

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC08-2156

Lower Tribunal Case No. 3D03-2689

JOHN LEE BARRON,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

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

AMENDED BRIEF OF RESPONDENT ON JURISDICTION

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INTRODUCTION

The respondent requests that this Court deny discretionary review of Barron v. State, 999 So.2d 1098 (Fla. 3d DCA 2007). The symbol "A" refers to the opinion set forth in the petitioner's Appendix.

STATEMENT OF THE CASE AND FACTS

The history of the case is set out in Barron v. State,

Id., and is also set out in the petitioner's jurisdictional brief, and both are hereby adopted.

SUMMARY OF THE ARGUMENT

This Court should decline to exercise its discretion to accept this case because the instant Third District Court of Appeal opinion does not expressly and directly conflict with a decision of this Court or of a District Court of Appeal.

ARGUMENT

I. THE DECISION OF THE THIRD DISTRICT COURT OF APPEAL IN THE PRESENT CASE DOES NOT EXPRESSLY AND DIRECTLY CONFLICT WITH A DECISION OF THE FLORIDA SUPREME COURT OR A DISTRICT COURT OF APPEAL.

This Court should exercise its discretion and not accept this case because, contrary to the argument of the petitioner, the Third District Court of Appeal opinion does not expressly and directly conflict with a decision of this Court or of a District Court of Appeal. Florida Star v. B.J.F., 530 So.2d 286, 289 (Fla. 1988); First Union National Bank v. Turney, 832 So.2d 768 (Fla. 1st DCA 2002).

The Third District opinion in the instant case stated that in contrast to the cases cited by the petitioner in the initial brief and the dissent, are the cases decided by this Court that specifically address the issue that the Third District was faced with, whether co-felons may be held criminally responsible for the acts of co-perpetrators committed during the course or furtherance of their initial criminal purpose.(A.12). Its examination in this case focused on whether the attempted murder of Ed Cody was committed in furtherance of the initial common design or purpose, or whether the shooting constituted an independent act outside of and foreign to the original criminal scheme.(A.13).

The Third District stated that in the instant case, the jury found the defendant guilty of attempted armed robbery.(A.15). The evidence established that the defendant, the other three gunman and the woman who was used to lure Ed Cody outside, were all participants in the common scheme to rob Ed Cody. While one of the gunmen held Ed Cody at gunpoint outside, the defendant and the other gunmen went into the Cody home and began rifling through Cody's belongings in an effort to carry out their scheme. Ed Cody's son, Derrick, who was hiding in the bathroom, began shooting at them, causing the defendant, who had been shot, and the other two gunmen who had accompanied him inside the house to commit the robbery, to flee. Meanwhile, the fourth gunman, who was guarding Ed Cody and attempting

to place handcuffs on his hands, shot Ed Cody in the back after he broke away and attempted to reach his son in the house. Thus, the evidence clearly establishes that the shooting occurred during the course of the robbery. **“A killing in the face of either verbal or physical resistance by a victim is properly viewed as being within the original criminal design.”** Jones v. State, 804 So.2d 551, 552 (Fla. 3d DCA 2002) (emphasis added); see also Lovette, 636 So.2d 1304, 1306-1307 (Fla. 1994). (A.16) As the attempted murder of Ed Cody occurred while he was attempting to resist during the commission of the armed robbery, the Third District concluded, as it did in Jones, that the shooting fell within the original criminal design and thus, the shooting did not constitute an independent criminal act.

The Third District placed its attention on the dissent and stated that the dissent incorrectly posits that it is the majority's position that because the attempted murder of Ed Cody was committed during the course and in furtherance of the attempt to rob Ed Cody, that the defendant is guilty of attempted second degree **felony** murder.

The Third District stated that the dissent misunderstands both the majority's findings and the law regarding second degree felony murder and attempted second degree felony murder. The Third District stated that that is not the majority's position, nor do the facts or the

law support such a finding. The defendant was properly convicted of attempted second degree murder, not attempted second degree felony murder. (A.18-19).

The petitioner posits that the Third District misapplied this Court's decisions in Adams v. State, 341 So.2d 765 (Fla. 1976); Parker v. State, 458 So.2d 750 (Fla. 1984); Lovette v. State, supra and Ray v. State, 755 So.2d 604 (Fla. 2000) by holding that the felony-murder precepts there announced are equally applicable to this attempted second degree murder case.

However, this Court stated in Adams v. State that in Florida, as in the majority of the jurisdictions, the felony murder rule and the law of principals combine to make a felon generally responsible for the lethal acts of his co-felon. Adams, 341 at 769. In Parker the defendant was found guilty of third degree murder of Jody Dalton, and first degree murder of Richard Padgett and Nancy Sheppard when the defendant threatened to hang Tommy Groover if he did not make good on some drug debts. Padgett was then shot by Groover with the defendant on the scene and still demanding re-payment, Dalton was shot by Groover and the defendant helped weight her body and sink it in a lake, and Sheppard was killed by Billy Long, who was ordered to do so by the defendant. This Court stated that as a principal to the kidnaping of Padgett, the defendant is a perpetrator of the

underlying kidnaping and thus a principal in the homicide. Parker, 458 So.2d at 752-753. In Lovett, the defendant did not fire the shots that killed the owner, wife of the owner and delivery man of a Domino's Pizza store, but he was a perpetrator of the underlying armed robbery and this Court stated that as perpetrators of an underlying felony, co-felons are principals in any homicide committed to further the initial common criminal design. Lovett, 636 So.2d at 1306. The Third District cited Ray for the proposition that "during the course of the robbery" encompasses the period of time when the felons are in flight from the scene of the crime. (A.15); Ray, 755 So.2d at 609.

