IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

v.

MICHAEL GIBSON,

Respondent.

CASE NO. 87,530,
87,543 (consolidated)

ON DISCRETIONARY REVIEW
FROM THE FIRST DISTRICT COURT OF APPEAL

MERITS BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

The Petitioner, the State of Florida, was the prosecution in the trial court and the Appellee below; the brief will refer to the Petitioner as the State. The Respondent, Michael Gibson, was the defendant in the trial court and the Appellant below; this brief will refer to the Respondent as the defendant.

The symbol "R" will refer to the record on appeal and the symbol "T" will refer to the transcript of trial court proceedings. Each symbol is followed by the appropriate page number.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

JURISDICTIONAL STATEMENT

Article V, Section 3(b)(4) of the Florida Constitution provides, in pertinent part, that the Supreme Court

> [m]ay review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance...

Similarly, Fla. R. App. P. 9.030(a)(2)(v) provides that the discretionary jurisdiction of this Court may be sought to review

decisions of a district court of appeal which "pass upon a question certified to be of great public importance."

STATEMENT OF THE CASE AND FACTS

The historical facts, as established by the opinion of the First District Court of Appeal, dated February 6, 1996 are as follows:

> Michael E. Gibson, the appellant, was charged in an eight-count information with armed burglary of a dwelling (Count I), armed kidnaping (II), attempted first-degree felony murder (III), armed robbery (IV), and sexual battery with a deadly weapon (V through VIII). The jury found him not guilty of armed kidnaping and guilty as charged in Count I and Counts III through VIII. We affirm the judgment and sentence as to Count I and Counts IV through VIII. We reverse the conviction in Count III and remand with directions to dismiss that count and to conduct any further proceedings authorized pursuant to State v. Gray, 654 So. 2d 552, 554 (Fla. 1995), and State v. Grinage, 656 So. 2d 457, 458 (Fla. 1995), in which the Florida Supreme Court held that attempted felony murder is no longer a crime in Florida. Perea v. State, 657 So. 2d 8, 9 (Fla. 3d DCA) (supplemental opinion in light of Gray, on state's motion for rehearing), rev. den., 663 So. 2d 632 (Fla. 1995). As to the matter of attempted first-degree felony murder and the available opinion, if any, upon remand, we certify the same question of great public importance raised in Alfonso v. State, 661 So. 2d 308, 309 (Fla. 3d DCA) (on motion for rehearing and certification), cause dism., --- So. 2d --- (Fla. 29, 1995)...
>
> Like the defendant in Alfonso, the appellant was convicted of attempted first-degree felony murder.

> Neither Gray nor Grinage addressed whether, after a conviction for attempted felony murder is vacated, lesser-included offenses remain viable for a new trial or for a reduction of the offense. We recognize that this type of question will arise, and that conflicting results are likely to be reached, in the numerous other cases affected by Gray and Grinage. See, e.g., Selway v. State, 660 So. 2d 1176 (Fla. 5th DCA 1995); Wilson v. State, 660 So. 2d 1067 (Fla. 3d DCA 3d DCA 1995) (on motion for rehearing and certification); Williams v. State, 657 So. 2d 80 (Fla. 1st DCA 1995). Accordingly, we certify the same question presented by the Third District Court in Alfonso, 661 So. 2d at 309:
>
> > 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?
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> 21 Fla. L. Weekly at D358.

The lower court affirmed the case in all other respects and reversed and remanded solely as to the attempted felony first degree murder charge.

The State brings the issue before this Court based upon the question certified below.

SUMMARY OF ARGUMENT

The Court should answer the question yes and hold that reversal of a conviction pursuant to Gray does not preclude retrial for either attempted premeditated first degree murder or any lesser offense. Case law holds that original jeopardy continues while a conviction is on appeal, that reversal of a conviction on appeal, where the evidence is sufficient to uphold the conviction, does not interrupt jeopardy, and that an appellant/defendant who successfully obtains a reversal of a conviction may be retried. There is no double jeopardy bar to such reprosecution. These rules of law are particularly apropos where convicted criminals, as here, have received a beneficent change in appellate law overturning settled law of long duration.

ARGUMENT

ISSUE I

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?

