ORIGINAL

IN THE SUPREME COURT OF FLORIDA

FILED
DEBBIE CAUSSEAUX
JUL 09 1999
CLERK, SUPREME COURT
By

GABRIEL JOCK KENON,	)	
	)	
Petitioner,	)	DCA CASE NO. 97-3558
	)	
versus	)	
	)	
STATE OF FLORIDA,	)	S.CT. CASE NO. 94,991
	)	
Respondent.	)	
	)	

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

ANNE MOORMAN REEVES
ASSISTANT PUBLIC DEFENDER
Florida Bar No. 0934070
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: 904-252-3367
COUNSEL FOR PETITIONER

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES CITED (continued) PAGE NO.

TABLE OF CITATIONS (continued) PAGE NO.

OTHER AUTHORITIES CITED

IN THE SUPREME COURT OF FLORIDA

GABRIEL JOCK KENON,	)	
	)	
Petitioner,	)	DCA CASE NO. 97-3558
	)	
versus	)	
	)	S.CT. CASE NO. 94,991
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	

STATEMENT OF THE CASE AND FACTS

The petitioner, Gabriel Jock Kenon, was adjudged guilty of attempted second-degree murder with a firearm, attempted first-degree murder of a law-enforcement officer with a firearm, carrying a concealed firearm, and possession of a firearm by a convicted felon. Kenon was found to be a habitual violent felony offender. For the attempted second-degree murder, Kenon was sentenced as an HVFO to life in prison with the discretionary fifteen-year mandatory minimum plus the three-year mandatory minimum for use of a firearm. For the attempted murder of a law enforcement officer, Kenon was sentenced as an HVFO to a consecutive life sentence with consecutive mandatory fifteen-year and

three-year minimums. On each firearm conviction, Kenon was sentenced to five years concurrent with each other and concurrent with the terms for the two attempted murders.

Kenon challenges various sentencing issues and the existence of the crime of attempted second-degree murder. The latter issue was not preserved below; of the four sentencing matters, two were raised below in a timely motion to correct sentence.

The Fifth District Court of Appeal issued a per curiam affirmance without opinion, citing Gentry v. State, 437 So. 2d 1097 (Fla. 1983) (second-degree murder is a general intent crime); Watkins v. State, 705 So. 2d 938 (Fla. 5th DCA 1998) (the crime of attempted second-degree murder exists in Florida); and Maddox v. State, 708 So. 2d 617 (Fla. 5th DCA), rev. granted, 718 So. 2d 169 (Fla. 1998) (no sentencing errors not objected to may be heard on appeal).

The decision of the district court is cited as Kenon v. State, [cite][1] This court accepted jurisdiction by order dated June 8, 1999, and dispensed with oral argument.

---

[1] A copy of the opinion is attached hereto as Appendix.

SUMMARY OF THE ARGUMENT

Point I: The crime of attempted second-degree murder has no basis in logic, nor is it consistent with the established law of attempts. This honorable court is requested to declare that this crime does not exist in Florida.

Point II: The Criminal Appeal Reform Act, if interpreted as in Maddox to eliminate the jurisdiction of Florida's appellate courts to address any issue that has not been preserved below, operates contrary to judicial efficiency and to essential fairness. A defendant who has been sentenced contrary to the clear directive of the statutes, which error was not preserved below by objection of counsel, should not have to forego representation when arguing against the excessive limitation on his liberty. Nor should the court system, overburdened as it is, be required to let go an issue it could correct with dispatch, so that the trial court may face the issue in post-conviction proceedings, with the possibility of its returning once again to the appellate court. This honorable court should reverse Maddox and provide a reasonable and fair interpretation of the Act.

ARGUMENT

POINT I

THIS HONORABLE COURT SHOULD DECLARE THAT THE CRIME OF ATTEMPTED SECOND-DEGREE MURDER IS LOGICALLY IMPOSSIBLE AND DOES NOT EXIST IN FLORIDA.

Kenon shot his brother in the left shoulder and superficially in the thigh and knee. According to existing precedent, his conviction for attempted second-degree murder is lawful. See, e.g., Harell v. State, 24 Fla. L. Weekly D674 (Fla. 5th DCA March 12, 1999); Massie v. State, 724 So. 2d 587 (Fla. 2d DCA 1998); Manka v. State, 720 So. 2d 1109 (Fla. 4th DCA 1998); Pitts v. State, 710 So. 2d 62 (Fla. 3d DCA 1998).

In Watkins v. State, 705 So. 2d 938 (Fla. 5th DCA 1998), the district court deals with the question whether attempted second-degree murder remains an acknowledged crime in Florida, or whether it should properly go the way of attempted felony murder, in State v. Gray, 654 So. 2d 552 (Fla. 1995). Judge Griffin, writing for the majority, refers to the supreme court's fifteen-year-old analysis in Gentry v. State, 437 So. 2d 1097 (Fla. 1983), which proves the crime. She announces that attempted second-degree murder is different from

attempted felony murder, and concludes that the evidence presented was "plainly sufficient" to support Watkins's conviction. Watkins at 939.

