IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
MAY 4 1995
CLERK, SUPREME COURT
By Chief Deputy Clerk

CASE NO. 85,478

THE STATE OF FLORIDA,

Petitioner,

-vs-

TREVOR MILLER,

Respondent.

FILED
SID J. WHITE
MAY 4 1995
CLERK, SUPREME COURT
By Chief Deputy Clerk

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

The certified question presented in this case is identical to the question previously certified by the Third District Court of Appeal in the case of Gray v. State, 19 Fla. L. Weekly D1039 (Fla. 3d DCA May 10, 1994). That case is now pending in this Court under the name of State v. Collin Gray, Case No. 83,766. State v. Gray has been fully briefed and oral argument was conducted on March 8, 1995.

References to the transcript herein refer to the transcripts filed in the Third District Court of Appeal record in the case of Collin Gray v. State, Third District Case No. 93-763. Gray was a codefendant of Trevor Miller, the Respondent herein, and the two of them were tried at a joint trial. The Third District Court of Appeal, in Miller v. State below, entered an order granting a motion to adopt the record on appeal from the case of Collin Gray v. State, Case No. 93-763. (R. 125). Thus, the transcripts pertinent to the instant proceeding can be found in the record of Third District Case No. 93-763, which is currently pending in this Court as Case No. 83,766. Additionally, insofar as the original transcripts for Trevor Miller were contained in Collin Gray's appellate record, the State, in the lower court, filed an additional set of the pertinent transcripts for use of the Third District Court of Appeal in Trevor Miller's appeal. (R. 131-132). That set of transcripts has been included in the record which the Clerk of the Third District Court of Appeal transmitted to this Court.

STATEMENT OF THE CASE AND FACTS

Trevor Miller was charged by information with one count of attempted first degree murder, one count of armed robbery and one count of robbery. (R. 1-3).[1] Miller was charged along with two codefendants, Collin Gray and Andrew Jackson.

Albert Lee, the victim of the armed robbery alleged in count three of the information, testified that on April 9, 1992, he was working the cash register in his restaurant, the Pepper Pot. (T. 231). At approximately 2:00 p.m., he noticed three black Jamaican males enter his restaurant. (T. 234). Mr. Lee then heard a command to lay down. (T. 235). He turned around to face a man standing six inches away from him. (T. 235). The man, whom Mr. Lee identified in court as the codefendant Gray (T. 237), was pointing a semiautomatic handgun at his head. (T. 237, 267, 268).

Gray had Mr. Lee face down on the ground behind the counter. (T. 268). Gray stood over Mr. Lee, and demanded that Mr. Lee tell him where he kept his money. (T. 268). Gray then took a wallet and some cash from Mr. Lee's pockets. (T. 269).

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[1] Immediately prior to the commencement of voir dire, the State sought and obtained leave to amend the robbery count to a charge of robbery with a firearm, as a result of an inadvertent omission of that language. (T. 133-34). A superseding information was charged, reflecting this change. (R. 4-7; T. 128).

Gray also opened a drawer underneath the cash register, where he stole more cash and Mr. Lee's Colt revolver. (T. 271). Eventually, Gray forced one of Mr. Lee's employees to open the cash register, where he stole even more cash. (T. 272). Mr. Lee testified that Gray stole approximately $2,500 to $3,000 in cash from him. (T. 272). After robbing Mr. Lee, Gray went to the grocery section of the restaurant where he robbed a Jamaican man of approximately $7,000 in Jamaican currency. (T. 273). The entire armed robbery lasted for about five minutes. (T. 274). Lee identified Miller and Jackson as Gray's two accomplices, asserting that Miller and Jackson were both armed. (T. 270-71). After the defendant and his accomplices fled, Mr. Lee called the police. (T. 274).

Officer Richard Shadwick was patrolling the area of 119th Street and Northwest 12th Avenue, in an unmarked police car, when he received a BOLO on his radio about an armed robbery. (T. 300-303). Minutes after hearing the BOLO, Shadwick noticed a car matching the BOLO driving eastbound on 119th Street. (T. 303, 306). The car was a gray Toyota with a temporary tag, and the officer testified that there were three occupants in the car. (T. 305-306).

Shadwick began following the Toyota. (T. 306). At the same time, he used his police radio to inform other police officers that he had identified armed robbery suspects and that he was following the suspects. (T. 307). Soon thereafter, a marked

Metro-Dade police car joined the chase. (T. 307). At this point, the Toyota was driving westbound on 125th Street. (T. 307).

