IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

versus

HAROLD LEONARD GRINAGE,

Respondent.

CASE NO. 84,318
5TH DISTRICT COURT CASE NO. 93-1583

APPEAL FROM THE CIRCUIT COURT
IN AND FOR ORANGE COUNTY

RESPONDENT'S BRIEF ON THE MERITS

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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ATTORNEY FOR RESPONDENT

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STATEMENT OF THE FACTS

Respondent accepts Petitioner's statement of the case and facts, except to add:

Kelly Boaz, the undercover sheriff's deputy, testified that he never saw the knife involved in this case until the instant when, he said, Respondent attempted to stab him with it. Grinage v. State, 19 Fla. L. Weekly at D1763 (Fla. 5th DCA August 19, 1994). (T 193)

A fellow deputy testified that he had worked with Kelly Boaz for about a year and had spoken to others about his character. (T 392, 393, 396) He told the jury that Kelly Boaz does not have a reputation within the law enforcement community for being truthful. Grinage v. State, 19 Fla. L. Weekly at D1763 (Fla. 5th DCA August 19, 1994). (T 395, 398, 418)

SUMMARY OF ARGUMENT

POINT I: The District Court correctly held that the trial court erred by instructing Respondent's jury that the State was not required to prove that Respondent knew that the complainant was a law enforcement officer in order for Respondent to be convicted of attempted first-degree felony murder of a law enforcement officer. The statute which makes attempted murder of a law enforcement officer a life felony punishable as a capital offense does not clearly state that knowledge of the victim's occupation is not required for conviction and the subsection is part of a statute which otherwise requires scienter in order for a defendant's sentence for offenses against law enforcement officers to be greatly enhanced. The statute is vague because it does not specify whether knowledge is a requirement and it must therefore be construed as requiring scienter.

POINT II: The questions certified to this Honorable Court by the District Court should each be answered in the negative. The felony murder statute is not the proper vehicle for charging attempted murder of a law enforcement officer. Even if Section 783.04(1)(a)2 is an appropriate method for charging attempted murder of a law enforcement officer, proof of a necessary element of the felony underlying the alleged "attempted felony murder of a law enforcement officer" cannot serve also as proof of the overt act necessary to constitute "attempted felony murder." In any event, the information in this case charged nothing more than

aggravated assault on a law enforcement officer and could not sustain a conviction for "attempted felony murder of a law enforcement officer."

POINT III: The crime of "attempted felony murder" has no basis in logic nor is it consistent with the established law of attempts. This Honorable Court is asked to reverse its decision in Amlotte v. State, 456 So. 2d 448 (Fla. 1984), and declare that the crime of "attempted felony murder" does not exist in Florida.

ARGUMENT

POINT I

THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL SHOULD BE AFFIRMED BECAUSE THE TRIAL COURT ERRED BY INSTRUCTING THE JURY AT RESPONDENT'S TRIAL FOR ATTEMPTED FIRST-DEGREE FELONY MURDER OF A LAW ENFORCEMENT OFFICER THAT THE STATE WAS NOT REQUIRED TO PROVE THAT THE ACCUSED KNEW THAT THE COMPLAINANT WAS A LAW ENFORCEMENT OFFICER.

Respondent was charged with "attempted first degree felony murder of a law enforcement officer." (R 120) The amended information alleged that Respondent:

> . . . attempt[ed] 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)

Deputy Boaz, who at the time of Respondent's trial had been transferred to road patrol, was working as an undercover narcotics agent on the night of this incident. (T 167, 168, 170, 171, 208, 209) He drove an unmarked automobile, dressed and wore his hair in a fashion calculated to conceal his occupation, and never identified himself as a law enforcement officer. (T 171, 173, 214) Respondent did not know Kelly Boaz was a law

enforcement officer. (T 325, 328)

The prosecution requested and was granted an instruction to the jury that it was not necessary for the State to prove that Respondent knew that Kelly Boaz was a law enforcement officer in order for Respondent to be found guilty of attempted murder of a law enforcement officer. (T 597) Respondent's objections to the jury instruction were overruled and Judge White told the jury:

> THE COURT: * * *
>
> In order to convict of first degree felony murder, it is not necessary for the State to prove that the defendant had a premeditated design or intent to kill.
>
> Robbery will be defined for you later.
>
> It is not necessary for the State to prove that Harold Grinage knew that Kelly Boaz was a law enforcement officer.

(T 597, 599, 600, 671) The judge also told the jury that in order to prove "first-degree felony murder of a law enforcement officer," the State would have to show that Respondent did "some act towards committing the crime of first degree felony murder of a law enforcement officer . . . " (T 670)

Respondent recognizes that the First District Court of Appeal has held, in Carpentier v. State, 587 So. 2d 1355 (Fla. 1st DCA 1991), that a defendant's knowledge that the alleged victim is a law enforcement officer is not an element of the offense of attempted murder of a law enforcement officer. See also Isaac v. State, 626 So. 2d 1082 (Fla. 1st DCA 1993); and Evans v. State, 625 So. 2d 915 (Fla. 1st DCA 1993). Respondent

contends, however, that knowledge of the victim's occupation is a necessary element of the crime. The Fifth District Court of Appeal so held:

> Grinage urges, and we agree, that before he can be convicted of attempting to murder a police officer engaged in the lawful performance of his duty, the State must allege and prove that he knew his victim was a police officer. . . .

Grinage v. State, 19 Fla. L. Weekly D1763, at D1764 (Fla. 5th DCA August 19, 1994).

Section 784.07(3) is a subsection of Section 784.07 which is entitled "**Assault or battery of law enforcement officers, firefighters, intake officers, or other specified officers; reclassification of offenses.**" Section 784.07(3) 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 attempt 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.

Section 775.0825 in turn requires anyone convicted of attempted murder of a law enforcement officer to serve 25 years in prison before becoming eligible for parole.

In Carpentier v. State, supra, the First District Court of Appeal divided Section 784.07(3) into two parts and discerned

logic in concluding that "Part One," the attempted murder of a law enforcement officer engaged in his lawful duties, was a strict liability crime and that "Part Two" by contrast requires proof of mens rea because "Part Two" makes it the same crime even if the officer is not engaged is his duties, if the State can prove that the attempt was motivated by the officer's duties. Respondent asserts that this conclusion is, rather, illogical and that Section 784.07(3) is, at best, vague because it fails to specify whether or not knowledge of the victim's occupation is a requirement. In order for Section 784.07(3) to be lawfully applied, the trier of fact must be required to find knowledge and intent to violate the statute before a conviction can be had. Respondent maintains that "Part Two" of Section 784.07(3) operates only to qualify as a life felony an attempt on an off-duty law enforcement officer's life, and not to add specific intent to the subsection, because that is already required.

