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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. CASE NO. 91,951

BILL BRADY, JR.,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT
OF APPEAL, FIFTH DISTRICT AND THE
NINTH JUDICIAL CIRCUIT IN AND FOR
ORANGE COUNTY, FLORIDA

INITIAL BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The pertinent facts are not in dispute. Respondent attempted to murder Ricky Mack by firing a single shot. (T 29-30, 37) The bullet missed Mack and caused extensive injury to the hand of Toya Harrell, an innocent bystander. (T 113-115, 123-126) Respondent was convicted of two counts of attempted second degree murder. (T 254; R 167-70) It was admitted by the State that Respondent never intended to kill or harm Harrell. Respondent's sole target was Mack.

The district court analyzed the doctrine of transferred intent in California caselaw and stated that even though the "better answer" is that both convictions should stand, (slip opinion, attached, at p.2) the attempted murder conviction of unintended victim Harrell must be reduced to the lesser included offense of aggravated battery. However, because this appears to be a case of first impression in Florida, the district court certified the issue. It is from this ruling that the State timely sought discretionary jurisdiction and review in this Court.

ARGUMENT

POINT ON APPEAL

THE DISTRICT COURT ERRED IN ADOPTING CALIFORNIA'S TRANSFERRED INTENT LAW WHICH IS INCONSISTENT WITH EXISTING FLORIDA LAW AND UNSOUND IN ITS APPLICATION.

The factual scenario of this case is simple and easily explained: Respondent attempted to kill Mack by firing one shot; the shot missed Mack but injured Harrell. Respondent did not intend to harm Harrell, but he was convicted of two counts of attempted second degree murder.

The legal ramifications of this factual scenario, however, are interwoven and complex. The district court certified the following question to this Court:

> CAN A DEFENDANT BE CONVICTED OF ATTEMPTED MURDER OF BOTH THE INTENDED VICTIM AND AN INNOCENT BYSTANDER WHEN THE DEFENDANT HAD NO INTENT TO MURDER THE LATTER, BUT THE LATTER IS INJURED DURING THE ATTEMPT ON THE INTENDED VICTIM?

This is a classic case of transferred intent.

The district court has totally misconstrued and misapplied the established doctrine of transferred intent. Second degree murder is a ***general intent*** crime. See Hahn v. State, 626 So.2d 1056, 1058 (Fla. 4th DCA 1993). In its opinion the district court stated that "[i]ntent (at least general intent) is not a commodity; it is a frame of mind. It is incapable of being 'used up.'" (slip opinion at 2) Yet the court found that in this case, where only one shot was fired, most of the intent ***was*** in fact "used up," and Respondent

can only be convicted of a lesser included offense (aggravated battery on Harrell) which requires ***specific intent***. This is clearly error.

This Court has long been

> committed to the doctrine that one who kills a person through mistaken identity or accident...is guilty of murder in the first degree..."

Lee v. State, 141 So.2d 257, 259 (Fla. 1962). Attempted second degree murder is no different. A specific analysis of this exact issue is found in this Court's opinion in Gentry v. State, 437 So.2d 1097 (Fla. 1983) where it was held that if the State is not required to show specific intent to successfully prosecute the completed crime, the State will not be required to show specific intent to prosecute an attempt of that crime. There is no question that only a general intent was to be "transferred" in this case. Said intent travels with the bullet. It exists entirely separate and distinct from the intent to harm the intended victim.

Respondent intended to harm Mack and did some act in furtherance of said intent, i.e., he pulled the trigger. At that instant the crime of attempted murder (of Mack) was complete. When the bullet missed, the intent traveled with the bullet to the unintended victim. Otherwise, this Court must simply abolish transferred intent; for this case is the paradigm of the doctrine.

It is puzzling that the district court chose only to review and follow two California cases in reaching a result it acknowledged was ***not*** the "better answer." In so doing the district

court overlooked a myriad of other foreign cases which uphold dual convictions in cases identical to this one. For example, a case which offers a historical analysis of the transferred intent doctrine dating back to the year 1553 resulted in the affirmance of two counts of attempted murder under exactly the same circumstances. See State v. Wilson, 546 A.2d 1041 (Md. 1988). Petitioner urges this Court to adopt the reasoning of the Maryland court in Wilson:

> Instead, we align ourselves with the numerous jurisdictions which have applied the transferred intent doctrine to specific intent crimes including attempted murder.

