IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,244

HERMAN ROTH,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

****

ON APPLICATION FOR DISCRETIONARY REVIEW

****

RESPONDENT'S BRIEF ON THE MERITS

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INTRODUCTION

This is Respondent's response on the merits to this Court's order dated August 4, 1992.

The Petitioner, Herman Roth, was the Defendant in the trial court. The Respondent, the State of Florida, was the prosecution. All parties will be referred to as they stood below.

The symbol "T" will be used to designate the transcript, the symbol "R" will be used to designate the record on appeal and "App." will be used to designate the appendix.

STATEMENT OF THE CASE AND FACTS

The Appellant, Herman Roth (hereinafter "Defendant"), pled guilty on September 8, 1989 to a charge of attempted first degree murder with a firearm, contrary to sections 782.04(1), 777.04, and 775.087 Florida Statutes, Case No. 8830600 (R. 2). On September 21, 1989, an additional information was filed against the Defendant for tampering with a witness, Case No. 89-35068, in violation of Sec. 914.22(1), Fla. Stat. (R. 54).

Pursuant to a negotiated plea agreement, the Defendant was sentenced to a term of twelve (12) years in Case No. 88-301500 and to a term of five (5) years in Case No. 89-35068 to run concurrently. (R. 5-8, 59; App. A) A Fla.R.Crim.P. 3.988(a) Category 1 guideline scoresheet was employed and reflected 150 points for the primary offense at conviction, 10 points for witness tampering, and 14 points for moderate victim injury. (R. 9).

On October 24, 1989, the Defendant filed a pro se Motion for Reduction or Modification of Sentence under Fla.R.Crim.P. 3.800 in Case No. 88-30600. (R. 11-13) The Defendant also filed a Motion for Post-Conviction Relief to Vacate and Correct Illegal Sentence and a supporting memorandum of law, pursuant to Fla.R.Crim.P. 3.850. (R. 15; 22-27) The latter Motion raised as grounds, in pertinent part, that:

I.

Defendant was denied effective assistance of counsel in the plea and sentencing phase of the proceedings;

II.

The trial court committed fundamental error in sentencing the defendant for an offense he was never charged with;

III.

It was error for the court to impose fines and costs without giving proper notice to the defendant nor holding a hearing;

IV.

The trial court committed fundamental error in reclassifying the felony offense from a first degree felony to a punishable by life;

V.

The State filed an amended information without leave of court and without informing the defendant;

VI.

The plea agreement was violated by the State's failure to nol prosse the charge of tampering with a witness and by filing the amended information.

(R. 15-20).

A hearing was held June 12, 1990 before Judge Margolius and said motion was denied. (R. 28).

Subsequently, the Defendant appealed the final order denying the Motion for Post-Conviction Relief. (R. 31).

In January, 1991, the Defendant pro se filed an additional Motion for Correction of Illegal Sentence pursuant to Fla.R.Crim.P. 3.800(a). (R. 33). The defendant alleged, in pertinent part, that:

> The scoresheet used was incorrect since the Category 1 scoresheet applies only to those cases involving death and only when an attempt is affected then Category 9 is appropriate.

(R. 33-37).

Said motion was denied. (R. 33). In addition, the Defendant filed an amendment to his Motion and raised, as grounds, that:

> The use of 14 points for victim injury was incarrect.

(R. 40).

On May 15, 1991, the Defendant filed a Motion to Correct Illegal Sentence through counsel pursuant to Fla.R.Crim.P. 3.800. (R. 41-46). Defense counsel essentially reiterated the grounds raised in the January, 1991 Motion. Counsel "requested

that to the extent that the issues raised are similar, the court treat this motion as one for reconsideration." (R. 42). The Defendant claimed, in part, that:

> Use of the Category 1 scoresheet was incorrect and that the court should recalculate the Defendant's guidelines using Category 4 or Category 9.

(R. 45).

Defense counsel filed an additional Motion to Vacate Illegal Plea and Sentence pursuant to Rule 3.850 in June, 1991. (R. 47) The lower court denied the Motion to Correct Illegal Sentence and Motion to Vacate the Illegal Plea and Sentence. (R. 47: 63)

In July, 1991, the Defendant appealed this Order to the Third District, Case No. 91-1793. (App. B) In August, the Defendant filed a Motion for Clarification. (App. C) The court responded. (App. D) On September 3, 1991, this court per curiam affirmed the appeal. (App. E) The affirmance applied solely to the Order denying the Motion to Vacate Illegal Plea and Sentence pursuant to Fla.R.Crim.P. 3.850 (Filed June 17, 1991).

