IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,680

FILED
SID J. WHITE
NOV 20 1995
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

THE STATE OF FLORIDA,

Petitioner,

vs.

EDUARDS WILSON,

Respondent.

ON PETITION FOR DISCRETIONARY JURISDICTION

BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Eduards Wilson was charged by amended information with one count of attempted first degree murder and one count of armed robbery. (R. 3-4). The attempted first degree murder count alleged that "EDUARDS WILSON, on or about JUNE 12, 1993, . . . did unlawfully and feloniously attempt to kill a human being, to wit: ELAN LOUIS, while engaged in the perpetration of, or in an attempt to perpetrate any robbery, by DISCHARGING A FIREARM AT ELAN LOUIS, CAUSING A PROJECTILE TO STRIKE AND/OR ENTER THE BODY OF ELAN LOUIS, with a firearm, in violation of s. 782.04(1) and s. 777.04 and s. 777.087, Fla. Stats. . . ." (R. 3).

The victim, Elan Louis, stated that he was waiting for a bus, while carrying a bag with a pair of shoes which he had just purchased. (T. 157-58). While waiting for the bus, a man whom Louis subsequently identified as the defendant herein, approached him, inquiring whether Louis knew a certain person. (T. 159). Louis responded negatively, and the defendant pulled out a gun. (T. 159). The defendant had exited a car which was occupied by two other men, and he obtained the gun from one of the other occupants of the car. (T. 160). The defendant started pulling the bag which Louis was carrying, although the shoes fell out of the bag. (T. 160-61). The defendant got back into the car from which he had come (T. 161), but, as Louis started walking away, the defendant pursued him. (T. 161-62). The defendant shot his gun towards Louis, striking Louis in the arm. (T. 162-63; 146-47).

A few weeks after the incident, the police presented a photo identification lineup to

Louis, and Louis selected the photo of the defendant, indicating that he was 100% certain of the identification. (T. 167-71; 203-205; 215-17). Louis also identified the defendant, in a courtroom identification during trial, as the person who shot him. (T. 170-71).

Annette Baptiste witnessed the shooting from a window in her apartment, but she was unable to identify the perpetrator. (T. 144-46). Afterwards, she and her mother went to the victim and observed that he had been shot in the arm. (T. 147). Ms. Baptiste heard three or four shots. (T. 150).

The jury was instructed on attempted first degree felony murder. (T. 280-81). The jury was not instructed on attempted first degree premeditated murder. The jury was also instructed on the following offenses as lesser included offenses of attempted first degree felony murder: attempted second degree murder (T. 281-82); attempted voluntary manslaughter (T. 282-83); and aggravated battery. (T. 283).

At the conclusion of the prosecution's case, defense counsel moved for a judgment of acquittal, arguing that the evidence was insufficient to establish that the defendant was the person who committed this crime. (T. 227). Defense counsel's sole argument was that the identification evidence did not sufficiently establish that the defendant was the perpetrator. Similarly, in closing argument, defense counsel argued that this was a case of misidentification. (T. 246-56; 268-75).

The defendant was found guilty of the offenses of attempted first degree felony

murder and armed robbery, and he received concurrent sentences of 27 years on each count. (T. 312, 326; R. 22-25).

On appeal to the Third District Court of Appeal, the conviction and sentence for attempted felony murder were reversed, in reliance upon this Court's recent decision in State v. Gray, 654 So. 2d 552 (Fla. 1995). The District Court of Appeal rejected the State's argument that the conviction for attempted felony murder should be reduced to an appropriate lesser included offense for which there had been sufficient evidence at trial. (R. 36-38). Pursuant to the State's motion for rehearing and certification, the Third District issued a subsequent opinion. (R. 39-40). The Court again rejected the State's argument that the conviction for attempted felony murder should either be reduced to an appropriate lesser included offense or remanded for retrial as to such lesser included offenses. However, the Court did certify the following question, as one of great public importance, to this Court:

> WHEN A CONVICTION FOR ATTEMPTED FIRST DEGREE FELONY MURDER MUST BE VACATED ON AUTHORITY OF STATE V. GRAY, 654 So. 2d 552 (Fla. 1995), DO LESSER INCLUDED OFFENSES REMAIN VIABLE FOR A NEW TRIAL OR REDUCTION OF THE OFFENSE?

