IN THE SUPREME COURT OF FLORIDA

CASE NO. SC06-628

DEWARN ANTONIO BROWN,

Appellant,

-vs-

STATE OF FLORIDA,

Appellee.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, THIRD DISTRICT

REPLY BRIEF OF PETITIONER ON THE MERITS

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INTRODUCTION

This cause is before the Court on petition for discretionary review. The parties will be referred to as they stood in the trial court.

Defendant was charged with armed robbery and felony murder. The jury returned a verdict finding him guilty of petit theft and felony murder. The trial court set the felony murder verdict aside. The District Court reversed and directed the trial court to enter judgment on the felony murder verdict.

For purposes of this brief, the symbol AR.@ refers to the record on appeal filed in the District Court, and the symbol AT.@ refers to the transcripts filed in the District Court.

STATEMENT OF THE CASE AND FACTS

Defendant Dewarn Brown was charged with first degree felony murder and armed robbery (R. 28-29). Co-defendant Tyrone Barbary was also charged with these offenses, and with possession of heroin with intent to sell (R. 29). Brown and Barbary were tried separately. The State=s assertion (State=s Brief at 1) that Brown was charged with possession of heroin is flatly contradicted by the express terms of the indictment at page 29 of the record.

The jury rendered a verdict that Brown was guilty of petit theft and felony murder (R. 61, T. 757-59). On motion, the trial court set aside the felony murder conviction, and denied rehearing, on the ground that the conviction for petit

theft was an acquittal on the robbery charge, and thus inconsistent with the guilty verdict as to felony murder. *See* R. 62-69, 71-79, 80, 83, 95-110). The Third District reversed, and directed the trial court to enter judgment on the jury verdict for first degree murder. *State v. Brown* , 924 So. 2d 86 (Fla. 3d DCA 2006).

This Court granted discretionary review.

SUMMARY OF ARGUMENT

Here the jury **convicted** Brown of petit theft as a lesser of armed robbery. As a matter of law, the petit theft conviction exonerates Brown for all lesser offenses of armed robbery other than petit theft that were or could have been charged as lesser offenses, and precludes a conviction for robbery, attempted robbery or any felony upon which a felony murder conviction could be predicated. Thus the guilty verdict for petit theft exonerates defendant not only for armed robbery, but also for the lesser offense of attempted robbery, and precludes any felony murder conviction.

ARGUMENT

I

BECAUSE DEFENDANT WAS CONVICTED OF PETIT THEFT, A NECESSARILY INCLUDED LESSER OFFENSE OF ROBBERY THAT IS A MISDEMEANOR, THE VERDICT EXONERATES HIM OF ALL OTHER LESSER OFFENSES OF THE ROBBERY CHARGED, AND THUS PRECLUDES A CONVICTION FOR FELONY MURDER

Defendant=s contention here is that, because the jury **convicted** Brown of petit theft as a lesser of armed robbery, as a matter of law, the petit theft conviction exonerates Brown for all lesser offenses of armed robbery other than petit theft that were or could have been charged as lesser offenses, and precludes a conviction for robbery, attempted robbery or any felony upon which a felony murder conviction could be predicated. The guilty verdict for petit theft thus exonerates defendant not only for armed robbery, but also for the lesser offense of attempted robbery, and precludes any felony murder conviction. *See* *Redondo v. State*, 403 So. 2d 954, 956 (Fla. 1981); *Mahaun v. State*, 377 So. 2d 1158 (Fla. 1979).

It is a curiosity that the jury in this case convicted defendant of felony murder but did not convict him of any felony. The jury found that Sloate was killed in the course

of a petit theft. No one told the jury that petit theft was a misdemeanor, not a felony.

Indeed, the prosecutor=s closing argument expressly invited the jury to convict for first degree murder if Sloate was killed in the course of the commission of any crime, without regard for whether the other crime was a misdemeanor or a felony: AThe law in the State of Florida is that if you are in the commission of a crime, your co-defendant, one of your co-defendants kills someone, you are guilty of felony murder.@ T. 699. Of course, the prosecutor subsequently indicated that here the other crime was robbery, and explained Brown=s potential liability for robbery as a principal, but jurors do not distinguish robberies from burglaries, petit thefts or other possible offenses in which property is taken.