In Amlotte v. State, 456 So. 2d 448 (Fla. 1984) this Court interpreted section 777.04(1), Florida Statutes (1981) as creating a criminal offense of "attempted first degree murder done in the felony murder mode." Amlotte at 449. Eleven years later, although the legislature had not acted to correct this Court's interpretation of the statute and the statute remained as it was at the time of Amlotte, this Court reinterpreted the statute in Gray and determined that it did not create an offense of attempted first degree felony murder. This partly retrospective, partly prospective, judicial repeal of the statutory criminal offense was made applicable to all cases on direct appeal or not yet final. The abrupt 180 degree turn in the law has created confusion in the law. The district courts have not only applied the actual holding of Gray to overturn jury verdicts of attempted first degree felony murder, they have gone further and held that the decision precludes conviction or

prosecution for alternative offenses to attempted first degree felony murder. Although Gray violated at least three basic principles of statutory interpretation[1], the State will not now attempt to persuade the Court that it should reverse the decision in Gray and return the law to that enacted by the legislature as interpreted by Amlotte and relied on by all concerned, particularly prosecutors, for some eleven years. Instead, the State will simply argue that the good faith prosecution and conviction for the then extant criminal offense of attempted first degree felony murder does not bar the State from prosecuting and convicting criminals for other alternative offenses. The certified question should be answered yes.

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[1]These three principles, so well-settled as to require no citation, are (1) a court interpreting a statute or rule close in time to its enactment is presumed to be more familiar with legislative purpose and intent than a subsequent court interpreting the statute or rule after a lengthy lapse of time, (2) a decision of the legislature not to overturn a judicial interpretation of a statutes indicates that the judicial interpretation is correct and should not be overturned, and (3) **stare decisis** is critical to the stability and integrity of the law. For an example of the continuing mischief which occurs when these principles are violated, see the ongoing saga of Batilla v. Allis Chalmers Manufacturing, 392 So. 2d 874 (Fla. 1981); Pullum v. Cincinnati, Inc., 476 So. 2d 657 (Fla. 1985); Firestone Tire & Rubber Co. V. Acosta, 612 So. 2d 1361 (Fla. 1992); and Mosher v. Speedstar Div. Of AMCA INT. Inc, 52 F. 3d 913 (11th U.S.C.A 1995).

The district court in this case, as it was required to do by Gray, reversed and remanded the defendant's conviction for attempted first degree felony murder. Because of its uncertainty on the full import of Gray, and its reluctance to prohibit retrial on other alternative offenses, the district court certified the same question as that certified by the Third District Court of Appeal in Alfonso v. State, 661 So. 2d 308 (Fla. 3d DCA 1995), cause dismissed, ___ So. 2d ___ (Fla. 1995) and Wilson v. State, 660 So. 2d 1067 (Fla. 3d DCA 1995).

In Alfonso and Wilson, the court reversed and remanded the defendants' convictions for attempted first degree felony murder and discharged them from all criminal liability based on the irrelevant truism that "there can be no lesser-included offenses under a non-existent offense such as attempted first degree felony murder." 660 So. 2d at 1069. The State asserts that the reversal of a conviction for an offense, whether existent or nonexistent, does not preclude conviction or retrial for other existent offenses. The trial courts did not err in instructing on lesser included offenses, they would have erred had they not done so. The fact that this Court changed its view on whether there is an offense of attempted felony murder does not taint the other offenses. The reversal of a conviction for the charged

higher offense does not preclude either retrial on other offenses or affirmation of convictions for lesser included offenses already obtained.

Attempted first degree murder and first degree murder may be charged as general offenses and the jury alternatively instructed under both premeditated and felony theories. Would Gray mandate reversal of a conviction for attempted first degree murder if the evidence supported a verdict of attempted premeditated first degree murder during the commission of a felony? Not at all. This conclusion is fully consistent with decisions of this Court on cases involving an indictment of first degree murder where the case is submitted to the jury for its determination upon alternative theories of premeditated and first degree murder and the jury returns a general verdict of guilty as charged. Where the evidence adduced at trial supports a verdict of guilt on one of the two theories of the case, courts have refused to substitute their opinion of the evidence for that of the jury. Atwater v. State, 626 So. 2d 1325, 1327-1328, n. 1, (Fla. 1993), cert. denied, ___ U.S. ___, 114 S. Ct. 1578, 128 L. Ed. 2d 221 (1994). Similarly, in cases in which a verdict of guilty of attempted first degree murder has been entered, if the evidence supports a verdict on premeditated attempted first, then no court

should replace the fact finding authority of the jury and determine that the conviction was based upon an underlying felony which necessitates reversal. Certainly, they should not reverse and prohibit retrial.