(R. 40). After the State's motion for rehearing was denied and the above question was certified as being of great public importance, the State commenced the proceedings herein seeking discretionary review.

QUESTION PRESENTED

WHETHER LESSER INCLUDED OFFENSES REMAIN VIABLE FOR A NEW TRIAL OR REDUCTION OF THE OFFENSE AFTER A CONVICTION FOR ATTEMPTED FIRST DEGREE FELONY MURDER IS VACATED PURSUANT TO STATE V. GRAY, 654 So. 2d (Fla. 1995).

SUMMARY OF ARGUMENT

In State v. Gray, 654 So. 2d 552 (Fla. 1995), this Court receded from Amlotte v. State, 456 So. 2d 448 (Fla. 1984), and held that attempted felony murder is no longer an offense in Florida. That decision was to be applied to all cases, such as the instant one, which were currently pending on direct appeal at the time of the issuance of the decision in Gray. Gray did not address how the appellate courts should deal with issues such as the possibility of reducing the conviction for attempted felony murder to an offense which was a lesser included offense of attempted felony murder at the time of the trial. Nor did this Court's opinion in Gray discuss the possibility of remanding such cases to the trial court for retrial on such potential lesser included offenses as attempted second degree murder, attempted voluntary manslaughter or aggravated battery. The Third District Court of Appeal, construing Gray, has effectively held that the only proper action is to reverse the attempted felony murder conviction. Without the possibility of either a reduction of that conviction to a lesser included offense or a retrial on such lesser included offenses, the Third District's decision is effectively discharging the defendant from all acts related to the shooting of the victim, even though there has never been any acquittal of the defendant on any charge, and even though the evidence presented to the jury - the intentional shooting of the victim in the arm - is fully consistent with various lesser degrees of attempted homicide. Based on this Court's policy decision to recede from Amlotte, the defendant has been given an unwarranted free ride as to any and all other homicide related charges. That result does not ensue from anything which this Court stated in Gray.

ARGUMENT

LESSER INCLUDED OFFENSES REMAIN VIABLE FOR A NEW TRIAL OR REDUCTION OF THE OFFENSE WHEN A CONVICTION FOR ATTEMPTED FIRST DEGREE FELONY MURDER IS VACATED PURSUANT TO STATE V. GRAY, 654 So. 2d 552 (Fla. 1995).

While this Court, in State v. Gray, 654 So. 2d 552 (Fla. 1995), held that attempted felony murder is no longer an offense in Florida, that decision did not address the propriety of either remanding such cases to the trial court for retrial on lesser included offenses of the original charge of attempted felony murder, or reducing the conviction for attempted felony murder to a potential lesser included offense. Insofar as this Court did not address either of those possibilities in its opinion in Gray, the Third District Court of Appeal's construction of Gray, in the instant case, as mandating outright reversal, without the possibility of either retrial or reduction to a lesser included offense, is clearly erroneous.

Several appellate court decisions in Florida have dealt with the ramifications flowing from judicial decisions that various criminal convictions were for nonexistent offenses. Those cases have typically remanded the case for retrial. For example, in Hieke v. State, 605 So. 2d 983 (Fla. 4th DCA 1992), the defendant was found guilty of solicitation to commit third degree murder. After concluding that the conviction was for a nonexistent crime, the appellate court remanded the case to the trial court for a new trial on the lesser included offenses of aggravated battery or battery as both of those lesser included offenses had been submitted to the jury which returned the conviction

for the nonexistent offense. This Court dealt with a similar situation in Achin v. State, 436 So. 2d 30 (Fla. 1983), where the defendant, who had been charged with extortion, was convicted of the nonexistent offense of attempted extortion. The remedy for the improper conviction of a nonexistent offense was for a retrial on the original charge of extortion, an obviously higher level offense than the improper conviction for the nonexistent offense of attempted extortion. Likewise, in Jordan v. State, 438 So. 2d 825 (Fla. 1983), where the defendant was charged with resisting arrest with violence and convicted for the nonexistent offense of attempted resisting arrest with violence, the remedy was a retrial on the original charge. While Hieke involved a situation virtually identical to that presented in the instant case,[1] the decisions in Jordan and Achin were both permitting retrials not merely for any offenses which had been lesser included offenses of the conviction for a nonexistent offense, but for the original greater charge under which the defendant had been tried. Since those cases were going back for retrial on the original, greater charge, it necessarily follows, pursuant to this Court's decision, that the trial court would have jurisdiction, on retrial, to permit the jury to consider not just the original, greater charge, but any proper lesser offenses of that charge as well. See also, State v. Sykes, 434 So. 2d 325 (Fla 1983) (permitting retrial on theft charges after conviction for nonexistent offense of attempted second-degree theft was overturned); Ward v. State,

