IN THE SUPREME COURT OF FLORIDA

ROGER L. DURHAM,

Petitioner,

CASE NO. SC00-913

versus

FIFTH DCA CASE NO. 5D99-1890

STATE OF FLORIDA,

Respondent.

PETITIONER'S BRIEF ON THE MERITS

PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the Prosecution in the Criminal Division of the Circuit Court, Ninth Judicial Circuit, in and for Orange County, Florida. In the Brief the Respondent will be referred to as "the State" and the Petitioner will be referred to as he appears before this Honorable Court.

In the brief the following symbols will be used:

"R" - Record on appeal, including transcript of sentencing proceedings

"T" - Transcript of trial proceedings, Volumes I through IV

STATEMENT OF THE CASE

Petitioner was charged by an information filed in the Circuit Court of Orange County, Florida, with two counts of attempted first-degree murder; robbery with a firearm; carjacking with a firearm; four counts of aggravated assault with a firearm and a mask; aggravated assault with a firearm; grand theft, third degree; shooting at or into a building; burglary of a dwelling while armed with a firearm; false imprisonment with a weapon; and petit theft. (R 82-88) He was tried by a jury on May 3 through 5, 1999, and found guilty of two counts of attempted second-degree murder with a firearm; robbery with a firearm; carjacking with a firearm; three counts of aggravated assault with a firearm and a mask; grand theft, third degree; shooting at or into a building; armed trespass; aggravated assault with a weapon; petit theft; and false imprisonment with a firearm. (R 149-172; T 479-486, Vol. IV) A judgment of acquittal was entered for one count of aggravated assault with a firearm and a mask and the conviction for grand theft, third degree was set aside. (T 404, Vol. IV; R 11, 12, 173, 232)

Petitioner was sentenced on June 24, 1999, to two consecutive terms of life in prison, a consecutive term of five years in prison, and a consecutive term of fifteen years in prison, to be served along with other, concurrent terms of imprisonment, and including eight three-year mandatory minimum terms for carrying a firearm. (R 65-69, 195-206)

On March 24, 2000, the Fifth District Court of Appeal affirmed Petitioner's conviction for attempted second-degree murder but certified to be of great public importance the question:

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

(APPENDIX).

STATEMENT OF THE FACTS

In the afternoon of January 3, 1999, a man entered the Krystal Restaurant on South Orange Blossom Trail in Orange County, asked an employee, William Moore, where the manager was, and was directed to the back of the store. (T 90, 91, 114, 115, 126, 130, 139, 147, 149, 150, Vol. I; T 223, Vol. III) At first George McKinney, the manager, laughed when the man said give me all the money but then, William Moore said over objection, the man said, "You have five or twenty seconds to empty the safe." (T 93-96, 98, 100, 130, 140, 150, Vol. I) The gun that the Krystal personnel said was pointed at George McKinney's head was described as "old, "rusty," a "silver revolver," and as having "a round thing that turns." (T 103, 126, 127, 141, 142, 149, Vol. I; T 234, Vol. III)

George McKinney could not open the safe so another employee, Lisa Taylor, opened it. (T 104, 108, 109, 130, 132, 133, 141, 142, Vol. I; T 225, 226, 228, 238, 239, Vol. III) While he was trying to open the safe, Mr. McKinney said, he gave everything he had in his pockets to the man who kept saying he was going to kill the manager if he did not open the safe. (T 226, 227, Vol. III) When he heard the "rolling" sound of metal, Mr. McKinney said, he turned his head and the gun fired and he felt something hot and burning hit his head and his ear rang. (T 106, 131, 132, 137, 141, 142, Vol. I; T 227, 228, 235-237, Vol. III) Later, he said, he saw that a bullet had struck the floor directly behind his head. (T 236, 238, Vol. III) The jury

was shown photographs of a red mark behind George McKinney's ear and of his knee which he said was bruised when he was being pulled out of the office to make room for Lisa Taylor to open the safe. (T 135, Vol. I; T 231, 232, 238, Vol. III) The man took about three hundred dollars from the safe and the wallet from George McKinney's back pocket. (T 142, Vol. I; T 228, 229, Vol. III)

