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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

DENISE WILLIAMS,

Respondent.

Case No. SC21-587

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ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL, FIRST DISTRICT OF FLORIDA

JURISDICTIONAL BRIEF OF PETITIONER

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STATEMENT OF THE ISSUES

I. Whether a defendant who conspires to commit a crime and helps in planning the crime is liable as a principal under section 777.011, Florida Statutes, when the co-conspirator commits the crime they conspired to commit and mutually planned.

II. Whether the Legislature, in enacting the principal statute, intended to create a new offense or whether it intended to keep alive the distinctions between principals and accessories before the fact.

III. Whether an appellate court may, after rejecting an appellant's legal argument for reversal, sua sponte consider an argument not raised and then grant reversal on that basis.

STATEMENT OF THE CASE AND FACTS

Respondent and her husband, Mike Williams ("Mike")[1], were friends with Brian Winchester ("Winchester") and his wife. (App. 2).[2] Respondent and Winchester began an affair and they later discussed ways to be together. (App. 2). Respondent refused to divorce her

[1] The victim will be referred to by his first name because Respondent still uses his last name.

[2] The Appendix is cited as "App" followed by the page number appearing at the bottom of the opinion itself.

husband. (App. 2). Instead, she and Winchester "hatched a plan to kill Mike" and collect on his life insurance policy. (App. 2). Respondent and Winchester discussed alternative methods of killing Mike, and Winchester described the planning as "very mutual." (App. 2). In fact, Respondent "squashed plans that she thought were took risky." (App. 21).

After discussing and rejecting several plans, Respondent and Winchester decided that Winchester would kill Mike during a hunting trip and make it look like an accident. (App. 2-3). On December 16, 2000, Winchester took Mike on the planned hunting trip at Lake Seminole, pushed him into the water, and shot him in the head. (App. 4).

A jury found Respondent guilty of first-degree murder and conspiracy to commit first-degree murder and she appealed those convictions to the First District Court of Appeal. The First District affirmed the conviction for conspiracy to commit murder but reversed the conviction for murder. (App. 6-23). Although section 777.011 is unambiguous, the First District looked to the common law to define the statute's terms. Specifically, the First District concluded that in order to be a principal to a crime, one must be an accessory before

the fact or a principal in the first or second degree, as those terms were understood at common law. (App. 14-16).

The First District concluded that Respondent did not meet the requirements to be a common law accessory before the fact or principal in the first or second degree. Regarding the accessory before the fact, the First District acknowledged evidence of mutual planning, but held that Respondent did not do *enough* planning. (App. 17).

ARGUMENT

WHETHER THE FIRST DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION FROM THIS COURT OR ANOTHER DISTRICT COURT OF APPEAL ON THE SAME QUESTION OF LAW CONCERNING PRINCIPAL LIABILITY FOR ONE WHO CONSPIRES TO COMMIT A CRIME AND HELPS IN THE PLANNING OF SAID CRIME.

A. Standard of Review and Jurisdictional Criteria

Article V, § 3(b)(3) of the Florida Constitution provides: "[t]he supreme court ... [m]ay review any decision of a district court of appeal ... that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law." The conflict between decisions "must be express and direct" and "must appear within the four corners of the majority decision." *Reaves v. State*, 485 So.2d 829, 830 (Fla. 1986).

B. Jurisdictional Argument

This Court should exercise its conflict jurisdiction for any of three reasons. First, the First District misapplied this Court's precedent concerning reweighing the evidence. Second, the First District's holding that Respondent can agree to commit a crime and do some of the planning, but not be guilty of the substantive crime when her partner committed it, is in conflict with multiple decisions of this Court affirming convictions for a substantive crime based on nothing but participation in planning the crime. Finally, the First District's holding that the Legislature's use of the "ancient terms" from the common law evinces an intent to retain their common law meaning is in conflict with numerous cases holding that the Legislature intended to abolish all distinctions and technicalities between the common law crimes of accessory before the fact and principals in the first and second degree that permitted defendants to evade justice on mere technicalities.

Misapplication of this Court's Precedent

The First District's decision is a misapplication of this Court's decision in *Tibbs v. State*, 397 So. 2d 1120, 1123 (Fla. 1981), *aff'd sub nom. Tibbs v. Florida*, 457 U.S. 31 (1982), which prohibits

appellate courts from reweighing the evidence. A misapplication of this Court's precedent creates conflict jurisdiction. *Robertson v. State*, 829 So. 2d 901, 904 (Fla. 2002).

