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IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,505

DARYL THOMPSON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

****

ON PETITION FOR DISCRETIONARY REVIEW

****

BRIEF OF RESPONDENT ON JURISDICTION

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INTRODUCTION

The Petitioner, **DARYL THOMPSON** was the defendant in the trial court and the appellant in the Third District Court of Appeal. The Respondent, the **STATE OF FLORIDA,** was the prosecution in the trial court and the appellee in the Third District Court of Appeal. The parties will be referred to as Petitioner and Respondent in this brief. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Petitioner was convicted of attempted first degree murder of a law enforcement officer for firing shots at an undercover officer as he tried to escape apprehension during a "reverse sting" operation. (App. A: 1, 5). The charge went to the jury on the theories of attempted felony murder and attempted premeditated murder. The underlying felonies upon which the attempted felony murder charge was based, were armed trafficking in cocaine, conspiracy to traffick in cocaine and armed robbery of the confidential informants, among others. (App. A:5). As a result of this Court's decision in State v. Grav, 654 So. 2d 552 (Fla. 1995), the crime of attempted felony murder no longer exists and was applicable to cases pending on appeal, including the Petitioner's case. (App. A: 1-2). The Third District Court of Appeal reversed the conviction of attempted first degree murder, returning the matter to the trial court for a new trial on the charge of attempted premeditated murder of the undercover officer, "where the facts of the case could support a guilty verdict on that charge." (App. A:2-3, 5).

The district court further decided that the trial court correctly denied Petitioner's requested

jury instruction that it is an element of the crime of attempted murder of a law enforcement officer that a defendant know that the victim is a police officer, finding that the omission of the requested instruction was not prejudicial error. (App. A:3, 5). The district court opined that Petitioner's reliance on Grinage v. State, 641 So. 2d 1362 (Fla. 5th DCA 1994) for the proposition that the state must allege and prove that the defendant knew that his victim was a police officer for conviction under section 784.07(3), Fla. Stat., was misplaced. (App. A:3). The court distinguished subsections (2) and (3) of the enhancement statute, as follows:

> . . .However, we do not read that case as deciding the question of whether or not knowledge of the victim's status as a law enforcement officer is a necessary element of the offense of attempted murder when the conviction is enhanced under Florida Statute section 784.07(3)(1993).
>
> Section 784.07(2), Florida Statutes (1993) involves the offense of assault or battery upon a law enforcement officer. That section specifies that the assault or battery be committed "knowingly." Section (3) however, pertains to attempted murder of a law enforcement officer engaged in the lawful performance of his duty and clearly does not require that the offense be committed "knowingly."

(App. A:3-4). The district court expressly recognized that the Fifth District in Grinage v. State opined that "the state must allege and prove that the defendant knew that his victim was a police officer for a conviction under section 784.07(3), Florida Statutes (1993)." (App. A:3). Grinage v. State, 641 So. 2d at 1364. However, the Third District went on to distinguish its opinion by pointing out that the issue in Grinage as well as the questions certified in that case to this Court, involved the offense of attempted felony murder. This Court affirmed the Fifth District's reversal of Grinage's attempted felony murder conviction, holding that the crime no longer exists, without

deciding the question of whether or not knowledge of the victim's status as a law enforcement officer is a necessary element of the offense of attempted murder when the conviction is enhanced under Florida Statute section 784.07(3) (1993). (App. A:3-4). State v. Grinage, 656 So. 2d 457, 458 (Fla. 1995).

OUESTION PRESENTED

WHETHER THE OPINION OF THE THIRD DISTRICT EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FIFTH DISTRICT COURT AND THE SUPREME COURT OF FLORIDA IN *GRINAGE V. STATE,* 641 So. 2d 1362 (Fla. 5th DCA 1994)?

SUMMARY OF THE ARGUMENT

The decision of the Third District Court of Appeal does not expressly and directly conflict with the Fifth District's decision in Grinage v. State, 641 So. 2d 1362 (Fla. 5th DCA 1994). The factual bases upon which each case was decided were different. Moreover, the legal bases were distinct, in that in Grinage the Fifth District struggled with the proposition that an essential element of the underlying qualifying felony (robbery with a deadly weapon) cannot also serve as the overt act (the use of the knife to rob the officer) necessary to prove attempted murder. Moreover, where the Information failed to allege premeditation in Grinage, the charges constituted no more than aggravated assault of a law enforcement officer, subject to enhancement under section 784.07(2) which requires "knowledge." In contrast, here, the Third District vacated the conviction for attempted felony murder in which the Petitioner shot at the undercover officer after he had engaged in the robbery of the confidential informants and the conspiracy to traffick in cocaine (the underlying felonies), pursuant to this Court's opinion in State v. Gray.. The Third District correctly remanded for retrial on the charge of attempted premeditated murder which was subject to enhancement under section 784.07(3). As the decision below does not expressly and directly conflict with the decision in Grinage v. State, discretionary review in this cause should be denied.

