

IN THE SUPREME COURT OF FLORIDA

OWEN L. TUCKER,
PETITIONER,

VS.

CASE NO. 91,923

STATE OF FLORIDA,
RESPONDENT, /

017
FILED

SID J. WHITE

JAN 30 1998

CLERK, SUPREME COURT

By

Clerk Deputy Clerk

AMENDED PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

PETITIONER WAS THE DEFENDANT IN THE TRIAL COURT AND APPELLANT IN THE FIFTH DISTRICT OF APPEAL.

RESPONDENT WAS THE PROSECUTION AND APPELLEE.

THE FOLLOWING SYMBOL WILL BE USED:

R = RECORD ON APPEAL

T. II AND III = VOLUME OF THE RECORD ON APPEAL¹

1. THE ROMAN NUMERAL PRECEDING THE PAGE NUMBER REFERS TO THE VOLUME OF THE RECORD ON APPEAL, AS THE TRANSCRIPTS CONTAINED IN VOLUMES II AND III ARE SEPARATELY NUMBERED.

STATEMENT OF THE CASE

PETITIONER WAS CHARGED BY INFORMATION WITH TWO COUNTS OF ATTEMPTED FIRST-DEGREE MURDER, ARM BURGLARY, AND SHOOTING INTO AN OCCUPIED DWELLING. (R. 5-6).

PETITIONER WAS TRIED AND FOUND GUILTY AS CHARGED ON ALL FOUR COUNTS. (R. 118-119). HE WAS SENTENCED TO 31 YEARS WITH THREE-YEAR MINIMUM MANDATORY ON EACH COUNT CONCURRENT (R. 135-136 AND 191-192).

AN APPEAL WAS FILED TO THE FIFTH DISTRICT COURT OF APPEAL, THE FIFTH DISTRICT COURT OF APPEAL AFFIRMED PETITIONER'S CONVICTIONS, JUDGMENT, AND SENTENCES. THE COURT CERTIFIED CONFLICT WITH STATE V. TRIPP, 642 So.2d. 728 (1994) AND RILEY V. STATE, 654 So.2d. 621 (FLA. 5TH DCA 1995).

PETITIONER FILED A TIMELY NOTICE TO THIS COURT FOR DISCRETIONARY REVIEW. THIS COURT POSTPONED ITS DECISION ON JURISDICTION AND ORDERED BRIEFING ON THE MERITS. THE BRIEF ON ITS MERITS FOLLOWS.

STATEMENT OF FACTS

ROSA AND OWEN TUCKER HAD BEEN MARRIED FOR SEVERAL YEARS BEFORE THEY DIVORCE IN EARLY 1995 (T. II, 163). DURING THAT SAME YEAR, ERIC LOZINSKI AND ROSA TUCKER WERE WORKING TOGETHER AND EVENTUALLY STARTED SEEING EACH OTHER ROMANTICALLY (T. II, 26-27 AND II, 165). ON DECEMBER 4, 1995, LOZINSKI WAS STAYING WITH ROSA AT HER HOME ON PALMETTO STREET IN PALATKA, FLORIDA (T. II, 28 AND II, 167). AT APPROXIMATELY 2:00 THAT MORNING, LOZINSKI AND ROSA WERE IN THE KITCHEN EATING, WHEN ROSA SAID SHE SAW SOMEONE RUNNING ON HER PROPERTY (T. II, 30 AND II, 167-168). ROSA TOLD LOZINSKI IT WAS PETITIONER (T. II, 168). LOZINSKI THEN HEARD A LOUD NOISE AND SAW A MAN'S HEAD, WHOM LOZINSKI IDENTIFIED AT TRIAL AS PETITIONER (T. II, 38), COME THROUGH THE WINDOW (T. II, 30). ACCORDING TO ROSA AND LOZINSKI, PETITIONER SAID, "WHAT ARE YOU DOING IN MY HOUSE." (T. II, 30 AND II, 168). PETITIONER THEN ALLEGEDLY WENT OVER TO THE PATIO DOOR AND TRIED UNSUCCESSFULLY TO GET INSIDE BY KICKING THE DOOR, AND WENT INSIDE THE HOUSE (T. II, 31-32 AND II, 169-170).

