IN THE SUPREME COURT OF THE STATE OF FLORIDA

STATE OF FLORIDA,
Petitioner,

v. CASE NO.: 84,318

HAROLD LEONARD GRINAGE,
Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON MERITS

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TABLE OF CONTENTS

POINT OF LAW

WHETHER THE TRIAL COURT ERRED WHEN IT INSTRUCTED THE JURY THAT THE STATE DID NOT HAVE TO PROVE THAT THE DEFENDANT KNEW THAT THE VICTIM WAS A LAW ENFORCEMENT OFFICER SINCE THAT IS THE CORRECT APPLICATION OF BOTH THE RELEVANT STATUTORY AND CASE LAW.

TABLE OF AUTHORITIES

CASES

MISCELLANEOUS AUTHORITIES

STATEMENT OF CASE

The Respondent in this case was charged with the offenses of attempted first degree murder of a law enforcement officer and attempted robbery with a deadly weapon. (R 120-122).[1] A jury found him guilty as charged, and the Defendant was sentenced on the 14th of June 1993, to life in prison including a minimum mandatory of twenty-five years for the attempted murder charge as well as a concurrent sentence of twelve years prison for the attempted robbery. (T 58-59, 705-706, R 259-260, 285-289).

The Defendant filed a direct appeal raising four issues; however, only one of these was addressed by Fifth District Court. The Defendant submitted in his brief that the trial court had committed reversible error by instructing the jury that the State was not required to prove that the Defendant knew that the victim was a law enforcement officer at the time of the attack. The Fifth District Court of Appeal agreed with this argument and had additional concerns about this causing it to certify the following three questions to this Court:

> 1. IS SECTION 782.04(1)(a)(2) A PROPER VEHICLE FOR FILING A CHARGE OF ATTEMPTED MURDER OF A POLICE OFFICER ENGAGED IN THE LAWFUL PERFORMANCE OF HIS DUTY?
>
> 2. IF SO, CAN THE PROOF OF A NECESSARY ELEMENT OF THE UNDERLYING QUALIFYING FELONY ALSO CONSTITUTE THE OVERT ACT NECESSARY TO PROVE THE

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[1]In this brief the Respondent will referred to as either the Respondent or the Defendant, and the Petitioner will referred to as the State. Additionally, "R" will used for cites to the record on appeal, and "T" will used for cites to the trial transcripts.

ATTEMPTED (FELONY) MURDER OF A LAW ENFORCEMENT OFFICER ENGAGED IN THE LAWFUL PERFORMANCE OF HIS DUTY?

3. IF SECTION 782.04(1)(a)2 IS AN APPROPRIATE VEHICLE FOR THE CHARGE AND IF AN ESSENTIAL ELEMENT CAN ALSO SERVE AS THE NECESSARY OVERT ACT, ARE ALLEGATIONS IN THE INFORMATION WHICH MERELY ALLEGE THE OFFENSE OF AGGRAVATED ASSAULT OF A POLICE OFFICER ENGAGED IN THE LAWFUL PERFORMANCE OF HIS DUTIES, WHICH ASSAULT TOOK PLACE DURING AN ATTEMPTED ROBBERY, SUFFICIENT TO SUSTAIN A CONVICTION FOR FIRST-DEGREE FELONY MURDER?

STATEMENT OF FACTS

The charges in this case arose from an undercover drug operation which occurred on the 10th of February 1992. (T 167-171, 207-209). Orange County Sheriff's Deputy Kelly Boaz arranged to buy 400 dollars worth of cocaine from the Defendant. The Defendant met the deputy in a parking lot and got into the officer's car. (T 180-185, 241-242). The Defendant pulled out what was described by one officer as a six inch, double edge, boot knife, and threatened the deputy. (T 276, 568, 579). The Defendant at this point grabbed him and attempted to stab him, only being stopped by the fact that the officer blocked the knife. (T 193-196, 203, 214). The deputy's hand was cut while protecting himself. (T 193, 197, 205, 210-212, 214, 218-219). A six-officer team was monitoring the operation in case trouble arose, and they responded when the attack occurred. (T 173-180, 200, 240, 242, 265). After some struggle, the Defendant was subdued. (T 198-199, 215, 224-225, 237, 245-252, 272, 379, 400, 404).