William Moore testified that he unlocked and emptied the drive-in cash register and put the money in a large Krystal bag. (T 104, 105, 107, 121, 143, Vol. I) When the man had the gun on his chest, Mr. Moore said, he pushed it away and the man told him he was "cool." (T 109, 122, Vol. I) The man told other employees he was not going to shoot them because it was "a white thing." (T 129, Vol. I; T 225, Vol. III) After the man got the bag of money he went into the rest room. (T 108-110, Vol. I) No usable fingerprints were recovered from coin wrappers found on the rest room floor or on other items found elsewhere. (T 176-181, Vol. I) No one inside the Krystal restaurant had seen the man's face because he was wearing something on his face that was described as "a little blank thing," a scarf or mask, or a blue bandana. (T 91, 104, 110, 112, 127-129, 140, 145, 149, 155, Vol. I; T 223, 224, 234, Vol. III)

Krystal employee Velvet Wyatt climbed outside through the drive-in window, got into a customer's truck, and contacted Orange County Sheriff's Deputy Albert Rivera nearby. (T 150-152, 154, Vol. I; T 322, 323, Vol. IV) With Ms. Wyatt on the floor of his car, Deputy Rivera joined a pursuit. (T 155, 156, Vol. I; T 324, 325, 328,

Vol. IV)

In response to a radio report Orange County Sheriff's Deputy Steven Knapp had driven to the area of the Payless Shoe Store when he saw a man wearing jeans, a blue jacket, and a tan baseball cap coming out of the Krystal restaurant. (T 197-200, 210, Vol. I) Deputy Knapp identified the man, who was not wearing a mask, as Petitioner. (T 202, 203, 209, 210, Vol. I) He said he commanded the man to stop but he kept walking and then, when he ran, Deputy Knapp chased him. (T 200-202, Vol. I) While the man was out of his sight, Deputy Knapp heard a loud bang. (T 203, 204, 211, Vol. I)

Inside the Payless Shoe Store, Selena Hudson said he she heard a deputy hollering at someone to stop. (T 253, 254, Vol. III) Just as someone inside locked the store's front door, a man described as being dressed all in black and carrying a small silver handgun pulled on the door and shot at the lock, not through the door. (T 254-261, 263, Vol. III) Later a projectile was found on the sidewalk in front of the shoe store either 89 inches or eight or nine inches from the door. (T 189, Vol. I; T 262, Vol. III) No determination was made of the caliber of projectiles found either at the Krystal restaurant or at the shoe store. (T 193, 194, Vol. I)

Dennis Allen was stopped at a traffic light on South Orange Blossom Trail in front of a Papa John's restaurant when a man he said was wearing a dark jacket and holding a revolver came to passenger door and got into the car. (T 158-162, 164, 167,

204, 205, Vol. I; T 240, 241, 249, Vol. III; T 312, 314, 315, 328-330, Vol. IV) Mr. Allen said that Petitioner could possibly be the same man but he could not say. (T 160, Vol. I) Denise Demps-Rolling, the Orange County Sheriff's robbery investigator, said that Petitioner was never presented to Mr. Allen for identification because, she said, the suspect was already in custody. (T 386, 387, Vol. IV)

With a gun which a motorcyclist described as a small automatic pistol to Mr. Allen's head, the man yelled for him to get out. (T 162, 163, 165, 170, Vol. I; T 247, 249, Vol. III) As Mr. Allen turned his head to open the door, the gun fired and the window shattered but he was not injured. (T 162, 163, 167, 169, 170, Vol. I; T 243, Vol. III; T 316, 317, Vol. IV) Mr. Allen was shoved out onto the street and the man drove the car into Papa John's parking lot. (T 112, 113, 136, 163, 164, 168, 206, Vol. I; T 243, 244, Vol. III; T 317-319, 328, 329, 332, Vol. IV) Both Deputy Knapp and Deputy Rivera testified respectively that the car was headed right toward him and each thought he would be hit, so each fired at the vehicle, Deputy Knapp hitting the driver's door and Deputy Rivera firing through the hood and tire. (T 164, 206-209, 211, 213, Vol. I; T 245, Vol. III; T 320, 330, 331, Vol. IV) Deputy Knapp said the car veered sharply when the left front tire went flat. (T 207, 208, Vol. I) Later a crime scene technician observed bullet holes in the tire which had come off its rim and in the wheel well and found projectiles and blood inside the car but no identifiable fingerprints. (T 168, 169, Vol. I; T 269-272, 285, 286, 289, 290, 312,

