Number S123074

SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)
Plaintiff/Respondent,	)
v.	)
JARMAAL LARONDE SMITH,	)
Defendant/Appellant.	)

Appeal from the Superior Court of Sacramento County,
Case Number 00F01948

Hon. Michael S. Ullman, Judge

APPELLANT'S BRIEF ON THE MERITS

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* By appointment of the court of appeal under the C.C.A.P. independent case system

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INTRODUCTION

Jarmaal Laronde Smith (appellant) petitioned for review after the Court of Appeal affirmed several felony convictions which all arose from a single incident in which appellant fired a single shot from a firearm. Two of the convictions were for attempted murder. Appellant contends that under a proper application of the law and of this court's cases, only a single attempted murder conviction was possible on the facts here.

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The court granted review without further comment or specification of the issue(s). The issue as framed in the Petition for Review is:

THE SUPREME COURT SHOULD CONSIDER THE CONFLICT BETWEEN ITS OWN RECENT DECISION ON THE SUBJECT OF WHAT PROOF OF INTENT IS NECESSARY TO SUPPORT A CONVICTION OF ATTEMPTED MURDER, AND A DEVELOPING LINE OF COURT OF APPEAL DECISIONS ON THIS SUBJECT

RULE 29.1(c) CERTIFICATION

The undersigned counsel hereby certifies as follows, pursuant to rule 29.1(c) of the California Rules of Court:

The word count of this brief on the merits is: 2,620.

STATEMENT OF THE CASE

An amended information (C.T. 63) filed December 7, 2000, alleged five felony counts against appellant, all arising out of an incident on February 18, 2000, in which a single gunshot was

fired at a vehicle. Counts 1 and 2 alleged attempted murder (Pen. Code, §§ 664, 187) of, respectively, Karen Anderson and Renell Thorpe, Sr. Counts 1 and 2 are the only ones concerned in the proceedings before this court.

Count 3 alleged discharging a firearm at a vehicle (Pen. Code, § 246). Count 4 alleged causing a child to be endangered, under conditions likely to produce great bodily harm or death (Pen. Code, § 273a, subd. (a)). Count 5 alleged assault with a firearm (Pen. Code, § 245, subd. (a)(2)). The information alleged further, for sentence enhancement as to each count, that appellant used a firearm in the crime. The enhancements as to counts 1, 2, and 3 were pled under subdivision (b) of Penal Code section 12022.53; the enhancements as to counts 4 and 5 were pled under Penal Code section 12022.5.

The case was tried to a jury between December 7 and December 22, 2000. (C.T. 60-61,67-68, 74-80, 89-90, 93-96, 99-102; R.T. 20-473.) At the close of the evidence the court granted a motion by the prosecution to amend the information, such that it alleged the victim of count 2 to be Renell Thorpe, Jr.; alleged the count-3 firearm use enhancement under Penal Code section 12022.5, not section 12022.53; and alleged the other two section 12022.53 enhancements under subdivision (c) (relating to discharge of the firearm), instead of subdivision (b). (C.T. 89-90; R.T. 320-321, 408-410.)

The jury found appellant guilty as charged and found the enhancement allegations true, on all counts. (C.T. 100-102, 145-

149; R.T. 459-462.)

On December 12, 2002, the court pronounced judgment and sentenced appellant to a term of 27 years' imprisonment. The components of the term were a middle term of seven years, plus a 20-year enhancement, on count 1; a like term, to be served concurrently, on count 2; and terms that were stayed, pursuant to Penal Code section 654, on counts 3, 4, and 5. (C.T. 14, 247; R.T. 530-536.) Appellant was credited with 1,009 days of prejudgment time served.

By an opinion filed February 2, 2004, the Court of Appeal, Third Appellate District, modified the judgment with respect to the stayed sentence on count 3, and affirmed it as so modified. This court granted review by an order filed May 12, 2004.

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STATEMENT OF FACTS

On February 18, 2000, Karen Anderson was driving in her car, along with her boyfriend, Renell Thorpe, Sr., and their baby, Renell Thorpe, Jr. The baby was in a rear-facing infant seat that was located behind the driver's seat.[1] Anderson and Thorpe had a dispute about Thorpe's having flirted with a girl, and it was agreed that Anderson would drop Thorpe off at a friend's house on Greenholme. (R.T. 20-24.)

