OA 3-8-95 047

IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,766

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THE STATE OF FLORIDA,

Petitioner,

-vs-

COLLIN GRAY,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

SUPPLEMENTAL REPLY BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

The Petitioner relies on the Statement of the Case and Facts contained in its Initial Brief of Petitioner on the Merits.

SUMMARY OF ARGUMENT

The Respondent, through a Supplemental Brief, has asked this Court to revisit its decision in Amlotte v. State, 456 So. 2d 448 (Fla. 1984), regarding the existence of the offense of attempted felony murder. Such reconsideration is unwarranted in view of the general principles of stare decisis, as well as the legislative acceptance of the Amlotte decision. The Florida legislature, in the 10 years since Amlotte, has amended and reenacted both the attempt and murder statutes, but has not sought to negate this Court's construction of those statutes in Amlotte.

ARGUMENT

THIS COURT SHOULD NOT OVERTURN ITS DECISION IN AMLOTTE V. STATE, 456 So. 2d 448 (Fla. 1984).

Contrary to the argument presented by the Respondent in the Respondent's Supplemental Answer Brief, compelling reasons exist to deter this Court from either reconsidering its decision in Amlotte v. State, 456 So. 2d 448 (Fla. 1984), or eliminating the offense of attempted felony murder.

The decision in Amlotte, through its construction of section 777.04(1), Florida Statutes, defining criminal attempts, and section 782.04(1)(a), Florida Statutes, creating the offense of felony murder, is a decision which determines whether the Florida legislature, through its legislative pronouncements, created an offense such as attempted felony murder. As Amlotte is a decision construing legislative intent, the fact that the Florida legislature, in more than 10 years since the Amlotte decision, has not effectuated any statutory amendments to undo Amlotte, is a form of legislative approval of this Court's decision in Amlotte, thus corroborating the view that the legislature concurs that its statutory pronouncements did create the offense of attempted felony murder.

In Johnson v. State, 91 So. 2d 185, 187 (Fla. 1957), this Court discussed the significance of legislative inaction subsequent to a significant judicial decision interpreting a statute in a particular manner:

> . . . In the civil case of White v. Johnson, Fla., 59 So. 2d 532, we said, in accord with a fundamental principle of statutory construction, that failure by the legislature to amend a statute which had been construed in 1939 in the case of Wolf v. Commander, . . . amounted to legislative acceptance or approval of the construction rendered in the earlier case. . . . Moreover, contemporaneous construction and long acquiescence in a particular construction are entitled to great weight.

In White v. Johnson, 59 So. 2d 532, 533 (Fla. 1952), similarly discussing the significance of legislative inaction in the aftermath of judicial statutory interpretation, this Court stated:

> . . . Since that date [of prior Supreme Court decision] there have been numerous sessions of the legislature, including the one existing on that date, and at no one of such sessions has the legislature seen fit to change in any material manner the language in the body of the statute. This fact may be taken as an indication that the legislature approved or accepted the construction placed upon Section 222.11, supra, by the effect of the three to three decision of this Court in the case of Wolf v. Commander, supra.

This Court, in Garner v. Ward, 251 So. 2d 252, 256 (Fla. 1971), acknowledged "the doctrine that when a statute has been construed by the courts, and subsequently re-enacted,the legislature is presumed to be familiar with the judicial construction and to adopt it as part of the law." Garner limited that application of the doctrine to situations in which the legislature has specifically reenacted the statute subsequent to the appellate decisions in question. In the instant case, both the attempt statute, section 777.04, Florida Statutes, and the homicide statute, section 782.04, Florida Statutes, have been amended on several occasions subsequent to Amlotte, and those statutes have been reenacted, in their amended forms, without any amendments negating Amlotte. See, Laws of Florida, ch. 86-50, s. 2 (amending s. 777.04); Laws of Florida, ch. 91-224, s. 170 (amending s. 777.04); Laws of Florida, ch. 93-406, s. 4 (amending s. 777.04); Laws of Florida, ch. 87-243, s. 6 (amending s. 782.04); Laws of Florida, ch. 89-281, ss. 2, 4 (amending s. 782.04); Laws of Florida, ch. 90-112, s. 4 (amending s. 782.04); Laws of Florida, ch. 93-212, s. 3 (amending s. 782.04).