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[1] If anything, the facts of the instant case present a more compelling position for permitting retrial than do the facts of Hieke. While Hieke involved an offense which had never been recognized as an existing offense in Florida, the instant case involved attempted felony murder which, for at least 11 years, from the time of Amlotte v. State, 456 So. 2d 448 (Fla. 1984) until this Court's decision in Gray, eleven years later and one year after the trial in this case. Thus, attempted felony murder clearly had been a recognized offense, including at the time of the trial herein. It would be absurd for appellate courts to deal more harshly with efforts at reprosecution under such circumstances than in the case of a conviction for a nonexistent offense where that offense, as in Hieke, had never been explicitly recognized as a viable offense in Florida.

offense of attempted second-degree theft was overturned); Ward v. State, 446 So. 2d 267 (Fla. 2d DCA 1984) (permitting retrial on forgery charge after conviction for nonexistent offense of attempted uttering of a forged instrument was overturned); Cox v. State, 443 So. 2d 1013 (Fla. 5th DCA 1984) (permitting retrial on insurance fraud charge after conviction for nonexistent offense of attempted insurance fraud was overturned); Brown v. State, 550 So. 2d 142 (Fla. 1st DCA 1989) (permitting retrial on solicitation charge after conviction for nonexistent offense of attempted solicitation was overturned).

Thus, the Third District's conclusion that retrial on lesser included offenses of attemtped felony murder is prohibited by Gray is clearly erroneous. As in Hieke, the jury in the instant case was instructed on a wide variety of lesser included offenses: attempted second degree murder, attempted voluntary manslaughter, and aggravated battery. Furthermore, it is clear that there is no double jeopardy bar to retrial on the various lesser included offenses. The verdict which the jury had returned was a conviction for the highest degree offense which the jury had been instructed to consider. There was no acquittal of the defendant for either that offense (attempted felony murder) or any of the lesser offenses which the jury was instructed to consider. Under such circumstances, a retrial does not present any double jeopardy problems. The double jeopardy clause furnishes protection in three distinct situations, none of which are applicable herein: (1) it protects against second prosecution for the same offense after acquittal; (2) it protects against second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense. Ohio v. Johnson, 467 U.S. 493, 104 S.Ct. 2536, 81 L.Ed. 2d 425 (1984). As to the second situation,

the typical situation of a reversal of a conviction, for reasons other than insufficient evidence, on an appeal initiated by the defendant, which ultimately results in the retrial on remand to the trial court. See, e.g., Montana v. Hall, 481 U.S. 400, 107 S.Ct. 1825, 95 L.Ed. 2d 354 (1987) (defendant convicted under an inapplicable statute, after reversal on appeal, could be tried on the correct charge); United States v. Scott, 437 U.S. 82, 90-91, 98 S.Ct. 2187, 57 L.Ed. 2d 65 (1978) ("[t]he successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict . . . poses no bar to further prosecution on the same charge."); Achin, supra.

The lower Court's concerns regarding the viability of lesser included offenses after the reversal of the attempted felony murder conviction, arose from the lower Court's perception that "there can be no lesser included offenses under a non-existent offense." (R. 40). Not only would the same concern have existed in Hieke, Achin and Jordan, but, in the instant case it is clearly a false concern. As noted above, attempted felony murder clearly was a recognized offense in Florida, certainly from the time of Amlotte, in 1984, until Gray receded from Amlotte in 1995.[2] As attempted felony murder was explicitly recognized as an offense under Florida law at the time of the trial in this case, it must therefore be concluded that notwithstanding the ultimate reversal of the attempted felony murder conviction, at the time of the trial herein, all of the lesser included offenses were properly treated as lesser included offenses of the main charge, attempted felony murder.