ROSA AND LOZINSKI TESTIFIED THE PETITIONER POINTED A GUN AT LOZINSKI'S HEAD AND SHOT HIM IN THE FOREHEAD (T. II, 32 AND II, 171). LOZINSKI FELL TO GROUND, LOOKED UP, AND SAW PETITIONER POINTED THE GUN AT HIS HEAD AGAIN (T. II, 33). LOZINSKI HELD HIS ARM IN FRONT OF HIS HEAD TO AVOID THE BULLET (T. II, 33). PETITIONER FIRED ANOTHER SHOT, WHICH STRUCK LOZINSKI IN THE ARM (T. II, 33).

LOZINSKI TESTIFIED THAT AT AFTER THE SECOND SHOT, HE BLACKED OUT FOR ABOUT A MINUTE (T. II, 35). WHEN HE CAME TO, HE WALKED INTO THE LIVING ROOM AND SAW ROSA TRYING TO DEFEND HERSELF AGAINST PETITIONER (T. II, 35). ROSA TESTIFIED THAT SHE WAS TRYING TO RUN AWAY WHEN SHE HEARD A "POP" AND FELT BURNING SENSATIONS IN HER BUTTOCKS AND SHOULDER AREA (T. II, 173). LOZINSKI SAID HE SAW PETITIONER SHOOT ROSA IN THE BUTTOCKS, (T. II, 35).

LOZINSKI RAN TO A NEIGHBOR'S HOUSE AND BEGAN KNOCKING AT THE DOOR (T. II, 36). ROSA TESTIFIED THAT, MEANWHILE, PETITIONER WAS STILL STANDING OVER HER POINTING THE GUN AT HER (T. II, 176). HE THEN BACKED OFF, AND ROSA RAN OUT OF THE HOUSE AND OVER TO HER NEIGHBOR'S HOUSE, WHERE SHE SAW LOZINSKI (T. II, 36, 176, AND 183). THE NEIGHBOR, ALPHONSO MCRAE, WAS AWAKENED BY ROSA AND LOZINSKI KNOCKING ON HIS DOOR, SAYING THAT THEY HAD BEEN SHOT (T. II, 9). MCRAE LET THEM INSIDE HIS HOUSE AND CALLED 911 (T. II, 10).

DEPUTIES STEVE ROSE AND KENNETH MANDERVILLE, WITH THE PUTNAM COUNTY SHERIFF'S OFFICE, RESPONDED TO McRAE'S HOME (T. II, 57 AND II, 64). ROSA TOLD THE DEPUTIES THAT PETTIDNER SHOT HER AND LOZINSKI (T. II, 56 AND II, 64-65). THE DEPUTIES THEN WENT TO ROSA'S HOUSE TO INVESTIGATE (T. II, 57). THE DEPUTIES NOTICED DAMAGES TO THE GARAGE DOOR AND OTHER AREAS IN THE HOME (T. II, 58 AND II, 66). WHILE THEY WERE AT THE RESIDENCE, A WOMAN APPROACHED AND TOLD THE DEPUTIES THAT SHE HAD SEEN PETTIDNER DRIVING FAST DOWN THE ROAD, SO SHE WENT TO THE TUCKER'S HOME TO SEE IF ANYTHING WAS WRONG (T. II, 60). BASED ON THE DESCRIPTION THE WOMAN PROVIDED, ROSA ISSUED A BE-ON-THE-LOOKOUT (BOLD) ORDER (T. II, 60).

BETTY SUTTON, PETTIDNER MOTHER, TESTIFIED THAT PETTIDNER SHOWED UP AT HER HOUSE BETWEEN 2:30 AND 3:00 AM. ON DECEMBER 4 (T. II, 141). ACCORDING TO HER STATEMENT TO THE POLICE, PETTIDNER SEEMED DISORIENTED, HE WAS CRYING, AND HE TOLD HER HE THOUGHT HE HAD SHOT SOMEONE (T. II, 141-142). SHE TOLD HIM TO TURN HIMSELF IN TO THE POLICE, AND SHE AND PETTIDNER'S SISTER FOLLOWED HIM TO THE POLICE STATION (T. II, 143 AND III, 27). AT TRIAL, MS. SUTTON TESTIFIED THAT SHE ACTUALLY WAS NOT SURE WHAT PETTIDNER HAD SAID (T. II, 149-150). SHE WAS ON SEVERAL MEDICATIONS AT THE TIME DUE TO HER POOR HEALTH AND SHE TESTIFIED THAT HER MEMORY IS BAD (T. II, 149-150).