When the marked police car turned on its emergency equipment, the Toyota turned north on I-95 and began driving very fast. (T. 308). After recklessly weaving in and out of traffic for approximately a half mile, the Toyota exited I-95 at 135th Street. (T. 308-309). The Toyota then ran through a red light at the intersection of 135th Street and 6th Avenue and violently struck another car in the intersection . (T. 309). Codefendant Jackson was then observed exiting from the driver's window of the Toyota. (T. 320). Gray was observed in the front passenger's seat. (T. 312). Miller, as a result of the accident, had been ejected from the back seat of the car. (T. 312-13).

Shadwick identified the driver of the stricken car as Jerome Passmore. (T. 316-17). The physician who treated Passmore stated that Passmore was rendered a quadriplegic as a result of the collision, due to a traumatic injury to the cervical spine. (T. 382).

Sgt. Anthony Collins arrived at the accident scene shortly after the collision. (T. 323). Eventually, he opened the passenger's side door of the gray Toyota, and he saw Gray, who was injured, sitting in the front passenger's seat. (T. 3 26, 340). When Collins opened the car door, a .357 Magnum revolver and a loaded .9 mm semiautomatic handgun fell from where Gray had

been sitting. (T. 327-31, 334). Collins also found a loaded .38 revolver two feet from the body of Miller, who had been thrown from the Toyota after the collision. (T. 325, 336). Ultimately, Collins found a wallet and a stack of Jamaican currency in Gray's pants pockets. (T. 332).

Detective Pellechio, the lead detective on this case, arrived at the scene of the accident and collected four handguns from Officer Collins, a wallet and approximately $6,875 in Jamaican currency. (T. 345-46). Pellechio stated that Mr. Lee identified the .357 Colt revolver as the one which Gray stole from the Pepper Pot. (T. 347). Pellechio also testified that the wallet found in Gray's pockets belonged to Mr. Lee. (T. 3 49).

Codefendant Jackson ultimately confessed to Pellechio. (T. 357-58). He told Pellechio that he, Miller and Gray were driving to Jackson's girlfriend's house when they stopped at the Pepper Pot. (T. 358). Gray decided that they were going to rob the restaurant, so all three men went inside. (T. 359). Jackson and Miller stood inside the restaurant near the front door, while Gray jumped over the counter and robbed Mr. Lee. (T. 359). Jackson held the .9 mm Star pistol; Miller held a .38 Special; and Gray used a .9 mm Sig Sauer semiautomatic handgun. (T. 358). After the robbery, all three men got in the gray Toyota and fled. (T. 358).

All three defendants moved for judgments of acquittal. (T. 398-406). The trial court denied the defendants' motions. (T.

413). The defendants all rested their cases (T. 417, 454), and they renewed their motions for judgments of acquittal. (T. 417-20). The trial court again denied the motions. (T. 420).

During the charge conference, Miller's attorney moved the trial court to refrain from reading the attempted felony murder instruction. (T. 430, 553-54). The trial judge denied that motion. (T. 432, 553-54).

The jury returned guilty verdicts as to counts one and three (R. 92-93; T. 556-58), and the trial court adjudicated Miller guilty as to those counts, attempted first degree murder and armed robbery. (R. 94-95; T. 560). The trial judge sentenced Miller to concurrent terms of twenty-two years and 15 years in state prison with a three year minimum mandatory sentence. (R. 99-103).

On appeal, the Third District Court of Appeal reversed the conviction for attempted first degree murder:

> Pursuant to the reasoning in Gray v. State, 19 Fla. L. Weekly D1039 (Fla. 3d DCA May 10, 1994) (review granted no. 83766) we reverse appellant's conviction for attempted first degree felony murder, affirm the conviction of armed robbery, and certify to the Supreme Court that this decision involves the following question of great public importance:
>
> Whether the "overt act" referred to in Amlotte v. State, 456 So. 2d 448, 449 (Fla. 1984), includes one, such as

> fleeing, which is intentionally committed but is not intended to kill or injure another?

(R. 133-134).

The Third District, in its decision in the codefendant Collin Gray's case, accepted Gray's argument "that there was insufficient evidence to present a jury question concerning whether the acts committed against the victim could have caused his death." (App. 5). The Third District reached this conclusion because "[t]he running of the red light and the resulting collision do not constitute overt acts reasonably understood to result in a person's death." (App. 5). That Court therefore found that such acts did not satisfy the "overt act" requirement, as defined by this Court in Amlotte v. State, 456 So. 2d 448 (Fla. 1984). (App. 5-6).

QUESTION PRESENTED

WHETHER THE "OVERT ACT" REFERRED TO IN AMLOTTE V. STATE, 456 So. 2d 448, 449 (Fla. 1984), INCLUDES ONE, SUCH AS FLEEING, WHICH IS INTENTIONALLY COMMITTED BUT IS NOT INTENDED TO KILL OR INJURE ANOTHER.