Subsequently, this court ordered the State to respond to the Defendant's Motion to Vacate Illegal Plea and Sentence and to include a plea colloquy. The State so responded. (App. F).

The State subsequently filed an answer brief February 14, 1992 applying to the order denying the motion to correct illegal sentence pursuant to the Fla. R. Crim. P. 3.800. (Rpp. G).

The Third District Court of Appeal filed an affirmance on June 23, 1992 and a mandate was issued July 9, 1992. (App. H)

At bar, the Defendant has sought discretionary jurisdiction based on the Third District's order dated June 23, 1992, Case No. 80,244. The State *of* Florida herein responds on the merits.

POINT ON APPEAL

WHETHER THE DEFENDANT'S SENTENCE WAS PROPER WHERE HE ENTERED INTO A NEGOTIATED PLEA AGREEMENT WITH THE COURT AND, IN ADDITION, WHERE THE TRIAL COURT PROPERLY UTILIZED FLA.R.CRIM.P. 3.988(A) CATEGORY 1 SCORESHEET VERSUS A CATEGORY 9 SCORESHEET FOR THE INCHOATE OFFENSE OF FIRST DEGREE MURDER?

SUMMARY OF THE ARGUMENT

The Defendant entered into a negotiated plea of guilty to the attempted first degree murder charge in exchange for the State's agreement to file only one count for witness tampering. The Defendant received the benefit of his bargain.

The exception stated on the face of Fla.R.Crim.P. 3.988(a) Category 1 scoresheet for Sec. 782.04(1)(a), capital murder, neither includes nor applies to attempted first degree murder. In support of its position, the State initially reviews legislative intent applicable to this issue. Next, the State analyzes applicable Florida Statutes and pertinent case law.

ARGUMENT

THE TRIAL COURT PROPERLY SENTENCED THE DEFENDANT.

The Defendant contends that the trial court erred in using a Category 1 scoresheet for the inchoate offense of Attempted First Degree Murder and that Category 3 was appropriate. The Defendant relies on Tarawneh v. State, 16 FLW D2510 (Fla. 4th DCA, Oct. 4, **1991)** for support and basss its request for jurisdiction in this Court on the conflict.[1] It is the State of Florida's position that, indeed, the Category 1 is the correct scoresheet for the offense of Attempted First Degree Murder, not Category 9.

The transcript of the **plea** colloquy conclusively establishes that the Defendant entered into a negotiated plea of guilty to the attempted first degree murder charge in exchange for the State's agreement to file only one count for aitness tampering. **(App.** A, 4-9) The agreed upon sentence was twelve years for Attempted Murder, and a five year concurrent sentence for witness tampering. At the plea hearing, the court Ensured the Defendant entered the pleas knowingly and intelligently and understood the nature of the agreement. He was sentenced in

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[1] This court is considering both Hayles v. State, **596** So.2d 1236 **(Fla.** 1st **DCA** 1992), Case #79-743 and Orr v. State, 397 So.2d **833 (Fla.** 5th **DCA 1992), Case No. 79-793.**

accordance with the agreement and received the benefit of his bargain with the court. Brown v. State, 367 So.2d 616, 622 (Fla. 1979) (Bargained guilty pleas...are in a large part similar to a contract between society and an accused, Entered into on the basis of a perceived mutuality of advantage.)

The State will first provide an overview of legislative history to facilitate its position. In Chapter 82-145, Laws of Florida, the Florida Legislature, with the expressed purpose of eliminating "disparity in sentencing practices" and prcmoting "certainty and fairness in the sentencing process," enacted section 921.001, Fla. Stat. to create a sentencing commission to make recommendations for the implementation of sentencing guidelines in this state. In Chapter 83-87, Laws of Florida, sections 2 and 5, following its receipt of these recommendations, the Legislature amended section 921.001(4), Fla. Stat. to authorize the Florida Supreme Court to promulgate rules of criminal procedure governing presumptive sentencing ranges for all non-capital felonies under Florida's new guidelines effective October 1, 1983. On September 8, 1983, our Supreme Court followed this directive, In Re Rules of Criminal Procedure (Sentencing Guidelines), 439 So.2d 848, 849 (Fla. 1983). The Court announced in Fla.R.Crim.P. 3.701(b)(3) that under the guidelines, "the penalty imposed should be commensurate with the severity of the convicted offense." Neither the judiciary nor the Legislature has ever deviated from

the principle that the guidelines should be fairly applied to sentence criminal defendants according to the severity of their offense. See, e.g. The Florida Bar: Amendment to Rules of Criminal Procedure 3.701, 3.988 (Sentencing Guidelines;, 451 So.2d 824, 825 (Fla. 1984).