The foregoing principles regarding legislative intent are especially appropriate in the historical context of the relationship between the legislature and this Court, over the past decade, in the context of decisions construing criminal

statutes. In the aftermath of significant decisions construing penal statutes, when the legislature has disagreed with either the interpretation of this Court, or the result of this Court's decisions, the legislature has routinely and promptly acted to effect a different result. Thus, after this Court, in Carawan v. State, 515 So. 2d 161 (Fla. 1987), broadened the concept of double jeopardy to utilize the rule of lenity to prohibit multiple convictions for statutes dealing with the "same evil," the legislature enacted section 775.021(4)(b), Florida Statutes (1988), effectively abolishing the rule of lenity. Laws of Florida, ch. 88-131 (effective July 1, 1988). Similarly, after this Court acknowledged the existence of the defense of objective entrapment, in Cruz v. State, 465 So. 2d 516 (Fla. 1985), the legislature promptly proceeded to abrogate that defense. See, section 777.201, Florida Statutes (1987); Laws of Florida, ch. 87-243, s. 42. Comparable legislative action occurred subsequent to decisions from this Court, which construed the sentencing guidelines statutes to require proof beyond a reasonable doubt for clear and convincing reasons for departure, State v. Mischler, 488 So. 2d 523 (Fla. 1986), and which deemed departure improper if a single reason for departure was improper. Id. See, Laws of Florida, ch. 87-110, s. 2; section 921.001, Florida Statutes (1987) (requiring affirmance of sentence if any departure reason is valid, and amending burden of proof for departure reason to proof by a preponderance of the evidence).

Given such a relationship between the Court and the legislature on matters dealing with interpretations of penal statutes, the legislative acceptance, over the past decade, should be deemed to connote legislative concurrence in this Court's Amlotte decision. This is especially true insofar as numerous appellate court decisions have either construed the doctrine of attempted felony murder, or have referred to charges or convictions based on attempted felony murder.[1] Similarly,

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[1] See, e.g., Pentz v. State, 642 So. 2d 836 (Fla. 5th DCA 1994) (affirming reclassification of attempted first-degree felony murder to life felony); Wright v. State, 642 So. 2d 1210 (Fla. 5th DCA 1994) (affirming denial of sworn motion to dismiss as to attempted felony murder); Smith v. State, 640 So. 2d 1257 (Fla. 3d DCA 1994) (certifying same question as certified herein); Isaac v. State, 626 So. 2d 1082 (Fla. 1st DCA 1993) (rejecting argument that crime of attempted felony murder is unconstitutional; rejecting concept of different degrees of attempted murder of law enforcement officer); Salgat v. State, 630 So. 2d 1143 (Fla. 1st DCA 1994) (offenses of felony murder and attempted felony murder of same victim merged into single offense); Wright v. State, 596 So. 2d 471 (Fla. 4th DCA 1992) (noting conviction for attempted felony murder); Wike v. State, 596 So. 2d 1020 (Fla. 1992) (same); Hayes v. State, 564 So. 2d 161 (Fla. 2d DCA 1990) (reversing conviction for attempted felony murder due to error in jury instructions); McDonald v. State, 564 So. 2d 523 (Fla. 1st DCA 1990) (noting dismissal of attempted felony murder charge pursuant to plea agreement); Oropesa v. State, 555 So. 2d 389 (Fla. 3d DCA 1990) (finding evidence of attempted felony murder sufficient under Amlotte); Johnson v. State, 486 So. 2d 657 (Fla. 4th DCA 1986) (applying concept of attempted felony murder in context of codefendants); George v. State, 509 So. 2d 972 (Fla. 5th DCA 1987) (rejecting double jeopardy claim with respect to attempted felony murder and other offenses); Douglas v. State, 523 So. 2d 704 (Fla. 2d DCA 1988) (prohibiting reclassification of attempted felony murder where issue of firearm use was not submitted to jury); Diaz v. State, 601 So. 2d 1269 (Fla. 3d DCA 1992) (finding evidence of attempted felony murder sufficient, based on successive blows to elderly victim's head and taping of victim's mouth); Brown v. State, 569 So. 2d 1320, 1321 at n. 1 (Fla. 1st DCA 1990) (noting with

many newspaper articles in Florida publications have routinely noted that various defendants had been charged with, or convicted of, attempted felony murder.[2] The foregoing serves to confirm that the concept of attempted felony murder is one of which members of the legislature would presumably have been aware. See, State of Florida, Department of Revenue v. Bonard Enterprises, Inc., 515 So. 2d 358, 359 (Fla. 2d DCA 1987) (legislature was presumed to have been aware of Department of Revenue position regarding documentary stamp taxes, and, "[n]ot having thereafter amended the relevant legislation, the legislature may be considered to have thereby implicitly affirmed that position as reflecting the legislative intent."). In view of the foregoing, the note reflecting that a majority of the members of the committee on Standard Jury Instructions

