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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

v. : **CASE NO.** 87,768

ARNOLD LEON PRATT, :

Respondent. :

_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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SECOND JUDICIAL CIRCUIT

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IN THE FLORIDA SUPREME COURT

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 87,768

ARNOLD LEON PRATT,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF ON THE MERITS

Respondent was the Appellant in the district court of appeals and will be referenced as "Respondent" or "Mr. Pratt" in the following brief. A one-volume record on appeal will be referenced by "R", followed by the appropriate page number in parenthesis. A two-volume transcript of jury trial will be referenced by "T."

STATEMENT OF THE CASE AND FACTS

Respondent accepts the Petitioner's "Statement Of the Case and Facts."

SUMMARY OF THE ARGUMENT

Issue I

This Court can not impose a conviction for attempted manslaughter as a category 1 lesser-included offense of attempted second-degree depraved mind murder because the jury's verdict [attempted third-degree (felony) murder] does not include a finding regarding specific intent, a necessary element of attempted manslaughter. Nor may Respondent be twice tried for this offense without violating constitutional protections against double jeopardy.

Issue II

The State of Florida's prosecution for this offense began 4 ½ years after Respondent's arrest on this charge, in violation of the Statute of Limitations regarding the prosecution of first-degree felonies. The fact that Respondent was continually absent from the State of Florida did not toll the Statute of Limitations since his absence was not of his choosing, but was caused by his incarceration for the same offense in a federal prison in Leavenworth, Kansas. Because the State of Florida failed to exercise their prerogative to prosecute Respondent within the 4 years required by the Statute, the trial court lacked subject-matter jurisdiction to convict.

ARGUMENT

ISSUE I

CERTIFIED QUESTION

> WHEN A DEFENDANT IS CHARGED WITH ATTEMPTED SECOND-DEGREE (DEPRAVED MIND) MURDER AND IS CONVICTED BY A JURY OF THE CATEGORY 2 LESSER-INCLUDED OFFENSE OF ATTEMPTED THIRD-DEGREE (FELONY) MURDER, DO *STATE V. GRAY*, 654 SO. 2D 552 (FLA. 1995), AND SECTION 924.34, FLORIDA STATUTES (1991), REQUIRE OR PERMIT THE TRIAL COURT, UPON REVERSAL OF THE CONVICTION, TO ENTER JUDGEMENT FOR ATTEMPTED VOLUNTARY MANSLAUGHTER, A CATEGORY 1 NECESSARILY INCLUDED LESSER OFFENSE OF THE CRIME CHARGED?
>
> IF THE ANSWER IS NO, THEN DO LESSER-INCLUDED OFFENSES OF THE CHARGED OFFENSE REMAIN VIABLE FOR A NEW TRIAL?

The answer to the first part of the certified question is "no." Petitioner argues Section 924.24, Florida Statutes, is applicable. Section 924.34 provides:

> When the appellate court determines that the evidence does not prove the offense for which the defendant was found guilty but does establish his guilt of a lesser statutory degree of the offense or a lesser offense necessarily included in the offense charged, the appellate court shall reverse the judgement and direct the trial court enter judgement for the lesser degree of the offense or for the lesser included offense.

Petitioner is wrong. Section 924.34 is inapposite because, by it's plain language, it references convictions which have been overturned for insufficient evidence, only. By contrast, respondent's conviction has not been overturned for insufficient

evidence, but rather, it has been declared a non-existent crime by this Court. See State v. Gray, 654 So. 2d 552, 554 (Fla. 1995). It was well-reasoned by the First District Court of Appeals that "attempted third-degree (felony) murder has no necessarily included lesser offense." Pratt v. State, 668 So. 2d 1007, 1009 (Fla. 1st DCA 1996). And if it did, attempted-manslaughter could not be one since it contains an element (specific intent) not found in attempted third-degree (felony) murder.

> [3] If the jury had convicted the appellant as charged, the law would have required the jury to find intent on the appellant's part. Instead, in convicting him of a lesser-included crime that does not contain the element of intent, the jury obviously did not have to find intent. Were we to adopt the state's position and direct entry of the judgement for attempted manslaughter (an intent crime) pursuant to Section 924.34, we necessarily would be acting as the fact-finder and would have to assume the presence of the requisite intent. Such a result would encroach impermissibly upon the province of the jury.

Id. Respondent can say it no better. Hence, the appropriate remedy does not allow for imposition of a phantom lesser-included offense. See, also, State v. Wilson, 21 Fla. L. Weekly S292 (Fla. July 3, 1996).

The answer to the second part of the certified question is, also, "no." Principles of double jeopardy prohibit the re-trial of Respondent for the same conduct which formed the basis for the

original charge. Petitioner's reference to Montana v. Hall, 481 U.S. 400, 107 S. Ct. 1825, 95 L. Ed. 2d 354 (1987) is unavailing. In that case, the Supreme Court said a defendant could be re-tried where a conviction had been obtained for a non-existent crime containing essentially the same elements as the new charge. Of course, this was the holding of Achin v. State, 436 So. 2d 30 (Fla. 1982), as well; but this adds nothing to the discussion because, as demonstrated above, the charge of attempted manslaughter contains a necessary element (specific intent) which may not be presumed from the jury's verdict.