The majority opinion begs the question, saying that the crime exists because it exists. What is necessary now is to determine whether it **should** exist. The Watkins dissent notes that second-degree murder comes about by happenstance, and that attempt requires the intent to commit the underlying crime. Watkins, 705 So. 2d at 943 (Harris, J., dissenting). It points out that because it is logically impossible to intend to commit a happenstance, the offense that underlies an attempted second-degree murder must be that act which is imminently dangerous to another evincing a depraved mind regardless of human life. But, the dissent continues, in what we call attempted second-degree murder, this act is not merely attempted--it is "spectacularly **achieved**." Id. (emphasis in the original). The fact that the victim has not been killed does not reverse the achievement of the act. Where the victim dies as a result of the achieved act, the offense is second-degree murder. But if the victim lives, in spite of the act, the result is **not** attempted second-degree murder. It is aggravated battery, or possibly aggravated assault. Id.

In its Gray opinion, by which it receded from Amlotte v. State, 456 So. 2d 448 (Fla. 1984), in holding that there is no crime of attempted felony murder in

Florida, this court repeated the Fifth District Court's statement of its responsibility "to point out to the [supreme] court new or additional arguments that should be considered by it in determining whether questioned law should remain in effect." Gray, 654 So. 2d at 554, quoting Grinage v. State, 641 So. 2d 1362, 1367 (Fla. 5th DCA 1994). This court added, with respect to the principle of stare decisis, that "[p]erpetrating an error in legal thinking under the guise of stare decisis serves no one well and only undermines the integrity and credibility of the court." Gray at 554 (citation omitted).

In that attempted second-degree murder is, like attempted felony murder, logically impossible, the two offenses are not, after all, "different." The characteristic they share is a crucial one: whether by definition they can logically exist.[2] The petitioner asserts that they cannot.

The fifth and fourteenth amendments to the United States Constitution, and article I, section 9, of the Florida Constitution, guarantee a defendant that he shall be afforded due process of law. In a criminal case, due process insures that conviction will follow only upon proof of the elements of the crime charged. See

---

[2] Considering that Gentry was decided before Amlotte, Mr. Justice Overton's presence in Gentry's unanimous majority should not be taken to mean that, his having been correct after all in Amlotte, his position in Gentry is the correct one. See Watkins, 705 So. 2d at 943, n. 1.

In re Winship, 397 U. S. 358 (1970). Conviction of a crime that does not exist must be the quintessential due process violation.

This court should declare that the crime of attempted second-degree murder does not exist. If it is unwilling to take this bold step, it should provide the guidance of a detailed explanation of its position.

POINT II

THE MADDOX OPINION INCORRECTLY INTERPRETS THE CRIMINAL APPEAL REFORM ACT TO PRECLUDE REVIEW OF ANY ISSUE NOT PRESERVED, NOT EXCLUDING SENTENCING MATTERS.

For his conviction for attempted first-degree murder of a law enforcement officer, Kenon was sentenced according to section 775.084, Florida Statutes, as a habitual violent felony offender. The penalty for this offense, however, is governed by section 775.0823, Florida Statutes (1997), setting out the required sentences for "[v]iolent offenses committed against law enforcement officers" and certain others:

> Any provision of law to the contrary notwithstanding, the Legislature does hereby provide for an increase and certainty of penalty for any person convicted of a violent offense against any law enforcement or correctional officer . . . as follows:
>
> . . .
>
> (2) For attempted murder in the first degree as described in s. 782.04(1), a sentence pursuant to the sentencing guidelines.

Sec. 775.0823 (2), Fla. Stat. (1997). By mentioning the guidelines, the legislature indicates its intention to exclude the possibility of a habitual offender

sentence, which does not fall within the guidelines. Tillman v. Smith, 533 So. 2d 928 (Fla. 5th DCA 1988).

In Maddox, the district court determines that no sentencing issue not preserved may be heard on appeal, even what used to be "fundamental" sentencing error. But the Maddox court relies entirely upon rule 9.140 of the Florida Rules of Appellate Procedure. It does not consider the language of the Criminal Appeal Reform Act[3] itself, which specifically recognizes the continuing viability of the concept of fundamental error, sentencing not excluded.

Kenon's sentence is not illegal in the narrow sense of one that exceeds the statutory limit, Davis v. State, 661 So. 2d 1193, 1196 (Fla. 1995), but it is illegal in the broader sense of one that fails to comport with statutory or constitutional limitations, State v. Mancino, 714 So. 2d 429 (Fla. 1998), and should properly have been heard on that account.

Kenon's HVFO sentence was reviewable also in that it is obvious on the face of the record and improperly restricts his freedom, according to Denson v. State, 711 So. 2d 1225 (Fla. 2d DCA 1998) (provided the court has jurisdiction through some other, preserved or fundamental, error), and Bain v. State, 24 Fla.

---

[3] Ch. 924, Fla. Stat.

