

No. 78739-5

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BY C. J. RITT
CLERK

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the matter of the Personal Restraints of Jacob Bowman and Johnny Nav
STATE OF WASHINGTON,

Respondent,

v.

JACOB BOWMAN,
JOHNNY NAV

Petitioner.

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FROM THE COURT OF APPEALS, DIVISION I

Court of Appeals No. [REDACTED]; 53250-2-I

MOTION OPPOSING PETITION FOR REVIEW

DAVID S. McEACHRAN
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A. Identity of Respondent

Respondent, State of Washington, by Kimberly Thulin, Appellate Deputy Prosecutor for Whatcom County, seeks the relief designated in Part B.

B. Decision and Relief Requested

Respondent asks this court to deny petitioner's request to review the court of appeals decision dismissing petitioner's untimely personal restraint petitions. See COA slip opinion, attached and incorporated herein as respondent's Exhibit A.

C. Issues Presented for Review

Petitioners Nav and Bowman seek review of the court of appeal's order denying their personal restraint petitions. Bowman and Nav contend the court of appeals erred by not extending the scope of In re Address, 147 Wn.2d 602, 56 P.3d 981 (2002), to find that reckless endangerment/drive by shooting may not serve as a predicate offense to felony murder in the second degree. The state, as respondent, respectfully contends that drive by shooting continues to support a conviction for felony murder in the second

degree and therefore requests this court deny the petitioners' request for discretionary review of their untimely petitions.

D. Facts Relevant to Motion

On July 3rd, 1997, Jacob Bowman fired a gun out of the window of a moving car into an apartment. One of his bullets struck and killed 18 year-old, Raymond Hunter. On April 30th, 1998 Bowman plead guilty to the amended charge of felony murder in the second degree predicated on drive by shooting. Johnny Nav plead guilty in 1997 to second degree felony murder predicated on reckless endangerment. Nav acknowledged he shot a gun out of a van striking and killing James Tauple.

On October 23rd, 2003 Bowman filed a personal restraint petition with the court of appeals requesting his conviction be reversed in light of In re Andress, 147 Wn.2d 602, 56 P.3d 981 (2002), wherein this court determined *assault in the second degree* cannot serve as a predicate offence to felony murder. Nav filed a similar petition asserting reckless endangerment can no longer serve as a predicate offense to felony murder. Bowman and Nav argued that in light of Andress, drive by shooting/reckless endangerment should no longer serve as a predicate offense to

felony murder in the second degree. The court of appeals rejected this argument and declined to extend or apply Andress with such broad application. Bowman and Nav now seek review of this court of appeals decision.

E. Argument in Opposition to Discretionary Review

For the reasons outlined below Bowman and Nav's motion for discretionary review should be denied. RAP 13.5 (a)-(c) governs a motion for discretionary review of an order dismissing a Personal Restraint Petition. RAP 16.14 (c). Pursuant to RAP 13.5(b), the court will grant review only:

- (1) If the court of appeals has committed obvious error which would render further proceedings useless; or
- (2) if the court of appeals has committed probable error and the decision of the court of appeals substantially alters the status quo or substantially limits the freedom of a party to act; or
- (3) if the court of appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such departure by a trial court or administrative, as to call for the exercise of revisory jurisdiction by the Supreme Court.

The court of appeals did not commit obvious error by dismissing Bowman and Nav's untimely personal restraint petition. Felony murder in the second degree may still be

predicated on the distinct crime of drive by shooting. RCW 9A.32.050(1)(b). As such, In re Andress is not material to Bowman and Nav's case and does not provide a basis for filing an untimely collateral attack. Absent a showing of materiality, Bowman and Nav's petitions are untimely and consequently, procedurally barred. RCW 10.73.090(1). Petition for review should be denied.

The legislature intends persons who commit the felony of drive by shooting, a class B felony, to be strictly liable for any death caused in furtherance of such crime. RCW 9A.36.045. Bowman asserts however, pursuant to Andress, that there is no distinction between the crime of drive by shooting and assault in the second degree because both crimes are listed in the "assault" chapter of the Revised Code of Washington, that predicating felony murder on drive by shooting renders the "in furtherance language" of the felony murder statute meaningless and that Bowman and Nav's convictions for felony murder should therefore be vacated. See Pet for Rev at 4.

A person is guilty of felony murder in the second degree when he commits or attempts to commit *any felony* other than

those enumerated in RCW 9A.32.030 (1)(c) and, in the course of and in furtherance of such crime or immediate flight therefrom, he or another participant, causes the death of a person other than one of the parties. (*emphasis added*).

In Andress, this court, relying in part on the “in furtherance language” of the 1975 version of the felony murder statute, concluded the legislature could not have intended assault in the second degree to be a predicate offense to felony murder. The court determined it was illogical to find assault part of the ‘res gestae’ of the murder where the assault and murder constitute the same conduct. See, In re Andress, 147 Wn.2d at 610. Andress is not material to Bowman or Nav’s convictions for felony murder predicated on drive by shooting/reckless endangerment.

