issue is not appealable by a defendant under Section 924.06 (1)(e), Florida Statutes (1990).

ARGUMENT

THE TRIAL COURT PROPERLY EMPLOYED A CATEGORY 1 SENTENCING GUIDELINES SCORESHEET IN DETERMINING THE PRESUMPTIVE SENTENCING RANGE FOR THE PRIMARY OFFENSE OF ATTEMPTED FIRST DEGREE MURDER.

In Tarawneh v. State, 588 So.2d 1006 (Fla. 4th DCA 1991), the Fourth District Court of Appeal found that, since capital murder was excluded from Category 1 of the Sentencing Guidelines, an attempt to commit capital murder must fall under Category 9, "All Other Felony Offenses", rather than Category 1, "Murder, Manslaughter". In Hayles v. State, 596 So.2d 1236 (Fla. 1st DCA 1992), the First District used a common sense approach in concluding that the reason for excluding capital felonies from the guidelines was because there were only two sentencing alternatives in those cases, death or life imprisonment. An attempt to commit capital murder, however, would still fall under Category 1. The Court referred to Committee Note (c) to Florida Rule of Criminal Procedure 3.701. That note explains that the guidelines are inapplicable to capital felonies. It further specifies that Category 9 should be used only where the primary offense at conviction is not included in another, more specific category. An attempt to commit first degree murder is not a capital felony and is, therefore, not excluded from the sentencing guidelines. The most specific category for such an offense would be Category 1, "Murder, Manslaughter" rather than Category 9, "All Other Felony Offenses". In reaching this conclusion, the Fist District certified conflict with Tarawneh

and that case, Hayles v. State, is presently pending before this Court, Florida Supreme Court Case No. 79,743.

The Fifth District Court of Appeal in the case sub judice, noting conflict with Tarawneh, agreed with the reasoning of the First District in Hayles and reached the same conclusion, that a Category 1 scoresheet was appropriately employed where the primary offense at sentencing is an attempt to commit first degree murder. Orr v. State, 597 So.2d 833 (Fla. 5th DCA 1992). A common sense analysis of the Committee Note (c) to Rule 3.701 requires such a conclusion. Only capital felonies **are** excluded from the guidelines. Attempted murder is not a capital offense. Category 9 should be used only where there is no more specific category applicable to the primary offense at conviction. Attempts are included under the category of the offense attempted. Category 1, "Murder, manslaughter" is the appropriate, specific category under which attempted first degree murder would be included.

It should be noted that, in the instant case, Petitioner was sentenced to seventeen years imprisonment to be followed by a period of probation using a Category 1 scoresheet. Had the trial court employed a Category 9 scoresheet, it could have imposed the same sentence. Under Category 1, the recommended sentencing range was seventeen to twenty two years imprisonment with a permitted range of twelve to twenty seven years imprisonment. Using of a Category 9 scoresheet, the recommended range would be twelve to seventeen years imprisonment with a permitted range of nine to twenty two years imprisonment. Although Petitioner would

apparently prefer that a Category 9 scoresheet be employed, a seventeen year sentence of imprisonment would be within the recommended range under either scoresheet. See Section 924.06(1)(e), Florida Statutes (1990).

CONCLUSION

Based on the arguments and authorities presented herein, Respondent would assert that the decision of the Fifth District Court of Appeal in the case sub judice that a Category **1** Sentencing Guideline Scoresheet was properly employed in calculating the recommended and permitted ranges for Petitioner's sentencing for Attempted First Degree Murder was correct and should be adopted by this Court and the decision of the Fourth District Court of Appeal in Tarawneh, Supra, should be **disapproved.**

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Brief on the Merits has been furnished to Anne Moorman Reeves, Esquire, Office of the public Defender, Counsel for Petitioner, at 112-A Orange Avenue, Daytona Beach, Florida 32114, this 15th day of September, 1992.

Anthony J. Golden
Assistant Attorney General

IN THE SUPPREME COURT OF FLORIDA

HOWARD ORR,

Petitioner,

v. CASE NO. 79,793

STATE OF FLORIDA,

Respondent.