Wilson, 546 A.2d at 1044. The Wilson court cited with approval several other cases which applied transferred intent to the crime of attempted murder. See also State v. Gillette, 102 N.M. 695, 699 P.2d 626 (1985) (defendant's intent followed the container of poison and he was therefore guilty of the attempted murder of each person who ingested the poison).

In this case, the district court failed to apply the doctrine of transferred intent. It simply ruled that there was no intent to harm the unintended victim. This illustrates the very reason for the existence of the transferred intent doctrine. It is the transferred intent doctrine which allows the original intent to travel with the bullet. Thus, the intent to commit the underlying crime (attempted murder of Mack) did exist and was transferred to Harrell. There was an act in furtherance of the commission of said offense. These are the only two requirements needed to sustain an

attempt conviction. They are also all that are necessary to sustain an attempted murder charge against the unintended victim via the transference of that intent.

The district court appears troubled by what can be termed the "single bullet" theory, but in reality it does not matter if Respondent fired 15 shots at Mack and only one hit Harrell. Harrell is still an unintended victim of attempted murder. The district court erroneously compares transference of intent with the rulings in Amlotte v. State, 456 So.2d 448 (Fla. 1984) and State v. Gray, 654 So.2d 552 (Fla. 1995) prohibiting attempted felony murder. Not only are the cases distinguishable, but the felony murder doctrine completely fabricates intent out of thin air. Transferred intent requires existence of the intent before it can be transferred.

This Court prophesied the outcome in Gray, supra, by suggesting that the law should not presume intent to murder (where there is no death) simply because the assault occurs during the commission of a felony. See Grinage v. State, 641 So.2d 1362, 1366 (Fla. 5th DCA 1994). But in this case the intent is not presumed; it existed -- and then was transferred. To hold otherwise would be a disservice to the people, the law, and anyone harmed by the intentional murderous acts of a criminal. If Respondent intended to harm Mack, he intended to harm anyone else in the path of the bullet. It is even more certain, contrary to the district court's opinion, that if Respondent intended to murder Mack, he cannot have somehow **specifically** "intended" merely to commit aggravated battery

on Harrell or anyone else. Thus even the reasoning used by the district court fails logical analysis.

In Mordica v. State, 618 So.2d 301, 303 (Fla. 1st DCA 1993) the court rejected the argument that transferred intent applies ***only*** where the defendant entirely misses the intended victim and hits the unintended victim. The implication is clear that transferred intent is primarily applicable in cases exactly like the present case. Regardless, Mordica cites U.S. v. Sampol, 636 F.2d 621, 674 (D.C. Cir. 1980), which held that there are even ***stronger*** reasons to apply the doctrine of transferred intent where the intended victim is killed by the same act that kills the unintended victim. Sampol also recognized that the critical intent transferred by the doctrine is only that directed toward the ***intended*** victim, not the unintended victim. Thus, the fact that Respondent meant no malice to the unintended victim is irrelevant. The intent directed toward the intended victim is transferred. Respondent's intent to kill Mack was transferred to Harrell. This would clearly be the case if Harrell were killed; how can the intent be any different if Harrell is only wounded?

Instead, under the fiction adopted by the district court, the fact that Harrell is only wounded results in the commission of a specific intent crime: aggravated battery. The district court found that Respondent's "general intent" to harm Mack is "susceptible" of being transferred in order to satisfy the "intentionally causing bodily harm" requirement of aggravated

battery against Harrell. A general attempt is never "susceptible" of being transferred into a specific intent. See In Interest of J.G., 655 So.2d 1284, 1285 (Fla. 4th DCA 1995)(only the appellant's intent to strike his opponent--a student--could be transferred, and there could be no intent to strike a school employee). The reasoning below is unsupported by logic or caselaw.

