

IN THE SUPREME COURT OF FLORIDA

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JUL 18 1996

CLERK, SUPREME COURT

By _____
Clerk Deputy Clerk

STATE OF FLORIDA, :
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 Petitioner, :
 :
 v. :
 :
 RONALD RIGGINS, :
 :
 Respondent. :

CASE NO. 87,949

_____ /

RESPONDENT'S BRIEF ON THE MERITS

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PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

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TABLE OF CONTENTS

	<u>PAGE(S)</u>
TABLE OF CONTENTS	i
TABLE OF CITATIONS	ii
I PRELIMINARY STATEMENT	1
II STATEMENT OF THE CASE AND FACTS	2
III SUMMARY OF ARGUMENT	7
IV ARGUMENT	8
<u>CERTIFIED QUESTION</u>	
ONCE A DEFENDANT IS CHARGED WITH ATTEMPTED SECOND DEGREE (DEPRAVED MIND) MURDER OF A LAW ENFORCEMENT OFFICER AND IS CONVICTED BY A JURY OF THE LESSER OFFENSE OF ATTEMPTED THIRD DEGREE FELONY MURDER, A NONEXISTENT OFFENSE, DOES <i>STATE V. GRAY</i> , 654 So. 2d 552 (Fla. 1995), PERMIT THE TRIAL COURT, UPON REVERSAL OF THE CONVICTION AND REMAND, TO ENTER JUDGMENT FOR THE OFFENSE OF RESISTING ARREST WITH VIOLENCE, A LESSER INCLUDED 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?	
V CONCLUSION	8
	11
CERTIFICATE OF SERVICE	11

TABLE OF CITATIONS

PAGE(S)

CASE(S)

Amlotte v. State, 456 So. 2d 448 (Fla. 1984) 2

Iacovone v. State, 639 So. 2d 1108
(Fla. 2d DCA 1994), approved,
660 So. 2d 1371 (Fla. 1995) 4

Riggins v. State, 21 Fla. L. Weekly D855
(Fla. 1st DCA April 9, 1996) 6

Standard Jury Instructions in Criminal Cases,
636 So. 2d 502 n. 1 (Fla. 1994) 4

State v. Gray, 654 So. 2d 552 (Fla. 1995) 3,5,8,9,11

State v. Grinage, 656 So.2d 457 (Fla. 1995) 5

State v. Wilson, 21 Fla. L. Weekly S292
(Fla. July 3, 1996) 7-9,11

STATUTES

Section 782.04(2), Florida Statutes 9

Section 843.01, Florida Statutes 9

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 87,949

RONALD RIGGINS,

Respondent.

_____ /

RESPONDENT'S BRIEF ON THE MERITS

I PRELIMINARY STATEMENT

Respondent, RONALD RIGGINS, was the defendant in the trial court and appellant in the First District Court of Appeal. He will be referred to in this brief as Respondent or by his proper name. Petitioner, the State of Florida, was the prosecuting authority and appellee in the courts below, and will be referred to as Petitioner.

The record on appeal will be designated as set forth in Petitioner's brief at page 1, n. 1.

II STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Facts with the following additions and corrections:

Ronald Riggins was charged in a four count information with offenses occurring on November 26, 1993, after police were dispatched to a residence in Gainesville in response to a domestic disturbance. Count I alleged that Riggins committed attempted second degree murder of Gainesville Police Officer Mason Byrd, who was engaged in the law performance of his duties, by biting Officer Byrd knowing that he was infected with the HIV virus. Counts II, III and IV alleged that Riggins resisted, obstructed or opposed Gainesville Police Officers Dana Bryant, Larry Reyes and Mike Maresca, respectively, by offering or doing violence to the person of each officer (R 7-8).

Riggins was found guilty of the lesser included offense of attempted third degree felony murder in Count I, guilty of resisting arrest without violence in Count II, and guilty of resisting arrest with violence as charged in Counts III and IV (R 89-90; T 648-649).

Petitioner asserts on page 2 of its brief that counsel for Riggins expressly requested that the jury be instructed on attempted third-degree murder, as a lesser included offense of attempted second-degree murder of a law enforcement officer, implying that this was a case of invited error. This statement is legally and factually misleading.

Riggins' trial occurred on January 9, 1995, four months before this Court overturned Amlotte v. State, 456 So. 2d 448 (Fla.

