IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

vs.

CHARLES KETTELL, : Case No. SC07-573

Respondent. :

_____

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

BRIEF OF RESPONDENT ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BRUCE P. TAYLOR
Assistant Public
Defender

Fla. Bar No. 224936

Public Defender's Office
Polk County Courthouse

P.O. Box 9000-- Drawer
PD

Bartow, Fl. 33831
(863) 534-4200

ATTORNEYS FOR RESPONDENT

TABLE OF CONTENTS

TABLE OF CITATIONS

STATEMENT OF THE FACTS AND OF THE CASE

Respondent accepts the factual and procedural summary provided by Petitioner.

ISSUE

Did the Trial Court Err in Instructing the Jury? (As Restated by Respondent)

SUMMARY OF ARGUMENT

The jury instruction in the instant case incorrectly reduced or eliminated the need of the prosecution to prove the element that the act be committed with either wanton or malicious intent. The instruction was therefore erroneous and Respondent is entitled to a new trial. The decision of the Second District in this cause should be affirmed.

ARGUMENT

Respondent was accused of having violated Sec. 790.19 Fla. Stat (2005). An element of that offense is the act must be done "wantonly or maliciously", Fla. Standard Jury Instruction 10.13 and Polite v. State, 454 So. 2nd 769 (Fla. 1st DCA 1984). Although the trial court gave the standard instruction, it also added language instructing the jury that the intent element is satisfied by anyone who shoots at or within a building, per se. The District Court found that the trial court abused its discretion in giving that instruction because the "per se language" could have created the impression that the wanton or malicious intent element was automatically satisfied by anyone shooting at or within a building.

To assess the correctness of the District Court's ruling, several basic principles must be remembered. First, a defendant in a criminal trial is entitled to have the jury properly instructed as to each element of the offense charged, Scott v. State, 808 So. 2nd 166 (Fla. 2002). Although the decision to give or withhold a jury instruction is reviewed under an abuse of discretion standard, the range of discretion held by the trial court is very limited, Chavers v. State, 901 So. 2nd 409 (Fla. 1st DCA 2005). Any instruction that purports to eliminate or reduce a portion of the burden of proof as to any element of the offense charged is improper, Scott, supra. and Mascolini v. State, 673 So. 2nd 3 (Fla. 1996).

Petitioner argues the language used in the instruction, taken from Holtsclaw v. State, 542 So. 2nd 437 (Fla. 5th DCA 1989) is an accurate statement of the law. Petitioner points to the precedents cited in Holtsclaw to bolster this position. A close examination of those authorities is therefore necessary. In Johnson v. State, 436 So. 2nd 248 (Fla. 5th DCA 1983) we find the first reference to the "per se" language in this context, in the concurring opinion. However, the language was not used in the context of dispensing with the wanton or malicious intent element. Rather, the whole purpose of the discussion in the opinion in Johnson was to show that there was no requirement the defendant have a specific

intent to shoot at or in the alleged target, thereby receding from an earlier opinion holding otherwise. In fact, the concurring opinion clearly states the malicious or wanton requirement might be satisfied by anyone who commits the act with disregard to deadly consequences. There is nothing in Johnson to suggest the author of the opinion considered any shooting at or in a building to "per se" satisfy the wanton or malicious intent element.

Petitioner mentions Ballard v. State, 447 So. 2nd 1040 (Fla. 2nd DCA 1984). However, Ballard concerned the denial of a motion to dismiss. The only actual ruling in the Ballard is that since the facts could have established guilt, it was proper to deny the motion to suppress. Since intent is almost always a question for the trier of fact, Hardwick v. State, 630 So. 2nd 1212 (Fla. 5th DCA 1994) the decision was undoubtedly correct. However, again, it does not stand for the proposition that any shooting at or within a building "per se" satisfies the malicious or wanton intent element of the offense charged in the instant case.

Petitioner also relies on Skinner v. State, 450 So. 2nd 595 (Fla. 5th DCA 1985). In this brief opinion we find the first use of the actual language that was used to instruct the jury in the instant case. As in

Holtsclaw it is not clear what factual issue was attempted to be addressed by the "per se" language, but it appears to undersigned counsel the Fifth District, in both cited authorities, was attempting yet again to address the issue of whether there needed to be specific intent to shoot at the building, or whether there needed to be knowledge the building was occupied. From the context of the language in both opinions, it can not be said there was an attempt to dispense with the wanton or malicious intent element of the offense. Indeed, under Scott, supra. and Mascolini, supra., such an attempt would be improper. It is interesting to note that in neither Skinner nor Holtsclaw was the District Court approving a specific jury instruction that included the "per se" language. Since a person who shoots at or within a building is not "per se" guilty, but only guilty if that shooting is done wantonly or maliciously, the jury instruction given by the trial court was erroneous.

