IN THE SUPREME COURT OF FLORIDA

AHMAD MILTON
Petitioner

Case No: SC 11-1338

-vs-

L.T. Case No: 3D09-122,
F06-11820

STATE OF FLORIDA
Respondent

_____ /

DISCRETIONARY JURISDICTION REVIEW DECISION OF THE THIRD DISTRICT COURT OF APPEAL OPINION...

AMENDED PETITIONER'S JURISDICTIONAL BRIEF

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PETITIONER'S JURISDICTIONAL BRIEF

On review from the District Court of Appeal, Third District of Florida in Case No: 3D09-122 the decision of the Third District Court of Appeal in this case expressly and directly conflicts with the decision of this Court in, *State v. Beasley*, 317 So.2d 750; *Sinclair v. State*, 46 So.2d 453; *Rosin v. Anderson*, 155 Fla. 673 21 So.2d 143, the Third District Court of Appeal's decision in, *Ferrell v. State*, 358 So.2d 843, *Coicou v. State*, 867 So.2d 409; the Fourth District Court of Appeals decision in, *Tucker v. State*, 857 So.2d 978

JURISDICTIONAL STATEMENT

The Florida Supreme Court has discretionary jurisdiction to review a decision of a district court of appeal that expressly and directly conflicts with a decision of the Florida Supreme Court or another district court of appeal on the same point of law. Art. V § 3(b)(3) Florida Constitution (1980, Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv).

STATEMENT OF THE FACTS

On October 27, 2008, the Petitioner went to a jury trial.

On October 31, 2008, the jury acquitted the Petitioner of Second-Degree Murder, but found Petitioner guilty as charged on the remaining counts.

On January 16, 2009 the Petitioner filed a Notice of Appeal to the Third District Court of Appeal.

On September 8, 2010 the Petitioner appeal was affirmed with an Opinion.

On September 20, 2010, Petitioner filed a Motion for Rehearing.

On June 1, 2011, Petitioner's Motion for Rehearing was denied.

Petitioner's notice to invoke the discretionary jurisdiction of this court was timely filed on June 30, 2011.

SUMMARY OF ARGUMENT

I. The Third Judicial Circuit Court of Appeal's decision in its Opinion affirming the defendant's conviction pursuant to *Brinson v. State*, 18 So.3d 1075, conflicts expressly and directly with the decisions made in *Coicou v. State*, 867 So.2d 409 and *Tucker v. State*, 857 So.2d 978.

II. The Third Judicial Circuit Court of Appeal's decision in its Opinion stating "the trial court did not fundamentally error," conflicts expressly and directly with the following constitutional and statutory provisions Article I, Section 16 of the Florida Constitution, § 782.051(1) Fla.Stat. and Fla.R.Crim.P. 3.140(d)(1), it also conflicts expressly and directly with the decisions in, *Rosin v. Anderson*, 155 Fla. 673, 21 So.2d 143; *Ferrell v. State*, 358 So.2d 843; *State v. Beasley*, 317 So.2d 750; *Sinclair v. State*, 46 So.2d 453.

ARGUMENT I

THE THIRD JUDICIAL CIRCUIT COURT OF APPEAL'S DECISION IN ITS OPINION AFFIRMING THE DEFENDANT'S CONVICTION PURSUANT TO THE ATTORNEY GENERAL'S RESPONSE THAT THE TRIAL COURT DID NOT FUNDAMENTALLY ERROR IN CONVICTING THE DEFENDANT OF ATTEMPTED FELONY MURDER WHERE THE SINGLE ACT OF SHOOTING INVOLVED IN THE CHARGES OF ATTEMPTED SECOND-DEGREE MURDER AND ATTEMPTED FELONY MURDER WHERE PERMISSIBLE BECAUSE THEY DID NOT INVOLVE THE SAME VICTIM PURSUANT TO, *BRINSON V. STATE*, 18 SO. 3D 1075, CONFLICTS EXPRESSLY AND DIRECTLY WITH THE DECISIONS MADE IN, *COICOU V. STATE*, 867 SO.2D 409 AND *TUCKER V. STATE* 857 SO.2D 978,

The defendant's reliance on *Tucker v. State*, 857 So.2d 978 and *Coicou v. State*, 867 So.2d 409, is on point.