During the trial the Defendant admitted that he agreed to meet Boaz, but he had no drugs so he decided to rob the deputy. (T 325, 328-329, 562-564, 571, 575, 578). He testified that while he was preparing to leave to meet Boaz he put on his jacket, and it had a knife in it. (T 558-559). However, he did not know how the knife got in his jacket. (T 558-559). The Defendant got inside the deputy's car, pulled a knife, and "with my hand wrapped around his neck" demanded the money. (T 567-568). This was admitted to by the Defendant both during a taped statement and during his

testimony at trial.

Officer McCann who took the Defendant's taped statement testified that the Defendant stated that while he put his arm around Boaz's head he did not have him in a headlock. (T 325). During his taped statement, the Defendant responded to the question of whether the knife was his by stating that it was his if his fingerprints were on it but it was not his if they were not. (T 325). Also, during this taped statement, the Defendant called the weapon a butter knife despite an officer's description of it as a six inch, double edge, boot knife. (T 572, 276). The Defendant also admitted that Deputy Boaz repeatedly asked the Defendant not to stab him. (T 568, 579). The Defendant stated that after he placed the victim in a headlock Deputy Boaz placed the money down, and he reached to get it. (T 568,587). While admitting to attempting to rob Deputy Boaz, the Defendant denied getting over the top of the officer and trying to stab him. (T 585).

Officer Dilts who had been with the Sheriff's office thirteen years stated that when he pulled up in his car he saw the Defendant leaning over Boaz, Boaz's hands were in the air above the seat, and the two were struggling. (T 246). Dilts also stated that after the Defendant was dragged out of the car Deputy Boaz came around from the other side of the car holding his bleeding hand and yelling that the Defendant had tried to kill him. (T 252).

Officer Winsett was monitoring the transmitter and heard Boaz pleading for the Defendant to not stab him and telling the Defendant just to take the money. (T 269). He also testified that

when he responded to the scene he saw the Defendant and Boaz struggling with the Defendant leaning over Boaz. (T 270-271). Further, like Dilts, Winsett saw Boaz bleeding and holding his wrist. (T 273, 287).

SUMMARY OF ARGUMENT

The issue presented to the both the trial court and the appellate court in this case was whether the State would have to prove the Defendant's knowledge of the victim's status as a law enforcement officer. However, numerous other issues were addressed in the opinion by the Fifth District Court ultimately leading to a challenge of the very existence of "attempted felony murder."

Just like which a killing occurs and the defendant is committing a felony the courts eliminate any intent requirement as to the homicide, intent is a non-issue when someone commits an act which could have caused death, but we are fortunate enough that none occurred. This is attempted felony murder.

In this case the added point exists that the victim was a law enforcement officer. The Legislature has clearly shown its intention to increase the penalty whenever someone attempts to murder a law enforcement officer regardless of if the defendant is aware of the victim's job. The defendant is being subjected to strict liability for his actions. Such a penalty is at the legislature's discretion to impose.

ARGUMENT

POINT OF LAW

WHETHER THE TRIAL COURT ERRED WHEN IT INSTRUCTED THE JURY THAT THE STATE DID NOT HAVE TO PROVE THAT THE DEFENDANT KNEW THAT THE VICTIM WAS A LAW ENFORCEMENT OFFICER SINCE THAT IS THE CORRECT APPLICATION OF BOTH THE RELEVANT STATUTORY AND CASE LAW.

The opinion by the Fifth District Court raised numerous issues many of which were not presented below by either side. In order to address these concerns, a historical overview of attempted felony murder would be helpful.[2]

The crime of felony murder historically could be defined as any homicide committed during the perpetration of any felony. Such a crime dates back into the early common law and has always existed in Florida. See, Adams v. State, 341 So. 2d 765 (Fla. 1976), LaFave, Criminal Law, 2d. Ed. (1986). The state of mind or the intent of the defendant is immaterial because the death is caused while the defendant is committing or attempting to commit a felony. In Florida there are different degrees of felony murder. See, §782.04, Fla. Stat. (1993). The offense of first degree murder is committed when the defendant has the premeditated design to effect the death of the person killed or when the unlawful killing results during one of the enumerated felonies listed in the statute. See,

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[2]The State feels forced to take such an approach. In addition to addressing the difficult issue before it, the Fifth's opinion also takes the opportunity to question the very existence of "attempted felony murder." Without the offense of "attempted felony murder," the State's cannot possibly defend "attempted felony murder of a law enforcement officer."

