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FILED
SID J. WHITE
JUL 29 1996
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. 88,144

JOSEPH WILEY,

Respondent.
_____/

PETITIONER'S REPLY BRIEF ON THE 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, the symbol "T" will refer to the transcript of trial court proceeding, and the symbol "AB" will refer to respondent's answer brief. 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

The State relies on the facts as set forth in the State's initial brief and respondent's answer brief.

ARGUMENT

ISSUE I

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?] (Restated)

Respondent was charged with attempted first degree premeditated murder, and he was convicted on attempted third degree murder. (R-3, 510). The First District reversed respondent's conviction for attempted third degree murder because the offense of attempted felony murder no longer exists under Gray v. State, 654 So. 2d 552 (Fla. 1995). Respondent argues that he his entitled to discharge without retrial.

In State v. Wilson, No. 86,680 (Fla. July 3, 1996), Wilson was convicted of attempted felony murder, and the Third District reversed his conviction for the nonexistent crime. Id. at 2. This Court held that the proper remedy was not discharge, but the remedy, instead, was to remand the case "to the trial court for retrial on any of the other offenses instructed on at trial." Id.

Because the jury did not acquit Wilson for the charge of attempted felony murder, this Court found that "[t]here is, therefore, no constitutional bar to retrial on one of the other offenses on which the jury was instructed." Id. at 3. The trial court in Wilson had instructed the jurors on the offenses of attempted first degree felony murder, attempted second-degree murder, attempted voluntary manslaughter, and aggravated battery. Id. However, it had not instructed them on the crime of first degree premeditated murder Id.

In the case at bar, the trial court instructed the jury on attempted first degree premeditated murder and its lesser included offenses of attempted second degree murder, attempted third degree murder, attempted voluntary manslaughter, aggravated battery, aggravated assault, battery, and assault. (T-1492-1499). Respondent argues on appeal that he cannot be retried on aggravated assault and attempted manslaughter because they are the same degree offenses as attempted third degree murder. However, attempted manslaughter and aggravated assault were appropriate lesser included offenses of the charged offense of attempted first degree premeditated murder. Accordingly, they remain viable options for retrial under Wilson.

In Montana v. Hall, 481 U.S. 400, 107 S.Ct. 1825, 95 L.Ed.2d 354 (1987), the Montana Supreme Court had reversed Hall's conviction for incest because at the time of Hall's offense the Montana statute did not include the sexual assault of stepchildren in its incest statute[1] and held that double jeopardy prohibited Hall's retrial. 481 U.S. 402, 107 S.Ct. 1826. The Montana court stated that "if the offense in the second trial is the **same in law** and fact as the offense charged in the first trial, the double jeopardy clause prohibits successive trials." Id. (emphasis added).

The United States Supreme Court reversed the Montana Supreme Court stating that:

> It is a "venerable principl[e] of double jeopardy jurisprudence" that "[t]he successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict, Burks v. United States, [437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978)], poses no bar to further prosecution on the same charge."

481 U.S. 402, 107 S.Ct. 1826. The Court further stated that:

> Although Montana's ex post facto law clause prevents Montana from convicting respondent of incest, **we see no reason why the State should not be allowed to put respondent to a trial on the related charge of sexual**

[1]The Montana Legislature had amended the incest statute to include step children three months after Hall had committed the offense. 481 U.S. at 401-402, 107 S.Ct. 1826.

> **assault**. There is no suggestion that the evidence introduced at trial was insufficient to convict respondent.

481 U.S. 403, 107 S.Ct. 1826-1827 (emphasis added).

The Montana Court had also held that "A retrial after a conviction for committing a nonexistent crime also would subject respondent to double jeopardy." 481 U.S. 402, 107 S.Ct. 1826. Nevertheless, the United States Supreme Court held that:

> "The Montana court also suggested that the Double Jeopardy Clause would forbid retrial because respondent was convicted of an offense that did not exist when respondent had committed the acts in question. But, under the Montana court's reading of the Montana sexual assault statute, respondent's conduct apparently was criminal at the time he engaged in it. If that is so, the State simply relied on the wrong statute in its second information. It is clear that the Constitution permits retrial after a conviction is reversed because of a defect in the charging instrument."

481 U.S. 404, 107 S.Ct. 1827.

Therefore, although retrial on a higher degree offense than the offense for which the defendant was convicted would violate double jeopardy, retrial on an offense of an equal or lesser degree does not.[2] Attempted third degree murder is a third degree felony.

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[2]This Court, in Wilson, remanded for retrial on the lesser included offenses of attempted first degree felony murder which were instructed on at the original trial. However, under Montana v. Hall, retrial on the offense of attempted first degree premeditated murder, an offense of the same degree as attempted first degree felony murder, would be permissible. Although it is

§ 782.04(4), Fla. Stat. (1995), § 777.04(4)(d), Fla. Stat. (1995). Attempted manslaughter and aggravated assault are also third degree felonies, § 782.07, Fla. Stat. (1995), § 777.04(4)(d), Fla. Stat. (1995); § 784.021, Fla. Stat. (1995), and battery and assault are misdemeanors. § 784.011, Fla. Stat. (1995), § 784.03, Fla. Stat. (1995). Because the above offenses are the same degree or lesser degree offense of the offense for which appellant was convicted, and because the jury was instructed on these offenses during respondent's original trial, this Court, in accordance with Wilson, should remand this case to the trial court for retrial on any of the above offenses.

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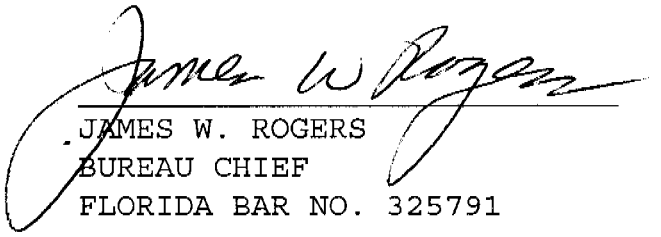
not clear from the Wilson opinion, the factual evidence in the Wilson case may not have support the element of premeditation, especially in light of the fact that the jury was not instructed on attempted premeditated murder. Therefore, if there was no evidence of premeditation, it would have been improper to charge appellant with attempted first degree premeditated murder, which could explain this Court reasons for remanding the Wilson case for retrial on the lesser included offenses rather than attempted premeditated murder.

CONCLUSION

For the reasons stated above, the State respectfully requests that this Court answer the certified question in the affirmative, and remanded this case for retrial for any of the same degree or lesser degree offenses which were instructed on at respondent's trial.

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 Answer 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 29th day of July, 1996.

Trisha E. Meggs
Assistant Attorney General

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