IN THE SUPREME COURT OF FLORIDA

ROGER DURHAM,

Petitioner,

v.

CASE NO.: SC00-913
DCA case no.: 5D99-1890

STATE OF FLORIDA,

Respondent.
_____/

ON REVIEW FROM THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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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?

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's argument is that the offense of attempted second degree murder is so inherently illogical that it should not exist. The Petitioner bases part of its argument on the case of State v. Gray, 654 So. 2d 552 (Fla. 1995), in which the offense of attempted felony murder was found not to exist. The Florida Supreme 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 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 simply a general intent crime like the crime it is derived from - second degree murder. 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 (emphasis added), Taylor v. State, 444 So. 2d 931 (Fla. 1983) (recognizing the long time existence of attempted voluntary 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 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 courts 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), rev. denied, 729 So. 2d 391 (Fla. 1999), 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, this Court implicitly acknowledged the continued validity of the challenged offense in the case State v. Brady, 745 So. 2d 954 (Fla. 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 to eliminate the offense of 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.

Counsel for the State reviewed several cases from out-of-state, but each seemed dependent upon the wording of its own statutes and the legacy of its own case law. Most of the case law analyzed the offense of attempted voluntary manslaughter like this State did in the Taylor case. Most states seemed to go the same path and reject attempted negligent homicide, but allow attempted voluntary manslaughter.

Of course the instant case is not addressing manslaughter, it is addressing attempted second degree **murder**. The State must prove that the defendant did an intentional act with a depraved mind. Given the ill will, hatred, spite, or evil intent requirement needed for this act, it is quite logical to make such an act more culpable than the much less thought out act involved in voluntary manslaughter. If someone in the heat of passion just reacts and shoots his newly discovered cheating lover who does not die upon being shot, the defendant may meet the elements of attempted voluntary manslaughter, but he would not have committed

attempted second degree murder. However, if someone with a depraved mind shoots at someone and hits another person (again who does not die), the defendant would have committed the more culpable act of attempted second degree murder - the intentional act evidencing a depraved mind. (This of course is the fact pattern from Brady).

Another example illustrating the void filled by attempted second degree murder is where a defendant is a pharmacist and with a depraved mind does the intentional act of switching all the prescriptions he is filling (but without a premeditated intent to kill). If someone dies, this would be second degree murder. However, the victim only goes into a coma in this example. There is no attempted voluntary manslaughter; there is no aggravated battery or even battery. What the defendant committed is attempted second degree murder. If a defendant with no premeditated intent to kill cuts the brake line on a racer's car and the racer cannot stop his car and hits the wall of a track, there is no attempted voluntary manslaughter, there is no battery or aggravated battery. What was committed was attempted second degree murder.

Lastly, the question of the validity of the offense at issue in this case is being considered by the Florida Supreme Court in the case of Brown v. State, case no.: SC95-844. While reserving the issue of jurisdiction, the Florida Supreme Court held oral argument on the issue for March 6, 2000.

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 Brynn Newton, counsel for the Petitioner, 112 Orange Ave. Ste. A., Daytona Beach, FL 32114, this _____ day of June 2000.

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