§782.04(1)(a)1,2, Fla. Stat. (1993).

The offense of attempted felony murder was officially recognized by the Florida Supreme Court in the case of Amlotte v. State, 456 So. 2d 448 (Fla. 1984). This Court agreed with the Fifth District that such an offense exists in Florida. Both the Fifth and this Court cited the case of Fleming v. State, 374 So. 2d 954 (Fla. 1979). In that case this Court noted

> Accordingly, the offense of attempted first degree murder requires a premeditated design to effect death. In cases where the alleged "attempt" occurs during the commission of a felony, however, the law presumes the existence of premeditation, just as it does under the felony murder rule.

Id. at 956.

Therefore, the offense was addressed when Fleming was decided in 1979 and reaffirmed when Amlotte was decided in 1984. However, the majority opinion in the Fifth is uncomfortable with such an offense despite the direct affirmative answer to the question certified in Amlotte of whether there exists in Florida the offense of attempted felony murder. Justice Overton's dissent which is cited by the majority adopted the dissenting opinion of Judge Cowart in the lower court opinion. See, Amlotte v. State, 435 So. 2d 249, at 253 (Fla. 5th DCA 1983). Judge Cowart discussed the problem he had with the concept of "attempted" felony murder without any intent requirement. Id. at 253. He was troubled by the fact that every attempt included the specific intent to commit the crime except "attempted felony murder". He submitted that one

would have be found guilty of attempting to commit a crime - attempted murder - without ever intending to commit the crime.[3] Judge Cowart is correct that "attempted felony murder" is a unique crime and is an exception to the general "attempt" offense. However, this only makes the offense true to its origin. The general definition of first degree murder assumes the existence of "premeditation." Only when the death occurs during a felony enumerated in the statute do we have the exception to the premeditation requirement.

The Defendant in this case was charged and convicted of attempted first degree felony murder of a law enforcement officer. (R 120). The information read as follows:

> [The Defendant] attempted to murder KELLY BOAZ, a law enforcement officer for the Orange County Sheriff, while said KELLY BOAZ, was engaged in the lawful performance of his duty, to-wit: an undercover narcotics investigation, and in furtherance of said attempt HAROLD LEONARD GRINAGE did grab KELLY BOAZ around the neck and did thrust a knife toward the chest or throat area of KELLY BOAZ, an act which could have caused the death of KELLY BOAZ, and which act occurred during the perpetration of an attempted robbery by HAROLD LEONARD GRINAGE of KELLY BOAZ.

(R 120) (emphasis added). The *Standard Jury Instructions in*

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[3]Since it is the name "attempted felony murder" and specifically the "attempted" which causes part of this conceptual problem, perhaps "failed" or "unsuccessful" murder during a felony would be more logically acceptable.

Criminal Cases (93-1), 636 So. 2d 502 (Fla. 1994)[4], provides as follows:

> Before you can find the defendant guilty of Attempted First Degree Felony Murder, the State must prove the following two elements beyond a reasonable doubt:
>
> 1. a. [(Defendant) did some overt act, which could have caused the death of (victim), but did not.]
>
> 2. The act was committed as a consequence of and while
> a. [the defendant was engaged in the commission of (crime alleged).]
> b. [the defendant was attempting to commit (crime alleged).]
>
> In order to convict of attempted first degree felony murder, it is not necessary for the State to prove that the defendant had a premeditated design or intent to kill.

The Defendant's actions in this case could easily be found to

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[4]The jury instructions given in this case were different than the ones listed since the trial occurred in April of 1993, which was before the new jury instructions were recommended to the Court. See, 636 So. 2d 502 (Fla. 1994); see also, the dissent in this case. However, it is the State's position that any jury instruction issue (other than one raised concerning the Defendant's knowledge that the victim was a law enforcement officer) were waived. See, Sochor v. Florida, 112 S.Ct. 2114, at 2120, (1992), Adams v. State, 630 So. 2d 641 (Fla. 3d DCA 1994), Florida Rule of Criminal Procedure 3.390(d).