Attempted murder of a law enforcement officer is part of the battery on a law enforcement officer statute, and battery on a law enforcement officer is already a specific intent crime because it requires a subjective intent to commit not only simple battery but the more serious offense of battery on a law enforcement officer, i. e., one must know that the victim is a law enforcement officer. Evans v. State, 452 So. 2d 1093 (Fla. 2d DCA 1984). It is not logical to eliminate the necessity of proving knowledge for the even greater offense of attempted murder of a law enforcement officer. Likewise, it is not logical

to require knowledge for the attempted murder of an off-duty law enforcement officer, and not require knowledge for the attempted murder of an on-duty, uniformed policeman, whose status is obvious.

The knowledge requirement in Section 784.07(2) (assault or battery on a law enforcement officer) suggests that an increase in a prison sentence should be based on something a defendant intended to do. Carpentier holds instead that the penalty for an act can be vastly enhanced on the basis of a fact that the defendant knows nothing about. There is no reason for assuming a lesser proof requirement for the greater offense of attempted murder than for assault or battery.

Because the Legislature did not specify that there is no knowledge requirement under Section 784.07(3), it is not clear that the Legislature intended to eliminate scienter for attempted murder of a law enforcement officer. The statute must be read with consideration of the other provisions in Chapter 784, all of which point to a knowledge requirement. The language, "Notwithstanding the provisions of any other section," refers to other penalty provisions, such as Sections 775.082 and 921.001, which might otherwise indicate that Section 784.07(3) is less than a life felony or may be punished by less than a sentence of life and a mandatory minimum term of 25 years.

The State of Florida provides in its brief examples of why it should not be presumed that Section 784.07(2)(a)2 requires no

proof of scienter[1]. In State v. Sorakrai, 543 So. 2d 294 (Fla. 2d DCA 1989), the Second District Court of Appeal found that the statute prohibiting lewd and lascivious conduct does not require the defendant to know that the victim was under the age 16, because its elements were dependent upon the sexual battery statute which provides that ignorance of a victim's age is no defense. ss. 800.04, 794.021, Fla. Stat. (1993). The statute under which Respondent was prosecuted, however, does not eliminate the need for proof that he at least had knowledge of the element which made the charged crime so serious, and the subsection of the statute upon which his prosecution was dependent (Section 784.07(2)) does require such knowledge. The District Court wrote:

> While the "knowingly committing" language [of Section 784.07(2)] is not repeated in subsection (3), it is replaced by the legally equivalent word "attempted." As Justice Overton observed in his dissenting opinion in Amlotte v. State, 456 So. 2d 448, 450 (Fla. 1984), "A conviction for the offense of attempt has always required proof of the intent to commit the underlying crime." Here the underlying crime is "the murder of a police officer engaged in the lawful performance of his duty." How could Grinage have intended to

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1 "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)). . . . " (Pages 13-14, Petitioner's Brief on the Merits.) (Emphasis supplied.)

> murder (felony or otherwise) a "law enforcement officer . . . engaged in the lawful performance of his duty," if he did not know that Boaz was, in fact, a police officer? We agree that the court erred in instructing the jury that the State was not required to prove such knowledge.

Grinage v. State, 19 Fla. L. Weekly at D1764. (Emphasis in original).

The concept of felony murder itself has been stretched beyond logic already by the judicial creation in Florida of the crime of "attempted felony murder," an offense which most other states have rejected as "logically impossible." See Amlotte v. State, 456 So. 2d 448, 450 (Fla. 1984) (Justice Overton, dissenting). Felony murder is a statutorily created brand of murder whose underlying commission of a felony substitutes for the proof of premeditation, i. e., intent, that would otherwise be necessary. See s. 782.04(1)(a)2., Fla. Stat. (1993). To this legal fiction, that premeditation for murder is supplied by an underlying felony, the State asked Respondent's trial judge to add an instruction that the State did not need to prove any knowledge of the crucial fact that would aggravate attempted murder to a life felony subject to a capital sentence.

When considering whether to authorize the enhancement of a defendant's sentence via a sentencing guidelines departure, other District Courts have presumed the necessity of knowledge as a factor to justify the increased punishment. In Viera v. State, 532 So. 2d 743 (Fla. 3d DCA 1988), wherein the defendant was convicted of attempted first-degree murder, the victim was an

out-of-uniform police officer. The District Court approved the victim's status as a law enforcement officer as a grounds for departure because Viera knew she was a police officer:

> . . . We reject Viera's argument that because he did not know at the outset that his intended victim was a police officer, his departure sentence cannot stand. Viera knew before the shooting and struggle that the victim was a police officer. Under these circumstances, the fact that the victim was a police officer was a valid reason for departure. Garza v. State, 518 So. 2d 978 (Fla. 2d DCA 1988); Baker v. State, 466 So. 2d 1144 (Fla. 3d DCA 1985), aff'd, 483 So. 2d 423 (Fla. 1986). Baker established that a defendant "who chooses to make a police officer acting in the line of duty the victim of his crime is to be treated differently than a defendant who commits the same crime upon an ordinary citizen." 466. So. 2d at 1146. The trial court's imposition of the departure sentence was not founded on Viera's ignorance of the victim's occupation when he first approached her, but rather, upon Viera's commission of the offense of attempted murder of a police officer. The first reason for departure was, therefore, proper.

Viera, 523 So. 2d at 745. (Emphasis supplied.) Baker v. State, in turn, had relied on the fact that Baker knew his victim was a police officer and cited Smith v. State, 682 P. 2d 1125 (Alaska Ct. App. 1984) which held that where the sentencing guidelines statute specified, as an aggravating factor justifying a non-presumptive sentence, the fact that the defendant knowingly directed the conduct constituting the offense at, among others, a

law enforcement officer, a sentence in excess of the presumptive sentence would be upheld.

The Legislature did not make it clear in Section 784.07(3) that no proof of knowledge is required in order to prove attempted murder of a law enforcement officer. In this regard, the Fifth District Court of Appeal noted that the holding in State v. Medlin, 273 So. 2d 394, 396 (Fla. 1973), which was that the legislative denunciation of an act as criminal does not require the State to prove that the commission of the act was done with criminal intent, is inconsistent with the United States Supreme Court's recent holding on the subject. Grinage v. State, 19 Fla. L. Weekly D1763, 1765 (Fla. 5th DCA August 19, 1994). In Staples v. United States, 511 U. S. ___, 128 L. Ed. 2d 608, 114 S. Ct. 1793 (1994), the Supreme Court held that in order to be guilty of violating the National Firearms Act, someone accused of possessing an illegal firearm must **know** that the rifle had the characteristics that made it illegal. Among the reasons for the holding was that the statute was silent concerning the mens rea element and, equally pertinent to this case, "The potentially harsh penalty attached to violation of [the National Firearms Act]--up to 10 years' imprisonment--confirms our reading of the Act." Id., 128 L. Ed. 2d at 623. The Supreme Court wrote:

> . . . Historically, the penalty imposed under a statute has been a significant consideration in determining whether the statute should be construed as dispensing with mens rea. Certainly, the cases that first defined the concept of the public welfare offense almost

> uniformly involved statutes that provided for only light penalties such as fines or short jail sentences, not imprisonment in the state penitentiary. . . .