In its decision, the First District quoted *Tibbs* for the following proposition: "we do not reweigh conflicting evidence or retry the case; rather, we consider 'whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment.'" (App. 6). However, the First District reweighed the evidence and viewed it in the light most favorable to the defense when it acknowledged that Respondent and Winchester "hatched a plan to kill Mike[,]" (App. 2), but reasoned that Respondent did not do enough planning when it wrote, "[w]hile Brian characterized the planning of the murder as 'very mutual,' he also stated that he 'planned a lot of it' and that he 'instigated a lot of it.'" (App. 17). Winchester's testimony that the planning was "very mutual" and that he "planned a lot of it" necessarily meant that Respondent planned some of it. In essence, the First District reweighed the evidence and pardoned Respondent because of its belief that Winchester was more culpable. Once evidence of mutual

planning was placed before the jury, pursuant to *Tibbs* it was the jury's job to assign it weight and significance, not the First District's.

Additionally, the First District acknowledged that "[f]or their plan to work, the trip had to occur … before one of Mike's life insurance policies lapsed[,]" but then reweighed the evidence and determined that Respondent's secretly paying the premium on that insurance policy to extend the window of opportunity to commit the murder was not sufficient evidence of assistance before the murder. (App. 3, 19-20). This was yet another example of blatant reweighing of the evidence, which *Tibbs* forbids, and another encroachment on the jury's job to assign weight and significance to the evidence. As such, the First District misapplied *Tibbs*, thereby creating a basis for conflict jurisdiction.

Conflict of Decisions Concerning Vicarious Liability for Participation in Planning a Crime Physically Committed by a Partner

In addition to misapplying this Court's decision in *Tibbs*, the First District's decision conflicts with a century of case law from this Court that has affirmed convictions for a substantive offense based on evidence of participation in planning the crime and without requiring actual or constructive presence at the scene. For instance,

in *State v. Dene*, "Dene concocted a plan in which her daughter and a cohort would commit a burglary/robbery of the elderly woman" Dene worked for. 533 So. 2d 265, 266 (Fla. 1988). The plan required the daughter and cohort to treat Dene as a victim in order to conceal her involvement. *Id.* However, Dene was fired before the plan could be executed. *Id.* The daughter and cohort went forward anyway, though Dene was not present. *Id.* During the crime, the elderly woman was killed. *Id.* The jury ultimately found Dene guilty of second-degree murder after the trial court granted a directed verdict on the first-degree felony murder charge, but Dene argued she could not be guilty because she was not present during the crime. *Id.* On those facts, this Court held that "Dene was correctly charged with first-degree murder and it was error to direct a verdict on that charge." *Id.* at 269-70. It then summarized that the directed verdict due to her absence from the scene was based on "incorrect" case law. *Id.*

In this case, the First District acknowledged that "Brian and Denise hatched a plan to kill Mike." (App. 2). It also acknowledged evidence that the planning was "very mutual" and that Respondent "squashed plans that she thought were too risky." (App. 2, 17, 21).

Such facts make this case indistinguishable from *Dene*. There is no difference between one who "concocted" the plan, as in *Dene*, and one who jointly "hatched" the plan to commit murder and "mutual[ly]" participated in the planning of that murder. (App. 2, 17, 21). In fact, if it was error to direct a verdict in *Dene* for first-degree murder when all Dene did was plan a robbery, then it would certainly have been error here for the trial court to grant an acquittal on a murder charge for Respondent when she helped plan the very murder the court found she conspired to commit.

In *State v. Lowery*, "Lowery and Greg Sizemore planned the robbery of Leroy Moss. Sizemore committed the robbery during which Moss was killed. None of the evidence produced at trial placed Lowery at the scene of the crimes during their commission...." 419 So. 2d 621, 622 (Fla. 1982). On those facts, this Court held that Lowery "was an accessory before the fact." *Id.* at 624. Because Lowry was an accessory before the fact, he was a principal to the robbery. *Id.* (citing § 776.011, Fla. Stat. (1971)). This Court also held that by virtue of being a principal to the robbery, Lowery was also guilty of second-degree murder when his partner in crime murdered the robbery victim. *Id.* Notably, this Court's decision was not based on Lowery's

level of participation in the planning. Nor did it require his actual or constructive presence at the scene.

In this case, just as in *Lowery*, "Brian and Denise hatched a plan to kill Mike," and the planning was "very mutual." (App. 2, 17). If the defendant in *Lowery* could be convicted of felony murder based solely on his participation in planning the robbery his partner committed that led to the death of the victim, then it necessarily follows that Respondent was properly convicted of premeditated murder when she helped plan the very murder her partner committed.