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[2] This Court's pre-Amlotte decision in Fleming v. State, 374 So. 2d 954 (Fla. 1979), had also recognized atttempted felony murder as an offense in Florida.

This Court, in concluding that the Gray decision should be applied to all convictions which were not yet final, granted Gray, Wilson and other similarly situated defendants, a benefit which was not compelled by law. This Court could have treated Gray as a decision which applied purely prospectively, to offenses committed after the date of that decision. Article X, Section 9 of the Florida Constitution provides that when a criminal statute is repealed, such repeal "shall not affect prosecution or punishment for any crime previously committed." The decision of this Court, in Gray, to recede from Amlotte's recognition of attempted felony murder, is highly analogous to the situation in which the legislature expressly repeals a criminal statute. Just as the latter situation does not affect convictions for previously committed offenses, so too, this Court could have concluded that Gray would not affect previously committed offenses. Nevertheless, having decided to confer on pipeline defendants the full benefit of Gray, it is absurd to compel, as the Third District did, the further benefit of a complete discharge, not just from attempted felony murder, but from all offenses, which at the time of the trial, were proper lesser included offenses of attempted felony murder. Not only were those lesser offenses proper lesser included offenses of attempted felony murder, but, a review of the charging document further compels the conclusion that all of those lesser offenses are fully consistent with the language in the charging document, which alleged that the defendant, during the course of a felony, fired a gun at the victim. (R. 3).

Thus, as a starting point, and at a minimum, it must be concluded that the Third District erred in concluding that a retrial for such lesser included offenses as attempted second degree murder, attempted voluntary manslaughter, and aggravated battery, is somehow either improper or prohibited by Gray. The State, however, would go further, and state, in the instant case,

that not only is a retrial a viable remedy in the aftermath of Gray, but, given the unique facts of the instant case, that potential remedy should not be needed, as it would be proper, in the instant case, to reduce the conviction to attempted second degree murder. An intentional shooting of a victim is clearly consistent with attempted second degree murder. When the case was presented to the jury, the jury was instructed on attempted second degree murder as a lesser included offense, and the jury returned a verdict for what it believed to be a greater offense than attempted second degree murder. Moreover, as of the time of the trial herein, this Court had expressly held that attempted second degree murder was a necessarily lesser included offense of attempted first degree felony murder. Scurry v. State, 521 So. 2d 1077 (Fla. 1988); Linehan v. State, 476 So. 2d 1262 (Fla 1985); Florida Standard Jury Instructions in Criminal Cases, Schedule of Lesser Included Offenses. Under such circumstances, where attempted second degree murder was a necessarily lesser included offense at the time of the trial, it is reasonable to conclude that the jury necessarily believed the defendant to be guilty of attempted second degree murder. That is all the more so since the only issue presented by the defense in this case was the issue of misidentification. The defense did not argue that the elements of the charged offense or various lesser included offenses had not been established. The defense accepted those offenses as a given, and simply argued that the defendant was not the person who committed those offenses; that it was a case of misidentification. (T. 227, 246-56, 268-75). As the jury obviously disbelieved the sole defense, misidentification, there is no reasonable basis for concluding that the jury would not have returned a verdict for the previously existing necessarily lesser included offense of attempted second degree murder. Thus, while a remand for retrial on lesser offenses is clearly a viable alternative in many of the cases which have reversals of attempted felony murder convictions, that remedy should not have to be resorted to herein, as compelling

reasons exist for simply reducing the vacated conviction to a conviction for attempted second degree murder. If for any reason, this Court does not believe that it is proper to reduce the attempted felony murder conviction in that manner, it would then be proper to remand the case to the trial court for retrial on the lesser offenses.

CONCLUSION

Based on the foregoing, the decision of the District Court of Appeal should be quashed, in part, with directions to either reduce the overturned conviction for attempted felony murder to a conviction for attempted second degree murder, or, alternatively, to remand the case to the trial court for all offenses which, at the time of the trial herein, were lesser included offenses of attempted felony murder.

Respectfully submitted,

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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 16th day of November, 1995, to ROBERT KALTER, Assistant Public Defender, Office of the Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125.

RICHARD L. POLIN