Vol. III; T 337, Vol. IV) Casings found near Papa John's restaurant were not fired from a revolver. (T 331, 332, Vol. IV)

Deputy Rivera lost sight of the car but went in its direction until he came upon a car lying on its side. (T 333, 334, Vol. IV) Over objection, the deputy was allowed to testify that the overturned car's occupants signaled him to go in a northern direction and he later spotted a dust cloud which he followed to Mr. Allen's car on Rose Boulevard. (T 334-337, Vol. IV) Deputy Rivera testified, over objection, that a bystander indicated that the driver of the car had run between the nearby houses. (T 345, Vol. IV)

Alfred Adams was lying in his bedroom inside the house at 1712 Rose Boulevard watching a National Football League play-off game when he heard loud banging and saw a commotion outside. (T 353, 354, Vol. IV) When he came back inside, he said, Petitioner was in his kitchen holding a pistol. (T 354-356, Vol. IV) At Petitioner's command, he said, Mr. Adams closed the vertical blinds on his window and went back and forth from the living area to the bedroom. (T 356, 357, 361, Vol. IV) He said that Petitioner wanted to change from the jacket and pants and boots he was wearing and told Mr. Adams that his pants were wet with blood because the police had shot him. (T 357, 358, Vol. IV) He said Petitioner sat on his bed making telephone calls and offered Mr. Adams half the money inside a torn-up Krystal bag if he did not tell the police where he was. (T 359, 365, Vol. IV)

Petitioner and Mr. Adams were in the living room when there was a noise outside the bedroom side of the house and when Petitioner went into the bedroom to investigate, Mr. Adams went outside. (T 360, 361, Vol. IV)

One hundred and ten dollars were recovered from the rear patio of 1712 Rose Boulevard. (T 274, Vol. III; T 380, Vol. IV) There was blood on clothing found on the floor of Mr. Adams' bedroom and a hole in the left leg of a pair of pants. (T 292, Vol. III; T 369, 371, Vol. IV) At Petitioner's trial, Deputy Michael Davis looked into the pants pocket and found one hundred and fifteen dollars. (T 373-375, 381, Vol. IV) Between the frame and mattress of Mr. Adams' water bed deputies found a brown wallet containing a Florida I.D. for Petitioner and George McKinney's black wallet was found on the bed. (T 280, 281, 292, 296, 297, Vol. III; T 378, 382-384, Vol. IV) The door to the attic crawl space, which Mr. Adams said had been closed before, was found removed and lying on the floor. (T 281, Vol. III; T 365, Vol. IV) A brown Krystal bag was found in a laundry basket and a Krystal fries bag in the hallway. (T 282, 283, 296, Vol. III; T 376, 377, Vol. IV) Mr. Adams said there had been no Krystal bags in his house previously because he does not eat there. (T 359, 360, Vol. IV) The next day Mr. Adams said he found two spent shell casings in his toilet. (T 283, 285, Vol. III; T 362, 363, Vol. IV)

Deputies searched the yard, premises, and crawl space at 1712 Rose Boulevard and found no gun or bandana or any item similar to what Krystal employees said the

robber had worn as a mask. (T 283-285, Vol. III; T 367, 382, Vol. IV; T 92, 127-129, 140, 145, 149, Vol. I; T 223, 224, Vol. III) No one at the Krystal restaurant or in the Payless Shoe Store or at the scene in front of Papa John's restaurant was asked to identify any person or photograph. (T 119, 120, Vol. I; T 234, 235, 246, 263, Vol. III; T 386, 387, Vol. IV)

Petitioner's motions for judgments of acquittal were denied except that the trial court directed a judgment of acquittal of the charge of aggravated assault on Velvet Wyatt and set aside the verdict for the theft of George McKinney's wallet. (T 404, Vol. IV; R 11, 12, 173, 232)