Id., 128 L. Ed. 2d at 623. If the possibility of the imposition of a ten-year prison sentence for a crime was enough of a consideration to lead the United States Supreme Court to find that the crime under review required proof of mens rea, then the minimum sentence of life without eligibility for parole for 25 years which is mandatory for a violation of 784.07(3) surely compels a similar result in Florida.

Because the statute is vague, the question of whether the crime of attempted murder of a law enforcement officer, like all other violent crimes against law enforcement officers, requires knowledge that the victim is a law enforcement officer, must be construed in favor of the accused. See, e. g., State v. Wershow, 343 So. 2d 605, 608 (Fla. 1977), quoting Ex parte Amos, 93 Fla. 5, 114 So. 289 (1927):

> . . . Nothing is to be regarded as included within it that is not within its letter as well as its spirit; nothing that is not clearly and intelligently described in its very words, as well as manifestly intended by the Legislature, is to be considered as included within its terms; and where there is ambiguity as to leave reasonable doubt of its meaning, where it admits of two constructions, that which operates in favor of liberty is to be taken.

When the Fifth District Court of Appeal considered Section 784.07(3) in its context of a statute which enhances the

penalties for crimes **knowingly** committed against law enforcement officer, it concluded that the crime of attempted murder of a law enforcement officer does require proof that the defendant knew that the victim was a law enforcement officer. Grinage v. State, 19 Fla. L. Weekly at D1764. Section 784.07(3) must be construed as requiring that the accused knew that the alleged victim of the charged crime was a police officer. The trial court erred by overruling Respondent's objections to instructing the jury that he could be convicted of this crime without any proof that he knew what he was doing. The District Court's decision should be affirmed and Respondent granted a new trial.

POINT II

THE QUESTIONS CERTIFIED BY THE DISTRICT COURT OF APPEAL SHOULD BE ANSWERED IN THE NEGATIVE.

In its decision, the Fifth District Court of Appeal certified to this Honorable Court as being of great public importance the following questions:

> 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 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?

Grinage v. State, 19 Fla. L. Weekly D1763, 1765 (Fla. 5th DCA August 19, 1994). These questions must be answered in the negative, for the reasons stated by the Fifth District Court of Appeal.

1. Section 782.04(1)(a)2 is not the proper vehicle for filing a charge of attempted murder of a police officer engaged in the lawful performance of his duty.

The District Court wrote:

> Had the State charged Grinage with the offense of attempted murder under section 784.07(3), intent to commit the murder and knowledge that the victim was a police officer would, we think, be necessary elements. The State urges that it can avoid proving these elements by merely alleging that the attempted murder of a police officer engaged in the performance of his duty took place during a robbery and citing the felony murder statute.

Grinage v. State, supra, 19 Fla. L. Weekly at D1764. The District Court recognized that this Honorable Court created the crime of "attempted felony murder" in Amlotte v. State, 456 So. 2d 448 (Fla. 1984), but held that:

> . . . [T]o go further and presume that[,] because the attempt was made during the commission of an attempted robbery of an undercover officer in a sting operation, the defendant will be presumed not only to have intended a killing but also to know that the undercover agent was a police officer[,] is stacking presumption on top of presumption.
>
> We hold that section 782.04(1)(a)2 [the felony murder statute] is not the proper vehicle for charging a section [784.07(3)] attempted murder of a law enforcement officer engaged in the lawful performance of his duty. . . .

Id., 19 Fla. L. Weekly at D1764.

2. The proof of a necessary element of the qualifying felony underlying the charge of attempted murder of a police officer may not also constitute the overt act necessary to prove the attempted (felony) murder of a law enforcement officer engaged in the lawful performance of his duty.

The State of Florida argues that this conclusion by the District Court "seems to be a type of double jeopardy argument by the court." To summarily dispense with this consideration, Petitioner cites this Honorable Court's decision in State v. Enmund, 476 So. 2d 165 (Fla. 1985), which held that a defendant can be convicted of both felony murder and the underlying felony. But see e. g., Neville v. Butler, 867 F. 2d 886 (5th Cir. 1989) ("[T]he double jeopardy clause bars prosecution for both felony murder and the underlying felony."); and Sumrall v. State, 264 Ga. 148, 442 S. E. 2d 246 (1994) ("A defendant may not be convicted of felony murder and also be convicted of the underlying felony which was alleged by the indictment to support the felony murder conviction."). In Enmund, this Honorable Court found "sufficient intent that the legislature intended multiple punishments when both a murder and a felony occur during a single criminal episode." (Emphasis supplied.) In an attempted felony murder, on the other hand, a murder does not occur. The single criminal act which might have supplied the requisite mens rea to support a conviction for both the underlying felony and the resulting death, had death occurred, cannot be punished as both the attempted felony and the death that might have possibly

occurred[2]. This is true particularly where the underlying felony was, as here, attempted but not accomplished.

Petitioner points out that robbery can be committed by force, violence, assault, or putting in fear. s. 812.13(1), Fla. Stat. (1993). (Page 15, Petitioner's Brief on the Merits). The Fifth District Court of Appeal reasoned that if the same overt act that comprised the crime of "attempted felony murder" was also essential to prove the charged underlying felony, then "attempted felony murder" is not the appropriate way to charge someone with attempted murder of a police officer engaged in the lawful performance of his duty.

The overt acts alleged to constitute "attempted felony murder" in this case were grabbing the alleged victim's neck and thrusting a knife toward his chest or throat, "which act created a well-founded fear in KELLY BOAZ that such violence was imminent[3]." (R 69) By the same token, the count of the information charging attempted armed robbery alleged that "in furtherance thereof HAROLD LEONARD GRINAGE did struggle with KELLY BOAZ for control of or possession of UNITED STATES MONEY CURRENT [sic] or did stab KELLY BOAZ." (R 70) See, e. g., Booker v. State, 93 Fla. 211, 111 So. 476 (1927):

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[2] But see Anderson v. State, 530 So. 2d 1104 (Fla. 3d DCA 1988) ("Armed robbery and attempted first-degree felony murder constitute separate statutory offenses consisting of separate and distinct elements.")

[3] As the District Court pointed out, this language actually charged "nothing more than an aggravated assault . . . of a police officer . . . committed as a part of an attempted robbery. Grinage, 19 Fla. L. Weekly at D1764.

> It may not have been necessary for the pleader to have alleged in the indictment with such particularity the elements of the offense charged, but, having done so, he is required to establish the allegations beyond a reasonable doubt by appropriate evidence; . . . if one set of facts is alleged, it cannot be established by proof of the other.

Id., 111 So. at 477. By its drafting of the information in this case, the State chose to charge that Respondent attempted to commit armed robbery by doing the same act that the State alleged was the overt act constituting "attempted felony murder," i. e., attempting to stab the complainant.

In addition, the State's assertion, that there were separate acts of "putting in fear" and using force or violence[4], is contradicted by the testimony of Kelly Boaz:

> A All at once Mr. Grinage pulled out a knife, from, I believe -- I never saw the knife until then, I never -- to this day I haven't seen the knife except for pictures, I saw the blade, from his right hand. And he grabbed me with his left hand in a head lock, and I was down like this, and all I could see was him raising his arm and the knife coming down toward me.
>
> At that point I blocked it as fast as I could, I got stabbed, and blocked it, it came down, I got stabbed and held onto his wrist for dear life.