SUMMARY OF ARGUMENT

The Third District Court of Appeal, through its decision and certified question, suggests that the overt act required for attempted felony murder must be one which is both intentionally committed and intended to kill or injure another. In reaching such a conclusion, the lower court applied an erroneous legal standard and misconstrued this Court's decision in Amlotte v. State, 456 So. 2d 448 (Fla. 1984), as Amlotte simply requires that the overt act be an intentional one which could, but does not cause the death of another; it need not be intended to cause the death or injury of another.

Not only did the lower court apply an erroneous legal principle, but, in applying the law to the facts of the case, it reached an erroneous conclusion. The actions of the fleeing defendant, and his co-felons, in running a red light at an urban intersection, and thereby causing a collision which rendered the victim quadriplegic, were clearly actions which could, but did not, cause the death of another. The acts of fleeing and running the red light were also intentional acts. Thus, under the principles of Amlotte, the requisite overt act exists for the offense of attempted felony murder.

ARGUMENT

THE LOWER COURT ERRED IN CONCLUDING THAT AN ACT WHICH IS NOT INTENDED TO KILL OR INJURE ANOTHER CANNOT CONSTITUTE THE OVERT ACT REQUIRED TO PROVE ATTEMPTED FELONY MURDER.

The elements of the offense of attempted felony murder were defined by this Court in Amlotte v. State, 456 So. 2d 448, 449-50 (Fla. 1984):

> We find that whenever an individual perpetrates or attempts to perpetrate an enumerated felony, and during the commission of the felony the individual commits, aids or abets a specific overt act which could, but does not, cause the death of another, that individual will have committed the crime of attempted felony murder. Because the attempt occurs during the commission of a felony, the law, as under the felony murder doctrine, presumes the existence of the specific intent required to prove attempt.

Thus, while the overt act needs to be intentional, it need only be one "which could, but does not, cause the death of another." There is no requirement that the overt act be one which is both intentional and which is intended to kill or injure another.

For this reason, the lower court's certified question, and the reasoning behind its decision, are fundamentally flawed. The certified question asks whether an intentional act, such a fleeing, which is intentionally committed, but is not intended

to kill or injure another, is a sufficient overt act under Amlotte. As seen above, the overt act need only be intentional; it need not be one which was intended to kill or injure.

Just as the felony murder doctrine engages in a presumption that the specific intent required for the murder exists by virtue of the commission of the underlying felony, so too, in the case of attempted felony murder, this Court has acknowledged that the specific intent required to prove an attempt is presumed by virtue of the commission of the felony. 456 So. 2d at 450. Therefore, just as felony murder can be predicated upon intentional acts which are not intended to kill or injure,[2] so too, attempted felony murder can be predicated upon intentional acts which are not intended to kill or injure. Once attempted felony murder is recognized as an offense, there is no reason to require that the overt act be both intentional and intended to kill or injure. An individual can engage in intentional acts during the course of a felony, which the individual knows can result in the death or serious injury of others, even if those intentional acts are not intended to kill. Those are precisely the types of actions for which the felon should be culpable. Reckless driving can pose as much of a danger to physical well being as a gun shot. Setting fire to a building, for the purpose of defrauding an insurance company, poses every bit as

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[2] See, e.g., State v. Hacker, 510 So. 2d 304 (Fla. 4th DCA 1986); Parker v. State, 570 So. 2d 1048 (Fla. 1st DCA 1990). Indeed, the doctrine of felony murder typically involves an unintended homicide. Vol. 2, Wharton's Criminal Law, §147 (15th ed. 1994), p. 299.

much of a threat to occupants of the building as an act of violence directed specifically towards the occupants.

Requiring the overt act to be both intentional and intended to kill or injure would essentially render the offense of attempted felony murder a redundancy, as the overt act, if intended to kill, would typically suffice to establish the offense of attempted murder without resorting to the doctrine of attempted felony murder.

In light of the foregoing discussion, the recently adopted standard jury instructions on attempted felony murder should be noted. See, Standard Jury Instructions in Criminal Cases, 636 So. 2d 502, 504-505 (Fla. 1994); Standard Jury Instructions in Criminal Cases, 639 So. 2d 502 (Fla. 1994). As to the overt act requirement, the instruction simply reiterates Amlotte's requirement that the overt act be one "which could have caused the death of (victim), but did not." 636 So. 2d at 504. There is no requirement that the overt act be one which has the intent to kill or injure. Indeed, one of the new instructions explicitly states: "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." Id. at 505. When the overt act is committed by someone other than the defendant, the defendant is responsible for that act, if the defendant was a principal in the underlying felony. Id.

