IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner/
Cross-Respondent,

v.

MAURICE MORSELLS HORN,

Respondent/
Cross-Petitioner.
_____/

CASE NOS. 87,788 & 87,789

ANSWER BRIEF OF RESPONDENT/CROSS-PETITIONER

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ANSWER BRIEF OF RESPONDENT/CROSS-PETITIONER

Herein, Horn answers the argument in Point III of the State's initial brief concerning the viability of lesser-included offenses of the nonexistent crime of attempted third-degree murder. He relies on his initial brief as the points in the cross-appeal, without reply.

In this brief, citations to the record are as in the initial brief. The brief of the state is cited as (BS[page number]).

STATEMENT OF THE CASE AND FACTS

In Counts 2 and 3, the state charged Horn with attempted second-degree murder by "shooting at" the victims. (R33-34) Neither victim in these counts testified to being struck in the shooting. (T316-320, 379-392) The jury was given choices of guilty of attempted second-degree murder as charged or of attempted third-degree murder, attempted manslaughter, aggravated assault, or not guilty. (R152-153) The jury found him guilty of attempted third-degree murder and found that he used a firearm in the offense. (R152-153)

On appeal, the district court reversed the convictions of the nonexistent crime of attempted third-degree felony murder in Counts II and III. Horn v. State, 21 Fla. L. Weekly D867 (1st DCA April 12, 1996). The court also certified the following questions of great public importance:

> 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 JUDGMENT 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?

SUMMARY OF THE ARGUMENT

The certified questions must be answered in the negative. The sole remedy for conviction of the nonexistent offense of attempted third degree felony murder is dismissal. In contrast to reduction of a conviction resting on insufficient evidence pursuant to section 924.34, Florida Statutes, no statutory authority permits reduction of a conviction of a nonexistent offense. Reduction is particularly inappropriate where, as here, the two lesser included offenses on which the jury was instructed contain an intent element absent from attempted third-degree murder. Retrial on "lesser included offenses" is also inappropriate where, as here, the two offenses on which the jury was instructed are of the same degree as the nonexistent offense. Since neither attempted manslaughter nor aggravated assault is a lesser included offense of attempted third-degree murder, nothing remains on which to retry the defendant.

ARGUMENT

NO LESSER INCLUDED OFFENSES REMAIN VIABLE UPON DISCHARGE FROM THE NONEXISTENT OFFENSE OF ATTEMPTED THIRD-DEGREE FELONY MURDER.

On two counts alleging attempted second-degree murder, the court instructed the jury on lesser included offenses of attempted third degree murder, attempted manslaughter and aggravated assault. The jury found Horn guilty of the nonexistent crime of attempted third degree felony murder. The district court vacated these convictions and remanded for discharge, but certified the question whether the lesser included offenses remain viable either for reduction of the conviction pursuant to section 924.34, Florida Statutes, or for a new trial. Horn v. State, 21 Fla. L. Weekly D867 (1st DCA April 12, 1996). The First DCA has certified the same question in several other cases, including Pratt v. State, 668 So. 2d 1007 (Fla. 1st DCA 1996), rev. pending, Fla.Sup.Ct. No. 87,768, and the case of Horn's codefendant, Lee v. State, 21 Fla. L. Weekly D753 (1st DCA Mar. 25, 1996), rev. pending, Fla. Sup.Ct. No. 87,715. The question is a variation of the question certified in the apparent lead case on this issue, Wilson v. State, 660 So. 2d 1067 (Fla. 3d DCA 1995), rev. granted, Fla. Sup.Ct. No. 86,680:

> 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?

While Wilson concerns a vacated conviction of attempted first-degree felony murder, Pratt, Lee and this case concern a vacated conviction of attempted third-degree felony murder. The argument that follows focuses on the peculiarities of the latter situation.

The remedy for conviction of the nonexistent offense of attempted third degree felony murder is dismissal. In contrast to reduction of a conviction resting on insufficient evidence, no statutory authority permits reduction of a conviction of a nonexistent offense. Reduction is particularly inappropriate where, as here, the two lesser included offenses on which the jury was instructed contain an intent element absent from attempted third-degree murder. Retrial on "lesser included offenses" is also inappropriate where, as here, the two offenses on which the jury was instructed are of the same degree as the nonexistent offense. Since neither attempted manslaughter nor aggravated assault is a lesser included offense of attempted third-degree murder, nothing remains on which to retry Horn.

Section 924.34, Florida Statutes, authorizes an appellate court to reduce a conviction on which there is insufficient evidence to a lesser offense on which the evidence is sufficient. In Pratt, supra, the district court declined to apply this provision to the nonexistent crime of attempted third-degree murder, wisely recognizing that to do so it would have to presume

an intent element that the jury specifically rejected in acquitting the accused of attempted second-degree murder. The court stated:

> Such a result would encroach impermissibly on the province of the jury. We conclude that the appellant would be effectively denied his constitutional right to trial by a jury if we, sitting in an appellate capacity, were to presume a finding of intent that the jury itself did not have to make.

668 So. 2d 1008 (Fla. 1st DCA 1996). Here, the "lesser included offenses" of attempted manslaughter and aggravated assault contain an intent element missing from attempted third-degree murder. No appellate court may act as a jury and presume the intent necessary to either offense.