OFFICER ROBERT THROPP TESTIFIED THAT AS HE WAS LEAVING HIS SHIFT AT THE POLICE STATION AT APPROXIMATELY 3:15 A.M., PETTIDNER PULLED INTO THE PARKING LOT IN A CAR MATCHING THE DESCRIPTION PROVIDED IN THE BOLD (T. II, 72 AND II, 81-82). THROPP SAID PETTIDNER GOT OUT OF THE CAR AND BEGAN BEATING HIS HANDS ON THE ROOF OF THE CAR (T. II, 73). OFFICER THROPP TESTIFIED THAT PETTIDNER WAS NOT ARMED (T. II, 75), THROPP THEN ASKED PETTIDNER IF HE WAS MR. TUCKER, AND PETTIDNER RESPONDED AFFIRMATIVELY (T. II, 74). PETTIDNER WAS COMPLAINING OF PAIN IN HIS CHEST AND WAS OBVIOUSLY HAVING TROUBLE BREATHING (T. II, 74-75). PETTIDNER'S MOTHER TOLD OFFICER THROPP THAT PETTIDNER HAD A MEDICAL CONDITION, POTENTIAL AFFECTING HIS HEART (T. II, 74-75). RESCUE WAS CALLED, AND PETTIDNER WAS BROUGHT TO THE HOSPITAL, WHERE HE WAS TREATED AND SUBSEQUENTLY RELEASED TO THE CUSTODY OF THE SHERIFF'S OFFICE (T. II, 76 AND II, 116).

DETECTIVE KEITH RIDDICK INTERVIEWED PETITIONER AT THE SHERIFF'S OFFICE (T. II, 110). PETITIONER DENIED HAVING SHOT LOZINSKI AND HIS EX-WIFE (T. II, 111). HE TOLD THE DETECTIVE THAT HE HAD BEEN OUT TO DINNER, THAT HE HAD BEEN DRINKING, AND THAT HE WAS ON MEDICATION (T. II, 111). DETECTIVE RIDDICK CLAIMS THAT PETITIONER THEN SAID IF HE DID IT, HE DIDN'T REMEMBER DOING IT (T. II, 111).

RIDDICK LATER SHOWED A PHOTOGRAPHIC LINE-UP TO LOZINSKI (T. II, 113). LOZINSKI WAS UNABLE TO POSITIVELY IDENTIFY PETITIONER FROM THE LINEUP (T. II, 114). LOZINSKI TOLD THE DETECTIVE THE PERPETRATOR MIGHT BE EITHER PHOTOGRAPH #3 OR #6 (T. II, 114). PETITIONER WAS IN PHOTOGRAPH #3 (T. II, 114).

PETITIONER TESTIFIED ON HIS OWN BEHALF AT TRIAL. PETITIONER WAS AT RESTAURANT ON THE NIGHT IN QUESTION, UNTIL ABOUT 2:00 A.M. (T. III, 7). HE HAD BEEN DRINKING AND HE WAS ON MEDICATION (T. III, 6 AND 8). AS HE WAS DRIVING OUT OF THE RESTAURANT PARKING LOT, HE STRUCK THE DOOR OF SOMEONE'S CAR AS THEY WAS OPENING IT (T. III, 9). HE PARKED BECAUSE HE HAD NO INSURANCE, SO HE CONTINUED DRIVING (T. III, 10). HE WENT TO HIS MOTHER'S HOUSE AND TOLD HER HE HAD STRUCK SOMEONE WITH HIS CAR (T. III, 12). AT HIS MOTHER'S REQUEST, HE WENT TO THE POLICE STATION TO SEE WHAT TO DO ABOUT THE CAR ACCIDENT (T. III, 12).

PETITIONER TESTIFIED THAT ROSA WAS SEEING ANOTHER MAN AT THE TIME SHE WAS DATING LOZINSKI, AND THAT THIS OTHER MAN MUST HAVE COMMITTED THE CRIMES (T. III, 23-24). PETITIONER CLAIMED THAT ROSA WAS ACCUSING HIM BECAUSE SHE BLAMED HIM FOR HER DAUGHTER'S DEATH A FEW YEARS EARLIER (T. III, 23-24). HE ALSO TESTIFIED THAT SHE PROBABLY WAS NOT ACCUSING THE OTHER MAN BECAUSE SHE WAS FINANCIALLY DEPENDING UPON HIM (T. III, 23-25).