An analogy is found in Cooper v. State, 547 So. 2d 1239 (Fla. 4th DCA 1989), in which Cooper was convicted of the nonexistent offense of attempted manslaughter by culpable negligence. In that case, the District Court agreed

> with the appellant that the trial court erred in instructing the jury on attempted manslaughter by culpable negligence, a non-existent crime in Florida. *Taylor v. State*, 444 So. 2d 931 (Fla. 1983). Although the trial court also instructed the jury on attempted manslaughter by act, a crime that is recognized by Florida law, the trial court went astray when it informed the jury that the case at hand was one involving culpable negligence.
> 547 So. 2d at 1239.

Thus the key to the result in Cooper was the trial court's act of informing the jury that the case involved attempted manslaughter by culpable negligence, which, in essence, limited the jury's consideration to the non-existent crime as a basis for its verdict. The necessary implication of the decision in that case is that had the court not so instructed the jury, reversible error would not have occurred.

Other cases in which courts have applied Gray to convictions of attempted felony first degree murder present one of two types of situations. The first, as here, occurs where a defendant is charged with and convicted of attempted first degree felony murder. The second situation occurs where the defendant is charged with attempted felony first degree murder, but is convicted of some lesser degree crime. There is no bar in either situation to conviction or retrial on other existent offenses.

The defendant in the instant case was charged with and convicted of the attempted felony first degree murder of his victim. Some courts faced with the exact procedural circumstances at issue here have taken the position, either expressly or by implication, that discharge is required. Harris v. State, 658 So. 2d 1226 (Fla. 4th DCA 1995). This approach is erroneous and conflicts with other appellate decisions of this and other Florida courts which have dealt with the ramifications of convictions for nonexistent offenses and typically found that remand for retrial is the appropriate action.

In State v. Sykes, 434 So. 2d 325 (Fla. 1983), for example, this Court reversed Sykes' conviction for attempted second degree grand theft because the act was a nonexistent crime. The Court, however, held that reprosecution was not barred under principles

of double jeopardy so that discharge was not mandated. Similarly, in Achin v. State, 436 So. 2d 30 (Fla. 1983), Achin was convicted of the nonexistent offense of attempted extortion. After reversing the conviction, this Court approved retrial of Achin on the original charge of extortion, a higher level offense than the charge for which he was convicted. See also: Sponheim v. State, 416 So. 2d 54 (Fla. 2d DCA 1982). Jordan v. State, 438 So. 2d 825 (Fla. 1983) presented a similar situation in which Jordan was charged with resisting arrest with violence, but was convicted of the lesser nonexistent offense of attempted resisting arrest with violence. This Court reversed the conviction for the nonexistent offense, but remanded for retrial on the original offense. See also: Pickett v. State, 573 So. 2d 177 (Fla. 2d DCA 1991)

Another case, Hieke v. State, 605 So. 2d 983 (Fla. 4th DCA 1992), presented a situation in which a defendant was found guilty of solicitation to commit third degree murder. After concluding that the conviction was for a nonexistent crime, the Fourth District Court of Appeal remanded for retrial 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.

Other decisions which have reached similar results and permitted retrial on the original substantive offense after reversal for conviction of a nonexistent crime include Brown v. State, 550 So. 2d 142 (Fla. 1st DCA 1989) and Arline v. State, 550 So. 2d 1180 (Fla. 1st DCA 1989) in which convictions for attempted solicitation to introduce contraband into a correctional institution were reversed and the causes were remanded for retrial on the substantive offenses originally charged. In Cox v. State, 443 So. 2d 1013 (Fla. 5th DCA 1983), the District Court reversed Cox's conviction for the nonexistent offense of attempting to make a false insurance claim and permitted retrial on the substantive offense of making a false insurance claim. The Second District Court of Appeal, in Stephens v. State, 444 So. 2d 498 (Fla. 2d DCA 1986), held that following reversal of the defendant's conviction of the nonexistent crime of the temporary unauthorized use of a motor vehicle, the defendant's retrial was not barred under this Court's decision in Achin, recognizing that conviction of a technically nonexistent crime did not bar retrial where all of the elements of the crime are equal to the elements of the main offense since the jury did not acquit the defendant of the substantive offense.