The state cannot overcome this fundamental obstacle to reduction of the conviction, and consequently focuses most of its efforts on enabling prosecution of a lesser included offense. The chief stumbling block to this result is the fact that neither attempted manslaughter nor aggravated assault, on which the jury was instructed as to the attempted murder counts, are lesser included offenses of attempted third-degree murder. Lesser included offenses are by definition lesser in penalty. Fla.R.Cr.P. 3.490. See Nurse v. State, 658 So. 2d 1074 (Fla. 3d DCA 1995), and cases cited therein. Attempted third-degree murder, attempted manslaughter and aggravated assault are all third-degree felonies, which may be reclassified to second-degree

felonies for use of a deadly weapon. Secs. 782.04, 782.07, 784.021, 777.04(4)(e), 775.087(1)(c), Fla. Stat. (1993). Aggravated battery was unavailable because neither victim in these counts was struck, and the information specified "shooting at" the victims. (R33-36) In any event, aggravated battery is a second-degree felony, greater in penalty than attempted third-degree murder. Retrial on the remaining "lesser included offenses" of attempted manslaughter and aggravated assault is barred.

The cases on which the state pins its hopes for a different result are all inapposite, with one peculiar exception. They may be divided into several categories. First are those in which a conviction is supportable on both valid and invalid statutory elements. Examples cited by the state include Atwater v. State, 626 So. 2d 1325 (Fla. 1993), in which a first-degree murder conviction was affirmed as it rested on ample evidence of premeditation though evidence supporting felony murder was insufficient, and Cooper v. State, 547 So. 2d 1239 (Fla. 4th DCA 1989), in which an attempted manslaughter conviction was reversed and the case remanded for retrial because the court instructed the jury on the nonexistent offense of attempted manslaughter by culpable negligence. (BS36) Here, there is no valid alternative theory on which the conviction might validly rest. The reason for the state's invocation of these cases is unclear.

A second category comprises cases in which convictions are reversed for a defect in the statute defining the offense. Characteristic of this category are Harris v. State, 649 So. 2d 923 (Fla. 1st DCA 1995), and Hieke v. State, 605 So. 2d 983 (Fla. 4th DCA 1992), both invoked by the state. (BS38-42) In Pratt, the district court identified the controlling distinction between Harris, in which a conviction of sale of cocaine within 200 feet of a public housing facility was reduced, and the situation here:

> Reliance on section 924.34 is logical and proper in those instances like Harris and Paige [v. State, 641 So. 2d 179 (Fla. 5th DCA 1994)], where the defendant is convicted of the charged offense based on sufficient evidentiary grounds. Where the statute underlying the major offense is declared unconstitutional, then a reversal of that conviction and an adjudication of guilt of a necessarily included lesser offense of the charged and convicted crime are appropriate because the jury has determined that an evidentiary basis exists for the lesser offense.

668 So. 2d at 1009. In contrast, observed the court, a jury rejecting second-degree "depraved mind" murder in favor of third-degree murder, for which state of mind is immaterial, has not determined that an evidentiary basis exists for intent-based crimes such as attempted manslaughter or aggravated assault. Id.

In Hieke, the district court reversed a conviction of the nonexistent offense of solicitation to commit third degree murder and remanded for a new trial on aggravated battery or battery, "as same were set forth on the verdict form." As aggravated

battery is a second-degree felony, solicitation to commit third-degree murder a third-degree felony, this result cannot be squared with Rule 3.490 or Nurse. 605 So. 2d at 984. One cannot discern from the opinion whether the court recognized this anomaly. Accordingly, Hieke should be viewed as an aberration.

A third and final line of authority cited by the state consists of cases in which an accused is convicted of a variation of a crime such as attempt which, by definition, encompasses the variation. (BS41-42) In those situations, where the jury has in fact found all the elements of the substantive offense, retrial on the substantive offense is permitted. See, e.g., Brown v. State, 550 So. 2d 142 (Fla. 1st DCA 1989), Cox v. State, 443 So. 2d 1013 (Fla. 5th DCA 1983). The distinctions between those cases and this one are obvious: Horn was necessarily acquitted of the greater crime, attempted second-degree murder, when the jury found him guilty of attempted third-degree murder. Attempted third-degree murder, in which state of mind is immaterial, does not subsume attempted manslaughter and aggravated assault, both intent-based crimes.

In summary, discharge is required upon vacation of a conviction of attempted third-degree murder when remaining lesser included offenses are attempted manslaughter and aggravated assault. Entry of a judgment of a "lesser offense" is unauthorized because this is not a case of insufficient evidence,

as required by section 924.34, Florida Statutes, and because the remaining offenses of attempted manslaughter and aggravated assault contain an intent element absent from attempted third-degree murder. Retrial on these putative "lesser included offenses" is barred because they share the same penalty as the nonexistent offense and thus are not lesser. For these reasons, the certified question asking whether the attempted murder conviction may be reduced to manslaughter must be answered in the negative, as must the question asking whether lesser included offenses remain viable for a new trial.

CONCLUSION

Based on the arguments contained herein and the authorities cited in support thereof, Horn requests that this Honorable Court answer the certified questions in the negative and remand for dismissal of the charges on Counts II and III, in which he was convicted of attempted third-degree murder.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Giselle Lylen Rivera, Assistant Attorney General, by ~~delivery~~ mail to The Capitol, Plaza Level, Tallahassee, FL, on this 17th day of June, 1996.

GLEN P. GIFFORD
ASSISTANT PUBLIC DEFENDER