Petitioner alternatively argues that even if the "per se" language of the instruction was not accurate, when that language was considered in context with the remainder of the instruction, the jury would have realized the wanton or malicious intent element had to be proven. Inconsistent instructions prejudice a defendant, even if correct instructions are also included, Blocker v. State, 87 Fla. 128, 99 So. 250 (1924). The District

Court correctly pointed out that the question is not whether an astute juror could deduce or distill the correct statement of the law from the instructions given, but whether the instructions were confusing or inaccurate, citing Butler v. State, 493 So. 2nd 451 (Fla. 1986). The District Court also found this was not a case in which the record reflects the jury "could not have been misled by the instructions. Undersigned counsel can not add greater force of persuasion to the language of the District Court on this point.

Petitioner also argues the additional language in the jury instruction was added after closing arguments because defense counsel had allegedly violated an agreement to not argue ownership of the building or knowledge that someone other than Respondent himself occupied the building. Assuming for the sake of discussion that defense counsel did breach such an agreement, the proper remedy is not to give an incorrect jury instruction, as was done in the trial court, but to give a correct one. The jury could have easily been told that ownership of the building was not an issue, and that the building did not need to be occupied by anyone other than Respondent, or any number of things without the need to also tell them that anyone who shoots at or within a building is "per se" guilty of having wanton or malicious

intent. By so instructing the jury, the trial court removed or reduced the burden of proof on the prosecution as to the intent element, and committed reversible error, Scott, supra. Erroneous instructions as to elements of an offense are not harmless, and have been held to be fundamental, Reed v. State, 837 So. 2nd 366 (Fla. 2002).

Finally, some comments made by the Dissent in the District Court should be addressed. It was stated that there was no argument made, nor evidence presented that the discharge of the weapons was accidental. First, it is submitted there was such argument, as pointed out by Petitioner defense counsel argued the discharge might have been stupid, but was not malicious or wanton. More importantly, as has been repeatedly pointed out, the wanton or malicious intent is an element of the crime. Respondent was under no obligation to present evidence to disprove an element of the crime. The prosecution's proof had to eliminate all reasonable doubt as to each element, including the element that the act be done wantonly or maliciously. To hold that Respondent had to somehow present evidence to disprove an element of the offense, in order to be entitled to an accurate jury instruction as to that element, would be to violate the most basic principles of due process, Scott and Reed, supra. The Dissent also stated there was sufficient evidence on which to base a guilty verdict. Of course,

Respondent has not argued otherwise. However, that statement again misses the point. The issue is not whether there was sufficient evidence on which a guilty verdict could be based, but whether the particular jury in the instant case was properly instructed so that the evidence could be weighed and considered under a correct understanding of the law, Scott, supra. Finally, the Dissent points out there was evidence to undermine any argument the shooting was accidental or other than wanton or malicious. It is not for any appellate court to sit as a jury and weigh the evidence, Morris v. State, 396 So. 2nd 862 (Fla. 3rd DCA 1981). Rather, it is for the appellate courts to ensure juries are able to review and weigh the evidence under the law, Scott, supra.

CONCLUSION

This Court should affirm the decision of the Second District and, to the extent any conflict exists with the opinion of the Fifth District in Holtsclaw v. State, 542 So. 2nd 437 (Fla. 5th DCA 1989), disapprove the decision of the Fifth District.

Respectfully Submitted:

_____
BRUCE P. TAYLOR

Assistant Public Defender
Fla. Bar No. 224936
Public Defender's Office
Polk County Courthouse
P.O. Box 9000-- Drawer PD
Bartow, Fl. 33831
(863) 534-4200

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the Office of the Attorney General at 3507 East Frontage Rd. Ste. 200 Tampa, Fl. 33607 on this the 17th day of August, 2007 by regular U.S. Mail.

CERTIFICATE OF COMPLIANCE

Respondent's Brief is prepared in Courier New 12 point type.

_____

BRUCE P. TAYLOR
Assistant Public Defender

Fla. Bar No. 224936
Public Defender's Office
Polk County Courthouse
P.O. Box 9000-- Drawer PD

Bartow, Fl. 33831
(863) 534-4200