In *Arnold v. State*, Augustus Armstrong was a police officer and approached a hotel night desk clerk "with a scheme to stage a fake robbery." 83 So. 2d 105, 106 (Fla. 1955). According to the plan, Armstrong's confederates would enter the hotel, bind the clerk, and empty the safety deposit boxes *Id.* The clerk reported the plot to the police, who instructed the clerk to continue to play along. *Id.* As planned, Armstrong's confederates entered the hotel, bound the clerk, with his consent, and also bound the bellboy and a guest. *Id.* The police disrupted the robbery before it was completed. *Id.* Armstrong was not present when the crime occurred. *Id.* at 106-07.

This Court held that "Armstrong was guilty of the offense of being an accessory before the fact to the crime of assault with intent to commit grand larceny." *Id.* at 108-09.

Arnold conflicts with the First District's holding that "the terms 'counsel,' 'hire,' and 'procure' historically would not have included the mere agreement to commit an offense or the mere scheming with someone else to commit an offense in the future, because that was not the type of conduct that would have made someone an accessory before the fact...." (App. 12). In this case, Respondent jointly "hatche[d]" a plan to commit murder, "mutual[ly]" participated in the planning of that murder, and "squashed plans that she thought were too risky" in favor of another plan. (App. 2, 17, 21). That is no different than *Arnold*.

If one is guilty of felony murder after agreeing to commit and helping plan the commission of one felony that results in the death of the victim, as in *Dene* and *Lowery*, then it necessarily follows that Respondent was guilty of premeditated murder when her partner in crime committed the very murder Respondent conspired to commit and helped plan. *See Connolly v. State*, 172 So. 3d 893, 924 (Fla. 3d DCA 2015) (noting that FBI agent was principal to murder of

informant when the agent contacted Whitey Bulger and told him to "handle it" and further noted that agent would have been a principal even if all he had done was "participate in the planning and preparations of the murder.")

In sum, the First District acknowledged that there was evidence of mutual planning and an agreement to commit murder but reversed because, in its view, Winchester did the majority of the planning and work. That is blatant reweighing of the evidence, which *Tibbs* forbids. There was evidence of mutual planning and an agreement to commit murder. Pursuant to *Lowery*, *Arnold*, and *Dene* that was all that was required and the First District's decision to the contrary is in conflict.

Conflict of Decisions Concerning the Legislative Intent in Enacting the Principal Statute

In its decision, the First District acknowledged that in 1957, the Legislature drafted the current principal statute with the intention of eliminating the distinctions among accessories before the fact and principals in the first and second degree. (App. 13-14). However, it then held that because the Legislature used the "ancient terms" from the common law, it intended those terms to retain their common law meaning. (App. 14). This conflicts with multiple cases recognizing

that the common law requirements do not apply to one charged under the principal statute. *See Potts v. State*, 430 So. 2d 900, 902 (Fla. 1982) (noting that Ch. 57-310, Laws of Florida was passed in order to avoid distinguishing between accessories before the fact and principals, and rejecting argument that the principal statute imposed common law requirements); *State v. Blackburn*, 314 So. 2d 634, 636-37 (Fla. 4th DCA 1975) (noting that the terms "principal in the second degree" and "accessory before the fact" have become "obsolete" under the principal statute and that those terms "appear to have passed into the judicial history of the State of Florida. We now only have principals in the first degree."); *State v. Peel*, 111 So. 2d 728, 732 (Fla. 2d DCA 1959) (noting that if an accessory before the fact is charged "in the common-law-mode the common-law rules control the trial of the accessory," but if the accessory is charged for the substantive offense under the principal statute, the common law rules requiring prior conviction of the principal do not apply).

If the Legislature clearly intended section 777.011 to eliminate ancient common law requirements and distinctions that permitted defendants to evade justice on technicalities, as the enacting clause, *Potts*, *Blackburn*, and *Peel* demonstrate, then the Legislature could

not have intended the terms, "aids, abets, counsels, hires, or otherwise procures" in that statute to have an ancient meaning that permits defendants to evade justice on technicalities rooted in the same distinctions the Legislature explicitly rejected. Therefore, conflict exists, and this Court should exercise jurisdiction.

CONCLUSION

Based on the foregoing discussion, this Court should exercise its conflict jurisdiction.

CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Philip Padovano at PPadovano@BHAppeals.com on April 21, 2020.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing satisfies the word count provision of Florida Rule of Appellate Procedure 9.210 and other requirements of Florida Rule of Appellate Procedure 9.045.

Respectfully submitted and certified,
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