IN THE SUPREME COURT OF THE STATE OF FLORIDA

DARNELL L. BROWN ,	)	
	)	
Petitioner,	)	
	)	Case No. 95,844
vs.	)	
	)	
STATE OF FLORIDA,	)	5th D.C.A. Case No. 99-262
	)	
Respondent.	)	
_____	)	

APPEAL FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

PETITIONER'S BRIEF ON THE MERITS

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

The State originally charged the defendant with attempted first degree murder, and later amended the Information to charge attempted second degree murder and aggravated battery. (A 1-3)[1] The trial court ruled that double jeopardy precluded adjudication for both aggravated battery and attempted second degree murder, although the jury had returned guilty verdicts on both of those charges. (A 4-6,12) The prosecutor argued that double jeopardy did not bar adjudications for attempted 2nd degree murder and aggravated battery arising from a singe act; and said he would appeal the trial court's ruling if he found case law supporting the State's position. (A 6-13)

[1] Documents from the Record on Appeal in the District Court, and excerpts from the trial transcript, have been attached as an appendix to this brief. References to the Appendix will be designated by the symbol "A".

The victim in this case testified that the defendant shot him in the course of a vehicle traffic dispute, (what has come to be known as “road rage”). The entire episode was less that one minute in length. (A 14-19,21) The victim and the defendant were unknown to each other prior to the offense at issue. (A 20)

SUMMARY OF ARGUMENT

The accused should not be forced to defend against a charged offense for which there is no factual basis; nor should the defendant be convicted and sentenced for a crime that was neither intended nor committed. Petitioner therefore submits that the crime of attempted second degree murder should not exist in the State of Florida; and requests that this Court answer the question certified by the District Court in the negative.

ARGUMENT

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

Restated, the question certified by the lower court might read as follows: Should defendants be punished for attempting to bring about an event which they never intended, and which never occurred? Or: When the jury makes a specific finding that the defendant acted without the intent to kill; can the defendant nevertheless be punished for acting with the intent to kill? Petitioner submits that justice requires these questions to be answered in the negative. An articulate argument for the Petitioner's position in this case is that expressed by Judge Cobb, of the Fifth District Court, in the Special Concurring Opinion in Watkins v. State, 705 So.2d 938,941 (Fla. App. 5 Dist. 1998). Judge Cobb stated:

> If the crime of attempted felony murder does not exist, then neither, it would seem, could the crime of attempted second degree murder--and for the same reasons. It is just as illogical to say that one can attempt (i.e., intend) to commit an unintended homicide by a depraved act as to say that one can attempt to commit an unintended homicide by commission of the underlying felony.
> [The Supreme Court, in] Gray[2] also noted our opinion in Grinage v. State, 641 So.2d 1362, 1366

[2] State v. Gray, 654 So. 2d 552 (Fla. 1995)

> (Fla. 5th DCA 1994), approved, 656 So.2d 457 (Fla.1995), wherein we said that the offense of murder contemplates a completed act of homicide, and an intent to murder should not be presumed where there is no death simply because an assault occurs during the commission or attempted commission of a felony. Gray at 554. Since the Florida Supreme Court agrees with the reasoning in Grinage, as it apparently did in Gray, then it should also agree that no intent to murder should be inferred from a depraved act (not intended to kill) where no death results.

The opposing view holds that defendants would be "rewarded" if the State had to prove specific intent to convict for attempted second degree murder, when only general intent need be proven to convict for the completed offense - second degree murder. Proponents of this view maintain that those convicted of attempted second degree murder should punished severely, even though death was neither the intent or result of their criminal act. See, Gentry v. State, 437 So. 2d 097,1099 (Fla. 1983) Petitioner respectfully submits that this Court should expressly recede from the holding in Gentry, for several reasons.

First, as to the instant case, aggravated battery and attempted second degree murder are both second degree felonies. §§ 775.082(3)(a)3(c); 775.087(2)(g); 777.04(4)(c); and 784.02(2) Fla. Statutes (1988) The defendant in this case will thus obtain no benefit to which he is not entitled, should this Court declare that the crime of attempted second degree murder does not exist.