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interest that state had chosen not to charge defendant with attempted felony murder, where facts would arguably have sustained conviction for such offense); Davis v. State, 467 So. 2d 1094 (Fla. 1st DCA 1985) (noting conviction for attempted felony murder, as it related to double jeopardy claim); McCall v. State, 481 So. 2d 1231 (Fla. 1st DCA 1985) (noting conviction for attempted felony murder); McCleod v. State, 477 So. 2d 5 (Fla. 1st DCA 1985) (permitting multiple convictions for attempted felony murder and underlying felony); Castro v. State, 472 So. 2d 796 (Fla. 3d DCA 1985) (recommending, but not requiring, special verdict forms permitting jury to disclose whether verdict is for attempted premeditated murder or attempted felony murder); Grinage v. State, 641 So. 2d 1362 (Fla. 5th DCA 1994) (precluding same overt act from underlying felony/robbery from being used as overt act for attempted felony murder).

[2] The Appendix to this Supplemental Brief contains the text of 15 newspaper articles, starting in 1987, from The Miami Herald, Orlando Sentinel, Palm Beach Post, and St. Petersburg Times, which note either charges or convictions dealing with attempted felony murders.

dissapprove of Amlotte[3] is of no consequence, as this is simply a matter of legislative intent, and the legislature has clearly accepted Amlotte as a proper construction of the pertinent Florida statutes.

The State would further note that federal appellate courts, including the Supreme Court of the United States, have similarly vested Congressional silence, in the aftermath of Supreme Court pronouncements regarding statutory matters, with a high degree of significance. See, e.g., Toolson v. New York Yankees, Inc., 346 U.S. 356, 357, 74 S.Ct. 78, 98 L.Ed. 64 (1953); Flood v. Kuhn, 407 U.S. 258, 273-74, 92 S.Ct. 2099, 32 L.Ed. 2d 728 (1972); Stiffley v. Lutheran Hospital, 965 F. 2d 137, 140 (7th Cir. 1992) (deference to Congressional silence where "judicial statutory construction has been brought to the attention of the legislature, and the legislature has not sought to alter that interpretation even though it has amended the statute in other respects."); In re The Charter Co., 876 F. 2d 866 (11th Cir. 1989). Compare, Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. ___, 114 S.Ct. ___, 128 L.Ed. 2d 119, 137-38 (1994) (Supreme Court refused to draw any inferences from Congressional silence regarding federal securities laws where the Supreme Court had previously stated that it was reserving, for future adjudication, the particular

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[3] Standard Jury Instructions in Criminal Cases, 636 So. 2d 502 (Fla. 1994).

issue involved); The National Association for the Advancement of Colored People v. American Family mutual Insurance Company, 978 F. 2d 287, 300 (7th Cir. 1992) (refusing to attribute significance to Congressional silence in aftermath of statutory decisions of lower federal courts as opposed to decisions of Supreme Court, which reflect finality). Cf., United States v. Rutherford, 442 U.S. 544, 553-54 and n. 10, 99 S.Ct. 2470, 61 L.Ed. 2d 68 (1979) (deference to administrative interpretation of statute warranted where it involved issue of public controversy, Congress did not act to correct any misperception of its statutory objectives, and where Congress "had not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned.").

Not only does subsequent legislative concurrence with Amlotte militate against reconsideration of Amlotte, but the same conclusion ensues from the traditional doctrine of stare decisis. While prior rulings of this Court can, in appropriate cases, be reconsidered, such reconsideration typically rests upon a compelling reason, such as the need to "remedy continued injustice," or to vindicate "other principles of law." Haag v. State, 591 So. 2d 614, 618 (Fla. 1992); McGregor v. Provident Trust Co. of Philadelphia, 162 So. 323, 328 (Fla. 1935); Cottrell v. Amerkan, 35 So. 2d 383, 384-85 (Fla. 1948) (principle of stare decisis yields when reasons for prior law

fail). See also, Payne v. Tennessee, 501 U.S. ___, 111 S.Ct. 2597, 115 L.Ed. 2d 720, 736-37 (1991) ("Stare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process."); Moragne v. States Marine Lines, 398 U.S. 375, 403, 90 S.Ct. 1772, 26 L.Ed. 2d 339 (1970) ("Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments."); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. ___, 112 S.Ct. 2791, 120 L.Ed. 2d 674, 700 (1992) (". . . when this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proved to be intolerable simply in defying practical workability, . . . ' whether the rule is

subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, . . .; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, . . .' or whether facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification. . . .") (citations omitted).