Petitioner had been hospitalized pursuant to the "Baker Act" in August of 1996 and again August of 1998 following an attempt at suicide associated with the anniversary of the death of his brother who had bled to death in his arms in 1987. §394.451, Fla. Stat. (1997). (R 3-6, 8, 22-25, 34, 35, 37, 43, 47, 49, 53) He had been an "A" student in school but his biological depression was exacerbated by events such as the brutal kidnapping and murder of a younger brother in 1986; the murder of his six-week-old daughter in 1991; his being severely injured and left for dead by a drunk driver in 1993; his discovery in 1995 that two children he was rearing were not his; his wife's miscarriage in 1995; and the fact that his and his wife's son is profoundly mentally handicapped and terminally ill. (T 19-24, 26, 36, 50, 55) Petitioner's condition can be treated with medication but when he was released from

the hospital he could not afford the prescriptions. (T 9, 10, 25, 39) His wife's efforts to seek help for Petitioner, she said at the sentencing hearing, were to no avail and resulted instead in the issuance of a domestic injunction against Petitioner. (T 37, 38, 43, 44)

SUMMARY OF ARGUMENT

The crime of attempted second-degree murder is a judicial creation whose viability has been questioned by the Fifth District Court of Appeal in Watkins v. State, 705 So.2d 938 (Fla. 5th DCA 1998), and the existence of which has been certified, in Brown v. State, 733 So.2d 598 (Fla. 5th DCA 1999), Florida Supreme Court Case Number 84,944, to be a question of great public importance. It is illogical and a denial of due process to convict and punish someone for specifically intending to commit an unintentional act. Conviction for a non-existent crime is fundamental error.

ARGUMENT

IT WAS ERROR TO ADJUDICATE Petitioner GUILTY OF TWO COUNTS OF ATTEMPTED SECOND-DEGREE MURDER, AN OFFENSE WHICH LOGICALLY DOES NOT EXIST.

In Counts I and II of the information filed against Petitioner, he was charged with attempted first-degree murder. (R 83) The jury found him guilty in both instances of attempted second-degree murder. (T 479-480, Vol. IV; R 149, 150) In Brown v. State, 733 So.2d 598 (Fla. 5th DCA 1999), Supreme Court Case Number 95,844, this Honorable Court is reviewing the District Court's certified question whether the crime of attempted second-degree murder exists in Florida.

In Watkins v. State, 705 So.2d 938 (Fla. 5th DCA 1998), the Fifth District Court of Appeal upheld a conviction for attempted second-degree murder. Judge Griffin wrote for the majority:

> Whether the supreme court has changed direction in *Thomas v. State*, 531 So. 2d 708 (Fla. 1988) and *State v. Gray*, 654 So. 2d 552 (Fla. 1995) thereby eliminating attempted second-degree murder and displacing *Gentry [v. State*, 437 So. 2d 1097 (Fla. 1983)] is a question of some substance. . . . Manifestly, if the Florida supreme court did abolish the crime of attempted second-degree murder by its decision in *Gray*, it does not appear to have noticed that it did so. . . . Unless the high court says otherwise, the crime described by Justice Shaw in *Gentry* . . . remains viable.

Id.

In his concurring opinion in Watkins, however, Judge Cobb noted that

subsequent to the decision in Gentry, the Supreme Court had "returned to the traditional interpretation of an attempt," i. e., "an attempt exists *only* when there is an intent to commit a crime, . . . " Id. Judge Cobb also wrote:

> . . . Since the Florida Supreme Court agrees with the reasoning in *Grinage [v. State*, 641 So. 2d 1362 (Fla. 5th DCA 1994)], 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.
>
> That progression in logic, however, has not occurred. Subsequent to *Gray*, the Florida Supreme Court again has recognized the existence of attempted second degree murder. *See State v. Wilson*, 680 So.2d 411 (Fla. 1996); *Harris v. State*, 674 So. 2d 110 (Fla. 1996). Apparently there was no challenge raised in either *Wilson* or *Harris* as to the existence of that crime; nevertheless, we are bound by those cases until the Florida Supreme Court directly addresses the issue again.

Id. Judge Cobb further observed that if attempted second-degree murder is, like attempted felony murder, a non-existent crime, then a conviction therefor is reviewable as fundamental error.

Judge Harris, whose majority opinion in Grinage v. State, supra, led to the reversal of Amlotte v. State, 456 So. 2d 448 (Fla. 1984), in State v. Gray, wrote in his dissent to Watkins on the duty of the District Courts to question existing precedent and urge its examination when principles are contested, and suggested that the Supreme Court "reexamine all homicides other than first degree premeditated murder to see if they are subject to an attempt." Id.