Moreover, Respondent objected to the inclusion of any lesser-included offenses on the verdict form (T 304). He should not be made to pay for the State's error in electing to try him for a non-existent lesser offense. And though the State sought the conviction in good faith, with no preconception the offense of attempted felony murder would be stricken from the law, the fact is of little solace to a defendant who is faced with, yet, a third trial for this offense, having completed a prison sentence for the same at Ft. Leavenworth. Respondent has been punished once, already, for this crime, and the State of Florida had a fair opportunity to punish him a second time, but failed. Without assigning blame to either party, justice requires that Respondent, now, be set free. In any event, Respondent may not be twice tried for the same conduct (by the State of Florida),

notwithstanding the previous guilty verdict for a non-existent crime. See Harris v Oklahoma, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed 2d 1054 (1977); 5th & 14th Amendments, the U.S. Constitution; and Article I, Section 9, the Florida Constitution.

ISSUE II

WHETHER RESPONDENT'S ABSENCE FROM THE STATE OF FLORIDA, WITH THE KNOWLEDGE AND CONSENT OF THE STATE, TOLLED THE STATUTE OF LIMITATIONS THEREBY ALLOWING THIS PROSECUTION TO OCCUR 4½ YEARS AFTER THE COMMISSION OF THE CRIME.

Respondent was arrested by Okaloosa County sheriff's deputies on September 8, 1987 for having engaged in a conspiracy to steal a car. The state alleged Respondent attempted to run-down and murder Deputy Joe Nelson, using a pick-up truck as a deadly weapon, in the attempt to steal another vehicle. Respondent was subsequently released to the United States Air Force, Office of Special Investigations, with full knowledge that he would be prosecuted under military jurisdiction (R 30). The State of Florida knew Respondent was sentenced to 22 years prison in that case, and that Respondent was continuously incarcerated in the federal prison at Leavenworth, Kansas, from October 14, 1988, until September 3, 1991 (R 32). Attempted second-degree murder with a deadly weapon per Section 775.087 is a first-degree felony which must be prosecuted within 4 years. See Section 775.015(2)(b), Florida Statutes. Nonetheless, the State of Florida failed to commence its prosecution until March 5, 1992, 4 ½ years after Respondent's arrest (R 3, 4).

Once the court's jurisdiction was challenged by Respondent, the State had the burden to prove the prosecution was not barred by the statute. See Fleming v. State, 524 So. 2d 1146 (Fla. 1st

DCA 1988). The State relied upon Section 775.15(6), Florida Statutes which states, in part:

> (6) The period of limitation does not run during any time when the defendant is continuously absent from the state or has no reasonably ascertainable place of abode or work within the state, ...

The State argued the statute was tolled during the time Respondent was continuously incarcerated in Leavenworth Prison, in Leavenworth, Kansas (R 23). (Subtracting the time Respondent spent in Kansas from the date since his arrest results in a net delay of less than four years.) The trial court agreed, saying:

> COURT: I'm going to deny the motion to dismiss. The Court finds that the defendant was continuously absent from the State of Florida from October 14, 1988, until September 3rd, 1993, during which time the statute of limitations was tolled. The court finds that the statute of limitations would run from September 7th, 1987, through October 14th, 1988, and then would commence once again on September 3rd, 1991. Since that does not fall outside the six year maximum limit for prosecution of this offense, the Court will deny the motion to dismiss based on a violation of statute of limitations.

(T 40)

Respondent submits, however, his absence from the State of Florida did not toll the statute of limitations. See Section 775.15. Subsection (6), cited by the State, applies only where the defendant's absence prevents the State from obtaining in personam jurisdiction over a defendant. In Friday v. Newman, 183

So. 2d 25 (Fla. 2nd DCA 1966), the court said:

> [2, 3] As a general rule a tolling statute ... is not applied if a defendant could be served with process, either actual or substitute, in which event a defendant's absence from the state does not toll the running of the statute of limitations.

Id. at 26. In State v. Miller, 581 so. 2d 641 (Fla. 2nd DCA 1991), the court said:

> [3] Absence from the state can certainly cause the state problems in commencing a prosecution, affording a speedy trial, or affording due process to litigants. See Fleming, Antonietti, Friday v. Newman, 183 So. 2d 25 (Fla. 2nd DCA 1966), and when the absence is the fault of the defendant the relative time periods are tolled. When however, the absence from the state is not the fault of the defendant and does not result in preventing prosecution, the time periods of statutes of limitations are not tolled. Walker v. State, 281 So. 2d 41 (Fla. 2nd DCA 1973), cert. denied, 289 So. 2d 739 (Fla. 1974). See also Mishan v. Crews, 363 So. 2d 1178 (Fla. 1st DCA 1978); Fleming; Friday.

Id. at 642. While many of these cases involve the speedy trial rule (Rule 3.191, Florida Rules of Criminal Procedure), they speak to identical due process issues, nonetheless.

In this case, the State failed to show that the trial was delayed because of Respondent's absence from the state, or that Respondent resisted extradition. See Mishan v. Crews, 363 So. 2d 1178 (Fla. 1st DCA 1978); State v. Miller, supra; State v. Antonietti, 558 So. 192 (Fla. 4th DCA 1990). To the contrary, Respondent was continuously available for extradition and

prosecution during this period of time. Hence, the statute was not tolled and the court was without jurisdiction in this matter.

CONCLUSION

Based on the foregoing reasoning, caselaw and other citation of authority, Respondent requests this Honorable Court dismiss this cause for all time.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Carolyn Mosley, Assistant Attorney General, by delivery to The Capitol, Criminal Appeals Division, Plaza Level, Tallahassee, Florida, 32301, and a copy has been mailed to respondent, on this 11 day of July, 1996.

JAMIE SPIVEY