The felony of drive by shooting was created by the legislature, initially as reckless endangerment in the first degree, in response to increasing concern over drug trafficking related to drive by shootings and to ensure appropriate punishment for such offenders. See 1989 Laws of Washington, Ch.271, section 102, 103, 109, 100. Laws of 1997, Ch. 338, section 44. Drive by shooting is categorized as a “violent offense,” with a seriousness

level of VII; significantly higher category than assault in the second degree, which is ranked at a seriousness level IV. See sentencing guidelines manual (1997), IV-5, IV-8, felony index. As such, contrary to Bowman's contention, drive by shooting is a separate, distinct and more serious crime from assault in the second degree.

Holding a person strictly liable for any death caused in furtherance of the commission of such an inherently dangerous activity is well within reason and within our legislature's intent, particularly in light of our legislature's clarification in 2003 reaffirming its intent that "any felony" including assault in the second degree, may support a felony murder conviction. See Laws of 2003, Ch.3, section 1, 3. Certainly, the legislature did not and does not intend a different result when the predicate offense is the more serious offense of felony drive by shooting.

Furthermore, predicating felony murder on drive by shooting does not render the "in furtherance" language of the felony murder statute meaningless. Unlike the concerns expressed in Andress when felony murder is predicated on assault in the second degree, the elements of drive by shooting do not

encompass committing homicide. Drive by shooting requires a person to recklessly discharge a firearm in a manner which creates substantial risk of death or serious physical injury to another person and the discharge is either from a vehicle or the immediate area of the vehicle used to transport the shooter. RCW 9A.36.045. This offense only falls within the felony murder rule when a bullet actually strikes and kills someone. Where it is possible to commit the predicate felony without causing death, such predicate offenses should be considered sufficiently independent to fall within the felony murder rule. See, State v. Daniels, 124 Wn.App.830, 103 P.3d 249 (2004).

Washington courts have previously recognized that first-degree reckless endangerment, drive by shooting's predecessor, could serve as a predicate offense for felony murder. State v. Gilmer, 96 Wn.App. 875, 883-886, 981 P.2d 902 (1999), *review denied*, 139 Wn.2d 1023 (2000). Additionally, this court previously rejected applying a felony murder merger analysis in State v. Harris, 69 Wn.2d 928, 421 P.2d 662 (1966), where the defendant had, "with gun in hand, threatened to kill several people, pointed the gun and pulled the trigger." There, this court

found that such facts did not warrant application of the merger doctrine. Similarly, the facts of this case do not warrant extending the analysis set forth in Andress; drive by shooting is and should remain a valid predicate offense to felony murder.

Conclusion

Based on the preceding analysis, the arguments set forth in the State's collective response briefs before the court of appeals and the court of appeals opinion below, the respondent respectfully requests Bowman and Nav's motion for discretionary review be denied.

DATED this 30th day of May, 2006.

Respectfully submitted,



Kimberly Thulin, #21210
Appellate Deputy Prosecutor
Attorney for Respondent

CERTIFICATE

I certify that on this date I placed in the United States mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this certificate is attached to the following:

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EXHIBIT A

of reckless endangerment. Our Supreme Court later decided Personal Restraint of Address, 147 Wn.2d 602, 56 P.3d 981 (2002), holding that second degree assault cannot be a predicate crime for second degree felony murder. Bowman and Nav contend that we should apply the reasoning of Address and hold that drive-by shooting/reckless endangerment also cannot be a predicate offense for second degree felony murder. They contend that their PRPs are not time-barred because Address represents a change in the law material to their conviction. We disagree and deny the petitions.

FACTS

Jacob Bowman pleaded guilty to second degree murder with the predicate felony of drive-by shooting in 1998. The amended information alleged that Bowman, while committing or attempting to commit the crime of drive-by shooting, and in the course of and in furtherance of that crime, and in immediate flight from that crime, shot and killed Raymond Hunter. Bowman admitted that he fired a weapon into an apartment during a drive-by shooting. The court sentenced Bowman to 280 months.

Johnny Nav pleaded guilty to second degree murder with the predicate felony of reckless endangerment in 1997.¹ The amended information alleged that Nav, while committing or attempting to commit the crime of reckless endangerment, and in the course of and in furtherance of that crime and in

¹ In his PRP, Nav claims that he was convicted of second degree murder with the predicate felony of second degree assault. In fact, although the first information charged him with second degree murder with the predicate felony of assault, the amended information, to which he pleaded guilty, charged him with second degree murder with the predicate felony of reckless endangerment.

immediate flight therefrom, caused the death of James Taupule. Nav admitted that he shot out of a van and killed Taupule, and although Nav stated that he was acting in self-defense, he admitted the force he used was not reasonable. The court sentenced Nav to 180 months on the second degree felony murder charge.