Second, and more important, if the crime of attempted second degree murder remains in existence, countless individuals will face conviction and sentencing for crimes they did not commit. For example, assume a hypothetical defendant shoots at his victim ***without*** the intent to kill, but misses, leaving the victim unharmed. If convicted of aggravated assault, the third degree felony actually committed, he would face five years of imprisonment. See, §§ 784.021 (1)(a) Fla. Stat. (1998) But the same facts, under existing law, would also support a conviction for attempted second degree murder, and subject this hypothetical defendant to conviction and punishment - three times the prison term he would receive for aggravated assault - for a crime he did not commit; for an act he never intended, and which never occurred. It simply cannot be fair to thrust the defendant into the crucible of litigation with no means to defend against a charged offense for which the *mens rea* and the *corpus delicti* are mere fictions - mere fictions belied by the actual facts. Similarly, it would seem fundamentally unfair, after the accused has failed at the impossible task of proving a negative, (no intent to kill), to then punish him for what is essentially a state of mind - a state of mind which, according to the nature of the charge, the defendant never harbored. And, finally, abolishing the crime of attempted second degree murder will not, as suggested in Gentry, supra, subject the State to a heavier burden of proof. Rather, it will do no more than to insure that the State is held to the burden it assumes

in every case; i.e., to prove that the acts of the accused satisfy the elements of the charged offense. If the State proves premeditation, a conviction for attempted first degree murder will result. If no such specific intent is proven, the prosecution will then, depending on the facts of a particular case, secure a conviction for aggravated battery, or aggravated assault. At present the charge of attempted second degree murder allows the State to file an information which "overcharges"; and to inflame the jury with conjured images of an attempted murder, or to induce the defendant's plea to the inflated charge, when the facts support only an assault charge. Regarding this particular point, the State, at trial in this case, vowed to appeal when the trial court ruled that double jeopardy barred convictions for aggravated battery and attempted murder arising from the single act of firing a gun at the victim. (A 6-13) The State took no appeal; but the defendant was denied the right to have the jury determine his guilt or innocence based only upon the established facts.

According to the Tennessee Supreme Court, in every jurisdiction, except one, in which the question has been considered, it has been held that there can be no attempted "depraved mind" murder, only attempted premeditated murder. State v. Kimbrough, 924 S.W. 2d 888, 891,892 (Tenn. 1996). The Kimbrough court's ruling was founded on the sound premise that an attempt is a failure to accomplish an intended result - so that it is legally and logically unlawful to hold a defendant

accountable for attempted homicide absent proof of the specific intent to kill. In three particular jurisdictions, it is held that an act constituting an aggravated assault or aggravated battery will support an attempted murder conviction only upon proof of premeditation. Those three States recognize the crime of attempted premeditated murder, but not attempted second degree, (non-premeditated) murder[3]. See, Tacy v. State, 641 N.E. 2d 57,60 (Ind. 4th DCA 1994); Hall v. State, 566 N.E. 2d 1072,1074 (Ind. 2d DCA 1991); State v. Butler, 322 So. 2d 189 (La. 1975); and Selby v. State, 544 A. 2d 14,22 (Md. App. 1988).

There is additional support for receding from Gentry, and it is found in another Opinion of this Court; in the case of State v. Gray, supra, wherein this Court ruled as follows:

> Although receding from a decision is not something we undertake lightly, [...] we are convinced that we must recede from Amlotte. The legal fictions required to support the intent for felony murder are simply too great. [...] Accordingly, we recede from the holding in Amlotte that there is a crime of attempted felony murder in Florida. This decision must be applied to all cases pending on direct review or not yet final. We also approve the result in Gray, where the district court affirmed Gray's robbery conviction, reversed his attempted first-degree

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[3] Indeed, the Louisiana Supreme Court apparently believes that the logic of their holding is geometric, inescapable and universally accepted. See Butler, supra, 322 So. 2d at 192.

> felony murder conviction, and remanded for resentencing. (Citations omitted.)
>
> Gray, supra, 654 So.2d at 554

In Amlotte v. State, 456 So.2d 448, 450 (Fla. 1984); this Court had ruled as follows:

> Our conclusion is consistent with the reasoning in our recent decision in Gentry v. State, 437 So.2d 1097, 1098-99 (Fla.1983), in which we held that "there are offenses that may be successfully prosecuted as an attempt without proof of a specific intent to commit the relevant completed offense." We determined that "[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." Id. at 1099.

Now, however, the holding in Amlotte no longer constitutes controlling precedent. It would seem to follow that the holding in Gentry has been receded from as well; and that now, no basis exists for maintaining the premise that "there are offenses that may be successfully prosecuted as an attempt without proof of a specific intent to commit the relevant completed offense." As shown hereinabove, the appellate courts in the majority other states would agree.

CONCLUSION

Based upon the foregoing arguments, and the authorities cited therein, Petitioner respectfully requests that the Florida Supreme Court answer the certified question in this case in the negative, and vacate the Petitioner's conviction for attempted second degree murder.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered to the Honorable Robert Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, and mailed to: Darnell L. Brown, DOC # X13524, Polk Correctional Institution, 10800 Evans Road, Polk City, FL 33868-9213, on this _____ day of _____, 1999.

_____
NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER

CERTIFICATE OF FONT

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I hereby certify that the size and style of type used in this brief is point proportionally spaced Times New Roman, 14 pt.

_____
NOEL A. PELELLA
ASSISTANT PUBLIC DEFENDER

IN THE SUPREME COURT OF THE STATE OF FLORIDA