

IN THE SUPREME COURT OF FLORIDA

FILED

SID J. WHITE

JUL 29 1996

CLERK, SUPREME COURT

By

Chief Deputy Clerk

STATE OF FLORIDA,
Petitioner,
v.

CASE NO. 88,323

TRISTON ELLIS,
Respondent.

TRISTON ELLIS,
Petitioner,
v.

CASE NO. 88,342

STATE OF FLORIDA,
Respondent.

RESPONDENT'S (ELLIS) ANSWER BRIEF ON THE MERITS

STEVEN SELIGER
GARCIA AND SELIGER
16 N. ADAMS STREET
QUINCY, FLORIDA 32351
(904) 875-5668
FLA. BAR ID. 244597 (SS)

ATTORNEYS FOR TRISTON ELLIS

TABLE OF CONTENTS

	<u>Page</u>
Table of Contents	i
Table of Citations.	ii
Statement of the Case and Facts	1
Summary of the Argument	3
Argument	
WHEN A CONVICTION FOR ATTEMPTED FIRST-DEGREE MURDER MUST BE VACATED ON AUTHORITY OF <i>STATE V. GRAY</i> , 654 SO. 2D 552 (FLA. 1995), DO LESSER-INCLUDED OFFENSES REMAIN VIABLE FOR A NEW TRIAL OR REDUCTION OF THE OFFENSE? (The Certified Question)	4
Conclusion.	6
Certificate of Service.	7

TABLE OF CITATIONS

<u>Cases</u>	<u>Page(s)</u>
<i>State v. Gray</i> , 654 So. 2d 552 (Fla. 1995)	1,4
<i>State v. Wilson</i> , ____ So. 2d ____ (Fla. 1996)	3,4,5
<i>Wilson v. State</i> , 660 So. 2d 1067, 1069 (Fla. 3d DCA 1995)	4

Statutes

777.04, Florida Statutes	1
782.04(1), Florida Statutes	1

Other

Article V. Section (3)(b)(4), Florida Constitution	2
Rule 9.030(a)(2)(A)(v), Fla.R.App.P.	2

STATEMENT OF THE CASE AND FACTS

Mr. Ellis was charged by information with Attempted First Degree Murder while engaged in a dangerous felony and attempted robbery with a firearm. (R-8) The specific language of Count 1 of the information alleged that Triston Ellis, "on or about the 21st day of December, 1993, did unlawfully attempt to kill a human being, Ronald Hobbs, by shooting with a firearm, while engaged in the perpetration of or in the attempt to perpetrate the felony of robbery, contrary to Sections 777.04 and 782.04(1), Florida Statutes." (R-8)

The case was tried on an attempted first degree felony murder theory. (TR-224) The jury was instructed on attempted first degree felony murder and the lesser offenses of attempted second degree murder, attempted manslaughter, aggravated battery and battery. (TR-224) The jury found Mr. Ellis guilty of "Attempted First Degree Felony Murder, with a Firearm." (R-11)

On direct appeal, the First District reversed Mr. Ellis' conviction for attempted first degree felony murder under the authority of *State v. Gray*, 654 So. 2d 552 (Fla. 1995). Mr Ellis did not challenge the validity of his conviction on Count 2 for attempted robbery with a deadly weapon, a firearm. (R-12) In addition, the First District reversed Mr. Ellis' sentence and remanded the case for further proceedings.

As it had done with a number of other cases, the First District also certified a 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 (FLA. 1995), DO LESSER INCLUDED OFFENSES REMAIN VIABLE FOR A NEW TRIAL OR REDUCTION OF THE OFFENSE?

From this decision, both the State and Mr. Ellis invoked the jurisdiction of this Court pursuant to Article V, Section (3)(b)(4), Florida Constitution and Rule 9.030(a)(2)(A)(v), Florida Rules of Appellate Procedure. The State, without objection by Mr. Ellis, moved to consolidate the two cases and this Court granted the motion. In addition, at the request of the State, the First District entered an order to stay the issuance of the mandate pending this Court's review.

SUMMARY OF THE ARGUMENT

The decision of *State v. Wilson*, seems to require this Court to answer yes to the certified question. Should the State opt to retry him on Count 1 of the Information, it cannot be for attempted premeditated first degree murder.

ARGUMENT

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)

This case is directly controlled by this Court's recent opinion of *State v. Wilson*, ____ So. 2d ____ (Fla. 1996). The Third District certified the identical question certified by the First District. *Wilson v. State*, 660 So. 2d 1067, 1069 (Fla. 3d DCA 1995). This Court decided that a person convicted of attempted first degree felony murder may be retried "on any lesser offense instructed on at trial."

In the face of this language, the State argues that because Mr. Ellis "arguably committed a premeditated attempted murder", the State can retry him on this charge. This position is specious. Mr. Ellis and Mr. Wilson's cases are identical in their creation. Wilson was charged and convicted of robbery with a firearm and attempted felony murder, predicated on the robbery. This is exactly what occurred in Ellis' case. In *Wilson*, the State filed a motion for rehearing and certification, "arguing that on remand there should either be a trial on lesser included offenses or that the defendant's conviction for attempted first degree felony murder should be reduced to a lesser included offense." *Wilson v. State*, 660 So. 2d 1067, 1068 (Fla. 3d DCA 1995). In *Ellis*, the State argued in its answer brief that the

First District should certify a question that included "whether the State may retry the defendant on an attempted premeditated first degree murder." (State Answer Brief in First District, page 10) The First District did no such thing.

Consistent with *Wilson*, the State is limited to filing an amended information, if it chooses to do so, on any lesser included offense instructed to the jury and supported by the facts of the case.

CONCLUSION

Mr. Ellis requests this Court to follow *State v. Wilson* and remand the case to the trial court for further proceedings.

A handwritten signature in cursive script, reading "Steven Seliger", is written over a horizontal line.

STEVEN L. SELIGER
Garcia and Seliger
16 N. Adams Street
Quincy, Florida 32351
(904) 875-4668
Fla. Bar Id. 244597

Attorney for Triston Ellis

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished by U.S. Mail this 26th day of July, 1996, to the following:

James W. Rogers
Bureau Chief--Criminal Appeals
Senior Assistant Attorney General
Office of the Attorney General
The Capitol
Tallahassee, Florida 32399-1050

Mark C. Menser
Assistant Attorney General
Office of the Attorney General
The Capitol
Tallahassee, Florida 32399-1050



Steven L. Seliger