ARGUMENT

THE OPINION OF THE THIRD DISTRICT DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH THE DECISION OF THE FIFTH DISTRICT COURT AND THE SUPREME COURT OF FLORIDA IN *GRINAGE V. STATE,* 641 So. 2d 1362 (Fla. 5th DCA 1994).

Article V, Section 3(b)(3) of the Florida Constitution (1986) delineates the circumstances under which this Court may exercise its discretionary jurisdiction to review a decision of a district court of appeal which conflicts with a decision of another district court of appeal or of this Court. See Rule 9.030, Fla.R.App.P. The 1980 and 1986 constitutional amendments set forth limited avenues by which a case could receive review in the Supreme Court of Florida. Conflict jurisdiction can be obtained **only** if a question of law in the case presented expressly and directly conflicts with a **decision** of the Florida Supreme Court or another district court.

Initially, the cases are factually distinguishable. Although both arise out of incidents occurring between undercover law enforcement officers and defendants, in Petitioner's case the charge on remand to the trial court following reversal on the attempted felony murder conviction is of attempted premeditated murder stemming from the shots fired at the undercover "take down" officer as Petitioner was attempting to escape apprehension. In the case of Grinage, there was no remand for retrial on attempted felony murder where the underlying felony was the attempted robbery; the act of threatening the undercover officer with a knife constituted the "force" and "threat" necessary to establish the robbery charge and could not also establish attempted felony murder.

Be that as it may, the Fifth District acknowledged that the State's position on the statutory

silence of section 784.07(3) with respect to the requirement of *mens rea* is supported by Florida case law. Grinage v. State, 641 So. 2d at 1364, *citing* Carpentier v. State, 587 So. 2d 1355 (Fla. 1st DCA 1991); State v. Medlin, 273 So. 2d 394, 396 (Fla. 1973); La Russa v. State, 142 Fla. 504, 509, 196 So. 302, 304 (1940). That court continued its analysis, rejecting the theory of statutory silence by pointing out that:

> 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*. (Emphasis in original).
>
> While the "knowingly committing" language is not repeated in subsection (3), it is replaced by the legally equivalent word "attempted."

Grinage v. State, 641 So. 2d at 1365. Thus, the reasoning of the Fifth District was founded upon the fact that Grinage was charged with attempted felony murder of a law enforcement officer and that a conviction for the offense of attempt has always required proof of the intent to commit the underlying crime. In that case, the court stated that the underlying crime was "the murder of a police officer engaged in the lawful performance of his duty." The court could not find that Grinage *intended* to murder the officer if he did not know that the person was in fact an officer.

The Third District recognized no such distinctions. Its analysis of section 784.07(2), Florida Statutes (1993), clearly distinguished between subsection (2), which specifically requires that the assault or battery be committed "knowingly", and subsection (3) which sets out a separate

offense -- that of attempted murder of a law enforcement officer engaged in the lawful performance of his duty -- and clearly does not require that the offense be committed "knowingly." (App. A: 4). The Third District went on to state:

> . . .Therefore, we agree with the First District in Carpentier v. State, 587 So. 2d 1355 (Fla. 1st DCA 1991), review denied 599 So. 2d 654 (Fla. 1992) and the cases that follow,. . . that the "statute simply does not require that the offender have knowledge that the victim was a law enforcement officer. "

(App. A:4). The Third District went on to find support for the proposition that section 784.07(3) is merely an enhancement of a conviction for attempted murder if the victim happens to be a law enforcement officer engaged in the lawful performance of his duty or if the motivation for the attempt was related to the lawful duties of the officer, in this Court's opinion in State v. Iacovone. 660 So. 2d 1371 (Fla. 1995). This Court found that sections 784.07(3) and 775.0825, Florida Statutes (1991) do not apply to all degrees of murder, only to first degree murder, and. . . that [t]he penalty for attempted first degree murder is enhanced when undertaken against a law enforcement officer. . . . " Id. At 1373-74 (emphasis added). (App. A:5).