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[4] The State writes, "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." (Page 15, Petitioner's Brief on the Merits).

It all happened so fast. . . .

(T 193) (Emphasis supplied.) Kelly Boaz testified that the entire episode involving Respondent's alleged attempt to stab him lasted 17 seconds. (T 195, 197)

The State therefore alleged and presented evidence to prove that the overt act constituting attempted robbery in Count II was the same overt act which comprised the alleged "attempted felony murder" in Count I. The same act, essential to a conviction of either crime charged, cannot serve as the basis for convictions of both.

3. 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, are not sufficient to sustain a conviction for first-degree felony murder.

The Fifth District Court of Appeal correctly observed that because the count of the information charging Respondent with attempted felony murder of a law enforcement officer did not allege that Respondent intended to kill the officer, it charged nothing more than an aggravated assault:

> An aggravated assault is defined as an assault either with a deadly weapon without an intent to kill or an assault with an intent to commit a felony. Here, Grinage is alleged to have used a knife (deadly weapon) while intending to commit a felony (robbery).
>
> Although this aggravated assault allegation is coupled with the additional allegation that the victim was a police officer engaged in the lawful performance of his

> duty, this does nothing more than bring the offense within the ambit of section 784.07(2)(c) which enhances the penalty for the aggravated assault of a police officer engaged in the lawful performance of his duty. But this section additionally requires that the defendant know that the victim is a police officer.
>
> We hold that the State cannot transform the offense of aggravated assault on a police officer engaged in the lawful performance of his duty into attempted murder by merely alleging that since the assault took place as a part of a robbery attempt, it constitutes an "attempted felony murder."

Grinage v. State, 19 Fla. L. Weekly at D1764.

Each of the questions certified by the District Court to be a great public importance must be answered in the negative.

POINT III

THIS HONORABLE COURT SHOULD REVERSE ITS RULING IN AMLOTTE V. STATE, 456 So. 2d 448 (Fla. 1984), AND DECLARE THAT THE CRIME OF ATTEMPTED FELONY MURDER DOES NOT EXIST IN FLORIDA.

The Fifth District Court of Appeal wrote in this case:

> [I]t is our responsibility (while not reversing the supreme court) to point out to the court new or additional arguments that should be considered by it in determining whether questioned law should remain in effect. . . .

Grinage v. State, 19 Fla. L. Weekly D1763, 1765 (Fla. 5th DCA August 19, 1994).

The law questioned in this case is Amlotte v. State, 456 So. 2d 448 (Fla. 1984), wherein this Honorable Court held that the crime of "attempted felony murder" existed in Florida law. In that case, Justice Overton pointed out:

> I dissent. The majority opinion has made it impossible to distinguish those crimes for which there can be an attempt from those crimes for which there cannot be an attempt. A conviction for the offense of attempt has always required proof of the intent to commit the underlying crime. See Hutchinson v. State, 315 So. 2d 546 (Fla. 2d DCA 1975); Robinson v. State, 263 So. 2d 595 (Fla. 3d DCA 1972); Groneau v. State, 201 So. 2d 599 (Fla. 4th DCA), review denied, 207 So. 2d 52 (Fla. 1967). By recognizing the crime of attempt with regard to felony murder, a crime in which the intent to kill is presumed, the Court has created a crime which necessitates the finding of an intent to commit a crime which requires no proof of intent. . . .

Id., 456 So. 2d at 450.

Likewise, the District Court in this case wrote:

> Some criminal offenses (and we urge that first degree felony murder is one) simply were not intended by the legislature to support a conviction for their attempted commission. Section 782.04(1)(a)2, by its terms, contemplated a body--a completed act of homicide. Under this statute, the malice aforethought (intent) "is supplied by the felony, and in this manner the rule is regarded as a constructive malice device." Adams v. State, 341 So. 2d 765 (Fla. 1977). This conclusion is apparently based on the premise (perhaps legal fiction) that since one is presumed to intend the consequences of his acts, if a death occurs as a result of his intentional commission or attempted commission of a qualifying felony, he must have intended (and the law will presume such intent) the death of the victim. But where is the logic if there is no body? If we have a frightened or injured victim as a result of the commission or attempted commission of a felony, why should not the law presume that such was the intent of the offender? Why should the law presume an intent to murder when there is no death merely because the assault occurs during the commission or attempted commission of a felony?

Grinage v. State, 19 Fla. L. Weekly at 1764-1765.

The State suggests that the term "attempted felony murder" causes a "conceptual" problem with the fact that attempts to commit other crimes require specific intent but the judicially created crime of "attempted felony murder" requires only that the State show that the accused intended to commit a felony

enumerated in Section 782.04(1(a)2 and somebody could have been killed. (Page 9, Petitioner's Brief on the Merits). Petitioner further proposes that the terms "'failed' or 'unsuccessful' murder during a felony would be more logically acceptable." The common understanding of "failed" and "unsuccessful," however, just like the legal term of "attempt," implies that the person who has "failed" or was "unsuccessful" **intended** to accomplish an end which was not achieved[5].

Justice Overton in his dissent referred to several courts that have rejected Amlotte's "indefensible conclusion which gives Florida the dubious distinction of being one of the very few states to recognize" attempted felony murder. Amlotte v. State, 456 So. 2d at 450. One example was Head v. State, 443 N. E. 2d 44 (Ind. 1982), which typifies other jurisdictions' regard for attempted felony murder:

> Consequently, we hold that the applicability of the felony-murder doctrine is triggered only when the death of another results during the commission or attempted commission of the seven felonies enumerated in [the Indiana felony murder statute]. The Supreme Court of Illinois has reached the same conclusion:
>
> > "There can be no felony murder where there has been no death, and the felony murder ingredient of the offense of murder cannot be made the basis of an indictment charging attempt murder [sic]. Moreover, the

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5 Webster's definitions of "fail" include "to miss success in some effort : become forced to leave incomplete an attempt or enterprise." Webster's New International Dictionary (Unabridged) 814 (3d Edition 1981).

> offense of attempt requires an 'intent to commit a specific offense' . . . , while the distinctive characteristic of felony murder is that it does not involve an intention to kill. There is no such criminal offense as an attempt to achieve an unintended result." People v. Viser, (1975) 62 Il1.2d 568, 581, 426 N.E.2d 379 (crime of "attempted recklessness" does not exist).

Id., 443 N. E. 2d at 51. See also Petitioner's Brief on the Merits at Page 9: "Only when the death occurs during a felony enumerated in the statute do we have the [felony murder] exception to the premeditation requirement."