In fact, the lower court stated that it spent close to an hour and a half drafting the instructions and had reworked the attempted first degree felony murder instruction at least three times. (T 599) (as noted by the Fifth's dissent, "an effort in which defense counsel appears on this record to have been utterly uninterested"). The court asked for objections and even stated that "the **sole** objection to the instructions" is the knowledge issue. (T 599) (emphasis added). The defense agreed.

have satisfied the requirements of proving the offense of "attempted felony murder." The Defendant in this case admitted to trying to rob the victim. (T 562-564, 571, 575). Robbery is one of the enumerated offenses qualifying the Defendant for felony murder. See, §782.04(1)(a)2.d, Fla. Stat. (1993). Additionally, there was more than sufficient evidence presented by the State that the Defendant did some overt act (the stabbing) which could have caused the death of the deputy but did not.

However, this case does not end with "attempted felony murder." Only once we get to this point do we reach the issue which was presented on appeal to the Fifth which was what to do with §784.07(3) of the Florida Statutes (1991) which provides

> (3) Notwithstanding the provisions of any other section, any person who is convicted of attempted murder of a law enforcement officer engaged in the lawful performance of his duty or who is convicted of attempted murder of a law enforcement officer when the motivation for such attempted was related, all or in part, to the lawful duties of the officer, shall be guilty of a life felony, punishable as provided in s. 775.0825.

(emphasis added). The immediately preceding section provides

> (2) Whenever any person is charged with knowingly committing an assault or battery upon a law enforcement officer . . .

(emphasis added).

The Defendant argued that a defendant would have to have "knowledge" as to the status of his victim. The First District

Court of Appeal in case Carpentier v. State, 587 So 2d 1355 (Fla. 1st DCA 1991), review denied, 599 So. 2d 654 (Fla. 1992), addressed the issue raised by the Defendant and specifically stated that it was not an element of section 784.07(3) that the defendant know that the victim is a law enforcement officer. See also, Gantorius v. State, 620 So 2d 268 (Fla. 3d DCA 1991), cause dismissed, 593 So. 2d 1052 (Fla. 1992). Carpentier was cited to the lower court, and since no decision existed out of the Fifth District on this issue, the circuit court applied the controlling law. See, Pardo v. State, 596 So. 2d 665 (Fla. 1992).

The State's position follows the court's ruling in Carpentier: that the Legislature's intent is clear that whenever a defendant attempts to murder an officer who is engaged in the lawful performance of his duty, a defendant is guilty of a life felony. Simply because this statute can create strict liability for a defendant who attempts to murder an officer does make the statute unconstitutional.[5] The Legislature has the power to decide how certain offenses should be punished. State v. Bailey, 360 So. 2d 772 (Fla. 1978). In addition to the clarity of the words in the statute, the section immediately above the contested section specifically requires that the defendant knowingly assault or

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[5]The State is aware that the Second District has held §784.07(3) unconstitutional as applied to the defendant in that case who had committed an attempted third degree murder of a law enforcement officer. See, Iacovone v. State, 639 So. 2d 1108 (Fla. 2d DCA 1994). However, being convicted of attempted first degree murder, the Defendant in this case has no standing. See, Isaac v. State, 626 So. 2d 1082 (Fla. 1st DCA 1993), see also, Colquitt v. State, 588 So. 2d 49 (Fla. 3d DCA 1991) (finding no merit to the multiple constitutional claims raised by the defendant).

batter; whereas, the section at issue does not. The Legislature's intent was quite clear as was its use of words, and the statute does not require that the defendant know that his victim is a law enforcement officer.

