IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,
v.
TRISTON ELLIS,
Respondent.

CASE NO. 88,323

TRISTON ELLIS,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

CASE NO. 88,342

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, the Appellee in the First District Court of Appeal and the prosecuting authority in the trial court, will be referenced in this brief as Petitioner, the prosecution, or the State. Respondent, Triston Ellis, the Appellant in the First District Court of Appeal and the defendant in the trial court, will be referenced in this brief as Respondent or his proper name.

The symbol "R" will refer to the record on appeal, and the symbol "T" will refer to the transcript of the trial court's proceedings. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The Respondent, Triston Ellis, was charged by Information with the offense of "attempted murder" in violation of §782.04(1), Florida Statutes. (R. 8). The State tried Respondent on a more specific theory of attempted felony murder, for which Mr. Ellis was found guilty. The First District Court of Appeal reversed this conviction under State v. Gray, 654 So. 2d 552 (Fla. 1995), and certified the following question to this Court:

> 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?

(See, App. 1).

SUMMARY OF ARGUMENT

ISSUE I: The certified question should be answered in the affirmative given this Court's intervening decision in State v. Wilson, __ So. 2d __ (Fla. July 3, 1996), case no. 86,680. Moreover, because Respondent has not been acquitted of attempted (premeditated) first-degree murder as charged in the Information he is also eligible for retrial on attempted first-degree murder.

ARGUMENT

ISSUE I

WHEN A CONVICTION FOR ATTEMPTED FIRST-DEGREE 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? (The Certified Question)

The certified question differs somewhat from the opinion of the First District in that it follows the certified question in State v. Wilson, supra, (App. 2, herein) without reaching the full scope of the issues raised by the District Court's opinion. As a threshold matter, the certified question itself is answered by the Wilson decision and need not be revisited. It is apparent that Mr. Ellis can be retried before the Circuit Court due to the fact that there was no acquittal in this case.

It should be noted that Ellis was charged under §782.04(1), but without additional statutory restrictions. Although the allegata refers to an attempted murder being committed during the commission of a felony, the defendant, by consciously walking up to the victim's car and firing three shots at close range, also arguably committed a "premeditated" attempted murder. This theory was not presented or argued to the jury, nor was it included in the verdict form. Thus, there was no acquittal on "premeditation." Pursuant

to this Court's decisions in Achin v. State, 436 So. 2d 30 (Fla. 1983), and Jordan v. State, 438 So. 2d 825 (Fla. 1983), retrial should encompass the viable alternate theory of premeditated first-degree murder which was included in the scope of the Information, which has identical elements, and for which no specific acquittal was entered.

The certified question should be answered in the affirmative along the lines of Wilson, supra, with the inclusion of the disposition of the equivalent offense question presented to the lower court and controlled by Achin and Jordan.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the affirmative .

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S BRIEF ON THE MERITS has been furnished by U.S. Mail to **MR. STEVEN SELIGER**, Esquire, 16 North Adams Street, Quincy, Florida 32351, this 15th day of July, 1996.

Mark C. Menser
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. TRISTON ELLIS, Respondent.	CASE NO. 88,323
TRISTON ELLIS, Petitioner, v. STATE OF FLORIDA, Respondent.	CASE NO. 88,342

APPENDIX FOR
PETITIONER'S BRIEF ON THE MERITS

APPENDIX	DOCUMENT
1	Ellis v. State, 1st DCA Opinion Case No. 94-03648
2	State v. Wilson, Florida Supreme Court Opinion Case No. 86,680

[A:\ELLIS.MB --- 7/12/96,1:16 pm]

APPENDIX 1

94-111940
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IN THE DISTRICT COURT OF APPEAL

FIRST DISTRICT, STATE OF FLORIDA

TRISTON ELLIS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

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

CASE NO. 94-3648

Opinion filed June 19, 1996.

An appeal from the Circuit Court for Gadsden County.
William Gary, Judge. 93-770

Steven L. Seliger of Garcia and Seliger, Quincy, for Appellant.

