ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO	)	CASE NO. 2013-1290
	)	
Plaintiff-Appellant	)	On Appeal from the Portage
	)	County Court of Appeals,
	)	Eleventh Appellate District
	)	
	)	Court of Appeals Case
	)	Case No. 2012-P-0047
-v-	)	
	)	
BOBBY D. NOLAN	)	
	)	
Defendant-Appellee	)	

MERIT BRIEF OF DEFENDANT-APPELLEE BOBBY D. NOLAN

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STATEMENT OF THE CASE AND FACTS

Following a night of drinking and drug use, Bobby Nolan was involved in a confrontation with Travis McPeak during which Nolan attempted to strike McPeak with his fist from behind, but Nolan, in part due to his intoxication, stumbled. State v. Nolan, 2013-Ohio-2829 at para 6. McPeak turned to confront Nolan at which time Nolan removed a gun from his pocket and fired in McPeak's general direction but pointing the weapon at the ground. Nonetheless McPeak was shot in the thigh. State v. Nolan, 2013-Ohio-2829 at para 8-9.

Following a jury trial, Nolan was found not guilty of attempted murder but guilty of attempted felony murder, felonious assault, and having a weapon under disability. State v. Nolan, 2013-Ohio-2829 at para 1.

Appellant argues in a single proposition of law that it is error to find attempted felony murder a logical impossibility and further that the holding in State v. Nolan, 2013-Ohio-2829 is in conflict with this Court's ruling in State v. Williams, 2010-Ohio-147. Appellant is wrong on both counts.

ARGUMENT

There is no crime of attempted felony murder in Ohio because it is logically impossible.

Felony murder is codified in Ohio at R.C. 2903.02(B):

> No person shall cause the death of another as a proximate result of the offender's committing or

> attempting to commit an offense of violence that is a felony of the first or second degree...

Felony murder arises from an inadvertent homicide incident to the commission of a felony and is distinguishable from murder by its lack of intent to cause injury. By definition an inadvertent homicide has no element of intentionality or culpability. Intent is inferred by operation of a legal fiction in felony murder. Intent is said to "transfer" from the underlying felony to the felony murder offense. See e.g. State v. Mays, 2012-Ohio-838 for an extensive discussion of the history of felony murder. This mechanism is fraught with difficulty, however. Nowhere is that more clear than in the misplaced application of the attempt statute to felony murder.

The attempt statute at R.C. 2923.02 requires the defendant act with purpose or knowledge:

> (A) No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct that, if successful, would constitute or result in the offense.

Since attempt requires a knowing or purposeful culpability, whereas felony murder has intent only by operation of a legal fiction, there can never be attempted felony murder.

This was expressed by the Eleventh District as:

> In light of the respective elements under R.C. 2903.02(B) and 2923.02(A), a charge of "attempted felony murder" creates a purported offense that has conflicting elements. Although an accused must act purposely or knowingly in order to be found guilty of

an "attempted" offense, such a state of mind is not needed in causing the death of another under felony murder.

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... a felony murder charge requires both a felony of violence and an unintended death.... Not only is it impossible to attempt to cause an unintended result, one cannot specifically intend to commit a crime that statutorily requires a homicide where no death occurs. State v. Nolan, 2013-Ohio-2829.

Thus the Eleventh District correctly held that attempt cannot be applied to felony murder.

The Eleventh District's decision does not contravene State v. Williams, 2010-Ohio-147.

This court accepted Williams for the express purpose of answering questions regarding allied offense jurisprudence. "The issue presented on this appeal is whether felonious assault and attempted murder are allied offenses of similar import." Williams at 147. The fact that Williams involved a case in which defendant was convicted of attempted felony murder, but that issue was not raised, briefed, or argued does not substitue for argument and consideration on the merits.

A court is not bound to follow its own dicta from a prior case in which the point at issue "was not fully debated." Cent. Virginia Community College v. Katz (2006), 546 U.S. 356; see also Cosgrove v. Williamsburg of Cincinnati Mgt. Co., Inc. (1994), 70 Ohio St.3d 281, 284 (explaining that dicta in a prior case "has no binding effect on this court's decision in this case").

Since the issue raised here was not raised in Williams, the matter remains open for this court's consideration here.

Conclusion

The Plaintiff's sole proposition of law is not well taken. This Court should deny the relief requested.

Respectfully submitted,

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Certificate of Service

A copy of the foregoing Brief of Defendant-Appellee has been served by first class US mail, postage prepaid, this 12 th day of March, 2014 upon:

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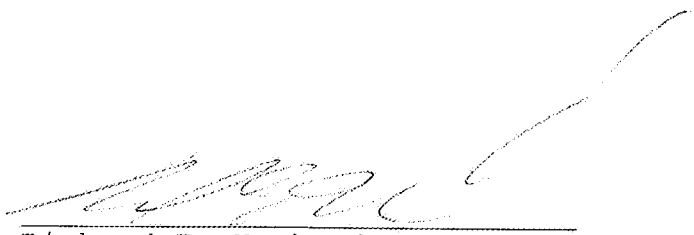

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