The distinction between this case and Grinage lies in the fact that here, Petitioner's case is remanded for trial on the charge of attempted premeditated murder of a law enforcement officer and is subject to enhancement under section 784.07(3) which does not require that the Petitioner "know" that the person he attempted to kill was a law enforcement officer. In Grinage the defendant was charged solely with attempted felony murder, the underlying felony being robbery and the factual bases supporting assault and threat rather than premeditated murder, and was subject to enhancement under section 784.07(2) which categorically requires "knowing" the officer's status. Not only are the factual bases different, the legal determination is different,

consequently there is no conflict in the decisions in these two districts.

Petitioner has failed to establish grounds for review of the instant case in light of the above standards. While Petitioner alleges that the opinion "expressly and directly conflicted with the Fifth District" on the issue sought to be reviewed, the factual and legal distinctions between the cases do not establish conflict jurisdiction. Therefore, the State respectfully requests that the petition for review be denied. Reaves v. State, 485 So. 2d 829, 830 (Fla. 1986).

CONCLUSION

WHEREFORE, there being no express and direct conflict established between decisions of this Court or any other district court of appeal of Florida, and based upon the foregoing argument and citations of authority, the Respondent respectfully submits that this Honorable Court should deny discretionary jurisdiction pursuant to Fla.R.App.P. 9.030(a)(2)(A)(iv).

Respectfully submitted,

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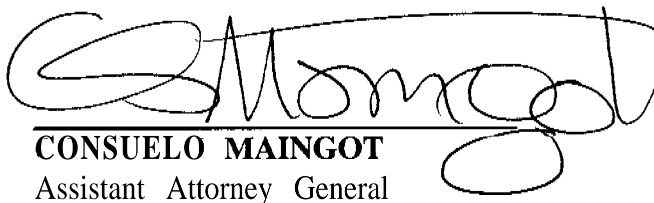
CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing **BRIEF OF RESPONDENT** was furnished by mail to **ROY D. WASSON, Esq.,** Special Assistant Public Defender, Suite 402 - Courthouse Tower, 44 West Flagler Street, Miami, Florida 33130 on this 2 day of April, 1996.



CONSUELO MAINGOT
Assistant Attorney General

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Appendix

NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION
AND, IF FILED, DISPOSED OF.

94-130721-W

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1996

DARRYL THOMPSON,	**	
Appellant,	**	
vs.	**	CASE NO. 94-903
THE STATE OF FLORIDA,	**	LOWER TRIBUNAL NO. 92-23967
Appellee.	**	

RECEIVED
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Opinion filed January 31, 1996.

An Appeal from the Circuit Court for Dade County, Jeffrey Rosinek, Judge.

Roy D. Wasson, for appellant.

Robert A. Butterworth, Attorney General, and Consuelo Maingot, Assistant Attorney General, for appellee.

Before BARKDULL, BASKIN and LEVY, JJ.

BARKDULL, Judge.

Among other things, the appellant was convicted of attempted first degree murder of a law enforcement officer prior to the supreme Court holding in State v. Gray, 654 So. 2d 552 (Fla. 1995). The matter went to the jury on two theories, attempted

felony murder and attempted premeditated murder. After Gray, one of these crimes no longer exists and the Gray decision applies to all cases in the "pipeline". , ate v. Grinage, 656 so. 2d 457 (Fla. 1995); Grav at 554.

Therefore, we reverse the conviction of attempted first degree murder pursuant to the authority of Humphries v. State, 20 Fla. L. Weekly D2634 (Fla. 5th DCA December 1, 1995); Tape v. State, 661 so. 2d 1287 (Fla. 4th DCA 1995) and Iiarris v. State, 658 So, 2d 1226 (Fla. 4th DCA 1995) and return the matter to the trial court for a new trial on the charge of attempted premeditated murder.

We note that in reversing and remanding for a new trial on the charge of attempted premeditated murder, this case differs from the recent cases of Lee v. State, 664 So. 2d 330 (Fla. 3d DCA 1995) (question certified); Alfonso v. State, 661 So. 2d 308 (Fla. 3d DCA 1995)(question certified), cause vol. dismissed, (Fla. November 29, 1995) and Wilson v. State, 660 So. 2d 1067 (Fla. 3d DCA 1995) (question certified). In those cases this court refused to reduce a conviction for attempted felony murder to a lesser included offense or remand for a new trial on a lesser included offense because it found that there could be no lesser included offense to the now non-existent crime of attempted felony murder. The facts in Lee, Alfonso and Wilson were such that charges of attempted premeditated murder were not viable. In the instant case however, the defendant was charged

in the alternative for both attempted premeditated and attempted felony murder. we see no impediment to reversing and remanding for a **new** trial on the charge of attempted premeditated murder where the facts of the case could support a guilty verdict on that charge.