Robert A. Butterworth, Attorney General and Giselle Lylen Rivera, Assistant Attorney General, Tallahassee, for Appellee.

Docketed
6/20/96 see CR
Florida Attorney General
6/20/96 E

PER CURIAM.

Triston Ellis, appellant, challenges his conviction of the crime of attempted first-degree felony murder, and the assessment of victim injury points on the sentencing guidelines scoresheet. We reverse the judgment and sentence for attempted first-degree felony murder, pursuant to the Florida Supreme Court's pronouncement in State v. Gray, 654 So. 2d 552 (Fla. 1995), but we

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remand for further proceedings. We affirm the assessment of victim injury points without comment.

The state does not dispute that appellant's conviction and sentence for the crime of attempted first-degree felony murder must be vacated on the authority of State v. Gray. Accord State v. Grinage, 656 So. 2d 457, 458 (Fla. 1995). In Gray and Grinage, the Florida Supreme Court held that the crime of attempted felony murder no longer exists in Florida. The decision was made applicable to all cases pending on direct review or not yet final. Gray, 654 So. 2d at 554; Grinage, 656 So. 2d at 458. However, the state does disagree with appellant's contention that the cause should be remanded with directions to discharge appellant, with respect to the conviction of what has been determined to be a non-existent crime.

Neither Gray nor Grinage addressed the nature or scope of options available to the state and the trial court, when a case is remanded after application of Gray to a conviction and sentence for attempted felony murder. See Gibson v. State, 667 So. 2d 884 (Fla. 1st DCA 1996); Pratt v. State, 668 So. 2d 1007 (Fla. 1st DCA 1996). In Pratt, the appellant was charged with attempted second-degree murder, but the jury convicted him of attempted third-degree felony murder. This court rejected Pratt's argument that Gray mandates outright dismissal of the charges. Noting that the case was not one of insufficient evidence to sustain a guilty verdict, the court reversed the conviction, remanded the cause for further

proceedings in accordance with Gray, and certified two questions of great public importance. 668 So. 2d at 1009-1010.

In Gibson, as here, the appellant was convicted of attempted first-degree felony murder. Judge Mickle, writing for the court, observed that the question left unanswered in Gray would continue to arise and conflicting results will be reached in numerous cases affected by Gray and Grinage. The court then certified as a question of great public importance whether, after an attempted first-degree felony murder conviction is vacated on authority of State v. Gray, lesser included offenses remain viable for a new trial or for reduction of the convicted offense.

As predicted in Gibson, a slightly different result was reached in Upshaw v. State, 665 So. 2d 303 (Fla. 2d DCA 1995). There, the Second District recognized that under Gray, Upshaw's two convictions of attempted first-degree felony murder were required to be vacated. However, rather than certification, the court instructed that on remand, "the state may file an amended information as to those two counts in order to charge a valid offense." 665 So. 2d at 304.

The question certified in Gibson tracks the language of the certified question in Wilson v. State, 660 So. 2d 1067, 1069 (Fla. 3d DCA 1995), and Alfonso v. State, 661 So. 2d 308, 309 (Fla. 3d DCA 1995). The supreme court has granted review in both cases, see State v. Wilson, 668 So. 2d 604 (Fla. 1996), and State v. Alfonso, 668 So. 2d 603 (Fla. 1996), but a decision is still pending as to

whether a new information may be filed to charge a valid offense after remand of a conviction vacated pursuant to Gray. Therefore, we join with other panels of this court and of the Third District Court, and certify the following question as a matter of great public importance:

> 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?

Accordingly, we reverse the conviction and sentence for attempted felony murder, and remand this cause for further proceedings in accordance with Gray and Grinage.

BOOTH, JOANOS and BENTON, JJ., CONCUR.

APPENDIX 2

Supreme Court of Florida

No. 86,680

STATE OF FLORIDA,

Petitioner,

vs.

