IN THE SUPREME COURT OF FLORIDA

CASE NO. _____
Third District Court of Appeal Case No. 3D03-2689
Lower Tribunal Case No. 00-28348

JOHN LEE BARRON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

BRIEF OF PETITIONER JOHN LEE BARRON ON JURISDICTION

ON DISCRETIONARY REVIEW FROM A DECISION OF THE
THIRD DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND FACTS

Petitioner John Lee Barron was convicted, among other charges, of the attempted second degree murder of Ed Cody and attempted armed robbery. Appendix (hereinafter "A") at 2. The state's evidence showed that on the afternoon of the incident, Ed Cody was at home with his teenage son, Derrick. (A:2). A woman sounded the front-gate buzzer and asked Cody for assistance with her vehicle. (A:2). When Cody went outside to help, another vehicle entered the gate, and the driver approached Cody and pointed a gun at Cody's head. (A:2). Three other armed men, one of whom Cody identified as Mr. Barron, then exited from the vehicle and, as they approached the residence, Cody yelled to Derrick to call 911. (A:2).

Derrick retrieved his father's firearm and, watching from a bathroom, observed the men searching throughout his father's bedroom. (A:2). At some point, Derrick started shooting at the men. (A:2). Meanwhile, outside of the home, the driver of the second vehicle was attempting to handcuff Ed Cody. (A:2). Upon hearing gunshots, Ed Cody ran towards the house and the woman yelled that the driver of the second vehicle should shoot Cody because he had seen her face. (A:3). The driver responded that he would put Cody in a wheelchair, and fired twice, hitting Cody, who fell to the ground. (A:3, 8). Cody is a paraplegic as a result of the shooting. (A:4).

The state's witnesses testified that, at the time that Ed Cody was shot, Mr. Baron was either inside of the Cody residence or already wounded, lying in front of the house. (A:7). Ed Cody testified that, after he was shot, he saw the three

men exiting his home; one had a chest wound and one, later identified by Cody as Mr. Barron, had a neck wound. (A:3). Mr. Barron had a mask no longer covering his face and a gun in hand, and collapsed in front of the house. (A:3). The others fled in the two vehicles. (A:3). Mr. Barron was left lying in front of the residence, wearing a bandana with a pair of gloves and gun nearby. (A:3).

Mr. Barron testified that he had accompanied the woman to the Cody home but was not involved with the other men who later arrived. (A:4). He attempted to intervene in the woman's behalf after a heated argument erupted between Cody, the woman, and one of the other men. (A:4). As Mr. Barron tried to convince the woman to leave, one of the other men started to force him at gunpoint in the direction of the Cody home. (A:4). This man shot Mr. Barron when Barron attempted to resist entering the house. (A:4, 7).

The state charged Mr. Barron with the attempted first degree murder of Ed Cody, and the jury returned a guilty verdict on the lesser offense of attempted second-degree murder. (A:7). On appeal, Mr. Barron raised several issues, including the insufficiency of the evidence to sustain the attempted second-degree murder conviction. (A:7). He argued that, according to the state's witnesses, at the time that Ed Cody was shot, Mr. Barron was either inside of the residence or lying wounded outside. (A:7). There was no evidence that he aided or abetted, or intended, the shooting. (A:8).

The Third District held that the shooting was in furtherance of the attempted robbery and not an independent criminal act and that Mr. Barron was therefore liable as a principal for the attempted murder. (A:9-23). The court concluded:

> [I]t 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. "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."

(A:22-23) (citations omitted).

SUMMARY OF ARGUMENT

The Third District's decision in this attempted second-degree murder case misapplies both felony-murder decisions of this Court, and the 30-year old decision of the First District in *Hampton v. State*, 336 So. 2d 378 (Fla. 1st DCA 1976).

The Third District's decision effectively holds that the elements of an attempted second-degree murder change when an additional felony offense is also committed. The court was confronted with the question whether a participant in an attempted armed robbery can be convicted of the attempted second-degree murder committed by a co-felon in the course of the felony solely by virtue of the fact that he was a partner in the underlying felony. The majority decision of the Third District, misapplying this Court's felony-murder jurisprudence, finds strict criminal liability if the attempted murder was in furtherance of the common scheme of the attempted robbery and not an independent act. The decision of the court below thus conflates criminal liability under the felony-murder rule with criminal liability under the principal/ aider and abettor rule, in a misapplication of felony-murder law that can only engender confusion in the lower courts.

The Third District's decision also misapplies the rule of *Hampton v. State,* 336 So. 2d 378 (Fla. 1st DCA 1976), which found criminal liability for an assault with intent to commit murder based upon then-extant felony-murder law. This felony-murder law no longer governs when there is no death involved. Under current law – Section 782.051(1), Florida Statutes (2008) - an additional overt act that could but does not cause death must be either committed or aided and abetted, for one to be culpable for a co-felon's attempted homicide on the ground that the attempt was committed in the course of committing another felony.

ARGUMENT

1. The Third District Misapplied *Adams v. State,* 341 So. 2d 765 (Fla. 1976), *Parker v. State,* 458 So. 2d 750 (Fla. 1984), *Lovette v. State,* 636 So. 2d 1304 (Fla. 1994), and *Ray v. State,* 755 So. 2d 604 (Fla. 2000).

