Supreme Court of Florida

THURSDAY, DECEMBER 22, 2005

CASE NO.: SC02-538
Lower Tribunal No.: 96-735-CFMB

LAMAR Z. BROOKS	vs.	STATE OF FLORIDA
Appellant(s)		Appellee(s)

Appellant's motion for rehearing is hereby denied.

WELLS, QUINCE, CANTERO, and BELL, JJ., concur
PARIENTE, C.J., dissents with an opinion, in which ANSTEAD, J., concurs.
LEWIS, J., dissents with an opinion.

A True Copy
Test:

Thomas D. Hall
Clerk, Supreme Court

jn
Served:

HON. WILLIAM E. EDDINS
HON. CURTIS A. GOLDEN
DAVID A. DAVIS
CHARMAINE M. MILLSAPS
HON. JERE TOLTON, JUDGE
HON. DON HOWARD, CLERK

PARIENTE, C.J., dissenting from denial of rehearing.

Although I dissented in part from the majority opinion and would have reversed Brooks' convictions because of the admission of the life insurance policy, I concurred in the majority's determination that the aggravated child abuse merged into the felony murder and therefore did not support a separate aggravating circumstance. Having reached that conclusion, I must now concur with Justice Lewis that Brooks' convictions should be reversed and the case remanded for a new trial. Under the United States Supreme Court decision in Yates v. United States, 354 U.S. 298 (1957), and this Court's decision in Fitzpatrick v. State, 859 So. 2d 486 (Fla. 2003), reversal is required because the general verdict of guilt precludes us from determining whether the jury relied upon the valid premeditated murder theory or the legally invalid felony murder theory.

ANSTEAD, J., concurs.

LEWIS, J., dissenting.

Although I continue to disagree with the original majority's holding that aggravated child abuse was not available as a matter of law for consideration as the felony underlying a felony murder theory of guilt because at all times it has been undisputed that only one lethal stabbing blow was inflicted to the infant's body for the reasons I set forth in my separate opinion in this case, see Brooks v. State, 30 Fla. L. Weekly S481, S493 (Fla. June 23, 2005) (Lewis, J., concurring in part and

dissenting in part), in my view, the Court majority having reached the conclusion that no underlying felony existed as a matter of law, we must grant Brooks's motion for rehearing, reverse his convictions, and remand this case for a new trial. The majority's decision has been based upon the theory of merger because it would be unconstitutional and illegal to predicate two convictions on the single act. As more fully explained below, pursuant to our previous opinion in Fitzpatrick v. State, 859 So. 2d 486 (Fla. 2003), which was required by the United States Supreme Court's decision in Yates v. United States, 354 U.S. 298 (1957), the majority's conclusion that a single stabbing blow cannot constitutionally, as a matter of law, constitute an underlying felony for the purpose of application of the felony murder doctrine requires this Court to reverse Brooks's convictions. See also Mackerley v. State, 777 So. 2d 969 (Fla. 2001) (holding that it is reversible error to sustain a conviction based on a general jury verdict for first degree-murder on dual theories of premeditation and felony murder where the felony underlying the felony murder charge is based on a legally unsupportable theory even when there is evidence to support premeditation); Valentine v. State, 688 So. 2d 313 (Fla. 1996) (holding that a conviction for attempted first-degree murder must be reversed where the jury was instructed on dual theories of attempted first-degree premeditated murder and attempted first-degree felony murder when this Court

later determined that attempted first-degree felony murder does not exist in Florida).