ALTHOUGH THE POLICE CONDUCTED A SEARCH, THEY DID NOT FIND A GUN EITHER IN PETITIONER'S CAR OR ON HIS PERSON (T. II, 116). ALSO, THE SHOES PETITIONER WAS WEARING THAT NIGHT DID NOT MATCH THE FOOTPRINT IMPRESSION LEFT ON THE GLASS DOOR TO ROSA'S HOME (T. II, 119-120).

SUMMARY OF ARGUMENT

IN THIS CASE, THE DISTRICT COURT OF APPEAL HELD IN THEIR OPINION BECAUSE PETITIONER'S VERDICT FORM WAS NOT TECHNICALLY A "SPECIAL VERDICT FORM" AS REFERENCE IN TRIPP AND RECOGNIZING IN PETITIONER'S CASE, THAT HAD THERE BEEN MORE THAN ONE ASSAILANT OR DEFENDANT INVOLVED, A SPECIFIC FINDING AS TO WHICH PETITIONER USED A WEAPON OR FIREARM WOULD BE NECESSARY. THE DECISION OF THE DISTRICT COURT CANNOT BE RECONCILED WITH THE PREVIOUS DECISION OF THIS COURT IN STATE V. TRIPP 642 So. 2d. 728 (FLA. 1994) WHEREIN THE COURT INTERPRETED § 775.087(1) TO REQUIRE A SPECIFIC FINDING BY THE JURY ON THE VERDICT FORM TO ENHANCE SENTENCE BY RECLASSIFICATION WHEN WEAPON OR FIREARM IS USED DURING COMMISSION OF OFFENSE. THUS, THE PETITIONER CONTENTS THAT THE DECISION OF THE DISTRICT COURT EXPRESSLY AND DIRECTLY CONFLICTS WITH A PREVIOUS DECISION OF THIS COURT.

ARGUMENT POINT ONE

THE TRIAL COURT ERRED IN RECLASSIFYING PETITIONER'S CONVICTIONS FOR ATTEMPTED FIRST-DEGREE MURDER FROM A FIRST-DEGREE FELONY TO A LIFE FELONY AND IN IMPOSING THREE-YEAR MINIMUM MANDATORY SENTENCES FOR THOSE CONVICTIONS.

THE DISTRICT COURT OF APPEAL INTERPRETED PETITIONER'S VERDICT FORM WAS NOT TECHNICALLY A SPECIAL VERDICT FORM AS REFERRED IN STATE V. TRIPP, 612 So.2d. 728 (FLA. 1994) THUS RECOGNIZED HAD THERE BEEN MORE THAN ONE ASSAILANT OR DEFENDANT INVOLVED IN PETITIONER'S CASE THEN A SPECIFIC FINDING AS TO WHICH PETITIONER USED A WEAPON WOULD BE NECESSARY.

AS EXPLAINED BELOW, THE DECISION OF THE FIFTH DISTRICT COURT CONFLICTS WITH A DECISION OF THIS HONORABLE COURT WITH A CERTIFIED QUESTION. THE COURT IN THE FIFTH DISTRICT REJECTED PETITIONER'S ARGUMENT BY A VOTE OF 6 TO 2. TUCKER V. STATE, 22 FLA. L. WEEKLY D2556 (NOVEMBER 14, 1997).

IN THE DECISION OF THIS COURT IN TRIPP, SUPRA, HELD:

THE VERDICT FORM INDICATED THAT THE JURY FOUND TRIPP GUILTY OF ATTEMPTED FIRST-DEGREE MURDER AS CHARGED IN THE INFORMATION, BUT DID NOT INCLUDE A SPECIAL FINDING BY THE JURY THAT TRIPP USED A WEAPON. WITHOUT THIS FINDING, THE TRIAL COURT SHOULD NOT HAVE RECLASSIFIED TRIPP'S ATTEMPTED FIRST-DEGREE MURDER CONVICTION PURSUANT TO SECTION 775.087 (1), F.S. (1987).

Id. AT 730

THE FIFTH DISTRICT COURT OF APPEAL IN REILEY V. STATE, 654 So.2d. 621 (FLA. 5TH DCA 1995) HELD BECAUSE THE JURY SIMPLY FOUND THE DEFENDANT GUILTY AS CHARGED, THAT VERDICT WAS INSUFFICIENT TO SUPPORT IMPOSITION OF THE MINIMUM MANDATORY THREE-YEAR SENTENCE, THEREFORE REVERSING REILEY'S SENTENCE. IN COUNT I, THE SAME RULE IN TRIPP IS APPLICABLE TO THE IMPOSITION OF A MANDATORY SENTENCE PURSUANT TO SECTION 775.087(2).