1984), and ruled that the crime of attempted felony murder does not exist. State v. Gray, 654 So. 2d 552 (Fla. 1995). At the charge conference, the parties discussed the propriety of instructions on both attempted voluntary manslaughter and attempted third degree murder. The following discussion ensued:

THE COURT: What lessers, then, are we going to talk about?

MR. TURNER [defense counsel]: Defendant has requested the lesser instruction of voluntary -- attempted voluntary manslaughter.

THE COURT: Okay. I think that would be appropriate. Does the state have any problem with attempted voluntary manslaughter?

MR. NILON [assistant state attorney]: No, you Honor. Your materials that we have received said attempted murder in the third degree as well. Have you abandoned that?

THE COURT: I think that's the one that was declared unconstitutional.

MR. TURNER: Yes, sir.

* * *

THE COURT: So that's one. What other lessers do we want to have? Resisting without?

MR. TURNER: Yes.

THE COURT: Okay.

MS. POOLEY [assistant state attorney]: As to Count I?

MR. TURNER: No.

MS. POOLEY: I'm sorry.

THE COURT: Resisting without as to the other counts.

MS. POOLEY: Sure, sure.

MR. NILON: Attempted involuntary manslaughter, that's the only one you're asking for, correct, Mr. Turner?

MR TURNER: Yes, * * * And I want, as a lesser-included of this also, resisting arrest with violence. And I haven't done that in writing, but I would ask for that orally.

THE COURT: Resisting arrest with violence?

MR. TURNER: With violence.

THE COURT: As to Mason Byrd--

MR. TURNER: As to Mason Byrd on Count 1. I think all the necessities are pled.

THE COURT: I don't have any problem with that. * * * Okay. That covers lessers.

(T 541-544). It was agreed by all that there was no crime of attempted third degree murder of a law enforcement officer, see Iacovone v. State, 639 So. 2d 1108 (Fla. 2d DCA 1994), approved, 660 So. 2d 1371 (Fla. 1995), but counsel

debat[ed] . . . whether to ask for attempted felony murder straight out, regardless of law-enforcement officer. * * * The *Ikavoni* (sic) decision basically ruled that because the penalty enhancement of attempted third-degree murder of a law-enforcement officer was such that it rendered the statute unconstitutional, they sustained the conviction of attempted third-degree murder and took out the enhancer.

(T 545-546). Counsel then withdrew his request for an instruction on attempted voluntary manslaughter (T 547). Both Assistant State Attorneys Nilon and Pooley concurred in defense counsel's request for the instruction on attempted third-degree felony murder (T 546-548).

Given that the issue had perplexed courts and even the Committee on Standard Jury Instructions in Criminal Cases, see Standard Jury Instructions in Criminal Cases, 636 So. 2d 502 n. 1

(Fla. 1994), it is no wonder that counsel "debat[ed] . . . whether to ask for attempted felony murder straight out," but the truth of the matter is that Riggins did not ask for an instruction on a nonexistent crime since attempted third-degree murder was a judicially recognized crime at the time of his trial.

The trial court then instructed the jury on the primary charge of attempted second-degree murder and the lesser offenses of attempted third-degree felony murder, resisting an officer with violence, and resisting an officer without violence (T 622-628), and the jury found Riggins guilty of the lesser included offense of attempted third degree felony murder as noted above.

On direct appeal, the First District reversed Riggins' conviction for attempted third degree felony murder on the authority of State v. Gray, 654 So.2d 552 (Fla. 1995), and State v. Grinage, 656 So.2d 457 (Fla. 1995). The court rejected the state's argument that the case should be remanded with directions to enter a judgment for the lesser included offense of resisting an officer with violence but certified the following questions as ones of great importance:

ONCE A DEFENDANT IS CHARGED WITH ATTEMPTED SECOND DEGREE (DEPRAVED MIND) MURDER OF A LAW ENFORCEMENT OFFICER AND IS CONVICTED BY A JURY OF THE LESSER OFFENSE OF ATTEMPTED THIRD DEGREE FELONY MURDER, A NONEXISTENT OFFENSE, DOES STATE V. GRAY, 654 So.2d 552 (Fla.1995), PERMIT THE TRIAL COURT, UPON REVERSAL OF THE CONVICTION AND REMAND, TO ENTER JUDGMENT FOR THE OFFENSE OF RESISTING ARREST WITH VIOLENCE, A LESSER INCLUDED 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?