The Supreme Court noted in Head that Indiana's statutes elevate certain felonies to a higher degree if bodily injury occurs during their commission. Florida does not have a "felony battery" statute, but the enactment of such a law might fill whatever perceived legislative gap the judicial creation, "attempted felony murder," may have been intended to fill. Otherwise, Florida already punishes potential results by increasing the penalties if felonies are committed in ways that increase the danger to innocent parties, e. g., using a firearm elevates the degree of and/or the punishment for some felonies; simply being armed aggravates the offense of burglary as much as does making an actual assault on a person; using a deadly weapon turns the misdemeanor of battery into the second-degree felony of aggravated battery; and threatening to use force likely to cause serious personal injury on the victim elevates the crime of sexual battery from a second-degree to a first-degree felony.

ss. 775.087, 810.02(2), 784.03(1)(a), 784.045(1)(a)2., 794.011(4)(b), Fla. Stat. (1993). The judicial branch should not enact a law holding that the possibility of death that these same circumstances raise is itself a separate, additional crime.

In its decision abolishing felony murder in the State of Michigan, the Supreme Court of Michigan noted that:

> At early common law, the felony-murder rule went unchallenged because at that time practically all felonies were punishable by death. It was, therefore, "of no particular moment whether the condemned was hanged for the initial felony or for the death accidentally resulting from the felony." . . .

People v. Aaron, 409 Mich. 672, 299 N. W. 2d 304, at 310-311 (1980). It is of considerable moment, however, if the strict liability of the felony murder rule which substitutes for proof of actual intent is implemented to punish people for what **could** have happened. Judicial conscience cannot allow a person to be imprisoned for a crime which does not exist. Vogel v. State, 365 So. 2d 1079 (Fla. 1st DCA 1979).

CONCLUSION

For the reasons expressed in Point I herein, Respondent respectfully requests that this Honorable Court approve the District Court's decision reversing his conviction for "attempted felony murder of a law enforcement officer." In addition, and for the reasons expressed in Point II herein, Respondent respectfully requests that this Honorable Court answer in the negative the questions certified by the District Court to be great public importance. In addition, and for the reasons expressed in Point III herein, Respondent respectfully requests that this Honorable Court reverse its decision in Amlotte v. State, 456 So. 2d 448 (Fla. 1984), and declare that the crime of "attempted felony murder" does not exist in Florida.

Respectfully submitted,

JAMES B. GIBSON, PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

BRYNN NEWTON
ASSISTANT PUBLIC DEFENDER
Florida Bar Number 175150
112-A Orange Avenue
Daytona Beach, Florida 32114-4310
904-252-3367

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, by delivery to his basket at the Fifth District Court of Appeal; and by mail to Mr. Harold L. Grinage, P. O. Box 158, Lowell, Florida 32663-0158, this 24th day of October, 1994.

ATTORNEY

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

versus

CASE NO. 84,318
DISTRICT COURT CASE NO. 93-1583

HAROLD LEONARD GRINAGE,

Respondent.

RESPONDENT'S BRIEF ON THE MERITS

A P P E N D I X

violation of community control.[1] The child was advised of his rights, waived an attorney to represent him and entered a plea of guilty. The child was adjudicated guilty of violation of community control and transferred from secure detention to home detention. B.S. was set for a disposition hearing.

A writ of prohibition would have been proper for several reasons. First, there was no basis for a violation of community control. The juvenile judge had terminated B.S.' community control on 22 March 1994. Therefore, any act subsequent to 22 March was not a violation of community control. Section 39.054(1)(a)5 allows the juvenile court to place a child on community control until the child's "19th birthday unless [t]he child is sooner released by the court, on the motion of an interested party or on its own motion." In this case, the child's community control was terminated before the violation petition was filed. HRS notified the court on 18 March 1994 that it "recommends honorable termination of supervision." The juvenile judge agreed and terminated community control on 22 March 1994. HRS had no authority to file a petition for violation of community control since B.S. was not on community control.

Second, the child was ordered detained without a legal factual basis. This detention violates Juvenile Rule of Procedure 8.005. Rule 8.005 requires a verified petition to be filed, or an affidavit or sworn testimony presented to the court before a judge can issue an order authorizing that a child be taken into custody. In this case, the juvenile judge entered the custody order on 25 April, and the petition alleging violation of community control, was not executed until 4 May 1994. The juvenile judge neither had an affidavit nor did he take sworn testimony prior to issuing the custody order.[2] Thus, the custody order was improperly issued. *See also*, § 39.042(3), Fla. Stat. (1993).

Finally, B.S. was ordered detained without meeting the criteria of section 39.042, Florida Statutes (1993). This section requires that all court orders regarding the detention of a child be based upon findings by the court that there is a need to detain the child as opposed to some less restrictive placement. § 39.042(2), Fla. Stat. (1993). The custody order made no such finding. Further, after the child was detained, we have nothing in the record before us to show that a risk assessment instrument was completed. *See* § 39.044(2), Fla. Stat. (1993); *R.W. v. Soud, Jr., Judge*, 19 Fla. L. Weekly S348, S349 (Fla. June 30, 1994). For these reasons, had a writ of prohibition been timely filed by HRS, the writ would have been granted.

[1]In its petition for writ of certiorari, HRS argues that the juvenile judge was informed *before* the petition was filed that HRS had no authority to file a petition for violation of community control because an order terminating community control had been entered by the juvenile court and that order specifically released the child from the supervision of HRS. *See* § 39.054(1)(a)5, Fla. Stat. (1993). As noted by my brethren, HRS capitulated to the judge's order. HRS should have considered a writ of prohibition at that time, especially since they had already decided to appeal.

[2]The letter from B.S.' mother was not under oath and she did not testify before the juvenile judge.

* * *

Criminal law—Attempted first degree felony murder of law enforcement officer—Jury instructions—Error to instruct jury that state was not required to prove that defendant knew victim was law enforcement officer—State cannot avoid proving defendant's knowledge that victim was law enforcement officer by alleging that attempted murder of law enforcement officer engaged in the performance of his duty took place during a robbery and citing the felony murder statute—Even if felony murder statute were proper vehicle for charging attempted murder of law enforcement officer, state could not rely upon knife thrust toward officer both to prove essential element of underlying felony of robbery and to establish "overt act" required to prove attempted murder—Allegations of information insufficient to sustain first-degree felony murder conviction where information alleged that defendant used knife while intending to commit robbery, but did not allege that defendant intended to murder victim—State cannot transform offense of aggravated assault on police officer into attempted murder by alleging that, since the assault took place as part of a robbery attempt, it constituted an "attempted felony murder"—Questions certified: 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 attempted (felony) murder of a law enforcement officer engaged in the lawful performance of his duty?; and 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?

HAROLD LEONARD GRINAGE, Appellant, v. STATE OF FLORIDA, Appellee. 5th District. Case No. 93-1583. Opinion filed August 19, 1994. Appeal from the Circuit Court for Orange County, Alice Blackwell White, Judge. Counsel: James B. Gibson, Public Defender, and Brynn Newton, Assistant Public Defender, Daytona Beach, for Appellant. Robert A. Butterworth, Attorney General, Tallahassee, and Wesley Heidt, Assistant Attorney General, Daytona Beach, for Appellee.