Attempted second-degree murder exists in law, as attempted felony murder did

for a while, as a judicial formulation to fill a perceived gap in the criminal code. The Legislature had not acted to create a crime punishing harm which occurred or which *could have* occurred as the result of criminal conduct but which was not specifically intended, so the Supreme Court "legislated," through Amlotte and Gentry, the offenses of attempted felony murder and attempted second-degree murder. After Amlotte was reversed by State v. Gray, the Legislature finally created, within the chapter on homicide, the offense of "Felony causing bodily injury," a first-degree felony. §782.051, Fla. Stat. (1997). This statute satisfies the goal of punishing an unintended harm resulting from the intentional perpetration of a serious crime without resorting to the tortured logic of Amlotte and Gentry which authorized prosecutors at their whim to seek punishment for the *possibility* of an unintended injury.

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 who have considered the question recognize the crime of attempted premeditated murder, but not attempted second degree, (non-premeditated) murder. 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).

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.

In State v. Gray, however, this Honorable Court found that "application of the majority's holding in Amlotte has proven more troublesome than beneficial" and that "the more logical and correct position," that the crime of attempted felony murder is logically impossible, was expressed by Justice Overton in his dissent to Amlotte:

> . . . Further extension of the felony murder doctrine so as to make intent irrelevant for purposes of the attempt crime is illogical and without basis in law.

Id., 456 So.2d at 451. As the Gray decision acknowledged, Justice Overton had also recognized that a conviction for the offense of attempt requires proof of the specific

intent to commit the underlying crime. Gray, 654 So.2d at 553. Justice Harding's opinion in Gray also contrasted the logic of receding from Amlotte with the continued existence of "attempted second-degree murder":

> This Court has interpreted section 777.04(1), Florida Statutes (1991) to mean that an attempt to commit a specific intent crime requires (1) a specific intent to commit a particular crime and (2) an overt act toward its commission. See, e.g., Thomas v. State, 531 So.2d 708, 710 (Fla.1988); ***but see Gentry v. State***, 437 So.2d 1097, 1098-99 (Fla.1983).

Id., 654 So.2d at 553. [Emphasis supplied.] It bears repeating that the Amlotte decision was reached in part because it was "consistent with the reasoning in our recent decision in Gentry v. State." Amlotte, 456 So.2d at 450.

This Honorable Court has *sub silentio* prolonged the existence of attempted second-degree murder by letting stand a conviction therefor in Harris v. State, 674 So.2d 110 (Fla. 1996), and authorizing re-instruction, at a re-trial, on the offense in State v. Wilson, 680 So.2d 411 (Fla. 1996). As Judge Cobb noted in his concurring opinion in Watkins, supra, however, the existence of second-degree murder apparently was not challenged in either of those cases, a fact which summons the logic from Justice Overton's dissent in Amlotte, in which the majority had relied in part on Fleming v. State, 374 So.2d 954 (Fla.1979), as precedent for proclaiming the existence of attempted felony murder:

> I would recede from Fleming v. State, 374 So.2d 954 (Fla.1979), to the extent that it recognized the crime of attempted felony murder and would at least distinguish Gentry. The legal

> question of whether attempted felony murder existed in Florida was not a major issue in Fleming. The defendant in Fleming pleaded guilty to first-degree murder and attempted first-degree murder, and he was sentenced to death. The validity of the death sentence was the primary issue in that case before this Court. There was absolutely no discussion in this Court's opinion of whether specific intent was an essential element of an attempt.

Amlotte, 456 So.2d at 451.

It is illogical and a denial of due process to convict and punish someone for specifically intending to commit an unintentional act. Art. I §9, Fla. Const.; Amends. V and XIV, U. S. Const. The District Court's certified question should be answered in the negative and Petitioner's convictions for attempted second-degree murder should be reversed.

CONCLUSION

For the reasons expressed herein, Petitioner respectfully requests that this Honorable Court answer the certified question in the negative and reverse his convictions for attempted second-degree murder.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118, by delivery to his basket at the Fifth District Court of Appeal; and by mail to Mr. Roger Lee Durham, 19225 U. S. Highway 27, Clermont, Florida 34711-9025, this 26th day of May, 2000.

ATTORNEY

ROGER DURHAM v. STATE OF FLORIDA
Case Number SC00-913

CERTIFICATE OF FONT

I HEREBY CERTIFY that the size and style of type used in this brief is 14-point "Times New Roman."

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