In *Tucker*, the defendant's act of shooting at two people was an essential element of Attempted Premeditated Murder and could not also support Attempted Felony Murder convictions without violating double jeopardy principles, 857 So.2d at 979-80.

Similarly, in *Coicou*, the defendant's act of shooting the victim was an essential element of the underlying felony of robbery and could not also support a charge of Attempted Felony Murder, 867 So.2d at 412.

Both Coicou and Tucker involved the Attempted Felony Murder statute, section 782.051, Florida Statutes, which requires the occurrence of an act that is

not an essential element of the underlying felony. The case at bar involves this statute also.

In the case at bar count (2) two of the charge information list the same named victims for the predicate felony (which was said to be Attempted Second Degree Murder, but does not reflect this in the Charge Information) and the Attempted Felony Murder charge. Count (2) two of the Charge Information reads that, Fellon Holloway and/or Brandon Harris and/or Sylvester Fisher and/or Randall Campbell and/or Arturo Vargas and/or Bryant Pitts, were the six victims of the predicated felony and those same named six victims were also named as the victims of the Attempted Felony Murder, which clearly shows that there was no intentional act that is not an essential element of the underlying felony and/or the defendant's act of shooting at the six victims was an essential element of the predicate felony and could not also support the Attempted Felony Murder convictions of the same six victims without violating double jeopardy principles.

Moreover, the Third District Court of Appeal's decision affirming the defendant's conviction in its Opinion pursuant to, *Brinson v. State*, 18 So.3d 1075 is not applicable in the case at bar. In Brinson the defendant's Charge Information reads that Louis Smith was the named victim of the predicate felony and a different named victim Cynthia Bethune was the victim named for the Felony Murder, which are clearly different victims, and not the same as in the case at bar.

Therefore, the case at bar is in compliance with *Coicou v. State*, 867 So.2d 409 and *Tucker v. State*, 857 So.2d 978, because there was no intentional act that was not an essential element of the predicate felony and/or the principles against double jeopardy were violated.

Furthermore, this fundamental error reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error. Pursuant to, § 924.051 this Court has jurisdiction to review this error and this Court should

ARGUMENT II

THE THIRD JUDICIAL CIRCUIT COURT OF APPEAL DECISION IN ITS OPINION STATING "THE TRIAL COURT DID NOT FUNDAMENTALLY ERROR" AFFIRMING THE DEFENDANT'S CONVICTION PURSUANT TO THE ATTORNEY GENERAL'S RESPONSE, THAT THE INFORMATION WAS NOT FUNDAMENTALLY DEFECTIVE, CONFLICTS EXPRESSLY AND DIRECTLY WITH THE FOLLOWING CONSTITUTIONAL AND STATUTORY PROVISIONS, ARTICLE I, SECTION 16 OF THE FLORIDA CONSTITUTION, § 782.051(1) FLA.STAT. AND FLA.R.CRIM.P. 3.140(D)(1), IT ALSO CONFLICTS EXPRESSLY AND DIRECTLY WITH THE DECISIONS IN, *ROSIN V. ANDERSON*, 155 FLA. 673, 21 SO.2D 143; *FERRELL V. STATE*, 358 SO.2D 843; *STATE V. BEASLEY*, 317 SO.2D 750; *SINCLAIR V. STATE*, 46 SO.2D 453.

In the case at bar counts (2) two (3) three, and (4) four purports to charge the Defendant with Attempted Felony Murder in violation of § 782.051(1) Fla.Stat.. However, these counts fail to allege specifically what criminal offense the Defendant allegedly committed as the predicate felony. Therefore, these counts

fail to allege all the elements essential to properly allege an offense under § 782.051(1) Fla.Stat.. It is impossible from the language in these counts to determine whether the Defendant committed, Attempted Second-Degree Murder or any other offense as the predicate felony. The statute requires that there be some specificity in pleading, and an allegation regarding what felony was allegedly being committed.

This Court has adopted a similar rule to that formulated in Russell:

The principle rule, as to the certainty required in an indictment maybe correctly laid down thus: that where the definition of an offense, whether by a rule of the common law or by statutes, include generic terms (as it necessarily must), it is not sufficient that the indictment should charge the offense in the same generic terms as in the definition, but it must state the species—it must descend to particulars.