EDUARDS WILSON,

Respondent.

[July 3, 1996]

HARDING, J.

We have for review a decision certifying the following question to be of great public importance:

> 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?

Wilson v. State, 660 So. 2d 1067, 1069 (Fla. 3d DCA 1995). We have jurisdiction. Art. V, § 3(b)(4), Fla. Const.

Wilson was convicted of attempted felony murder and armed robbery after attempting to rob a man waiting for a bus and then shooting at him when the victim started to walk away. The victim was hit in the arm but not killed. After a jury trial, Wilson was sentenced to two concurrent twenty-seven year terms. The jury had not been instructed on attempted first-degree premeditated murder, but had been instructed on three lesser included offenses: attempted second-degree murder, attempted voluntary manslaughter, and aggravated battery.

The Third District Court of Appeal reversed the conviction and sentence for attempted felony murder, citing this Court's intervening decision in State v. Gray, 654 So. 2d 552 (Fla. 1995), where we held that the crime of attempted felony murder no longer existed in Florida. The state argued that under section 924.34, Florida Statutes (1995),[1] the district court should direct the lower court to enter judgment on the basis of one of

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[1]The section provides:

> **924.34 When evidence sustains only conviction of lesser offense.**--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.

§ 924.34, Fla. Stat. (1995).

the lesser included offenses. The court rejected this argument, reasoning that there could be no lesser included offense to a nonexistent crime. However, on the state's motion for rehearing or certification, the court certified the question we now consider.

We hold that the proper remedy is remand to the trial court for retrial on any of the other offenses instructed on at trial.

We have previously considered nonexistent offenses in slightly different circumstances. For instance, we have held that the remedy for improper conviction of the nonexistent offense of attempted extortion was retrial on the original charge of extortion. Achin v. State, 436 So. 2d 30 (Fla. 1982). Similarly, we directed that the remedy for an improper conviction of the nonexistent offense of attempted resisting arrest with violence was retrial on the resisting arrest with violence charge. Jordan v. State, 438 So. 2d 825 (Fla. 1983).

Wilson is correct in his assertion that those cases involved nonexistent offenses which were lesser included offenses of the principal charge in the charging document, as opposed to the instant case, where the principal charge was a nonexistent offense. However, we do not agree that this mandates dismissal of the charges in the instant case. In the earlier cases, "nonexistent" had a slightly different connotation. There, the offenses in question were never valid statutory offenses in Florida; they were simply the product of erroneous instruction.

Here, attempted felony murder was a statutorily defined offense, with enumerated elements and identifiable lesser offenses, for approximately eleven years. It only became "nonexistent" when we decided Gray. Because it was a valid offense before Gray, and because it had ascertainable lesser offenses, retrial on any lesser offense which was instructed on at trial is appropriate.

Retrial on a lesser offense which was instructed on at trial does not present a double jeopardy problem. The United States Supreme Court has said that the double jeopardy clause affords three basic protections: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969) (footnotes omitted). None of these concerns are implicated here.

In the instant case, the jury convicted Wilson of the highest offense on which it had been instructed: attempted felony murder. There was no acquittal--explicit or implicit--for either the attempted felony murder charge or any lesser offenses. Wilson is not being punished twice. There is, therefore, no constitutional bar to retrial on one of the other offenses on which the jury was instructed.

For these reasons, we answer the certified question as explained above and remand to the trial court for retrial on any lesser offense instructed on at trial.

It is so ordered.

KOGAN, C.J., and OVERTON, SHAW, GRIMES, WELLS and ANSTEAD, JJ., concur.

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance
Third District - Case No. 94-2621

(Dade County)

Robert A. Butterworth, Attorney General and Richard L. Polin, Assistant Attorney General, Miami, Florida,

for Petitioner

Bennett H. Brummer, Public Defender and Robert Kalter, Assistant Public Defender, Eleventh Judicial Circuit,Miami, Florida,

for Respondent