When they arrived at that location Thorpe got out of the car. Anderson noticed appellant riding up on a bicycle. There were three to five other males in the vicinity also. Anderson knew appellant, because she had "kind of dated" him in the past. The last time she had talked to appellant, several months earlier, appellant had said that the next time he saw her he was going to "slap the shit out of you." (R.T. 26-27, 30-31, 36-40, 62.)

On this occasion appellant approached the car and said to Anderson, "Don't I know you, bitch?" Hearing this, Thorpe turned around and returned to the car, saying, "Well, you don't know me." Appellant responded by lifting his shirt and showing that there was a gun tucked in his waist band. Thorpe said words to the effect of, "it is cool," and re-entered the car. The other men in the area approached the car. They and appellant began

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[1] For clarity, the boyfriend will be referred to here as Thorpe, or Renell Thorpe, and the baby will be referred to as the baby.

striking Thorpe. As soon as Thorpe was securely inside the car, Anderson started to drive away. After she had traveled about one car length, a single shot rang out, and a bullet entered through the rear window, passed through the driver's side headrest, and lodged in the driver's side door. Anderson drove away from the area. When she reached a place of safety, she stopped and checked the baby. His face was full of glass pieces, and he was screaming. (R.T. 34, 42-52, 58; also R.T. 236 [police officer's testimony about final location of bullet].)

Anderson did not see appellant pull the trigger, but through the rearview mirror she thought she did see appellant pointing a gun at the car. She could not be sure it was appellant who fired the shot, but appellant was the only one she saw with a gun. (R.T. 78, 81-82.)

Renell Thorpe testified, reluctantly, to his version of the event. He really did not remember that day, though. He did hear the individual say the "B word" to Anderson, and it made him angry. He wanted to fight the man. But the man lifted his shirt and showed a .38 caliber hand gun in his waist band. So Thorpe said, "It is cool," and got back into the car. The man reached in and tried unsuccessfully to strike Thorpe. Thorpe threw a can of beer at the assailant. Anderson started to drive away. Thorpe heard a gunshot, and the rear window shattered. (R.T. 147-169.)

Appellant testified. In his version, he was unarmed, and it was Thorpe who displayed a weapon. Appellant heard the gunshot,

and immediately threw himself to the ground to protect himself. The gunshot was not fired by Thorpe. After he hit the ground appellant heard more shots. (R.T. 333-351.)

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DISCUSSION

THE SUPREME COURT SHOULD RESOLVE THE CONFLICT BETWEEN ITS OWN RECENT DECISION ON THE SUBJECT OF WHAT PROOF OF INTENT IS NECESSARY TO SUPPORT A CONVICTION OF ATTEMPTED MURDER (People v. Bland (2002) 28 Cal.4th 313), AND A POTENTIAL ALTERNATE APPROACH BASED ON COURT OF APPEAL DECISIONS ON THIS SUBJECT

The significant question in the appellate proceedings in this case has been whether, in addition to his liability for attempted murder of Karen Anderson, appellant was properly held liable also for attempting to murder her baby with the same single shot. There was no proof of animus towards the baby, but the track of the shot came close to the baby's location.

Appellant has contended that this issue is essentially controlled by this court's decision in People v. Bland (2002) 28 Cal.4th 313. In Bland, two gang members fired a fusillade of bullets at the retreating car of a rival gang member who happened to have two non-gang-member passengers along. The primary holding of this court in Bland was that the transferred intent doctrine does not apply in this situation. Thus, under Bland, when appellant shot at Anderson, his intent to kill her did not "transfer" to the baby, such that he was automatically guilty of attempting to kill the baby, because he intended to kill Anderson.

In Bland the court proceeded to discuss decisively the question of how fact finders can analyze situations where more than one potential victim is in the vicinity, and an attempted

murder charge is considered or is leveled with respect to one or more of these additional people:

> "The conclusion that transferred intent does not apply to attempted murder still permits a person who shoots at a group of people to be punished for the actions towards everyone in the group even if that person primarily targeted only one of them. As to the nontargeted members of the group, the defendant might be guilty of crimes such as assault with a deadly weapon or firing at an occupied vehicle. [Citation.][2] More importantly, the person might still be guilty of attempted murder of everyone in the group, although not on a transferred intent theory. * * * [A]lthough the intent to kill a primary target does not *transfer* to a survivor, the fact the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within what [may be] termed the 'kill zone.' 'The intent is concurrent . . . when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by *harming everyone in that victim's vicinity*. For example, an assailant who places a *bomb on a commercial airplane* [may be guilty of attempted murder of non-targeted persons] . . . Similarly, consider a defendant who intends to kill A and, in order to ensure A's death, drives by a group consisting of A, B, and C, and attacks the group with *automatic weapon fire or an explosive device devastating enough to kill everyone in the group*. The defendant has intentionally created a "kill zone" to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim. *When the defendant escalated his mode of attack from a single*

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[2] Note that here, too, appellant was convicted of other assaultive crimes as a consequence of his drawing and firing the gun, and the validity of these convictions is not and has not been contested.