Because this cause must be retried, we address several other issues raised by the appellant.

The appellant contends that the trial court erroneously denied his requested jury instruction that it is an element of the crime of attempted murder of a law enforcement officer that the defendant know that the victim is a police officer. He relies on Grinage v. State, 641 So. 2d 1362 (Fla. 5th DCA 1994) for the proposition that the state must allege and prove that the defendant knew that his victim was a police officer for a conviction under section 784.07(3), Florida Statutes (1993). Although Grinage does contain language to that effect, the questions certified to the Florida Supreme Court in that case involved the offense of attempted felony murder. The Florida Supreme Court recently considered the certified questions in State v. Grinage, 656 so. 2d 457 (Fla. 1995) and affirmed the Fifth District's reversal of Grinage's attempted felony murder conviction, holding that the crime of attempted felony murder no longer exists. Id. at 458. However, we do not read that case as deciding the question of whether or not knowledge of the victim's status as a law enforcement officer is a necessary element of the

offense of attempted murder when the conviction is enhanced under Florida Statute section 784.07(3) (1993).

section 784.07(2), Florida Statutes (1993) involves the offense of assault or battery upon a law enforcement officer. That section specifies that the assault or battery be committed "knowingly." Subsection (3) however, pertains to attempted murder of a law enforcement officer engaged in the lawful performance of his duty and clearly does not require that the offense be committed "knowingly." Therefore, we agree with the First District in Carpentier v. State, 587 So. 2d 1355 (Fla. 1st DCA 1991), review denied 599 So.' 2d 654 (Fla. 1992) and the cases that follow, Isaac v. State, 626 So. 2d 1082 (Fla. 1st DCA 1993), review denied 634 So. 2d 624 (Fla. 1994) and Evans v. State, 625 so. 2d 915 (Fla. 1st DCA 1993), that the "statute simply does not require that the offender have knowledge that the victim was a law enforcement officer." Carpentier at 1357.

We disagree with Isaac, however, to the extent that it holds that section 784.07(3) creates a, separate, substantive offense. Isaac at 1083. We read that section to be merely an enhancement of a conviction for attempted murder if the victim happens to be a law enforcement officer engaged in the lawful performance of his duty or if the motivation for the attempt was related to the lawful duties of the officer. This reading is supported by the recent case of State v. Iacovone, 660 So. 2d 1371 (Fla. 1995). In that case, the Florida Supreme Court held that sections

784.07(3) and 775.0825, Florida Statutes (1991) do not apply to all degrees of murder, only to first degree murder. Id. at 1373. If those sections created separate, substantive offenses, then it would not be logical to limit their "application" to only first degree murder. Even more persuasive is the statement that "[t]he penalty for attempted first-degree murder is enhanced when undertaken against a law enforcement officer...." Id. at 1373-74 (emphasis added). Therefore, we reject the appellant's argument that the omission of the requested instruction to the jury was prejudicial error.

The appellant next asserts that the trial court erroneously ordered his minimum mandatory sentence of three years for armed robbery be served consecutively to his minimum mandatory sentence of twenty-five years for attempted murder of a law enforcement officer. We disagree. The separate and distinct offense of armed robbery of the confidential informants was completed and the defendant was attempting to escape when he fired shots and attempted to murder the undercover officer. "When different crimes are committed in the same episode, however, minimum mandatory sentences can be consecutive." Downs v. State, 616 So. 2d 444, 445 (Fla. 1993).

The other grounds urged for reversal are found to be without merit, See Sections 59.041, 90.803(18)(e), Fla. Stat, (1993); State v. DiGuilio, 491 so. 2d 1129 (Fla. 1986); State v. Kearse, 491 so. 2d 1141 (Fla. 1986); Jacobs v. State, 396 So. 2d 1113

(Fla. 1981), cert. denied, 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981); Salvatore v. State, 366 so. 2d 745 (Fla. 1978), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979); Hester v. State, 503 So. 2d 1342 (Fla. 1st DCA 1987), aff'd in Dart. quashed in part, 520 So. 2d 273 (Fla. 1988).

Affirmed in part, reversed in part with directions.