The petitioner argued that there are two reasons why the Third District's holding constitutes a misapplication warranting discretionary review. First, the petitioner argues that the offense for which the defendant was convicted is attempted second degree murder, not felony murder. Secondly, the petitioner argues that since the conviction is for an attempted homicide, even applying the felony-murder doctrine, there could never be the same strict liability that governs when a homicide is perpetrated during the course of an attempted robbery. The Third District responded to these arguments in its discussion which contains arguments against the dissent, which the respondent has discussed above. (A.18-22).

Finally, the petitioner suggests that the principal of law in Hampton v. State, 336 So.2d 378 (Fla. 1st DCA 1976), upon which the Third District relies, “that, where if the victim had died the defendant would have been guilty of murder, the defendant may be held for assault with intent to commit murder if the victim lives” Hampton, 336 So.2d 381, is no longer valid. The petitioner argues that Hampton sets forth the governing rule for a felony-murder conviction, as opposed to an attempted second degree murder conviction: “All that is necessary to establish the requisite intent to kill is to show that the killing occurred during the course of a robbery.” Hampton, 336 So.2d 380. The petitioner argues that this rule of law does not apply to an attempted homicide, and most particularly, to an attempted second-degree murder as is at issue in this case. See §782.051(1), Fla. Stat. The petitioner argues that the Third District misapplied and extended Hampton far beyond its current reach, and created conflict.

In the instant case, the majority cited Hampton because it affirmed the defendant’s conviction for an assault with intent to commit murder in the second degree (attempted second degree murder). It did so in its argument against the dissent’s suggestion that Ray, Parker, Hall v. State, 403 So.2d 1321 (Fla. 1981), Jones, Dell v. State, 661 So.2d 1305 (Fla. 3d DCA 1995) and Perez v. State, 711

So.2d 1215 (Fla. 3d DCA 1998) are all first degree murder cases and do not apply to the instant case because the defendant was convicted of attempted second degree murder, with which it respectfully disagreed. (A.21). The Third District also cited Williams v. State, 261 So.2d 855 (Fla. 3d DCA 1972), in which it affirmed the defendant's conviction for second degree murder where the co-perpetrator shot and killed the victim during the commission of robbery that both the defendant and co-perpetrator planned to commit. (A.21-22). Likewise, it also cited Staten v. State, 519 So.2d 622 (Fla. 1988) in which the Florida Supreme Court affirmed Staten's conviction for second degree murder, armed robbery and aggravated battery finding sufficient evidence to sustain Staten's conviction as a principal.

The court found that Staten, who helped plan the robbery, was properly convicted as a principal to the second degree murder of a drug dealer who was shot and killed during the robbery and the aggravated battery of a bystander who was also shot during the robbery, even though Staten remained in the car.(A.22). The Third District, after citing these cases, stated that it is clear that the principal theory of prosecution may be applied regardless of whether the shooting was premeditated or not and regardless of whether the victim lives or dies, citing Lovette v. State, 636 So.2d at 1306 for the proposition that "One who participates with another in a

common criminal scheme is guilty of all crimes committed in furtherance of that scheme," unless the acts committed by a co-perpetrator "fall outside of, and are foreign to, the common design of the original collaboration." Ray v. State, 755 So.2d at 609.

Hampton answered the question of whether an accomplice in a robbery is guilty of assault with intent to commit murder if the shooting victim is fortunate enough to live. Hampton, 336 So.2d at 380. The First District affirmed the conviction for assault with intent to commit second degree murder because Hampton was a willing participant in a robbery in which he acted as an armed lookout and his brother went in to the shop and shot but did not kill the cashier.

The Third District in the instant case did not misapply Hampton. Rather, it was one of a number of cases cited by the Third District to illustrate the proposition that one can be held liable for attempted second degree murder where if the victim had died the defendant would have been guilty of murder.

CONCLUSION

Based on the foregoing authorities and arguments, because the instant District Court opinion is not in express and direct conflict with another district court's or this Court's decision, the Respondent State of Florida respectfully requests that this Honorable Court decline to accept jurisdiction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Brief of Respondent on Jurisdiction was mailed this 7th day of January, 2009 to Special Assistant Public Defender Karen M. Gottlieb, P.O. Box 1388, Coconut Grove, Florida

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is in compliance with the font standards of Rule 9.210(a)(2), Florida Rules of Appellate Procedure, and is submitted in Courier New 12-point font.

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