> *bullet aimed at A's head to a hail of bullets or an explosive device*, the factfinder can infer that, whether or not the defendant succeeded in killing A, the defendant concurrently intended to kill everyone in A's immediate vicinity to ensure A's death.' "
>
> (28 Cal.4th at pp. 329-330, first emph. in orig.)

Unmistakably, it would seem, under Bland appellant could not be convicted of attempted murder of Karen Anderson's baby. This case did not involve a hail of bullets or a bomb or any other form of "escalat[ion] [of the] mode of attack from a single bullet."

The Court of Appeal affirmed the conviction, however, by noting that in Bland this court did not overrule or disapprove People v. Chinchilla (1997) 52 Cal.App.4th 683, and therefore Bland can be read as approving Chinchilla, and Chinchilla can be construed such that a single shot fired at a single victim will support multiple attempted murder convictions. (See Attach. A to Petition for Review, pp. 9-10 (formerly reported at 115 Cal.App.4th 567, pp. 572-573).)[3]

Appellant argued below, and argues again here, that Chinchilla was wrong when it was filed, and it was simply a bad appellate opinion. The decision in Chinchilla was based in part

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[3] Chinchilla is mentioned once in the Bland opinion, but only as a secondary or tertiary citation on the point that it is settled that the transferred intent doctrine does not apply to attempted murder. (28 Cal.4th at p. 326.) Bland contains no discussion of the Chinchilla court's disposition of the issue before the court here, the issue of actual intent to murder a person or persons other than the primary targeted victim.

on a concession of the key issue by counsel for the appellant, a concession which, even if it was justified before Bland was decided, cannot be justified afterwards: Counsel conceded "that one shot could support a conviction on two counts of attempted murder if there was evidence that the shooter saw both victims" (52 Cal.App.4th at p. 690). This concession is inconsistent with the law as stated in Bland.

Additionally, the Chinchilla court mis-applied the substantial evidence rule, looking not to the question of whether there was substantial evidence sufficient to persuade a reasonable person beyond a reasonable doubt of the defendant's guilt, but instead to the questions of whether the evidence "compels" a not guilty verdict, or "establishes" innocence (*ibid.*, second full paragraph on p. 690). The Chinchilla court also assumed facts not in the record (i.e., that the shooter "abandoned" an intention to fire more shots, and that had the shooter not been a "poor marksman" he would have hit both targets with one bullet) (*ibid.*).

Separately — and most important of all — the Chinchilla court conceded that at that time, five years before Bland was decided, there were *no California cases on point*. (*Ibid.,* final full sentence on p. 690.)

It would seem unquestionable that after Bland, Chinchilla must be considered not good law. But the Bland opinion did not expressly say so, and the decision in the Court of Appeal's originally published opinion in this case suggests that some

courts, at least, will follow Chinchilla and validate attempted murder prosecutions and convictions in cases where this court's reasoning in Bland will not permit it.

Accordingly, this court should reaffirm its decision in Bland, disapprove People v. Chinchilla (1997) 52 Cal.App.4th 683, and the reasoning it employs, and reverse the count-2 attempted murder conviction in this case.

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CONCLUSION

For the reasons noted above, the count-2 conviction in this case should be reversed.

Respectfully submitted,

DATE: July 26, 2004

GREGORY MARSHALL

Attorney for Appellant

PROOF OF SERVICE BY MAIL

CASE: People v. Smith, no. S123074

DATE: July 26, 2004

I am a citizen of the United States and am employed in the County of Shasta, State of California. I am over 18 years of age and not a party to the within action. My business address is P.O. Box 996, Palo Cedro, California 96073.

On the date stated above I served the following document(s) on the parties indicated, by placing a true copy of each in an envelope, bearing first class postage prepaid, addressed as indicated below, and deposited the same in the U.S. mail at Palo Cedro, California.

DOCUMENT(S): Appellant's Brief on the Merits

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Jarmaal L. Smith

Executed July 26, 2004, at Palo Cedro, California.

I declare under penalty of perjury that the foregoing is true and correct.

GREGORY MARSHALL