

FILED

StE J. WHITE

FEB 25 1997

IN THE SUPREME COURT OF FLORIDA

RALPH FAYSON
Petitioner

vs .

THE STATE OF FLORIDA
Respondent,

_____ /

Case No. 89,554

District Court of Appeal
1st District- No, 95-4085

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

PETITIONER'S REPLY BRIEF

APPEAL FROM THE FIRST DISTRICT COURT OF APPEALS

FOR PETITIONER

✓
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PRELIMINARY STATEMENT

Note- The following system of abbreviation is used in this reply brief: The petitioner's initial brief is designated as "I.B.". The State's answer brief is designated as "A.B.".

RESPONSE AND REBUTTAL TO THE STATE'S ANSWER BRIEF

The State asserts that the present case is similar to Gonzalez v. State, 449 So.2d 882 (Fla. 3d DCA 1984) (A.B. 7).

This assertion is incorrect. Gonzalez was charged with two counts of first degree felony murder and one count of first degree attempted felony murder. Gonzalez, at 884. Also, Gonzalez was charged with robbery and trafficking in marijuana. Id. The predicate offense for the first degree felony murder was robbery. Id. Gonzalez was convicted of the lesser offenses of third degree felony murder and attempted third degree felony murder. Id.

Third degree felony murder is not a necessary lesser included offense of first degree felony murder but is a permissive lesser offense of which the jury is instructed only upon pertinent proof and pleadings. Alpern v. State, 605 So.2d 1291 (Fla. 3d DCA 1992). In Gonzalez, the jury was so instructed because Gonzalez was charged with trafficking in marijuana which was at that time a predicate offense for third degree felony murder. Gonzalez, at 887 n.3. Thus, the jury did not necessarily render an inconsistent verdict at all. The jury could have consistently concluded that Gonzalez committed a robbery but that the death of the victim occurred as a consequence of the marijuana trafficking not the robbery.

This method of examining the consistency of verdicts is employed by this Court in Pitts v State, 425 So.2d 542 (Fla. 1983). In Pitts, Pitts was charged with both aggravated battery and possession of a firearm during the commission of a felony. The predicate offense for the firearm charge was aggravated

battery which included an **attempt** to commit aggravated battery. Attempted **aggravated** battery apparently was not given to the jury as a lesser offense of **aggravated** battery. Pitts was acquitted of the **aggravated** battery and convicted of the **firearm** charge. This Court held that, although Pitts was acquitted of aggravated battery, a conviction for **possession** of the firearm was not necessarily inconsistent with such acquittal **because** the jury may have found that Pitts possessed the firearm during the commission of an **attempted** aggravated battery.

Thus, the Third District Court did not need to reach the issue of true versus logically inconsistent verdicts in Gonzalez. However, when the Third District Court writes concerning true inconsistent verdicts that "an exception . . . is recognized where an acquittal of the underlying felony effectively holds the defendant innocent of a greater offense involving that same felony," the court states the rule more narrowly than this Court does in Pitts and in State v. Powell, 674 So.2d 731 (Fla. 1996). This Court has never limited inconsistent verdicts to instances where one whole offense comprises an element of a second offense. This Court expresses a broader rule for inconsistent verdicts in Pitts which defines the exception crafted in Mahaun v. State, 377 So.2d 1158 (Fla. 1979) and Redondo v. State, 403 So.2d 954 (Fla. 1981) as "verdicts . . . that an essential element of the crime for which the jury found defendant guilty was missing by virtue of its other verdict." Pitts, at 544.

This Court's recent opinion in Powell adopts a definition of inconsistent verdicts from the Fourth District Court of Appeals

decision in another Gonzalez v. State, 440 So.2d 514 (Fla. 4th DCA), review dismissed, 444 So.2d 417 (Fla. 1983). Justice Anstead writes for the Fourth District in Gonzalez that true inconsistent verdicts are "those in which an acquittal on one count negates a necessary element for conviction on another count." Powell at 733 quoting Gonzalez at 515. As in Pitts, this Courts again defines inconsistent verdicts as charges which share elements and not necessarily the instance described by the Third District when one offense is wholly an element of a second offense .

CERTIFICATION

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by U.S. Mail to the Office of the Attorney General, Legal Section-Suite 1502, The capitol, Tallahassee, Fl 32399, this 24 day of February, 1997.

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