L. Weekly D314 (Fla. 2d DCA January 29, 1999) (expanded explication of appellate jurisdiction under Criminal Appeal Reform Act). The district court had jurisdiction to hear Kenon's appeal of the trial court's final orders of judgment and sentence, through the Florida Constitution, as Bain asserts. Where the district court may exercise its jurisdiction for any reason (such as through preserved error), it should not forswear its duty, by ignoring other errors, to see to the integrity of the judicial process, whether fundamental or patent and serious.

Kenon's motion to correct his sentence asserts that his HVFO sentence was invalid and that the mandatory minimums were improperly imposed. These issues are thus preserved according to rule 9.140(d)(2), Florida Rules of Appellate Procedure, allowing appeal of any error raised by motion pursuant to Florida Rule of Criminal Procedure 3.800(b).

In addition, Kenon's sentence is a clear instance of ineffective assistance of trial counsel. As such, it ought to be corrected whether or not the appellate court has jurisdiction through other means, as Denson would require. The Third District Court has followed this course in Mizell v. State, 716 So. 2d 829 (Fla. 3d DCA 1998), as a reasonable method of putting into effect the purpose of the Criminal Appeal Reform Act to improve the efficiency of the appellate process,

while not eliminating the concept of fairness to the appellant. On this head, it is not helpful to leave such an issue to the untrained appellant to pursue, either through a claim of ineffective representation or through a motion to correct his scoresheet. If a sentencing error passes without event through the lower court, see, e.g.,rule 3.701(d)(1), Florida Rules of Criminal Procedure, and section 921.0014(3), Florida Statutes (putting responsibility for accepting the scoresheet on the trial judge), it ought not as a consequence to be halted outside the door of the appellate court and routed instead back to the now-unrepresented defendant.

The second sentencing error that was preserved is the pronouncement that the mandatory minimums are to be served consecutively. Because the minimums are enhancements that arose out of the same offense, in each situation, they must be served concurrently. Jackson v. State, 659 So. 2d 1060, 1062 (Fla. 1995).

Two errors were not preserved, but are apparent on the face of the scoresheet. The first is the scoring of attempted second-degree murder as a level 10 offense. According to section 777.04(4)(c), Florida Statutes (1997), an attempted life or first-degree felony is a felony of the second degree. For use of a firearm, pursuant to section 775.087(1)(b), Florida Statutes (1997), the second-degree felony becomes a first-degree felony. Baque v. State, 653 So. 2d 1105 (Fla. 3d DCA 1995). Attempted second-degree murder does not appear on the

Offense Severity Ranking chart, at section 921.0012, Florida Statutes (1997). Thus, according to section 921.0013(3), it should be ranked as a level 7 offense, with the attendant reduction in points. Even though habitual offender sentences are imposed without regard for the guidelines, these corrections to the scoresheet should be made. A correctly calculated scoresheet is "necessary for a proper sentencing decision." State v. Chaplin, 490 So. 2d 52 (Fla. 1986).

The second unpreserved error, also apparent on the face of the scoresheet, is the scoring of an additional eighteen points for possession of a firearm. At the time of Kenon's sentencing, the prevailing law in the Fifth District permitted the assessment. Now, however, this court has decided the matter otherwise, so that according to White v. State, 23 Fla. L. Weekly S311 (Fla. June 12, 1998) (additional firearm points not appropriate where firearm possession not incidental to but the essence of an offense), and sections 921.0014(1)(b) and 775.087(2), Florida Statutes (1997), along with Florida Rule of Criminal Procedure 3.703(d)(19), which exclude attempted murder with a firearm from the eighteen-point assessment, the addition of those points is clear error, and should be corrected.

For both legal and policy reasons, the Maddox interpretation of the Criminal Appeal Reform Act's limitation of appellate jurisdiction should be

rejected. This court should reverse the decision of the Fifth District below, and remand with instructions to grant Kenon relief as to the HVFO sentence, the consecutive mandatory minimum terms, the incorrect scoring of attempted second-degree murder, and the erroneous addition of eighteen points for use of a firearm.

CONCLUSION

For the reasons expressed in Point I herein, the petitioner respectfully requests that this honorable court declare that the crime of attempted second-degree murder does not exist in Florida.

In addition, for the reasons expressed in Point II herein, the petitioner respectfully requests that this honorable court reverse Maddox based on an interpretation of the Criminal Appeal Reform Act that takes account of both judicial efficiency and the principle of fairness and remand his cause for resentencing according to law.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

ANNE MOORMAN REEVES
Assistant Public Defender
Florida Bar No. 0934070
112 Orange Avenue, Suite A
Daytona Beach, Florida 32114
Phone: 904/252-3367
COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, in his basket at the Fifth District Court of Appeal, and mailed to Gabriel Jock Kenon, Inmate No. A-372356, #C-2116, Santa Rosa Correctional Institution, 5850 E. Milton Road, Milton, Florida, 32583, on this 6th day of July, 1999.

Anne Moorman Reeves

ANNE MOORMAN REEVES
Assistant Public Defender