It is axiomatic that aggravated battery is a specific intent crime, whereas second degree murder only requires a general intent. See Hahn v. State, 626 So.2d 1056, 1058 (Fla. 4th DCA 1993); Gurganus v. State, 451 So.2d 817 (Fla. 1984); Evans v. State, 452 So.2d 1093 (Fla. 2d DCA 1984); Russell v. State, 373 So.2d 97 (Fla. 2d DCA 1979). Significantly, it has been held that the crimes of attempted manslaughter (or any attempted homicide) and aggravated battery are mutually exclusive. This is so because any intent to kill negates an implied element of aggravated battery (the absence of an intent to kill). The converse is also true: if the defendant had no intent to kill, then he could not be guilty of any attempted homicide. Thus, attempted homicide and aggravated battery are mutually exclusive crimes. See Barton v. State, 507 So.2d 638, 641 (Fla. 5th DCA 1987).

Moreover, the doctrine of transferred intent has never prohibited convictions for crimes committed against both the intended and unintended victim during the same episode. Edler v. State, 616 So. 2d 546, 548 (Fla. 1st DCA 1993). There is no dispute in this case that Respondent intended to harm Mr. Mack. Respondent aimed a firearm at Mr. Mack and fired the shot. There

is also no dispute that an innocent bystander was hit by the bullet. The innocent victim was struck with the same intent which was directed toward Mack.

The courts should either adopt or abandon the doctrine of transferred intent. The district court's effort to conjure a "hybrid" intent that can be transferred is no different than the fabrication of intent found in attempted felony murder. General intent cannot "become" specific; nor can an intent to murder magically form the basis of aggravated battery -- a crime which requires the ***absence*** of an intent to murder. Transferred intent cannot be "filtered down" as if strained through a sieve for each unintended victim harmed. The original intent is either transferred or it is not; there is no mutation. Both convictions for attempted murder should be reinstated.

CONCLUSION

Based on the arguments and authorities presented herein, Petitioner respectfully requests that this Honorable Court accept jurisdiction and reverse the decision of the district court, affirming the judgment and sentence of the trial court.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing initial brief on the merits in case number 91,951 has been furnished by basket delivery to Dan D. Hallenberg, Assistant Appellate Public Defender, Seventh Judicial Circuit, Daytona Beach, FL this 5th day of January, 1998.

CARMEN F. CORRENTE
ASSISTANT ATTORNEY GENERAL

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JULY TERM 1997

NOT FINAL UNTIL THE TIME EXPIRES TO FILE REHEARING MOTION, AND, IF FILED, DISPOSED OF.

BILL BRADY, JR.,

Appellant,

v.

CASE NO. 96-1851

STATE OF FLORIDA,

Appellee.

Opinion filed October 24, 1997

Appeal from the Circuit
Court for Orange County,
Theotis Bronson, Judge.

James B. Gibson, Public Defender, and
Dan D. Hallenberg, Assistant Public Defender,
Daytona Beach, for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and Carmen F. Corrente,
Assistant Attorney General,
Daytona Beach, for Appellee.

HARRIS, J.

Bill Brady, Jr. attempted to murder Ricky Mack by firing a single bullet at him. The bullet missed Mack but struck Toya Harrell causing substantial injury to her hand. Brady was convicted of two counts of attempted murder. We affirm without comment the trial court's departure sentence. However, Brady's conviction for two counts of attempted murder for the firing of a single shot raises a new issue in Florida.

There appears to be no legitimate issue as to whether Brady has committed two separate offenses; the intriguing question is whether he has committed two attempted murder offenses. We have no trouble with the doctrine of transferred intent. Brady's general intent to shoot Mack is sufficient intent to sustain a conviction for injuring Harrell. But should that offense be attempted murder?

An "attempt" under Florida law requires proof of two elements: (1) an intent to commit the underlying crime and (2) some act toward the commission of such offense. Clearly the evidence is sufficient to sustain the conviction for the attempted murder of Mack. Brady intended to kill Mack and fired a shot at him to carry out that intent. If Brady's intent to shoot Mack is used to justify the conviction for the attempted murder of Mack, is there sufficient intent left over to transfer to justify the conviction relating to Harrell? The better answer seems to be yes. Intent (at least general intent) is not a commodity; it is a frame of mind. It is incapable of being "used up."

