IN THE SUPREME COURT OF FLORIDA

TERRY P. SANDERS,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

SC05-2115
Lower Case No. 2D04-2046

DISCRETIONARY REVIEW OF A DECISION OF THE SECOND DISTRICT COURT OF APPEAL

INITIAL BRIEF OF APPELLANT

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STATEMENT OF CASE

Mr. Sanders was charged by Information with one count of attempted murder in the first degree for the alleged shooting of a firearm resulting in great bodily harm to David Snow, in violation of Sections 782.04(1). 777.04 and 775.087(2), Fla. Stat., and one count of felon in possession of a firearm, in violation of Sections (Vol. I, pp. 17-18). This matter went to trial solely on the count of attempted first degree murder. Following a jury trial held February 23-24, 2004, the jury found Mr. Sanders guilty of the lesser offense of attempted second degree murder, with a firearm (discharging firearm and inflicting great bodily harm). (Vol. I, pp. 80-81). A timely Notice of Appeal was filed on April 23, 2004. (Vol. I, pp. 125-128).

Prior to trial, the State filed both a Notice that Defendant be Treated as a Violent Career Criminal Pursuant to Section 775.084(1)(c), Fla. Stat., and a Notice that Defendant be Treated as an Habitual Felony/Habitual Violent Felony Offender. (Vol. I, pp. 32-33). On February 20, 2004, the State also filed a Notice of Intent to Seek Enhanced Sentence on the grounds that Mr. Sanders qualified as both an habitual felony offender and an habitual violent felony offender. (Vol. I, p. 53).

The applicable sentencing guidelines scoresheet gave Mr. Sanders a total of 182.1 points, resulting in the lowest permissible prison sentence of

115.575 months. (Vol. I, 112-114). However, on March 31, 2004, Mr. Sanders was sentenced to a term of natural life pursuant to the 10-20-life statute and was adjudicated an habitual felony offender. (Vol. I, pp. 115-122).

On appeal to the Second District Court of Appeal, Appellant challenged the sufficiency of the evidence and the application of the 10-20-Life statute to his case. In Sanders v. State, 912 So. 2d 1286 (Fla. 2d DCA 2005), the Second District affirmed Appellant's conviction and sentence, but certified the following question to this Court as a question of great public importance:

> IN ORDER FOR AN OFFENSE TO BE A LESSER-INCLUDED OFFENSE, MUST IT NECESSARILY RESULT IN A LESSER PENALTY THAN EITHER THE PENALTY FOR THE MAIN OFFENSE OR THE NEXT GREATER OFFENSE ON THE VERDICT FORM?

STATEMENT OF FACTS

On May 16, 2002, Mr. Sanders went to an establishment called Club Turbulence in Ybor City. Tiffany Gainous, Everell Forbes and Doland were also present at Club Turbulence that evening, all three known to Mr. Sanders. At some point in the evening, Mr. Forbes and Mr. Doland were forcibly ejected from the Club by the bouncers and a brief scuffle ensued. (Vol. III, p. 197, 217, 232).

Later in the evening, after the Club had closed, Forbes, Doland and Sanders returned to the Club to complain about the treatment they received from the bouncers earlier. These three individuals were standing at the entrance talking to David Snow, a bouncer, about their complaints. (Vol. III, pp. 197-199, 232). Mr. Doland stepped inside the Club, but was then asked to leave. (Vol. III, p. 210, 217-218, 232-233). After Mr. Doland exited the Club, David Snow saw a gun and turned and ran back into the Club. (Vol. III, p. 200). He did not see the actual shots fired. (Vol. III, p. 211). It was not until someone else noticed he was bleeding that Mr. Snow realized he had been shot. (Vol. III, p. 201).

Snow was treated at the hospital and released within three hours. The bullet had gone straight through his leg. (Vol. III, p. 201-202).