APPENDIX TO RESPONDENT'S BRIEF ON THE MERITS

Respectfully submitted,

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Bennett H. Brummer, Public Defender and Lydia A. Fernandez, Sp. Asst. Public Defender, for appellant.

Robert A. Butterworth, Atty. Gen. and Jorge Espinosa, Asst. Atty. Gen., for appellee.

Before SCHWARTZ, C.J., and HUBBART and GERSTEN, JJ.

SCHWARTZ, Chief Judge.

After a jury trial, the appellant was convicted of second degree murder with a firearm and possession of a firearm in the commission of the second degree murder. While the only substantive point is frivolous, two other issues require further treatment.

1. On the authority of *Lamont v. State*, 597 So.2d 823 (Fla. 3d DCA 1992), the life sentence without parole imposed upon Sessions for the life felony of second degree murder with a firearm is affirmed under section 775.084(4)(e), Florida Statutes (1989) of the habitual offender act. The fifteen year minimum mandatory provision is, however, vacated. See *Lamont*, 597 So.2d at 829. We make the same certifications of conflict as those contained in the *Lamont* opinion.

2. The separate judgment and sentence for possession of the firearm are also set aside an the authority of *Cleveland v. Stale*, 587 So.2d *1145* (Fla.1991). Accord *Davis v. State*, 590 So.2d 496 (Fla. 3d DCA 1991).

Affirmed in part; reversed in part.

GERSTEN, J., concurs.

HUBBART, Judge (concurring).

I think the trial court erred in sentencing the defendant to life imprisonment without parole [with a fifteen-year mandatory minimum term] as a habitual violent felony offender under Section 775.084, Florida Statutes (1989), for the life felony of second-degree murder with a firearm; this is so because the Habitual Offender Act contains no extended terms of imprisonment for a life felony conviction as here. Accordingly, the sentence under review should be reversed and the cause remanded to the trial court with directions to resentence the defendant under the sentencing guidelines, rather than the Habitual Offender Act. This result reflects the views which I expressed in my dissenting opinion in *Lamont v. State*, 597 So.2d 823 (Fla. 3d DCA 1992) (case nos. 89–2917 and 90–1419, opinion filed this date) (en banc) (Hubbart, J., dissenting) and is in accord with decisions of the First, Second, Fourth and Fifth District Courts of Appeal.[1]

Nonetheless, I am obviously bound by the contrary decision of the en hanc majority in *Lamont*, and, therefore, reluctantly concur with the court's decision to affirm the sentence under review, although striking the fifteen-year mandatory minimum provision. I concur with no reservations, however, in the court's decision on the remaining points on appeal as discussed and disposed of in the court's opinion.

KEY NUMBER SYSTEM

Howard ORR, Appellant,

v.

STATE of Florida, Appellee.

No. 91–1176.

District Court of Appeal of Florida, Fifth District.

Feb. 25, 1992.

On Motion for Rehearing April 3, 1992.

Defendant was convicted in the Circuit Court, Brevard County, Martin Budnick, J.,

1. *First District: Gholston v. State*, 589 So.2d 307 (Fla. 1st DCA 1990); *Johnson v. State*, 568 So.2d 519 (Fla. 1st DCA 1990); *Barber v. Stare*, 564 So.2d 1169 (Fla. 1st DCA), *rev. denied*, 576 So.2d 284 (Fla.1990); *Second District: Ledesma v. State*, 528 So.2d 470 (Fla. 2d DCA 1988); *Fourth District: Walker v. State*, 580 So.2d 281 (Fla. 4th DCA), *juris. accepted*, 589 So.2d 292 (Fla.1991); *Newton v. State*, 581 So.2d 212 (Fla. 4th DCA), *juris. accepted*, 589 So.2d 291, 292 (Fla.1991); *Fifth District: Power v. State*, 568 So.2d 511 (Fla. 5th DCA 1990).

of attempted first-degree murder with a firearm, and he appealed. On rehearing, the District Court nf Appeal, W. Sharp, J., held that rule excluding. **capital** murder from category one guideline scoresheet did not also exclude offense of attempted first-degree murder.