(HARRIS, C. J.) Harold Leonard Grinage (Grinage) appeals his judgment and sentence for "attempted first degree felony murder of a law enforcement officer" and attempted robbery with a deadly weapon. We reverse his conviction on the attempted murder charge and affirm his conviction for attempted robbery, but remand for resentencing on that charge since the score sheet will dramatically change.

Deputy Boaz, the State's primary witness, testified that he had arranged to make an undercover purchase of cocaine from Grinage in a shopping center parking lot. Boaz said he was sitting alone in his car when Grinage got into the car from the passenger side. Grinage asked to see the money, and Boaz complied. Grinage, instead of producing any cocaine, suddenly pulled a knife and Boaz was "stabbed" in the hand "when I caught the knife the first time." Boaz suffered a hand wound before Grinage was subdued by the backup team.

Grinage, who admitted the attempted armed robbery, maintained that he had never tried to kill Boaz. He claimed that he pulled the knife out to scare Boaz into giving him the cash, but stated that he never held the knife to Boaz's throat or thrust it towards his chest. It seems clear that Grinage did not know Boaz was a policeman.

Grinage moved for a judgment of acquittal and, although the trial judge observed that, "The physical evidence, such as it was, more closely matched [Grinage's] version of the events," she concluded the evidence was adequate to go to the jury. And even though substantial evidence impeaching Boaz' credibility, including testimony from his own supervisor, was offered, the jury convicted.

Several issues are raised on appeal, only one of which warrants discussion. Grinage made the argument that the jury instruction on "attempted first degree felony murder of a law enforcement officer"[1] was inadequate:

> Furthermore, the verdict is contrary to the law in that the jury instructions given as to count one, incorporating the State's proposed jury instruction number one, advised the jury that the State did not have to prove the Defendant had a premeditated design or intent to kill, nor did the State have to prove that the Defendant knew that Kelly Boaz was a law enforcement officer. The Defendant would submit that the jury was then left with the legal impression that all they had to do was find that the Defendant, Harold Grinage, did "some act" during the perpetration or attempted perpetration of a robbery in order to be found guilty of Attempted First Degree Felony Murder of a Law Enforcement Officer, "some act," being undefined, vague, overbroad and ambiguous, thus leaving the jury to speculate and conjecture.

We agree that the instructions given below were inadequate and require reversal. We further hold that upon retrial, merely giving the newly approved instructions (instructions that still omit the requirement of intent and the requirement of knowledge of the status of the victim) will not be sufficient to justify the conviction for unknowingly attempting to murder a police officer engaged in the performance of his duty.

Grinage urges, and we agree, that before he can be convicted of attempting to murder a police officer engaged in the lawful performance of his duty, the State must allege and prove that he knew his victim was a police officer. The State argues, however, that since section 784.07(3) is silent as to the requirement of *mens rea*, then the defendant's knowledge of the victim's status is immaterial. Admittedly, this was basically the holding in *Carpentier v. State*, 587 So. 2d 1355 (Fla. 1st DCA 1991).

Further, the State's position on statutory silence is consistent with *State v. Medlin*, 273 So. 2d 394, 396 (Fla. 1973);

> The Florida cases set out the rule that where a statute denounces the doing of an act as criminal without specifically requiring criminal intent, it is not necessary for the State to prove that the commission of such act was accompanied by criminal intent.

Medlin relied on *La Russa v. State*, 142 Fla. 504, 509, 196 So. 302, 304 (1940), which held:

> It is well settled that as a general rule, acts prohibited by statute (statutory as distinguished from common law crimes) need not be accompanied by a criminal intent, unless such intent be specifically required by the statute itself, as the doing of the act furnishes such intent.[2]

However, we find that section 784.07(3) is not silent as to the requirement of *mens rea*.

Section 784.07(3) is a subsection of a section entitled "Assault or battery of law enforcement officers . . . ; reclassification of offenses." The purpose of this section is to enhance the penalty for certain offenses against law enforcement officers (and other designated officers) when such offenses are committed while the officers are engaged in their official duties. In subsection (2), the statute increases the penalties for assault, battery, aggravated assault and aggravated battery against such officer *if the defendant knows of his or her status as an officer*.

While the "knowingly committing" language is not repeated in subsection (3), it is replaced by the legally equivalent word "attempted." As Justice Overton observed in his dissenting opinion in *Amlotte v. State*, 456 So. 2d 448, 450 (Fla. 1984), "A conviction for the offense of attempt has always required proof of the *intent to commit the underlying crime*." Here the underlying crime is "the murder of a police officer engaged in the lawful performance of his duty." How could Grinage have *intended* to murder (felony or otherwise) a "law enforcement officer . . . engaged in the lawful performance of his duty," if he did not know that Boaz was, in fact, a police officer? We agree that the court erred in instructing the jury that the State was not required to prove such knowledge.

Had the State charged Grinage with the offense of attempted murder under section 784.07(3),[3] intent to commit the murder *and* knowledge that the victim was a police officer would, we think, be necessary elements. The State urges that it can avoid proving these elements by merely alleging that the attempted murder of a police officer engaged in the performance of his duty took place during a robbery and citing the felony murder statute.

Admittedly, the supreme court majority in *Amlotte* held that attempted felony murder is recognized in Florida.[4] But the supreme court has not yet determined that the concept of felony murder can carry not only the offense of attempted murder but will also justify a conviction for the unknowing specific attempt to murder a police officer engaged in the lawful performance of his duty. That is the issue before us. In *Fleming v. State*, 374 So. 2d 954 (Fla. 1979), the supreme court held that the accidental shooting of a known police officer justified a plea to attempted felony murder because the attempt was committed during a felony and, therefore, premeditation was presumed. But to go further and presume that because the attempt was made during the commission of an attempted robbery of an undercover officer in a sting operation, the defendant will be presumed not only to have intended a killing but also to know that the undercover agent was a police officer is stacking presumption on top of presumption.

We hold that section 782.04(1)(a)2 is not the proper vehicle for charging a section 784.078(3) attempted murder of a law enforcement officer engaged in the lawful performance of his duty. Because it may be argued that *Amlotte* is broad enough to encompass this offense, we certify this issue to the supreme court.

Even if the felony murder rule is held to be a proper way to charge attempted murder of a police officer engaged in the lawful performance of his duty, it was not appropriate in this case. The overt act relied on by the State to justify the attempted murder charge is the knife "thrust . . . toward the chest or throat area of Kelly Boaz." But this "overt act" is the only alleged act of force, violence or assault to prove a necessary element of the underlying qualifying offense of robbery. If "force, violence or assault" is not present during the course of the taking, then there is no robbery. Can an essential element of the underlying qualifying offense *also* constitute the "overt act" required to prove attempted murder? If so, then practically every robbery will justify an attempted murder charge. Although *Fleming* dealt with an underlying robbery charge, the overt act there was not the violence that occurred during the taking but the shooting that occurred later during the getaway attempt. The accidental shooting of the police officer, although committed during the course of the robbery (the getaway) was a separate act of violence not necessary to prove the robbery. In *Amlotte,* the underlying offense was burglary so that the shooting into the residence was not an essential element necessary to prove the underlying qualifying felony. We hold, until the supreme court decides otherwise, that an essential element of the underlying qualifying felony cannot also serve as the overt act necessary to prove attempted murder.

