0/a 6-5-86

IN THE SUPREME COURT OF FLORIDA

FILED

JUN 1986

CLERK, SUPREME COURT
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ERINEO ACENSIO, :

Petitioner, :

vs. : Case No. 67,888

STATE OF FLORIDA, :

Respondent. :

_______________________________:

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

SUPPLEMENTAL BRIEF OF PETITIONER

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PRELIMINARY STATEMENT

This Brief is filed on behalf of the Petitioner, ERINEO ACENSIO, pursuant to the Court's request at oral argument. References to the Appendix to this brief are designated by "A" and the page number. References to the record on appeal are designated by "R" and the page number.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

In its instructions to the jury, the trial court set forth the elements of first degree murder, second degree murder, and manslaughter without mentioning the use of a firearm. (R245 - 248) The court then instructed the jury on the elements of attempt to commit a crime, again without mentioning the use of a firearm. (R248, 249) Next, the court instructed the jury on the elements of aggravated battery with a deadly weapon. (R249)

The court instructed the jury on the possible penalties to be imposed, including:

> For the offense of attempted manslaughter or the offense of aggravated battery, the maximum penalty is 15 years in the state prison with a minimum sentence of three years in the state prison. (R250)

The court read the verdict forms to the jury. (R257, 258) The only verdict form for attempted manslaughter was:

> We, the jury, find the defendant guilty of attempted manslaughter with the use of a firearm, a lesser included offense to that as charged in the information. (R258)

SUMMARY OF ARGUMENT

The trial court instructed the jury that the penalties for attempted manslaughter and aggravated battery were the same. The verdict form was for attempted manslaughter with a firearm. Therefore, the attempted manslaughter upon which the trial court instructed the jury was a felony of the second degree like the offense of aggravated battery for which Petitioner was convicted.

Since both attempted manslaughter with a firearm and aggravated battery were felonies of the second degree, neither offense could be a lesser included offense of the other. Thus, the attempted manslaughter instruction did not render the refusal to instruct on battery harmless. Battery was the next immediate lesser included offense to aggravated battery, and the refusal to instruct on battery was *per se* reversible error.

This Court should resolve the conflict between the District Court's decision and this Court's prior decision in *State v. Bruns*, 429 So.2d 307 (Fla. 1983), by quashing the District Court's decision and remanding with directions to reverse Petitioner's conviction and sentence and grant him a new trial.

ARGUMENT

ISSUE I.

THE TRIAL COURT ERRED BY REFUSING TO INSTRUCT THE JURY UPON THE LESSER INCLUDED OFFENSE OF BATTERY.

Petitioner was charged with attempted first degree murder with a firearm (R3, 4, 53, 54), a life felony. §§775.087 (1)(a), 777.04(4)(a), and 782.04(1)(a), Fla. Stat. (1983). He was convicted of aggravated battery with a firearm (R262, 266, 269), a felony of the second degree. [1/] §784.045(2), Fla. Stat. (1983).

On appeal to the District Court of Appeal, Second District, Petitioner argued that the trial court's refusal to instruct on battery (R219), a misdemeanor of the first degree, §784.03(2), Fla. Stat. (1983), was reversible error. The District Court affirmed, holding that the error was harmless. Acensio v. State, 477 So.2d 38 (Fla. 2d DCA 1985). (A1, 2) The District Court reasoned that battery was two steps removed from aggravated battery because the trial court instructed the jury on an intervening offense, attempted manslaughter, a felony of the third degree. 477 So.2d at 38 - 39. (A, 2)

This Court granted review of the District Court's decision on the basis of conflict with State v. Bruns, 429 So.2d 307 (Fla. 1983). In Bruns, this Court ruled that lesser included offenses and attempts are not interchangeable, so an attempt

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1/ This offense was not enhanced by the use of a firearm because the use of a deadly weapon is an essential element of aggravated battery. §§775.087(1) and 784.045(1)(b), Fla. Stat. (1983).

instruction does not provide a "step" for purposes of determining whether the refusal to give a lesser included offense instruction was harmless or reversible error. 429 So.2d at 309 - 310.

During oral argument before this Court, Petitioner's counsel pointed out that both he and the District Court had overlooked the trial court's penalty instruction and verdict form for attempted manslaughter. The trial court instructed the jury that the penalties for attempted manslaughter and aggravated battery were the same, a maximum of fifteen years imprisonment and a minimum of three years imprisonment. (R250) The verdict form was for attempted manslaughter with a firearm (R258), a felony of the second degree. §§775.087(1)(c), 777.04(4)(c), and 782.07, Fla. Stat. (1983). This Court directed Petitioner's counsel to submit a supplemental brief to help the Court determine the impact of this oversight upon the proper resolution of this case.

Since attempted manslaughter with a firearm and aggravated battery are both felonies of the second degree, neither offense can be regarded as a lesser included offense of the other. See State v. Carpenter, 417 So.2d 986, 987 (Fla. 1982) (where two crimes carry the same penalty, one is not the lesser of the other). Thus, the trial court's instruction on attempted manslaughter was not an intervening offense one step below aggravated battery as found by the District Court. Acensio v. State, 477 So.2d at 39. (A2) Therefore, the refused instruction on battery was only one step below aggravated battery, the offense for which Petitioner was convicted.

The failure to instruct on a lesser included offense which is but one step removed from the offense for which the defendant was convicted is per se reversible error. Reddick v. State, 394 So.2d 417, 418 (Fla. 1981). Since battery was the next immediate lesser included offense to aggravated battery, the failure to instruct on battery was per se reversible error. Foster v. State, 448 So.2d 1239 (Fla. 5th DCA 1984).

This Court's jurisdiction to review the decision of the District Court on petitioner's appeal is based upon the express and direct conflict between that decision and this Court's prior decision in State v. Bruns. See Art. V, §3(b)(3), Fla. Const. While one may speculate that no conflict would have occurred had the District court realized that the attempted manslaughter verdict form included use of a firearm, so that attempted manslaughter should not have been treated as a lesser offense intervening between aggravated battery and battery, the conflict remains on the face of the District Court's opinion.

"[I]t is the policy of this Court to avoid needless litigation and secure a final determination whenever possible." Ellison v. City of Fort Lauderdale, 183 So.2d 193, 195 (Fla. 1966). This Court has the power to reconsider and correct an erroneous ruling by the District Court. See Preston v. State, 444 So.2d 939, 942 (Fla. 1984). In order to achieve an expeditious resolution of the conflict between the District Court's decision and State v. Bruns and to secure a correct final determination of the merits of this case, this Court should quash the decision of

the District Court and remand with directions to reverse Petitioner's conviction and sentence and grant him a new trial.

CONCLUSION

Petitioner respectfully requests this Honorable Court to quash the decision of the District Court of Appeal, Second District and remand this cause with directions to reverse Petitioner's conviction and sentence and grant him a new trial.

Respectfully submitted,

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