The Third District, honoring no distinction between felony-murder and aider-and-abettor liability, misapplied seminal felony-murder precedent from this Court to uphold an attempted second-degree murder conviction based upon participation in an attempted armed robbery, where there was no evidence that Mr. Barron aided and abetted the act of shooting. The court found criminal liability for attempted second-degree murder because "the attempted murder of Ed Cody was *not* planned in advance" (A:19; original emphasis) and "because the defendant was a co-perpetrator in the commission of the attempted armed robbery, and the attempted killing of Ed Cody was during the commission and in furtherance of the attempted armed robbery, not outside of or foreign to their criminal purpose, the defendant was also guilty as a principal to that attempted murder." (A:19-20).

The Third District misapplied this Court's felony-murder decisions in *Adams v. State*, 341 So. 2d 765 (Fla. 1976), *Parker v. State*, 458 So. 2d 750 (Fla. 1984), *Lovette v. State*, 636 So. 2d 1304 (Fla. 1994), 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. Thus, the Third District found culpability, explicitly relying upon these felony-murder decisions that find that "co-felons may be held criminally responsible for the acts of co-perpetrators committed during the course or in furtherance of their initial criminal purpose." (A:12).

The Third District, citing *Adams*, opined that "[f]elons are generally held responsible for the acts of their co-felons." (A:12). Citing *Parker*, the court explained that this Court "found that since Parker was a principal of the *underlying criminal purpose* (the kidnapping of the victim when he failed to pay a drug debt), he was a principal in the homicide which was committed during the course of the criminal enterprise." (A:13; original emphasis). Citing *Lovette*, the court applied this Court's felony-murder rule that, because Lovett "was a willing participant in the armed robbery" (A:14) and "*because there was a causal connection between the robbery and the homicides, the evidence did not support an independent-acts theory of defense and the defendant was properly convicted as a principal to these murders." (A:14;* original emphasis). And citing and quoting *Ray*, the court found that culpability for an attempted homicide obtains "even though the murder was committed by a co-defendant" (A:14), where the defendant "*planned and committed an armed robbery" (*A:14; original emphasis), and the murder occurred

when "*the criminal episode had not ceased" (*A:15; original emphasis), and "*resulted from forces they set in motion."* (A:15; original emphasis).

There are two reasons why the Third District's holding constitutes a misapplication warranting discretionary review. First, the offense for which Mr. Barron was convicted is attempted second-degree murder, and not felony murder. And so traditional aider-and-abettor law pertains; not the strict liability imposed under felony-murder precedent. Second, 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. Attempted felony murder, since its codification in Section 782.051(1), Florida Statutes (1998), requires, in addition to the elements common to a completed felony murder, that the defendant commit, aid or abet, "an intentional act that is not an essential element of the felony and that could, but does not, cause the death of another." *Id.*

The Third District rejected petitioner's argument – that "because there is no evidence that the defendant intended that Ed Cody be murdered, and there was no evidence that he aided or abetted in the attempted murder of Ed Cody" (A:8), he could not be criminally liable where "[t]he State's witnesses testified that when Ed Cody was shot, the defendant was either inside of the Cody home or lying wounded in the front yard" (A:7) – through application of inapplicable felony-murder decisions of this Court. The Third District's conclusion that, "because the defendant was a co-perpetrator in the commission of the attempted armed robbery, and the attempted killing of Ed Cody was during the commission and in

furtherance of the attempted armed robbery, not outside of or foreign to their criminal purpose, the defendant was also guilty as a principal to that attempted murder" (A:19-20), is premised upon a misapplication of felony-murder jurisprudence and creates a conflict of decisions. *See Robertson v. State,* 829 So. 2d 901, 904 (Fla. 2002); *Vest v. Travelers Ins. Co.,* 753 So. 2d 1270, 1272 (Fla. 2000).

2. The Third District Misapplied *Hampton v. State,* 336 So. 2d 378 (Fla. 1st DCA 1976).

The Third District could find only one decision, *Hampton v. State,* 336 So. 2d 378 (Fla. 1st DCA 1976), to support its holding that "the principal theory of prosecution may be applied regardless of . . . whether the victim lives or dies" (A:22), and that the felony-murder tenets of *Lovett* and *Ray* discussed *supra* are apposite here. (A:22-23). Although the facts are substantially similar in that *Hampton* involved an attempted homicide during the commission of an attempted robbery, the principle of law – "that, where if the victim had died the defendant would have been held guilty of murder, the defendant may be held for assault with intent to commit murder if the victim lives" 336 So. 2d at 381 – no longer is valid.

Hampton properly 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." 336 So. 2d at 380. 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* Section 782.051(1), Florida Statutes

(1998). The Third District misapplied and extended *Hampton* far beyond its current reach, and created a conflict that can only engender confusion among the precedents. *See, e.g., Vest v. Travelers Ins. Co.,* 753 So. 2d at 1272; *Arab Termite & Pest Control of Florida, Inc. v. Jenkins,* 409 So. 2d 1039, 1040 (Fla. 1982).

CONCLUSION

Based upon the foregoing, Mr. Barron respectfully requests that this Court grant discretionary review in this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this brief on jurisdiction was mailed on November ___, 2008 to:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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