In Fitzpatrick, the trial judge instructed the jury with regard to both premeditated murder and felony murder with robbery and burglary as the underlying felonies. See id. at 490. The jury returned a nonspecific general verdict finding Fitzpatrick guilty of first-degree murder. See id. On appeal, Fitzpatrick asserted that reversal was required because the jury may have relied upon an erroneous and illegal definition of the underlying felony of burglary as the basis for a felony murder conviction. See id. In our opinion, we noted that the jury was instructed with regard to the statutory definition of burglary at the time but that definition did not accommodate the limitation on burglary as announced by this Court in Delgado v. State, 776 So. 2d 233 (Fla. 2000). Based on this conclusion, the Court, upon application of the United States Supreme Court's decision in Yates v. United States, 354 U.S. 298 (1957), reversed Fitzpatrick's conviction, holding "that a general jury verdict cannot stand where one of the theories of prosecution is legally inadequate." Fitzpatrick, 859 So. 2d at 490. We noted that we were compelled to reverse Fitzpatrick's conviction because a general jury verdict based on multiple theories of prosecution, one of which is felony murder based on an underlying felony later determined to be legally insufficient, cannot be upheld due to the fact that it is impossible to "discern whether the jury

convicted Fitzpatrick based on the legally sufficient grounds . . . , or the inadequate charge of felony murder based on burglary." Id. at 491.

In my view, our decision in Fitzpatrick and that in Yates are directly applicable in the instant matter and require the reversal of Brooks's convictions. Initially, it is clear that the jury here, as in Fitzpatrick, was instructed by the trial court on dual theories of guilt—premeditated first-degree murder and also first-degree felony murder. Additionally, as was the verdict in Fitzpatrick, the jury in the instant matter entered only a general verdict finding Brooks guilty of first-degree murder after being instructed on both theories. Moreover, similar to our holding in Fitzpatrick that the crime of burglary could not legally serve as the felony underlying the felony murder charge, the original majority in this case has determined that the jury was erroneously instructed that the aggravated child abuse charge could serve as the underlying felony in a felony murder theory of guilt because the undisputed single stabbing blow alleged to support the charge of aggravated child abuse does not exist as a matter of law on these undisputed facts and would be unconstitutional and illegal, thereby barring the existence of aggravated child abuse as the underlying felony.[1] See Brooks, 30 Fla. L. Weekly

1. It must be clear that the issue presented by Brooks in his motion for rehearing does not involve a disputed issue of fact. The fact that Alexis Stuart suffered only a single stabbing blow was never in dispute at any time. During the trial, neither party contended that multiple wounds were inflicted upon Alexis

at S485-86. Given the general jury verdict entered in the instant matter, similar to the situation the Court faced in Fitzpatrick, it is impossible to discern whether the jury here convicted him on the legally sufficient basis of premeditated murder or the legally invalid charge of felony murder based on an invalid underlying aggravated child abuse felony which the original majority in this case determined did not and could not constitutionally exist as a matter of law. Based on the foregoing, in my view, it is clear that this Court's decision in Fitzpatrick, which applied the United States Supreme Court's holding in Yates that a general jury verdict is invalid when it rests on multiple theories of liability, one of which is legally inadequate, see Yates, 354 U.S. at 312-13, requires that the conviction here be overturned and his case remanded with instructions for a new trial to be conducted. The failure to do so is in direct conflict with Yates and refuses to follow its clear mandate.

The State attempts to transform the original majority's decision in the instant matter into a factual dispute and argues that the majority merely established that there was a simple failure of proof in the State's case and that cases involving factual or evidentiary insufficiency are governed by the United States Supreme Court's opinion in Griffin v. United States, 502 U.S. 46 (1991), not by Yates which, the State contends, only applies to legal insufficiencies. A full reading of

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Stuart. Therefore, the issue presented in this motion for rehearing is strictly an issue of law.

the High Court's opinion in Griffin in proper context reveals that the State incorrectly contends that Griffin has application here. In Griffin, the defendant was charged with and found guilty by general verdict of unlawful conspiracy with two alternative objects: "(1) impairing the efforts of the Internal Revenue Service (IRS) to ascertain income taxes; and (2) impairing the efforts of the Drug Enforcement Administration (DEA) to ascertain forfeitable assets." 502 U.S. at 47. The defendant appealed, asserting that the decision in Yates required reversal because "the general verdict could not stand because it left in doubt whether the jury had convicted her of conspiring to defraud the IRS, for which there was sufficient proof, or of conspiring to defraud the DEA, for which (as the Government concedes) there was not." Id. at 48. The High Court rejected the defendant's argument, distinguishing the facts of Yates, and held that it was unwilling to extend Yates to the facts of Griffin to "set aside a general verdict because one of the possible bases of conviction was neither unconstitutional . . . , nor even illegal . . . , but merely unsupported by sufficient evidence." Id. at 56 (emphasis supplied). Isolated sentences taken out of proper context cannot alter the fundamental difference.