Rosin v. Anderson, 155 Fla. 673, 21 So.2d 143

Article I Section 16 of the Florida Constitution states that in all criminal prosecution an accused shall be informed not only of the nature of the accusation against him, but as well of its cause. The nature of the accusation relates to the type of crime allegedly perpetrated: that is, for example, it is asserted the defendant murdered with a premeditated design, or it is asserted he affected death by an act evincing a depraved mind. The nature of the accusation, therefore, refers

to those legal ingredients that make up a particular crime as defined either by statute or common law. On the other hand, the cause of the accusation pertains to those certain specific facts particularizing the crime charged: that is, it is alleged the defendant killed a certain person. Together, the legal assertions relating to the nature of an accusation and the factual allegations pertaining to its cause both determine and define the offense to be pleaded in any indictment or information. It is the offense, and that alone, against which a defendant is called upon to defend and for which he may not be re-prosecuted. He is not called upon to answer for the commission of a crime generally stated; i.e., he did murder another, nor is he called upon to answer for the perpetration of an act particularly describe; i.e., he did kill a named individual. Rather, he is held to answer for a specified crime well particularized; i.e., he did kill and murder a certain named individual. It is only when an accusatory writ alleges both the essential elements of the crime in question. *Sinclair v. State*, 46 So.2d 453 (Fla. 1950), and the essential facts particularizing that crime, Fla.R.Crim.P. 3.140(d)(1) that the constitutional mandate cited from Article I Section 16 is satisfied.

The Information in this case falls short of the constitutional requirement. It does not adequately inform the Defendant of the cause of the accusation, since the State fails to give essential facts constituting the predicate offense in the Attempted Felony Murder offenses.

In *Ferrell v. State*, 358 So.2d 843 (Fla. Dist. Ct. App. 3d Dist 1978), an information charged that appellant committed an aggravated battery on a specific individual. Notwithstanding the fact that this charging document named the crime and its victim, the court was compelled to strike it down as defective. It was held that by failing to affirmatively allege the essential elements of an aggravated battery, i.e., by not including an assertion of unlawful touching, the information was subject to dismissal. The Information in this case is subject to the same legal criticism Ferrell is not the only authority for condemning this indictment for not alleging the essential elements of the crime in question. In *State v. Beasley*, 317 So.2d 750 (Fla. 1975), this Court passed on the sufficiency of an information which charged the appellee with inciting a riot in violation of § 870.01(2), Fla.Stat..

In holding that the pleading contained insufficient allegations to establish the elements of the crime charged, the court indicated that the term "riot" could not substitute for language which defined its legal meaning. If the term "riot" a word whose meaning is popularly understood, has been held by this Court to inadequately inform a person of the nature of the accusation against him, then it follows as strongly that the terms used in the defendant's information suffer from the same legal disability.

Therefore, the charging document in this case fails to affirmatively allege

the essential legal elements of the charge. As such, and as a matter of law, it does not properly apprise the Defendant of the nature of the accusation against him, which makes the charge information fundamentally defective.

Furthermore, this fundamental error reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error. Pursuant to, § 924.051 this Court has jurisdiction to review this error and this Court should.

CONCLUSION

This Court has discretionary to review the decision of the Third District Court of Appeal and this Court should exercise that jurisdiction to consider the merits of the Petitioner's arguments.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief complies with the font requirement of Rule 9.120(a)(2) of the Florida Rules of Appellate Procedure.

/s/ Ahmad R Milton
Ahmad R. Milton DC #M24080

UNNOTARIZED OATH

I, Ahmad R. Milton DC#M24080, having read then re-read the foregoing Brief, swears and declares that under the penalties of perjury pursuant to Fla.Stat. 92.525, *State v. Shearer*, 628 So.2d 1101 (1993) that all facts stated therein are true and correct.

/s/ Ahmad R Milton
Ahmad R. Milton DC #M24080

CERTIFICATE OF SERVICE

I certify that a copy of this Amended Jurisdictional Brief that now complies with Florida Rule of Appellate Procedure 9.210 has been furnished to Prison Mailing Officials for the purpose of mailing to the Florida Supreme Court located at 500 South Duval Street, Tallahassee, Florida 32399 and the Office of The Honorable Pamela Jo Bondi located at 44 Brickell Ave., Rivergate Plaza, Suite #650, Miami, Florida 33131 on this 8 day of August 2011.

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