047

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 88,144

JOSEPH WILEY,

Respondent.
_____/

PETITIONER'S BRIEF ON MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, appellee below, will be referred to herein as "the State." Respondent, Joseph Wiley, appellant below and defendant in the trial court, will be referred to herein as "respondent."

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.

This case passes upon a question certified to be of great public importance by the Florida First District Court of Appeal.

STATEMENT OF THE CASE AND FACTS

Respondent and his codefendant, Frederick Wayne McLaughlin were indicted for first degree premeditated murder with a firearm, attempted first degree murder with a firearm, and shooting a firearm from a vehicle. (R-2-4). The indictment for the charge of attempted first degree murder read in pertinent parts as follows:

> JOSEPH WILEY AND FREDERICK WAYNE MCLAUGHLIN did unlawfully from a premeditated design to effect the death of a human being to wit: Jeffrey Brown, did attempt to kill and murder said Jeffrey Brown by shooting Jeffrey Brown with a firearm, and in the process thereof did use, carry, or posses a weapon, to-wit: a firearm, in violation of Sections 782.04, 777.04 and 775.087, Florida Statutes.

(R-3).

At trial the following evidence was presented. According to a written stipulation of facts, on December 10, 1993, Curtis Durm, a passenger in Frederick Wayne McLaughlin's truck, was shot and killed. (T-241). McLaughlin believed that Jeffrey Brown and Reggie Bradshaw were involved in Curtis Durm's death. However, three other people were charged with Curtis Durm's murder, and there was no evidence of Brown or Bradshaw's involvement. (R-241-242).

Bruce Durm, Curtis Durm's brother, testified at respondent's trial. (T-993). On December 12, 1993, at Bruce Durm's house, Durm heard McLaughlin say that Jeffrey Brown had to die. (T-1007). Respondent said that Brown had been following and harassing him, and he (Respondent) told McLaughlin that he was going to get Brown, and he had the guns, and knew how to get him. (T-1009). Respondent and McLaughlin left Durm's house together that afternoon, and later that evening, Durm saw McLaughlin leave the house in what appeared to be respondent's car. (T-1012-1013).

That evening, respondent drove the car and McLaughlin rode in the back seat. (T-1260). Respondent and McLaughlin followed a vehicle in which Jeffrey Brown was a passenger, to Mary Brown's house. (T-859, 1261). McLaughlin fired several shots from a rifle

from the back seat of appellant's car as Brown walked to the door of the house. (T-860). Brown was hit in the leg when he ran inside the house, and Demetrius Ewing, and eighteen month old baby inside the house, was hit in the chest and died. (T-860-861). Later that evening the police stopped respondent's car and arrested respondent. The police found shell casing in respondent's car. (T-564-565). Respondent claimed that he did not know that McLaughlin had the guns, a 30/30 rifle and a twelve gauge shotgun, and that he did not know that McLaughlin had intended to shoot Brown. (T-1275,1259-1260).

As for the shooting of Jeffrey Brown, the trial court instructed the jury on attempted premeditated first degree murder, attempted second degree murder, attempted third degree murder, and attempted voluntary manslaughter, aggravated battery, aggravated assault, battery, and assault. (T-1492-1499). The verdict in pertinent parts read:

> COUNT II ATTEMPTED FIRST DEGREE MURDER WITH A FIREARM OF JEFFREY BROWN
>
> A. ___ GUILTY OF ATTEMPTED FIRST DEGREE MURDER
>
> ___ GUILTY OF ATTEMPTED SECOND DEGREE MURDER
>
> ___ GUILTY OF ATTEMPTED THIRD DEGREE MURDER
>
> ___ GUILTY OF ATTEMPTED MANSLAUGHTER

___ GUILTY OF AGGRAVATED BATTERY

___ GUILTY OF AGGRAVATED ASSAULT

___ GUILTY OF BATTERY

___ GUILTY OF ASSAULT

___ NOT GUILTY

(R-510). The jury found respondent guilty of second degree murder and attempted third degree murder. (R-510).