In my view, the issue now presented in the instant matter is entirely distinct from the issue addressed in Griffin and, therefore, the outcome of the present case is not controlled by that decision. In Griffin, the High Court was assessing

whether it was error to allow a theory of responsibility to be submitted to the jury when there was only insufficient evidence to support one theory of responsibility, whereas the issue presented here, as directly presented in Yates, involves a legally invalid theory of responsibility being submitted to the jury due to the underlying felony presented as the only basis for the felony murder charge being nonexistent as a matter of law under the undisputed facts—creating a legal bar to a felony murder conviction or a nonexistent underlying felony as a matter of law. As we made clear in Fitzpatrick, in cases such as this, the uncertainty is created because it is impossible to discern whether the jury in the instant matter convicted Brooks of the legally valid charge of premeditated murder, or the legally invalid charge of felony murder based on aggravated child abuse as the underlying felony that requires the reversal of Brooks's conviction. See Fitzpatrick, 859 So. 2d at 491; see also Yates v. United States, 354 U.S. 298 (1957). The U.S. Supreme Court in Griffin even recognized this clear distinction and provided further explanation:

> That surely establishes a clear line that will separate Turner from Yates, and it happens to be a line that makes good sense. Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law—whether, for example, the action in question is protected by the Constitution, is time barred, or fails to come within the statutory definition of the crime. When, therefore, jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error. Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors are well

> equipped to analyze the evidence, see Duncan v. Louisiana, 391 U.S. 145 (1968).

Griffin, 502 U.S. at 59-60.

In a similar manner, our decision in San Martin v. State, 717 So. 2d 462 (Fla. 1998), is also clearly inapposite. First, the defendant in San Martin asserted that in the capital punishment context a general verdict form is itself unconstitutional which is not the issue here. Secondly, in San Martin, the defendant asserted that because the evidence was insufficient to support premeditation, it was reversible error for the trial court to instruct the jury on both premeditated and felony murder. See id. at 469. Although we agreed with San Martin that there was insufficient evidence to support premeditation, we held that any error was harmless because the evidence clearly supported a conviction for felony murder. See id. Relying on the decision in Griffin, we affirmed the defendant's conviction for first-degree murder, noting that "reversal is not warranted where the general verdict could have rested upon a theory of liability without adequate evidentiary support when there was an alternative theory of guilt for which the evidence was sufficient." See San Martin, 717 So. 2d at 470 (emphasis supplied). However, unlike the circumstance presented in San Martin, the issue presented here is whether a general verdict can stand when it may have rested on a legally invalid or unavailable theory of guilt—we have undoubtedly held that it cannot. In San Martin, we specifically recognized that "a general guilty

verdict must be set aside where the conviction may have rested on a . . . legally inadequate theory." Id. Therefore, because the issue in San Martin clearly addressed a factually unsupported theory being submitted to the jury, whereas the issue in the instant matter addresses the issue of a legally invalid theory of liability being submitted to the jury, our decision in San Martin is also of no application in consideration of this motion for rehearing.

Based on the above analysis and distinction, in my view, it is clear that the majority, by denying the motion for rehearing, has affirmed an unconstitutional imposition of the death penalty contrary to both applicable Florida and United States Supreme Court authority. The majority's denial of Brooks's motion for rehearing has rendered him without the means or a forum in which he can obtain relief except federal intervention to prevent the unconstitutional imposition of the death penalty. Accordingly, I dissent.