Although there are no Florida cases directly on point, two cases from California illustrate the problem. In *People v. Chinchilla,* 60 Cal. Rptr. 2d 761, (Cal. App. 1997), Chinchilla fired a single shot in the direction of officers Meisels and Silofau. On his appeal from his conviction for two counts of attempted murder, Chinchilla argued that the doctrine of transferred intent cannot support two attempted murder convictions when only one shot was fired. The court agreed with this general proposition, citing the earlier case of *People v. Czahara*, 250 Cal. Rptr. 836, 883, (Cal App. 1988):

> [W]here a single act is alleged to be an attempt on two persons' lives, the intent to kill should be evaluated independently as to each victim, and the jury should not be instructed to transfer intent from one to another.

The court in *Chinchilla* nevertheless upheld both convictions, holding that since one officer was kneeling behind the other, the jury could have found that Chinchilla intended to kill both with the single shot. Such is not an issue on this appeal.

In *People v. Scott* 927 P. 2d 288,292, (Cal. 1996), the California Supreme Court was concerned with the issue of whether the doctrine of transferred intent could be used to sustain a conviction for the murder (not the attempted murder) of an unintended victim when the defendant is also prosecuted for the attempted murder of the intended victim. The court had this to say:

> Nor is application of the transferred intent doctrine under these circumstances foreclosed by the prosecutor having charged defendants with attempted murder of the intended victim. Contrary to what its name implies, the transferred intent doctrine does not refer to any actual intent that is capable of being "used up" once it is employed to convict a defendant of a specific intent crime against the intended victim.
>
> * * *
>
> The legal fiction of transferring a defendant's intent helps illustrate why, as a theoretical matter, a defendant can be convicted of murder when she did not intend to kill the person actually killed. . . . [A]s applied here, it connotes a policy -- that a defendant who shoots at an intended victim with intent to kill but misses and hits a bystander instead should be subject to the same criminal liability that would have been imposed had he hit his intended mark.

In our case, had Brady actually hit Mack in the hand, he could have been convicted of aggravated battery. Further, since he intended to kill Mack, he could also be convicted of attempted murder. Can he, under Florida law, also be convicted of the attempted murder of Harrell when he unquestionably had no such intent to kill her?

Justice Overton stated in his dissent in *Amlotte v. State,* 456 So. 2d 448, 450, (Fla. 1984), "A conviction for the offense of attempt has always required proof of the intent to commit the underlying crime." It seems inconsistent, therefore, that one can be convicted of the attempt to murder a bystander when, in fact, the state concedes, and pleads, that no such intent was present. Justice Overton's dissent was approved as the court's majority in *State v. Gray,* 654 So. 2d 552 (Fla. 1995), albeit on the issue of attempted felony murder.

While it appears that Brady's general intent to shoot Mack is susceptible of being transferred in order to satisfy the "intentionally causing bodily harm" requirement of aggravated battery as against Harrell, to find that Brady actually attempted to murder her, when the allegations of the information and the evidence at trial show that he did not, seems not only contrary to reason but also inconsistent with *Gray.* We agree with *Chinchilla* that if the issue is whether the defendant attempted to murder multiple victims, then such specific intent is not subject to transfer but rather such intent should be independently evaluated as to each victim.

We, therefore, reverse the attempted murder conviction as it relates to Harrell and remand to the trial court to enter a conviction for the lesser included offense of aggravated battery.

Because this is a case of first impression, we certify the following issue to the supreme court:

CAN A DEFENDANT BE CONVICTED OF ATTEMPTED MURDER OF BOTH THE INTENDED VICTIM AND AN INNOCENT BYSTANDER WHEN THE DEFENDANT HAD NO INTENT TO MURDER THE LATTER, BUT THE LATTER IS INJURED DURING THE ATTEMPT ON THE INTENDED VICTIM?

PETERSON, J., concurs.
GOSHORN, J., concurs with result only.