Riggins v. State, 21 Fla. L. Weekly D855 (Fla. 1st DCA April 9,
1996).

III SUMMARY OF ARGUMENT

The certified questions presented are answered by this Court's recent decision in State v. Wilson, 21 Fla. L. Weekly S292 (Fla. July 3, 1996), which authorizes remand for a retrial on any lesser offense instructed on at trial.

IV ARGUMENT

CERTIFIED QUESTION

ONCE A DEFENDANT IS CHARGED WITH ATTEMPTED SECOND DEGREE (DEPRAVED MIND) MURDER OF A LAW ENFORCEMENT OFFICER AND IS CONVICTED BY A JURY OF THE LESSER OFFENSE OF ATTEMPTED THIRD DEGREE FELONY MURDER, A NONEXISTENT OFFENSE, DOES *STATE V. GRAY*, 654 So.2d 552 (Fla.1995), PERMIT THE TRIAL COURT, UPON REVERSAL OF THE CONVICTION AND REMAND, TO ENTER JUDGMENT FOR THE OFFENSE OF RESISTING ARREST WITH VIOLENCE, A LESSER INCLUDED 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 certified questions before the Court were resolved by this Court's recent decision in State v. Wilson, 21 Fla. L. Weekly S292 (Fla. July 3, 1996). In Wilson, the Court responded to the certified question:

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?

and concluded that the proper remedy is to remand to the trial court for retrial on any of the other offenses instructed on at trial. The trial court may not simply enter a judgment for a lesser included offense. Consequently, Riggins may be retried for the offense of resisting arrest with violence since the jury was instructed on that lesser offense at trial.

It should be noted that unlike the defendant in Wilson, who was charged with and convicted of attempted first-degree felony murder, Riggins was charged with attempted second-degree murder and convicted of the lesser (albeit non-existent) crime of

attempted third-degree felony murder. In addition to instructing the jury on attempted third-degree murder, the trial court also gave instructions on resisting arrest with violence and resisting arrest without violence, neither of which are necessarily included lesser offenses of the crime of attempted second-degree murder but are permissive lessers under the peculiar facts of this case.¹ Riggins can thus be retried on the resisting arrest charge since the jury was instructed on that offense.

The "error" here was not an erroneous jury instruction on attempted third-degree murder, as Petitioner claims at page 6 of its brief, since the crime "only became 'non-existent' when we decided *Gray*." Wilson. The issue here is what remedy, if any, is available in light of Gray. Wilson authorizes a remand for retrial on a lesser included offense on which the jury was instructed at trial.

¹One of the essential elements of resisting arrest which the state must allege is that the defendant *knowingly* and *willfully* resisted, obstructed, or opposed the officer. Section 843.01, Fla. Stat. Second degree murder is a general intent crime which requires an act imminently dangerous to another and evincing a depraved mind regardless of human life; it does not require a knowing and intentional act. Section 782.04(2), Fla. Stat. Because the intent element of resisting arrest with violence is not included in Section 782.04(2), resisting arrest is not a necessarily lesser included offense of second degree murder. It is a permissive lesser here because the information alleged that Riggins "bit[] Mason Byrd, a municipal pllice officer with the City of Gainesville Police Department who was engaged in the lawful performance of his duties, and at the time Ronald Riggins bit Mason Byrd, he knew that he was infected with the Human Immune Deficiency Syndrome virus, (HIV), and knew that Mason Byrd was a police office, . . ." (R 7).

For the foregoing reasons, the first certified question should be answered in the negative and the second question answered in the affirmative.

V CONCLUSION

Pursuant to Wilson, when a conviction for attempted third-degree felony murder is vacated on the authority of Gray, the cause may be remanded to the trial court for retrial on any lesser offense instructed on at trial. This Court should, therefore, affirm the District Court's decision reversing Riggins' conviction for attempted third degree felony murder and remand for further proceedings consistent with the decision in Wilson.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondent's Brief on the Merits has been furnished by delivery to Carolyn J. Mosley, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301; and a copy has been mailed to respondent, Mr. Ronald Riggins, on this 18th day of July, 1996.

Respectfully submitted,

Paula S. Saunders

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