ANALYSIS

Bowman's and Nav's claims are time-barred unless Andress, 147 Wn.2d 602, is a significant change in the law that is material to their convictions under RCW 10.73.100(6).² Under RCW 10.73.090(1), "[n]o petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction." RCW 10.73.100 provides several exceptions to the one-year time-bar, including if there has been a significant change in the law which is material to the conviction and is applied retroactively. RCW 10.73.100(6). The Supreme Court held in Andress that the legislature did not intend that assault could serve as the predicate for second degree felony murder.³ Andress, 147 Wn.2d at 615-16. The Supreme Court has also held that second degree felony murder with assault as the predicate under former RCW 9A.32.050 is a non-existent crime

² Bowman also claims that his PRP is not time-barred for two alternate reasons. He claims that the judgment and sentence is not valid on its face as required by RCW 10.73.090(1), because he was convicted of the nonexistent crime of felony murder predicated on drive-by shooting. He also contends that the felony murder statute was unconstitutional as applied to him under RCW 10.73.100(2), because it violates due process to convict someone of a nonexistent crime. These claims turn on whether Andress applies to drive-by shooting/reckless endangerment, so we will not address them separately.

³ The legislature disagreed and in 2003 amended RCW 9A.32.050 to explicitly include assault as a predicate offense. The legislature indicated that it has always intended that assault may serve as a predicate. Laws of 2003, ch. 3, § 1. This statement of intent, however, only applies prospectively. Pers. Restraint of Hinton, 152 Wn.2d 853, 861, 100 P.3d 801 (2004)

under Andress, and that such a conviction is accordingly invalid on its face and not subject to RCW 10.73.090's time-bar. Pers. Restraint of Hinton, 152 Wn.2d 853, 857-58, 100 P.3d 801 (2004).

A person is guilty of second degree felony murder when he or she commits or attempts to commit any felony other than the first degree felony murder predicates, and, in the course of and in furtherance of such crime or in immediate flight therefrom, he or she, or another participant, causes the death of a person other than one of the participants. Former RCW 9A.32.050(1)(b) (1975). Up until 1997, the drive-by shooting statute provided that

A person is guilty of reckless endangerment in the first degree when he or she recklessly discharges a firearm as defined in RCW 9.41.010 in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.

Former RCW 9A.36.045 (1995). In 1997, the legislature substituted the words "drive-by shooting" for "reckless endangerment in the first degree." Laws 1997, ch. 338, § 44. Hence, although Bowman and Nav committed the same crime, Nav is charged differently because he committed the crime before 1997.

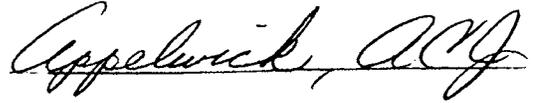
Andress is not a change in the law material to Bowman's and Nav's convictions. This is because Andress was limited to whether the crime of assault could be used as a predicate for second degree felony murder. The Washington Supreme Court has only applied Andress to cases in which the predicate crime

was an assault.⁴ See Hinton, 152 Wn.2d at 857 (“assault” was the predicate felony for each petitioner’s second degree felony murder conviction); State v. Hanson, 151 Wn.2d 783, 784, 91 P.3d 888 (2004) (court applied Andress to vacate second degree felony murder conviction based on second degree assault).

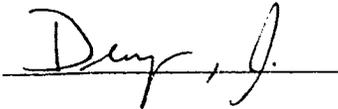
Drive-by shooting/reckless endangerment is not the same crime as assault—it is separate and distinct. Nevertheless, Bowman and Nav ask us to extend Andress to drive-by shooting/reckless endangerment, arguing that the logic of Andress is applicable. But that is not our function in reviewing a personal restraint petition. That decision is properly left to the Supreme Court. The issue before us is whether the Andress decision is a change in the law material to the convictions before us, not whether Andress should be extended to crimes other than assault. We hold that Andress is not a change in the law that is material to

⁴ Division Two of this court has applied Andress to vacate second degree felony murder convictions based on the predicate crimes of second degree assault of a child and third degree assault of a child. State v. DeRosia, 124 Wn. App. 138, 140-41, 100 P.3d 331 (2004) (second degree assault of a child); State v. Madarash, 116 Wn. App. 500, 515-16, 66 P.3d 682 (2003) (third degree assault of a child). Division Two has also specifically declined to extend Andress to a case in which criminal mistreatment was the predicate crime. State v. Daniels, 124 Wn. App. 830, 841-42, 103 P.3d 249 (2004),

the convictions.⁵ Bowman's and Nav's petitions are time-barred and are denied.



WE CONCUR:





⁵ We also note a pre-Andress case, State v. Gilmer, 96 Wn. App. 875, 878, 981 P.2d 902 (1999), in which the defendant was convicted of second degree felony murder, based on the predicate offenses of first degree reckless endangerment and second degree malicious mischief. Gilmer asserted that reckless endangerment could not serve as the predicate for a second degree felony murder conviction because reckless endangerment does not require proof of malicious intent. Gilmer, 96 Wn. App. at 890. The court disagreed, noting that "[t]he theoretical basis for felony murder is that the state of mind requirement for the felony murder offense is supplied by the commission of the underlying felony." Gilmer, 96 Wn. App. at 890. The Supreme Court denied review. State v. Gilmer, 139 Wn.2d 1023 (2000). Insofar as Bowman and Nav ask us to disregard Gilmer, we decline to do so.