Furthermore, Amlotte simply reflects judicial construction of the statutory language. The doctrine of stare decisis is of much greater significance in the context of judicial decisions interpreting legislative statutes than it is in other areas, such as matters of constitutional law or procedure. See, e.g., Hilton v. South Carolina Public Railways Commission, 502 U.S. ___, 112 S.Ct. 560, 116 L.Ed. 2d 560, 569 (1991); Patterson v. McLean Credit Union, 491 U.S. 164, 172-73, 109 S.Ct. 2363, 105 L.Ed. 2d 132 (1989) ("We have said also that the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction. Considerations of stare decisis have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done.").

It is therefore readily apparent, especially in the context presented by this case, which involves questions of statutory interpretation, that the doctrine of stare decisis precludes reconsideration absent the most compelling circumstances. Such circumstances do not exist herein. The doctrine of attempted felony murder, in the 10 years of its application since Amlotte, does not reveal any manifest injustices which have ensued. See, cases cited at n. 1, supra; and newspaper articles cited at n. 2, supra, and contained in the Appendix to this Brief. A fair review of the appellate decisions which in any way touch on the doctrine of attempted felony murder, see n. 1, supra, compels the conclusion that Amlotte has neither resulted in any continued injustice nor in an unworkable doctrine.[4] Besides the question presented herein, regarding whether the overt act must be one which is intended to kill or injure, the only other significant legal dispute has arisen in Grinage v. State, 641 So. 2d 1362 (Fla. 5th DCA 1994), questioning whether the overt act which satisfies an element of the underlying felony can simultaneously serve as the overt act for attempted felony murder.[5] Rather than

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[4] That conclusion is further implied by the fact that the lower court merely certified a limited question to this Court, regarding the nature of the overt act, and did not deem it necessary to ask this Court to revisit the doctrine of attempted felony murder itself.

[5] Insofar as the question raised in Grinage does not exist in the instant case, the State herein will leave that question for

reflecting the waving of a red flag begging for reevaluation, the paucity of legal issues arising out of Amlotte, over a ten-year period, is the clearest indicia of a workable legal doctrine.

While the Respondent herein is attempting to portray the attempted felony murder doctrine, in this case, as an egregious abuse of the doctrine, that is hardly the case. As previously noted by the State, this was not merely a case where the act of "flight" was the overt act. Rather, the overt act lay in the act of running a red light at an urban traffic intersection. That is an act which painfully reflects an egregious indifference to the value of human life. Nor is this a case involving a minor injury to the victim, as the victim was rendered quadriplegic. Thus, whether this Court applies the

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resolution pursuant to the question certified to this Court in Grinage, except to note that the Fifth District's characterization of the stabbing as an essential element of the underlying felony of robbery is totally unwarranted, insofar as Grinage contained ample evidence of force to satisfy the requirements of the underlying robbery, separate and apart from the stabbing. There mere act of pulling out the knife, indeed, even the mere possession of the knife, satisfied the underlying armed robbery, and the stabbing was therefore not essential to the underlying felony. Contrary to the fears of the Grinage majority, 641 So. 2d at 1366, not every armed robbery will justify an attempted murder charge. The mere display of a firearm or dangerous weapon will constitute an armed robbery, even though such actions will not be overt acts for attempted felony murder. Acts such as shooting or stabbing are therefore above and beyond what is necessary to establish the armed robbery, and the stabbing and/or shooting, which will constitute the overt acts for attempted felony murder are therefore, in typical armed robberies, not going to be the same acts which are essential to establishing the armed robbery.

doctrine of attempted felony murder to the facts herein or rejects such application, there is nothing inherent in the fact pattern presented which raises any general, pervasive concerns about the attempted felony murder doctrine itself.

The issues raised by the Respondent, such as attempted felony murder being a legal fiction, and the alleged conflict between the concepts of attempt and intent, were fully considered and evaluated in the Amlotte decision. As such, the Respondent's argument is nothing more than an effort to relitigate and reconsider precisely that which was previously considered and rejected. That does not present the compelling circumstances which would warrant reevaluation.

In view of the foregoing, it should be concluded that the doctrine of stare decisis precludes reconsideration of the issue resolved in Amlotte; legislative reenactment of the pertinent statutes with other amendments, without negating Amlotte, reflects legislative concurrence with this Court's prior interpretation of the statutes regarding attempted felony murder; and the Respondent's argument regarding Amlotte is no more than a reiteration of all of the arguments that were considered and rejected in Amlotte.

CONCLUSION

Based on the foregoing, this Court should quash the decision of the lower court, for reasons stated in the prior briefs herein, and this Court should not reconsider its prior decision in Amlotte.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Supplemental Reply Brief of Petitioner was mailed this 31st day of January, 1995, to J. RAFAEL RODRIGUEZ, Esq., 6367 Bird Road, Miami, Florida 33155.

RICHARD L. POLIN