As this Court's holding in Amlotte requires only that the overt act be one "which could, but does not cause the death of another," the only legitimate question in the instant case is whether the acts of flight from robbery and the running of the red light, which caused the ensuing violent collision, are acts which could, but did not, cause the death of the victim. The act of running a red light, at an urban intersection, near a major interstate highway, in the vicinity of other traffic, is clearly an act which is capable of causing the death of another.[3] The lower court erred in concluding that "[t]he running of the red light and the resulting collision do not constitute overt acts reasonably understood to result in a person's death." Gray, supra, 19 Fla. L. Weekly at D1039. Deaths resulting from various forms of reckless driving, including the running of red lights at urban traffic intersections, are an all too common occurrence for an appellate court to seriously maintain that such acts are not of the sort which are capable of causing death. Local sections of newspapers, hospital emergency rooms, and daily police reports, are all a sad testimonial to the fatal potential of an intentional decision to run a red light at a traffic intersection. Indeed, the recklessness of this flight from the police did come very close to killing the victim and left the victim in a quadriplegic state.

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[3] Acts committed during flight from the commission of a felony are within the scope of the felony murder rule. Parker v. State, 641 So. 2d 369 (Fla. 1994).

The hypothetical question will inevitably arise as to how far the doctrine of attempted felony murder will go if it applies to the act of running through the red light at the intersection. For example, what if the defendants' vehicle ran through the red light, but did not strike any vehicle or pedestrian and did not inflict any injury? Would an attempted felony murder conviction still ensue? The State would respond that a conviction for attempted felony murder will not hinge on whether there was actually a collision under such circumstances. However, that is not to say that <u>all</u> acts of running through a red light will be transformed into acts of attempted felony murder when they are committed during the flight from a robbery. The act of running a red light at a busy, urban traffic intersection, during daytime traffic, might very well be treated differently from the running of a red light at a remote, desolate intersection, at 4:00 a.m., when there are no visible signs of any traffic. The difference in such situations, however, is not a question of whether the defendant intended to kill or injure; the difference lies in the factual question of whether, under the totality of the circumstances, death or serious bodily injury could reasonably be foreseen as a consequence. The focus, therefore, is on the reckless indifference to human life.[4]

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[4] The Model Penal Code uses similar language in the context of felony murder, providing that a murder exists when "it is committed recklessly under circumstances manifesting extreme indifference to the value of human life." ALI, Model Penal Code, §210.2(1)(b) (1985), quoted in Volume 2, Wharton's Criminal Law §147 (15th ed. 1994), p. 301.

It must be emphasized that the acts of flight and running a red light are intentional acts; they are not acts of mere negligence. This point was duly noted in this Court's decision in State v. Smith, 638 So. 2d 509 (Fla. 1994). There, this Court observed that the acts of choosing to drive a vehicle under the influence, or driving with a suspended or revoked license, were intentional, willful acts. So, too, the acts of flight and running a red light are intentional, willful acts.

Moreover, even though the defendant, Trevor Miller, was not the driver of the vehicle, as a co-felon in the underlying felony, he is guilty of all crimes committed in furtherance of the common criminal scheme in which he participated. Jacobs v. State, 396 So. 2d 713, 716 (Fla. 1981); Adams v. State, 341 So. 2d 765 (Fla. 1976), cert. denied, 434 U.S. 878, 98 S.Ct. 232, 54 L.Ed. 2d 158 (1977); Bryant v. State, 412 So. 2d 347, 349 (Fla. 1982) ("the felony murder rule and the law of principals combine to make a felon liable for the acts of his co-felons.").

In view of the foregoing, it must be concluded that the lower court, through its apparent belief that the overt act must be one which is intended to kill or injure, applied an erroneous interpretation of Amlotte to the instant case, and secondly, that the lower court further erred in concluding that the acts involved in the instant case were not acts which were capable of causing the death of another.

CONCLUSION

Based on the foregoing, the decision of the lower court, with respect to the conviction for attempted first-degree murder, should be quashed, and the lower court should be directed to reinstate the conviction and sentence for that offense.

Respectfully submitted,

ROBERT A. BUTTERWORTH
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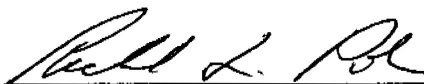

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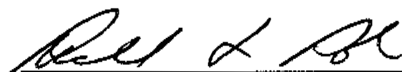
CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF PETITIONER ON THE MERITS** was mailed this 2nd day of May, 1995 to **RUSSELL K. ROSENTHAL, ESQ.**, 1925 Brickell Avenue, Suite D207, Miami, Florida 33129.



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