Finally, the information in this case alleged that Grinage:

> Attempted to murder Kelly Boaz, a law enforcement officer . . . engaged in the lawful performance of his duty . . . and in furtherance of said attempt . . . 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.

The above charge, without the additional allegation that Grinage *intended* to murder Boaz, charges nothing more than an aggravated assault (section 784.021) of a police officer engaged in the performance of his duty (section 784.07(2)(c)) committed as a part of an attempted robbery.

An aggravated assault is defined as an assault either with a deadly weapon *without an intent to kill* or an assault *with an intent to commit a felony*. Here, Grinage is alleged to have used a knife (deadly weapon) while intending to commit a felony (robbery).

Although this aggravated assault allegation is coupled with the additional allegation that the victim was a police officer engaged in the lawful performance of his duty, this does nothing more than bring the offense within the ambit of section 784.07(2)(c) which enhances the penalty for the aggravated assault of a police officer engaged in the lawful performance of his duty. But this section *additionally* requires that the defendant *know* that the victim is a police officer.

We hold that the State cannot transform the offense of aggravated assault on a police officer engaged in the lawful performance of his duty into attempted murder by merely alleging that since the assault took place as a part of a robbery attempt, it constitutes an "attempted felony murder."

Some criminal offenses (and we urge that first degree felony murder is one) simply were not intended by the legislature to

support a conviction for their attempted commission. Section 782.04(1)(a)2, by its terms, contemplates a body—a completed act of homicide. Under this statute, the malice aforethought (intent) "is supplied by the felony, and in this manner the rule is regarded as a constructive malice device." *Adams v. State*, 341 So. 2d 765 (Fla. 1977). This conclusion is apparently based on the premise (perhaps legal fiction) that since one is presumed to intend the consequences of his acts, if a death occurs as a result of his intentional commission or attempted commission of a qualifying felony, he must have intended (and the law will presume such intent) the death of the victim. But where is the logic if there is no body? If we have a frightened or injured victim as a result of the commission or attempted commission of a felony, why should not the law presume that such was the intent of the offender? Why should the law presume an intent to murder when there is no death merely because the assault occurs during the commission or attempted commission of a felony?

We recognize that parts of this analysis may be contrary to the majority opinion in *Amlotte,* but we believe it to have been invited by the supreme court's comment in Standard Jury Instruction, 19 Fla. L. Weekly S244 (Fla. May 5, 1994). There, the court said in a note to its opinion approving a new instruction on attempted murder and manslaughter:[5]

> The committee noted that it had great difficulty in drafting an instruction on attempted felony murder which incorporated the language of *Amlotte v. State*, 456 So. 2d 448 (Fla. 1984). In fact, the committee observed that a majority of its members were persuaded by the dissenting opinion in that case that there could be no such crime as attempted felony murder. Recognizing, however, that its function was not to change existing law, the committee submitted a proposed instruction for that crime.

Unlike the instruction committee, it is our responsibility (while not reversing the supreme court) to point out to the court new or additional arguments that should be considered by it in determining whether questioned law should remain in effect. In that regard, we certify to the supreme court the following questions:

> 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 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?

REVERSED in part; AFFIRMED in part and REMANDED for resentencing. (DAUSKCH, J., concurs. GRIFFIN, J., concurs specially and dissents with opinion.)

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[1]The instruction given was as follows:

In order to prove that defendant attempted to commit the crime of First Degree Felony Murder of a Law Enforcement Officer, the state must prove the following beyond a reasonable doubt:

1. Harold Grinage did some act toward committing the crime of First Degree Felony Murder of a Law Enforcement Officer that went beyond just thinking or talking about it.

2. He would have committed the crime except that someone prevented him from committing the crime of First Degree Felony Murder of a law Enforcement Officer, or he failed.

3. Kelly Boaz was a law enforcement officer.

It is not an attempt to commit First Degree Felony Murder of a Law Enforcement Officer if the defendant abandoned his attempt to commit the offense or otherwise prevented its commission, under circumstances indicating a complete and voluntary renunciation of his criminal purpose.

First Degree Felony Murder is the unlawful killing of a human being when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, a robbery. In order to convict of First Degree Felony Murder, it is not necessary for the State to prove the Defendant had a premeditated design or intent to kill.

Robbery will be defined for you later.

It is not necessary for the State to prove that Harold Grinage knew that Kelly Boaz was a law enforcement officer.

[2]It should be noted that this statutory construction is inconsistent with *Staples v. United States*, ___ U.S. ___, 114 S.Ct. 1793, ___ L.Ed.2d ___ (1994).

> As we observed in *Liparota v. United States*, 471 U.S. 419, 105 S. Ct. 2084, 85 L. Ed. 2d 434 (1985), "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." . . . Thus, we have long recognized that determining the mental state required for commission of a federal crime requires "construction of the statute and . . . inference of the intent of Congress." . . .
>
> The language of the statute, the starting place in our inquiry . . . provides little explicit guidance in this case. Section 5861(d) is silent concerning the *mens rea* required for a violation. . . . Nevertheless, silence on this point by itself does not necessarily suggest that Congress intended to dispense with a conventional *mens rea* element, which would require that the defendant know the facts that make his conduct illegal. *See Balint, supra*, at 251, 42 S. Ct., at 302 (stating that traditionally, "scienter" was a necessary element in every crime). . . . On the contrary, we must construe the statute in light of the background rules of the common law . . . in which the requirement of some *Mens rea* for a crime is firmly embedded. As we have observed, "[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence." *Id.* at 436, 98 S. Ct., at 2873 . . . *See also Morissette v. United States*, 342 U.S. 246, 250, 72 S. Ct. 240, 243, 96 L. Ed. 288 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil").
>
> There can be no doubt that this established concept has influenced our interpretation of criminal statutes. Indeed, we have noted that the common law rule requiring *mens rea* has been "followed in regard to statutory crimes even when the statutory definition did not in terms include it." . . . Relying on the strength of the traditional rule, we have stated that offenses that require no *mens rea* generally are disfavored . . . and have suggested that some indication of congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime.

Staples, 114 S. Ct. at 1796-1797.

[3]Assuming that section 784.07(3) creates a new substantive offense. *See Carpentier v. State*, 587 So. 2d 1355 (Fla. 1st DCA 1991).

[4]But see section 921.0012 (the offense severity ranking chart) which reflects that the legislature may not recognize attempted felony murder as an offense.

[5]We also mention by way of footnote (because there was no objection) that the trial court also failed to give the Introduction to Homicide charge *required* in all murder and manslaughter cases. Although this instruction has now been replaced by an Introduction to Attempted Homicide instruction, the requirement to define murder by defining homicide and then eliminating justifiable and excusable homicide and distinguishing between degrees of murder and manslaughter remains. In our case, there was no effort to define murder (or now attempted murder).