THOUGH EVIDENCE AT TRIAL ESTABLISHED THAT PETITIONER WAS THE ONLY ASSAULTANT AND DEFENDANT CHARGED WITH THE CRIMES OF TWO COUNTS OF ATTEMPTING FIRST-DEGREE MURDER A SPECIAL VERDICT FORM WAS STILL REQUIRED TO FIND PETITIONER CARRIED OR USED A FIREARM IN THE COMMISSION OF THESE CRIMES.

THIS HONORABLE COURT IN STATEY HARGROVE, 694 So.2d. 729 (FLA. 1997) ANSWER THE PERTINENT QUESTION IN THE NEGATIVE AND APPROVED THE DECISION OF THE DISTRICT COURT, 675 So.2d. 1010 (4TH DCA 1996):

" WHEN A DEFENDANT CHARGED WITH COMMITTING A CRIME WITH THE USE OF A FIREARM DOES NOT CONTEST ITS USE AND INSTEAD DEFENDS ON THE GROUNDS THAT HE WAS INSANE WHEN HE USED THE FIREARM, AND THE RECORD IS CLEAR BEYOND ANY DOUBT THAT DEFENDANT DID ACTUALLY USED THE FIREARM, MAY THE SENTENCING JUDGE IMPOSE THE MANDATORY MINIMUM SENTENCE FOR USE OF A FIREARM WITHOUT A SPECIAL FINDING OF THAT FACT BY THE JURY?" (EMPHASIS ADDED).
Id. AT 730

THIS COURT ESTABLISHED A STANDARD WHEREBY THE COURT WERE TO BE ABLE TO DETERMINE WHETHER A DEFENDANT OFFENSE CAN BE ENHANCED, OR SENTENCE BE MANDATORY-MINIMUM UNDER 775.087(1) AND 775.087(2) IN TREPP.

THE IMPOSED QUESTION PERTINENT BY THE DISTRICT COURT IN TUCKER'S CASE HAS INDEED AND DEFINITELY BEEN ANSWERED IN TREPP AT 729, IN WHICH THIS COURT CORRECTLY INTERPRETATED A DEFENDANT OFFENSE(S) MAY NOT BE RECLASSIFIED PURSUANT TO 775.087(1), THE FIFTH DISTRICT WAS (CONSISTANCE IN THIS STANDARD WHEN APPLYING THIS STANDARD) IN RILEY, SUPRA, THAT A MANDATORY-MINIMUM SENTENCE MAY NOT BE IMPOSED UNDER SECTION 775.087(2) WITHOUT A SEPERATE ADDITIONAL SPECIFIC VERDICT FORM THAT A JURY FINDS DEFENDANT CARRIED, DISPLAYED, OR USED A WEAPON OR FIREARM TO COMMIT SUCH OFFENSES.

THEREFORE, PETITIONER RESPECTFULLY REQUEST THIS COURT QUASH THE DECISION OF THE DISTRICT COURT AND VACATE HIS SENTENCE AND REMAND TO BE SENTENCED IN HIS RECOMMENDED GUIDELINES.

CONCLUSION

BASED ON THE FOREGOING ARGUMENTS AND AUTHORITIES CITED THEREIN, PETITIONER RESPECTFULLY REQUEST THIS COURT QUASH THE DECISION OF THE FIFTH DISTRICT AND VACATE PETITIONER'S SENTENCE AND REMAND FOR A PROPER ONE.

/s/Owen L. Tucker, Jr.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A TRUE AND CORRECT COPY OF THE FOREGOING AMENDED PETITIONER'S BRIEF ON THE MERITS HAS BEEN FURNISHED BY U.S. MAIL TO: ATTORNEY GENERAL OFFICE, 444 SEABREEZE BLVD, 5TH FLOOR, DAYTONA BEACH, FL. 32118 AND CLERK OF THE FIFTH DISTRICT COURT OF APPEAL, 300 S. BEACH STREET, DAYTONA BEACH, FLA.

3211A ON THIS 27 DAY OF January 1998

/s/Owen L. Tucker, Jr.

OWEN L. TUCKER