Just prior to the shooting, Officer Schurig was responding to a call of a disturbance at Club Turbulence. (Vol. IV, p. 282). He witnessed the shooting and then pursued the three individuals who had been outside the Club. (Vol. IV, p. 283-284). Two of the suspects entered a minivan which was pursued by Air Services. (Vol. IV, pp. 285-286, 296-298). Officer Schurig identified Mr. Sanders in court as the shooter. (Vol. IV, p. 289). However, Officer Schurig also admitted he only saw the shooter from behind. (Vol. IV, p. 292). The minivan was driven by Tiffany Gainous and when she was pulled over she was the only person in the vehicle. (Vol.. IV, p. 280).

Eventually, Mr. Sanders was developed as a suspect. However, David Snow could not pick him out of a photographic lineup of five individuals. (Vol. III, pp. 202-203, 212, 260). It was only when he was shown a single photograph that he made an identification. (Vol. III, p. 203, 213). According to Mr. Snow, the individual he identified from the single photograph was the one who came into the Club, who was told to leave and who was one of the people who had been ejected from the club earlier in the evening. (Vol. III, p. 203, 206-207, 214). Snow identified Mr. Sanders in the courtroom as the individual he identified from the single photograph. (Vol. III, p. 204).

Two other bouncers identified Mr. Sanders from the photographic lineup and in court as the shooter. (Vol. III, pp. 222-226, 235-239, 261). However, they also admitted that they did not see the actual shots fired. (Vol. III, p. 228-229, 235, 244, 246).

During the investigation of this case, Detective Morris obtained a video from an Ybor City security camera which captured the events of the night in question outside of Club Turbulence. (Vol. IV, pp. 262-265). Detective Morrison identified Forbes and Doland from the video for the jury. (Vol. IV, p. 268-270).

At the close of the State's case, the defense moved for a judgment of acquittal on the charge of attempted first degree murder, as well as on the lesser included offense of attempted second degree murder for which Appellant was ultimately convicted. (Vol. IV, pp. 326-328). The motion was denied. The jury found Appellant guilty of attempted second degree murder, with a firearm (discharging firearm and inflicting great bodily harm). (Vol. I, p. 80). This appeal ensued.

SUMMARY OF ARGUMENT

Appellant was convicted of an improper lesser included offense. By definition, a lesser offense must carry a lesser penalty than the charged offense. Here, Appellant was charged with attempted first degree murder. And, although he was convicted of the lesser offense of attempted second degree murder, the application of the 10-20-life statute resulted in sentence of imprisonment for a term of natural life. Thus, Appellant received the same sentence he would have received had he been convicted of the charged offense. This error mandates reversal.

ARGUMENT

ISSUE

WHETHER APPELLANT'S CONVICTION FOR A LESSER INCLUDED OFFENSE WAS IMPROPER AFTER THE APPLICATION OF THE 10-20-LIFE STATUTE RENDERED HIS SENTENCE THE SAME AS IF HE HAD BEEN CONVICTED AS CHARGED.

Appellant was initially charged with attempted first degree murder in violation of Section 782.04(1), Fla. Stat. However, the jury convicted him of the lesser included offense of attempted second degree murder with special findings that a firearm was discharged inflicting great bodily harm. (Vol. I, p. 80). Based upon the special findings, Section 775.087(2)(a)3, Fla. Stat., was applied to enhance Appellant's sentence to a term of natural life. Appellant submits that this sentence constituted reversible error as discussed in Franklin v. State, 877 So. 2d 19 (Fla. 4th DCA 2004), question certified by Franklin v. State, 29 Fla. L. Weekly D 1647 (Fla. 4th DCA July 14, 2004).[1]

The defendant in Franklin was tried for attempted murder, but the jury returned a verdict finding the defendant guilty of aggravated battery while discharging a firearm and causing serious bodily injury. See Franklin, 877 So. 2d 19. On appeal, the Fourth District Court of Appeal reversed in

[1] This error was raised by the defense to the trial court on several occasions. Initially, the defense objected during discussions regarding jury instructions. (Vol. II, pp. 144-146). Lastly, the Motion for New Trial addressed this issue. (Vol. I, pp. 82-83, 150-152).

reliance upon Ray v. State, 403 So. 2d 956 (Fla. 1981), which held that a lesser included offense, by definition, must carry a lesser penalty. Consequently, the Fourth District reasoned that aggravated battery with a firearm could not be a proper lesser included offense of attempted murder where the enhancement statute, Section 775.087, Fla. Stat., resulted in the same sentence for both attempted murder and the purported lesser offense of aggravated battery. See Franklin, 877 So. 2d 19.