All of these decisions, with the exception of Hieke, permitted retrial for the original substantive offense which was of a higher degree than the crime for which the appellants were actually convicted. The facts of the instant case are more compelling than those of Hieke for permitting retrial. While Hieke involved an offense which had never been recognized as a valid offense in the State of Florida, this case involves the crime of attempted felony murder, a crime which has been recognized and treated as a valid offense since this Court's decision in Amlotte, over eleven years ago. Unlike Hieke, the criminal offense at issue here was considered to constitute a valid offense at the time it occurred, the time the defendant was charged, the time the defendant was brought to trial, and the time he was convicted. It would be absurd for appellate courts to prohibit reprosecution where the reversed offense existed at the time of trial while permitting retrials where the offense had never been recognized as a valid offense.

The double jeopardy clause furnishes protection against retrial in three distinct situations, none of which apply under the circumstances of this case. It protects against: 1) a second prosecution for the same offense after acquittal, 2) a second prosecution for the same offense after conviction therefore, and

3) multiple punishment for the same offense. Ohio v. Johnson, 467 U.S. 493, 104 S. Ct. 2536, 81 L. Ed. 2d 425 (1984). Reprosecution after conviction, however, refers to subsequent prosecutions which attempt to obtain multiple convictions for the same offense. It has no bearing on the more common situation involving reversal of a conviction, for reasons other than insufficient evidence, following an appeal initiated by the defendant, where jeopardy is continuous, which ultimately results in a retrial upon remand by the appellate court. See e.g., Montana v. Hall, 481 U.S. 400, 107 S. Ct. 1825, 95 L. Ed. 2d 354 (1987) (a defendant who was convicted under an inapplicable statute, following 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. Double jeopardy cannot bar retrial where, as here, the information charged a nonexistent offense and both the conviction and sentence were for a nonexistent offense. See Jenkins v. State, 238 P.2d 922 (Md. App. 1968).

Double jeopardy does not bar reprosecution on either the substantive crime of attempted premeditated first degree murder, should the facts of the case be consistent with that charge, or any lesser included offense thereof. The verdict returned in this case was for the highest degree offense the jury was instructed to consider. There was no acquittal of the defendant by the jury for either the offense of attempted first degree felony murder or any possible lesser included offense for which the jury received instruction. Under these circumstances, double jeopardy does not preclude retrial.

This Court, in concluding that its decision in Gray should apply to all convictions which were not yet final, granted Gray and all other similarly situated defendants a benefit not compelled by law. Article X, Section 9, of the Florida Constitution provides that when a criminal statute is repealed, that repeal "shall not affect prosecution or punishment for any crime previously committed." As previously pointed out, the effect of this Court's decision in Gray, by receding from Amlotte which recognized attempted felony murder as a constitutionally valid crime, was analogous to legislative repeal of a statute. Given the fact that such legislative repeal cannot retroactively excuse convictions for previously committed offenses, this Court

could well have concluded that Gray did not affect previously committed offenses. This would have been consistent with the policy grounds on which Gray was based. Having decided to confer on all pipeline defendants the unearned benefits of Gray, such decision should not permit the discharge of defendants from all criminal liability. This is particularly true where, as here, the crime for which the defendant was convicted was a valid offense through the entire prosecution and conviction and for years prior to the commission of the offense.

CONCLUSION

Based on the foregoing analysis, the State respectfully urges this Honorable Court to answer the certified question affirmatively and to order remand for retrial on either the substantive offense, if the facts so permit, or a lesser included offense not inconsistent therewith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished by U.S. Mail to Mr. Steven A. Been, Esq.; Assistant Public Defender; Leon County Courthouse, Suite 401, North; 301 South Monroe Street; Tallahassee, Florida 32301, this 3rd day of April, 1996.

Giselle Lylen Rivera
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