The First District reversed respondent's conviction for attempted third degree murder because attempted felony murder is no longer recognized as criminal offense in Florida. Wiley v. State, 21 Fla. L. Weekly D1121, 1122 (Fla. 1st DCA May 7, 1996). However, the First District certified the following question as one of great public importance.

> WHEN A DEFENDANT IS CHARGED WITH FIRST DEGREE MURDER AND IS CONVICTED BY A JURY OF THE PERMISSIVE LESSER OFFENSE OF ATTEMPTED THIRD DEGREE MURDER, A NONEXISTENT CRIME, 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 ATTEMPTED MANSLAUGHTER, A NECESSARY LESSER INCLUDED OFFENSE OF THE CRIME CHARGED?

Id. at 1122. On May 23, 1996, the State timely filed its Notice to Invoke Discretionary Jurisdiction, and on May 30, 1996, this Court issued it order postponing decision on jurisdiction and brief schedule.

SUMMARY OF ARGUMENT

The certified question should be answered affirmatively. Respondent's conviction for attempted third degree murder, a nonexistent offense, should be reduced to attempted manslaughter, a lesser included offense. This is authorized under Section 924.34, Florida Statutes, and the evidence supports this offense, as well as the charged offense.

Alternatively, respondent should be granted a new trial, not discharge. Double Jeopardy does not bar reprosecution, and retrial, as this Court and other Florida courts have held on many occasions, is an appropriate action.

ARGUMENT

ISSUE

> WHEN A DEFENDANT IS CHARGED WITH FIRST DEGREE MURDER AND IS CONVICTED BY A JURY OF THE PERMISSIVE LESSER OFFENSE OF ATTEMPTED THIRD DEGREE MURDER, A NONEXISTENT CRIME, 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 ATTEMPTED MANSLAUGHTER, A NECESSARY LESSER INCLUDED OFFENSE OF THE CRIME CHARGED?

The First District certified the above question in accordance with the action it took in Pratt v. State, 668 So. 2d 1007 (Fla. 1st DCA 1996). In Pratt, the First District certified the following 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 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?

Pratt at 1009-1010. It appears that the First District inadvertently did not include the second paragraph of the question in Pratt in the certified question in this case. Moreover, in

regards to respondent's conviction for attempted third degree murder, respondent was charged with **attempted** first degree murder not first degree murder. Thus, the certified question in this case should read:

> WHEN A DEFENDANT IS CHARGED WITH **ATTEMPTED** FIRST DEGREE MURDER AND IS CONVICTED BY A JURY OF THE PERMISSIVE LESSER OFFENSE OF ATTEMPTED THIRD DEGREE MURDER, A NONEXISTENT CRIME, 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 ATTEMPTED MANSLAUGHTER, A NECESSARY LESSER INCLUDED OFFENSE OF THE CRIME CHARGED?
>
> **IF THE ANSWER IS NO, THEN DO LESSER-INCLUDED OFFENSES OF THE CHARGED OFFENSE REMAIN VIABLE FOR NEW TRIAL?**

(Emphasis added).

The answer to the certified questions is yes. 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. However, the good faith prosecution and conviction for the then existing criminal offense of attempted first degree felony murder does not bar the State from prosecuting and convicting criminals for other alternative offenses. Thus, the answer to the certified question should be yes.

The Third District certified similar questions to this Court in Alfonso v. State, 661 So. 2d 308 (Fla. 3d DCA 1995), cause dismissed, 665 So. 2d 220 (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.

Section 924.34, Florida Statutes provides that:

> **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 judgment and direct the **trial court to enter judgment for the lesser degree of the offense or for the lesser included offense**.

(Emphasis added.) In the case at bar, respondent was charged with attempted first degree premeditated murder, and attempted manslaughter is a lesser included offense. Taylor v. State, 444 So. 2d 931 (Fla. 1983); Holland v. State, 634 So. 2d 813, 816 (Fla. 1st DCA 1994)(Attempted second-degree murder and attempted manslaughter are necessarily lesser-included offenses of attempted first degree murder.).