Similarly, Appellant argues that it was improper for him to be sentenced to a term of natural life after being convicted of the lesser included offense of attempted second degree murder. Simply put, an offense is not a "lesser" if it carries the same penalty as the greater offense. See State v. Carpenter, 417 So. 2d 986 (Fla. 1982); State v. Weller, 590 So. 2d 923 (Fla. 1991); Nurse v. State, 658 So. 2d 1074 (Fla. 3d DCA 1995).

In Greene v. State, 714 So. 2d 554 (Fla. 2d DCA 1998), the Second District discussed the related issue of whether the level or degree of an offense can impact whether an offense is a proper lesser offense. In dicta, the Second District specifically noted, "'lesser' is usually determined by comparing the potential punishments for the offenses rather than their descriptive 'degrees.'" See Greene, 714 So. 2d 554, 557. Thus, where the 10-20-Life statute subjected Appellant to the same penalty for both the

charged greater offense of attempted first degree murder and the found lesser offense of attempted second degree murder, reversible error occurred.

However, the Second District, in this case, took another view. Basically, the Second District declined to require that a lesser offense carry a lesser penalty simply because sentencing has become complex. See Sanders, 912 So. 2d 1286. In other words, Appellant must remain in prison for life following a conviction for a lesser included offense because it would be too difficult to require trial judges to "…devise verdict forms that always guarantee a defendant will receive a lesser penalty for each successive option on the verdict form." See id. Respectfully, Appellant disagrees with this reasoning.

The complexity of the sentencing process should have no bearing on whether courts continue to rely on the "degree and penalty test" applied by this Court in determining fundamental error in sentencing. See Nesbitt v. State, 889 So. 2d 801, 802-803 (Fla. 2004), citing Ray, 403 So. 2d at 961. Here, Appellant was convicted of an offense which was not lesser in penalty than the charged offense. This is a simple concept. So simple, in fact, that juries need not be instructed on the potential penalties in order to realize that a lesser offense must carry a lesser penalty, but rather may rely on their common sense.

In an attempt to pay service to this "degree and penalty" test, the Second District distinguished the instant case from the facts in Franklin. Initially, the Second District assumed the verdict form in Franklin must have "unquestionably listed the lesser offenses in an order that was not descending in penalty." See Sanders, 912 So. 2d 1286. Relying on this assumption (despite the Second District's admission that it had not seen the actual verdict form used in Franklin), the Court found the verdict form in the instant case to be proper because the lesser offenses were listed in an "order that [gave] the trial court discretion to impose a sentence that [was] less severe than the preceding option on the verdict form." See id. Thus, in disagreeing with the Fourth District in Franklin, the Second District held it to be "…permissible for the trial court to place lesser offenses on the verdict form in an order that generally gives the trial court the discretion to impose a lesser penalty, even if that order also gives the trial court the discretion to impose an equal or greater penalty." See id.

In upholding Appellant's conviction and sentence, the Second District admitted their ruling was in error if this Court intends that Ray and Nesbitt limit lesser offenses only to those offenses that are guaranteed to result in a lesser penalty. See id. Based upon the precedent of this Court, Appellant

submits that the ruling of the Second District in this matter was in error. Reversal is warranted.

CONCLUSION

WHEREFORE, Appellant requests that this Honorable Court reverse the ruling of the lower court and remand for a new trial.

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Assistant Attorney General Jonathon Hurley, Office of the Attorney General, 3507 E. Frontage Rd., Ste 200, Tampa, Florida 33607 on this ____ day of January 30, 2006.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Times New Roman 14-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

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