As stated previously, the legislature has the power to decide how certain offenses are punished. The Florida Statutes are filled with numerous examples of how the "same" actions are classified as more severe crimes and a defendant's penalties increase whether or not he has knowledge about certain elements of the crime. For example, Fla. Stat. §893.135(1)(b)1. (1993), requires the defendant to have knowledge that the substance that he is possessing is cocaine; however, the weight of the cocaine itself subjects the defendant to strict liability as far as the penalty imposed. Way v. State, 475 So. 2d 239 (Fla. 1985); Weisenberg v. State, 455 So. 2d 633 (Fla. 5th DCA 1984). Therefore, based on the "same act" of trafficking in cocaine, a defendant's penalty can vary from a three year minimum mandatory to a fifteen year minimum mandatory based simply on the weight of the cocaine. See, §893.135(1)(b), Fla. Stat. (1993); see also, L.C. v. State, 579 So. 2d 783 (Fla. 3d DCA 1991), McMillian v. State, 566 So. 2d 291 (Fla. 1st DCA 1990), Vaillant v. State, 490 So. 2d 1326 (Fla. 3d DCA 1986) (these cases discuss the fact that a defendant is guilty of either felony grand theft or misdemeanor petit theft depending on the proven value to the property).

Another example can be seen in section 794.021, Fla. Statutes

(1993), which deals with sexual battery. The statute provides that whenever the issue arises as to a victim being under a certain age the defendant cannot argue mistaken belief, ignorance, or even misrepresentation. See also, State v. Sorakrai, 543 So. 2d 294 (Fla. 2d DCA 1989) (which applied the same requirement to section 800.04(2)). Much like in the statute at issue in this case, the defendant is held strictly liable for his actions and must take the victim as he or she exists. In fact, a defendant can be found guilty of a capital felony based on the victim's age regardless of how old the victim looks, whether he or she lied about his or her age, and regardless of consent.

Simply because it believes that some actions need to be more penalized than others, a legislature can impose strict liability upon a defendant. In the instant case, the Legislature knew of the numerous undercover operations involving law enforcement officers and decided to punish more severely those defendants who try to murder the officers who are in the performance of a lawful duty. When a defendant in an undercover operation like in the instant case decides to rob the "seller", the defendant is risking a harsh penalty if the victim turns out to be a law enforcement officer. Maybe this will cause defendants to think twice before committing such actions, and, therefore, some officers will gain even a low level of protection.

Now turning to the exact issues certified by the Fifth's opinion, the Fifth's initial question concerned whether the State could charge attempted murder of a law enforcement officer under

the felony murder statute. As discussed above, if attempted felony murder still exists in Florida, then the offense in the instant case should be able to be charged under the definition of felony murder.

The next issue raised by the Fifth concerned the assertion by the appellate court that the overt act necessary to prove attempted felony murder was also a necessary element of the underlying qualifying felony. This seems to be a type of double jeopardy argument by the court. Numerous cases have held that a defendant can be convicted of both the felony murder and the underlying offense. See, State v. Enmund, 476 So. 2d 165 (Fla. 1985), reversed on other grounds, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), Anderson v. State, 530 So. 2d 1104 (Fla. 3d DCA 1988), George v. State, 509 So. 2d 972 (Fla. 5th DCA 1987). Additionally, the issue certified does not even exist in this case because the underlying offense could exist separate from the overt act. The Fifth observed that if the overt act is the only act of force proving robbery, then "If so, then practically every robbery will justify an attempted murder charge." In this case the Defendant brandished the knife while demanding the money from the officer. This act by itself constituted robbery. The additional act of stabbing at the officer's head provided the separate act which could have caused the death of the victim.

As to the last certified question, the State's asserts as explained previously that the information charges the Defendant with the felony of robbery during which he committed an act which

could have caused the death of the victim. The State would have to prove the offense of robbery or attempted robbery as well as the life threatening overt act. As the facts of Amlotte show, the victim does not even have to suffer any injury. Amlotte, 456 So. 2d at 449. The defendant simply has to commit an act which could have killed while committing one of the enumerated felonies. That was the offense charged and proven in this case.

CONCLUSION

Based on the arguments and authorities presented above, the State respectfully prays this honorable Court affirm the judgment and sentence as imposed by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Answer Brief has been furnished by delivery to BRYNN NEWTON, counsel for the Respondent, 112-A Orange Avenue, Daytona Beach, Florida, 32114-4310, this 3rd day of October 1994.

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