

IN THE SUPREME COURT OF FLORIDA

DARNELL L. BROWN,

Petitioner,

v.

CASE NO. 95,844

STATE OF FLORIDA,

Respondent.

_____ /

ON REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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CERTIFICATE OF TYPE SIZE AND STYLE

The type size and style used in this brief is 12 point Courier New.

SUMMARY OF ARGUMENT

The Petitioner submits that convictions for the offense of attempted second degree murder are unfair to defendants. The State does not agree. Florida law is quite clear that attempted second degree murder is a general intent crime. When someone acts with a depraved mind without regard for human life and does an act imminently dangerous to another and the victim does not die, the offense of attempted second degree murder has been committed. An example can be shooting into a crowd of people (assuming there is no premeditated design to kill). Convicting someone for such an act is not unfair, unconstitutional, or even improper. The Petitioner has given no valid reason for overturning not only a long line of case law including cases from this Court but also ignoring the clear legislative intent of numerous statutes involving the offense of attempted second degree murder.

ARGUMENT

POINT OF LAW

WHETHER THE OFFENSE OF ATTEMPTED
SECOND DEGREE MURDER EXISTS IN
THE STATE OF FLORIDA.

The Petitioner in this case was charged with attempted second degree murder. On appeal the Fifth District Court of Appeal affirmed the conviction but certified the following question based upon argument presented on appeal:

DOES THE CRIME OF ATTEMPTED SECOND DEGREE
MURDER EXIST IN FLORIDA?¹

It is the position of the State that case law as well as statutory law clearly show that the offense exists, and the Petitioner has submitted nothing to reverse both the holdings of many appellate courts including this Court as well as the clear intent shown in the laws passed by the legislature.

The Petitioner bases part of its argument on this Court's case of State v. Gray, 654 So. 2d 552 (Fla. 1995), in which the offense of attempted felony murder was found not to exist. This Court in Gray noted that the completed offense of felony murder was based upon a legal fiction that implied intent from the underlying felony. Id. at 553. The opinion then held that further extending that fiction by maintaining that a defendant

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This same issue was raised by the defendant in the case Kenon v. State, S. Ct. case no.: 94,991. However, that case actually came to this Court as a Maddox v. State, 708 S. 2d 617 (Fla. 5th DCA 1998), rev. granted, No.: 92,805, preservation issue. In this case the certified issue is the only issue before this Court.

could then *attempt* some outcome whose intent element had been created only by implication had proven too difficult to apply. Id. at 553-554. The opinion also pointed out that although the offense of attempted felony murder had been recognized dating back to Amlotte v. State, 456 So. 2d 448 (Fla. 1984), it had proven impossible to adopt jury instructions which were understandable and usable. Again, this point illustrated the fact the extension of legal fictions was too great to be feasible.

The problem with using Gray to support its position is that attempted second degree murder does not depend upon a legal fiction. Instead, it is a general intent crime. As this Court held over fifteen years ago in the case of Gentry v. State, 437 So. 2d 1097 (Fla. 1983):

[I]f the state is not required to show specific intent to successfully prosecute the completed crime, it will not be required to show specific intent to successfully prosecute an attempt to commit that crime. We believe there is logic in this approach and that it comports with legislative intent....

Id. at 1099, see also State v. Overfelt, 457 So. 2d 1385 (Fla. 1984) (attempted third degree murder is a general intent crime and exists in Florida), Taylor v. State, 444 So. 2d 931 (Fla. 1983) (recognizing the long time existence of attempted manslaughter in Florida).

Unlike in Gray where the underlying offense (felony murder) completely lacked any intent element except that transferred from the underlying felony, second degree murder is a general intent

crime, and the attempt to commit a general attempt crime simply requires the same level of intent as the underlying offense. Unlike in Gray, the application of the offense has not proven difficult. Unlike in Gray, jury instructions exist and are quite usable.

In other words, the underlying offense of felony murder and second degree murder are quite distinct. This is the point recently recognized by the Second District Court of Appeal in rejecting the exact same challenge presented in the instant case to the offense of attempted arson in the case Coston v. State, 24 Fla. L. Weekly D1441 (Fla. 2d DCA June 11, 1999). To accept the defense's position in the instant case would eliminate attempts to commit all general intent crimes including offenses such as sexual battery.

Each of Florida's appellate court has recently reviewed challenges to the offense of attempted second degree murder, and each of these courts rejected such arguments. See Manka v. State, 720 So. 2d 1109 (Fla. 4th DCA 1998), Gilyard v. State, 718 So. 2d 888 (Fla. 1st DCA 1998), Quesenberry v. State, 711 So. 2d 1359 (Fla. 2d DCA 1998), Pitts v. State, 710 So. 2d 62 (Fla. 3d DCA 1998), Watkins v. State, 705 So. 2d 938 (Fla. 5th DCA 1998).

In fact, just a few weeks ago this Court implicitly acknowledged the continued validity of the challenged offense in the case State v. Brady, case no.: 91,951 (August 19, 1999). The defendant was charged with two counts of attempted first degree murder, and the jury found him guilty of the lesser included

offense of attempted second degree murder. The defendant shot at one person and instead hit another person standing nearby. The defendant was convicted of attempted second degree murder of both victims. While the lower court and the parties tried to sort out the parameters of transferred intent, this Court instead simply found that the actions of the defendant constituted attempted second degree murder citing to Gentry.

The Petitioner has presented no valid reason for this Court to eliminate the offense of attempted second degree murder. The out-of-state authority² cited by the Petitioner is inapplicable given the fact that it does not analyze the Florida statutes and case law which support attempted second degree murder. Put simply - one can attempt a general intent crime in Florida (in this case attempted second degree murder) and such conviction is not unconstitutional, improper, or illegal.

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Counsel for the State reviewed several cases from out-of-state, but each seems dependent upon the wording of its own statutes and legacy of its own case law. The case Curry v. Nevada, 792 P.2d 396 (Nev. 1990), rejected the offense of attempted voluntary manslaughter in its jurisdiction. However, the opinion noted that as of 1990, 18 of the 24 states which had reviewed the offense had upheld its existence.

CONCLUSION

Based on the arguments and authorities presented above, the State respectfully prays this Honorable Court affirm the holding of the Fifth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Merits Brief has been furnished by delivery via the basket of the Office of the Public Defender at the Fifth District Court of Appeal to Noel A. Pelella, counsel for the Petitioner, 112 Orange Ave. Ste. A., Daytona Beach, FL 32114, this _____ day of September 1999.

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