The plain language of Section 924.34 authorizes the reduction of respondent's conviction to attempted manslaughter. Moreover, the statute has been applied in similar situations. Paige v. State, 641 So. 2d 179 (Fla. 5th DCA 1994)(conviction under void statute); Harris v. State, 649 So. 2d 923 (Fla. 1st DCA 1995)(same); Ellison v. State, 547 So. 2d 1003, 1006 (Fla. 1st DCA 1989) (second-degree murder conviction reduced to manslaughter), quashed on other grounds, State v. Ellison, 561 So. 2d 576 (Fla. 1990). But see Jordan v. State, 416 So. 2d 1161, 1162 (Fla. 2d DCA 1982), approved, Jordan v. State, 438 So. 2d 825 (Fla. 1983).

Furthermore, even assuming arguendo that the trial court is not permitted to enter a judgment for attempted manslaughter, the lesser included offenses remain viable for new trial. Although some courts faced with the 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. 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. 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).

This Court, in concluding that its decision in Gray should apply to all convictions which were not yet final, granted Gray and all

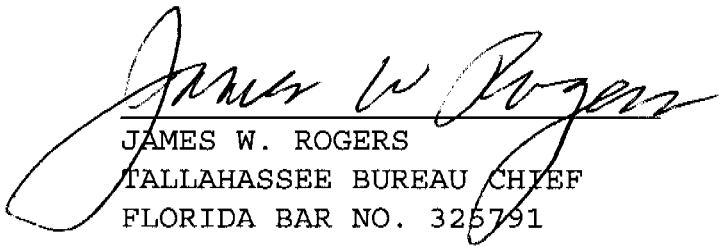
other similarly situated defendants a benefit not compelled by law. Article X, Section 9, of the Florida Constitution provides that when a criminal statute is repealed, that repeal "shall not affect prosecution or punishment for any crime previously committed." As previously pointed out, the effect of 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

For the reasons stated above, the State respectfully request that the certified question be answered in the affirmative and the decision of the First District quashed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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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 David P. Gauldin, Esq.; Assistant Public Defender; Leon County Courthouse, Suite 401, North; 301 South Monroe Street; Tallahassee, Florida 32301, this 20th day of June, 1996.

Trisha E. Meggs
Assistant Attorney General

[A:\WILEY.BI --- 6/19/96,10:03 am]

IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

JOSEPH WILEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 95-1047

Opinion filed May 7, 1996.

An appeal from Circuit Court for Okaloosa County. William H. Anderson, Judge.

Nancy A. Daniels, Public Defender, and David P. Gauldin, Assistant Public Defender, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Trisha E. Meggs, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

We reverse the appellant's conviction for attempted third degree murder, a classification of attempted felony murder, because attempted felony murder is no longer recognized as a criminal offense in Florida. State v. Grinage, 656 So. 2d 457 (Fla. 1995); State v. Gray, 654 So. 2d 552 (Fla. 1995). The appellee argues that this case should be remanded with directions to enter a judgment against the appellant for attempted manslaughter, a

necessary lesser included offense of the crime originally charged, attempted first degree murder. We reject this argument, but consistent with the action taken in Pratt v. State, 21 Fla. L. Weekly D311 (Fla. 1st DCA January 31, 1996), and numerous subsequent cases, we certify the following question to the supreme court as one of great public importance:

> WHEN A DEFENDANT IS CHARGED WITH FIRST DEGREE MURDER AND IS CONVICTED BY A JURY OF THE PERMISSIVE LESSER OFFENSE OF ATTEMPTED THIRD DEGREE MURDER, A NONEXISTENT CRIME, 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 ATTEMPTED MANSLAUGHTER, A NECESSARY LESSER INCLUDED OFFENSE OF THE CRIME CHARGED?

We affirm the appellant's conviction for second degree murder.

AFFIRMED IN PART AND REVERSED IN PART.

ALLEN, WEBSTER and LAWRENCE, JJ., CONCUR.