Affirmed.

1. Criminal Law ⇐1243

Rule excluding capital murder from category one guideline scoresheet did not also exclude offense of attempted first-degree murder. West's **F.S.A.** §§ 777.04, 782.02 et seq., 782.04(1)(a); West's F.S.A. RCrP Rules 3.701 note, 3.988(a).

2. Criminal Law ⇐1243

Rule prohibiting first-degree murder from being scored as primary offense under Sentencing Guidelines does not also exclude related inchoate offenses; the inchoate offenses are not capital felonies. West's **F.S.A.** §§ 777.04, 782.02 et seq., 782.04(1)(a); West's F.S.A. RCrP Rules 3.701 note, 3.988(a).

3. Criminal Law ⇐1243

Category one scoresheet **applicable** to noncapital murders and attempted murders should **be** used when attempted first-degree murder is scored as primary offense. West's **F.S.A.** §§ 775.087(1)(a), 777.04(4)(a).

James B. Gibson, Public Defender, and Paolo G. Annino, Asst. Public Defender, Daytona Beach, **for** appellant.

Robert **A.** Butterworth, Atty. Gen., Tallahassee, and Myra J. **Fried,** Asst. Atty. Gen., Daytona Beach, for appellee.

PER CURIUM.

AFFIRMED.

GOSHORN, C.J., **and W. SHARP and GRIFFIN, JJ.,** concur.

ON MOTION FOR REHEARING

W. **SHARP,** Judge.

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 arid 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.

[1] 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 (19911, and should likewise be excluded from category one.

In *Tarawneh 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,"

[2, 3] We agree **with the** opinion in ***Hayles v. State,*** 596 So.2d **1236 (Fla.** 1st **DCA** 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.

William ROSENFELD, Appellant,

v.

Maria Elena P. ROSENFELD, Appellee.

No. 90–716.

District Court of Appeal of Florida, Third District.

March 17, 1992.

On Motion for Rehearing May 12, 1992.

Husband appealed from order of the Circuit Court, Dade County, Frederick N. Barad, J., which dissolved marriage and divided property. The District Court of Appeal held that: (1) payments made by husband to former wife and children of that marriage, loans to relatives, and amounts spent on support of his parents were not waste or misuse of marital assets, and (2) enhancement of value of nonmarital property during the marriage was marital asset.

Affirmed in part and reversed and remanded in part.

1. Divorce ⇐252.3(1)

In making equitable distribution, it was improper for court to revisit the parties' expenditures throughout the marriage and retroactively decide which of those expenditures should not have been made.

2. Divorce ⇐252.3(1)

Once husband and wife marry, each spouse's income during the marriage was marital income.

3. Divorce ⇐252.3(1)

Payments made by husband to his first wife and children from that marriage pursuant to court order could not be considered as waste or misuse of marital assets of successor marriage, nor could payment of expenses incident to the prior dissolution be considered waste or misuse.

4. Divorce ⇐258, 308

Party cannot refuse to make court-ordered payments on grounds that he or she is now remarried.

5. Divorce ⇐252.3(1)

Wife who had accompanied husband on certain gambling trips made during the marriage could not complain at time of divorce that the trips should not have been made and constituted waste of marital assets by the husband.

6. Divorce ⇐252.3(1)

Loans made to husband's sister and husband's adult son from prior marriage were not waste or misuse of marital assets, although court could assign the amounts receivable from the sister and son to the husband as a portion of his equitable distribution.

7. Divorce ⇐252.3(1)

Support assistance given by husband to his parents was not waste or misuse of assets to be charged against We husband upon equitable distribution.

8. Divorce ⇐252.2, 253(2)

Equitable distribution of marital assets is presumptively equal, but may be varied if there is good reason to do so. West's F.S.A. 5 61.076.