Generally speaking, judicial constructions of provisions which lead to absurd results must be avoided. McKibben v. Mallory, 293 So.2d 48, 51 (Fla. 1974). And in terms of criminal provisos, the intent of the enactors of a provision must prevail over a mechanistic interpretation of its literal larguage. State v. Ramsey, 475 So.2d 671, 673 (Fla. 1985). If the letter of the law conflicts with its obvious spirit, the spirit is always paramount. Church of the Holy Trinity v. United States, 143 U.S. 457, 459-60 (1982).

In regard to attempts generally, "[i]t is importsnt to bear in mind the nature and ingredients of the alleged crime for the defendant is charged not for what he has affected, but for what he intended to affect; not only for his act, but for the intent with which he did that act.'' Groneau v. State, 201 So.2d 599, 602 (Fla. 4th DCA 1967). With this in mind, the framers of the sentencing guidelines have "always intended for crimes resulting in the death of a person to be scored on a Category 1 scoresheet." State v. Bohannon, 538 So.2d 1384, 1385 (Fla. 5th DCA 1989).

The Defendant argues that the Category 1 scoresheet is inapplicable because it makes an exception for capital murder, Sec. 782.04(1)(a). Fla.R.Crim.P. 3.988(a). He argues, like Tarawneh, that by excluding capital murder from Category 1, it follows that attempted capital murder cannot be scored on Category 1 but should be scored on a Category 9 scoresheet governing "All Other Felony Offenses." Fla.R.Crim.P. 3.988(i).

The exception made for capital murder noted on the Category 1 scoresheet exists because "[t]he guidelines do not apply to capital felonies." Fla.R.Crim.P. 3.701 Committee Note (c). As the Third District so cogently explained:

> The capital felony exclusion signifies only that no scoresheet should be prepared for such an offense, because the offense cannot be scored. By contrast, inchoate offenses--including attempted first degree murder-are covered by the guidelines **and** a guidelines scoresheet is to be prepared for sentencing purposes.

Roth v. State, 601 So.2d 613 (Fla. 3d DCA 1992).

A person who is convicted of a capital felcny is punishable by either execution or life imprisonment with a twenty-five years minimum mandatory sentence. Sections 775.082(1), Fla. Stat. (1989) and 775.04(1)(a), Fla. Stat. (1989). In contrast, a person convicted of a non-capital felony

is punishable under Sec. 775.082(3). Attempted first degree murder falls within this category and does not fall within the ambit of Sec. 782.04(1)(a) governing capital murder. Sec. 777.04(4)(a), Fla. Stat. governing attempts dictates that:

> If the offense attempted, solicited or conspired to is a capital felony, the person convicted is guilty of a felony of the first degree, punishable as provided in Sec. 775.082, 775.083, or 775.084.

Under Sec. 775.082(3)(b), a person found guilty of a first degree felony is subject to a term of imprisonment not to exceed thirty (30) years or, when specifically provided by statute, by imprisonment far a term of years not exceeding life imprisonment. In the case sub judice, the Defendant's sentence is subject to enhancement to a life felony because he used a firearm. See Sec. 775.087, Fla. Stat. (1989). Thus, because the crime under which the Defendant is charged is not a capital felony, clearly Category 9 does not apply.

The State of Florida adopts the reasoning of Hayles and Orr. Inchoate offenses are not capital felonies and should not be categorically excluded from Category 1 scoresheets. Therefore, the primary offense at bar was properly scored on the Category 1 scoresheet, so reversal is not appropriate.

CONCLUSION

Based on the foregoing points and authority, the State of Florida respectfully suggests this Court uphold the decision of the Third District Court of Appeal in Roth v. State, 601 So.2d 613 (Fla. 3d DCA 1992).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that **a true** and correct copy of the **foregoing APPELLEE'S BRIEF ON THE MERITS** was furnished by mail to **HERMAN ROTH, DC #186882-F-26,** Glades Correctional Institute, 500 Orange Avenue Circle, Belle Glades, Florida **33430** on this 25 day of September, 1992.

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