The State here does not challenge the accuracy of the transcript, but asserts that the claim that the prosecution invited the jury to convict for first degree murder if Sloate was killed in the course of the commission of any crime, without regard for whether it was a misdemeanor or a felony, is Afactually incorrect and belied by the record@ (State=s Brief at 7 n.2).

This assertion is apparently based upon the acknowledged fact that the prosecution mostly argued a killing in the

course of a robbery. It is nonetheless true and correct that at one point the prosecutor told the jury that AThe law in the State of Florida is that if . . . in the commission of a crime, your co-defendant . . . kills someone, you are guilty of felony murder@ (T. 699).

Whether this explains or does not explain how the jury convicted for felony murder without convicting for a felony is beside the point. Where the jury convicted for petit theft rather than for any felony, defendant cannot be convicted of any felony, and the felony murder verdict cannot stand.

II

DEFENDANT=S FAILURE TO OBJECT TO THE STANDARD JURY INSTRUCTIONS DOES NOT BAR RELIEF

Defendant=s mere failure to object to a jury instruction in accordance with Florida Standard Jury Instructions (Criminal) 3.12(a), that the jury should consider the felony murder and armed robbery charges separately, was not a waiver of defendant=s right to object to subsequently rendered inconsistent verdicts or of his right not to be convicted of two lesser offenses of the armed robbery charge.

The State prepared the jury instructions (*see* T. 632-51). The State=s proposed instructions included an instruction on

Asingle defendant, multiple counts@ (*see* R. 53). Defendant made no objection to the instruction; it was mentioned at the charge conference only because defense counsel wanted the instructions on verdict and cautionary rules (*see* R. 52) to be given before the instruction on single defendant, multiple counts (*see* T. 634; *see also* 632-51). Defendant did not request the instruction, did not expressly agree that it should be given and made no effort to take any advantage of it.

The State did not assert in the District Court that defendant had sought to take advantage of the fact that the jury would be instructed to consider the charges separately. Now, however, the State contends for the first time (State=s Brief at 35) that defendant=s argument at trial was so premised. This bald assertion is unsupported by any reference to the record, because there is nothing at all in the record that would support it. Defendant=s argument at trial was that the evidence showed only the commission of a crime by ABlack@ (defendant Barbary) and AJackie,@ and that the statements defendant Brown had made were not voluntary and set forth facts that had been fed to him, not the knowledge of a participant in the events. *See* T. 654-76, 701-13.

Here the jury convicted for first degree murder and not for robbery. It might have been advantageous for defense counsel to argue that any conviction should be for robbery, not murder; defense counsel made no such argument. Defendant benefitted from the verdict convicting him for petit theft rather than robbery, but defense counsel did not suggest that either. Certainly defense counsel did not argue that defendant should be convicted of murder but not of robbery. It is thus difficult to see how defendant so benefitted from the separate consideration of the charges that he should be estopped to assert that the felony murder conviction was not supported by any felony conviction.

Moreover, here the jury could convict for robbery without convicting for murder. Had counsel asked the trial court not to give Standard Jury Instruction 3.12(a), the court could hardly have omitted it; indeed, waiving the Standard Instruction might have constituted ineffective assistance of counsel, where the instruction told the jury they could convict for robbery without convicting of murder. Plainly the Standard Jury Instruction did not authorize the jury to convict for felony murder without convicting for any felony, and it could not constitute a waver prior to the verdict of any true inconsistent verdict subsequently rendered.

The cases that suggest that a defendant must object to the giving of Standard Jury Instructions in order to protect himself from a verdict that convicts him for felony murder when there is no felony conviction or, on the State=s argument, convicts for both petit theft and attempted armed robbery as a result of a single transaction or episode, are unsound and permit an end-run around *Redondo* and *Mahaun*. The better reasoned cases reject such a perverse doctrine.

CONCLUSION

The Court should quash the District Court=s ruling and reinstate the ruling of the trial court setting aside the felony murder verdict.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to Jennifer Falcone Moore, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, 444 Brickell Avenue, Suite 650, Miami, Florida 33131 on November 9, 2006.

_____

ROY A. HEIMLICH
Assistant Public Defender

CERTIFICATE OF COMPLIANCE

I hereby certify that the type font in this brief is Courier New 12 point, except that the headings are set in Times New Roman 14 point.

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