(GRIFFIN, J., concurring in part; dissenting in part.) I will leave the majority opinion to the supreme court; they'll either like it or they won't and they're the ones with power to change their precedents.

I would give the defendant a new trial because the jury instruction on "attempted first degree felony murder of a law enforcement officer" was fatally flawed.

The instruction given was as follows:

> In order to prove that defendant attempted to commit the crime of First Degree Felony Murder of a Law Enforcement Officer, the state must prove the following beyond a reasonable doubt:
>
> 1. Harold Grinage did some act toward committing the crime of First Degree Felony Murder of a Law Enforcement Officer that went beyond just thinking or talking about it.
>
> 2. He would have committed the crime except that someone prevented him from committing the crime of First Degree Felony Murder of a law Enforcement Officer, or he failed.

3. Kelly Boaz was a law enforcement officer.

It is not an attempt to commit First Degree Felony Murder of a Law Enforcement Officer if the defendant abandoned his attempt to commit the offense or otherwise prevented its commission, under circumstances indicating a complete and voluntary renunciation of his criminal purpose.

First Degree Felony Murder is the unlawful killing of a human being when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, a robbery. In order to convict of First Degree Felony Murder, it is not necessary for the State to prove the Defendant had a premeditated design or intent to kill.

Robbery will be defined for you later.

It is not necessary for the State to prove that Harold Grinage knew that Kelly Boaz was a law enforcement officer.

As expressed below by appellant:

Furthermore, the verdict is contrary to the law in that the jury instructions given as to count one, incorporating the State's proposed jury instruction number one, advised the jury that the State did not have to prove the Defendant had a premeditated design or intent to kill, nor did the State have to prove that the Defendant knew that Kelly Boaz was a law enforcement officer. The Defendant would submit that the jury was then left with the legal impression that all they had to do was find that the Defendant, Harold Grinage, did "some act" during the perpetration or attempted perpetration of a robbery in order to be found guilty of Attempted First Degree Felony Murder of a Law Enforcement Officer, "some act," being undefined, vague, overbroad and ambiguous, thus leaving the jury to speculate and conjecture.

This instruction appears to be a combination of the standard instruction on "attempt,"[1] the statutory definition of felony murder,[2] and the case law interpreting section 784.07(3), Florida Statutes, which requires an enhanced penalty for a person convicted of "attempted murder of a law enforcement officer." *Isaac v. State*, 626 So. 2d 1082 (Fla. 1st DCA 1993), *review denied*, 634 So. 2d 624 (Fla. 1994); *Carpentier v. State*, 587 So. 2d 1355 (Fla. 1st DCA 1991), *review denied*, 599 So. 2d 654 (Fla. 1992). Although the lower court did the best it could to fashion an adequate jury instruction on attempted felony murder (an effort in which defense counsel appears on this record to have been utterly uninterested), the instruction given was so defective that the defendant was deprived of a fair trial.[3]

The problem is that the instruction, as given, cannot be understood and cannot be applied by a jury in a manner consistent with *Amlotte v. State*, 456 So. 2d 448 (Fla. 1984). The Florida Supreme Court's newly adopted jury instruction on attempted first-degree felony murder brings into relief the flaws in the instruction given below. *Standard Jury Instructions in Criminal Cases (93-1)*, 636 So. 2d 502 (Fla. 1994). As noted by the Supreme Court Committee on Standard Jury Instructions, the offense of attempted felony murder cannot be charged "understandably" using the standard "attempt" instruction. The Florida Supreme Court's order reflects the difficulty of drafting a proper instruction on attempted felony murder even *without* the added problem of the victim's law enforcement status. The court reported that although a majority of the Committee concluded that the crime for which they were charged with writing a jury instruction did not exist, by using the language from *Amlotte*, they were able to fashion an instruction that the court has approved.

We now know, in light of the committee's work, that in order to meet the requirements of *Amlotte*, the instruction for attempted first-degree felony murder must contain two discrete elements, which are set forth in the new instruction:

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.

It is not an attempt to commit first degree felony murder if the [defendant] [person who committed the specific overt act] abandoned the attempt to commit the offense or otherwise prevented its commission under circumstances indicating a complete and voluntary renunciation of [his] [her] criminal purpose.

The first element is a critical component and nothing in the instruction given below was equivalent. *See Gray v. State*, 19 Fla. L. Weekly, D1039 (Fla. 3d DCA May 10, 1994).

I do not, however, disagree with the First District Court of Appeal that the state need not prove the defendant knew his victim was a law enforcement officer. It may be that the overall legislative scheme found in sections 775.0823, 775.0825, 782.04(1) and 784.07, Florida Statutes, is odd, but these statutes plainly communicate the legislative scheme for charging, proving and punishing the attempted murder of a law enforcement officer. When the language of a Florida statute is plain, it must be followed. *State v. Jett*, 626 So. 2d 691 (Fla. 1993).

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[1]Fla. Stand. Jury Instr. (Crim.) 1062.

[2]§ 782.04(1)(a), Fla. Stat. (1991).

[3]*Ray v. State*, 403 So. 2d 956, 960 (Fla. 1981).

* * *

Jurisdiction—Non-residents—Torts—Error to deny non-resident automobile rental company's motion to dismiss tort suit for lack of personal jurisdiction where rental agreement was executed in Delaware, and there was no indication in complaint or affidavits that defendant purposefully availed itself of privileges and protections of Florida other than fact that rental agreement did not preclude rented vehicle from being driven in Florida

AVH DAILY RENTAL CARS, INC., Appellant, v. BRENDA SUE SMITH, Appellee. 1st District. Case No. 93-4083. Opinion filed July 29, 1994. An appeal from the Circuit Court for Bay County. Judy Pittman, Judge. Counsel: Charles A. Schuster of Bell, Schuster & Wheeler, P.A., Pensacola, for Appellant. Pamela Dru Sutton and Michel L. Stone of Sutton & Stone, P.A., Panama City, for Appellee.

CORRECTED OPINION

[Original Opinion at 19 Fla. L. Weekly D1652a]

Editor's Note: The wording of the second paragraph of the opinion has been revised.

(SMITH, J.) Appellant, AVH Daily Rental Cars, Inc. (AVH), seeks reversal of an order denying its motion to dismiss for lack of personal jurisdiction. We reverse and remand for entry of an order dismissing appellant from the cause of action.

Appellee, the plaintiff below, was in a car accident in New Jersey. The car was driven by her husband, also a Florida resident. The employer of appellee's husband, Earth Resources, a Florida corporation, rented the vehicle from the appellant, a Delaware corporation. There is no dispute that the rental agreement was executed in Delaware. The rental agreement provides that the subject vehicle may be driven anywhere in the continental United States and Canada. Appellee filed a tort suit in Florida naming her husband, AVH Daily Rental Cars, and the husband's employer, Earth Resources, as defendants. AVH Daily Rental Cars moved, by special appearance, to quash service of process and to dismiss for lack of jurisdiction.[1] Following a hearing, the lower court denied AVH's motion on the ground that the language used in the rental agreement between AVH and Earth Resources Corporation gave AVH a reasonable expectation that