

ORIGINAL

IN THE SUPREME COURT OF OHIO

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

**BRIEF OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER  
IN SUPPORT OF APPELLEE BOBBY NOLAN**

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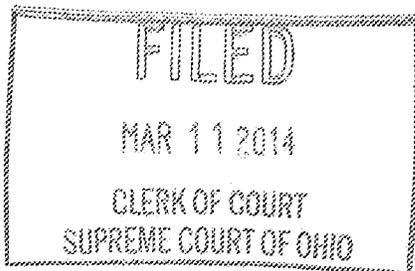
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## **INTRODUCTION**

This case illustrates the logical absurdity of attempted felony murder. The jury found that Bobby Nolan was not trying to kill his victim, and still convicted him of attempted murder. Attempted felony murder is logically impossible because one cannot attempt an unintended result. Recognizing attempted felony murder allows for convictions for attempted murder where the defendant did not attempt murder, as is the case here.

This amicus will briefly discuss the central issue in this case: the impossibility of attempted felony murder. The next section will discuss the negative implications of recognizing attempt liability for crimes involving unintended results. The final section will discuss other jurisdictions' nearly unanimous rejection of crimes involving attempted accidents, such as attempted felony murder.

## **STATEMENT OF INTEREST OF AMICUS CURIAE OFFICE OF THE OHIO PUBLIC DEFENDER**

The Office of the Ohio Public Defender (OPD) is a state agency, designed to represent criminal defendants and to coordinate criminal defense efforts throughout Ohio. The OPD also plays a key role in the promulgation of Ohio statutory law and procedural rules. The primary focus of the OPD is on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. The primary mission of the OPD is to protect the individual rights guaranteed by the state and federal constitutions through exemplary legal representation. In addition, the OPD seeks to promote the proper administration of criminal justice by enhancing the quality of criminal defense representation, educating legal practitioners and the public on important defense issues, and supporting study and research in the criminal justice system.

As amicus curiae, the OPD offers this Court the perspective of practitioners who routinely handle significant criminal cases in the Ohio appellate courts. The OPD has an interest in the case sub judice insofar as this Court's decision on whether or not to recognize attempted felony murder could have significant implications for the applicability of intent liability generally in Ohio. As amici argues below, recognizing attempted felony murder would allow attempt liability for crimes involving unintended results. This would create a significant expansion of attempt liability with no clear boundaries. Accordingly, the OPD has an enduring interest in protecting the integrity and manageability of Ohio's justice system and ensuring equal treatment under the law.

#### **STATEMENT OF THE CASE AND FACTS**

Appellee Bobby Nolan and Travis McPeak were involved in a physical altercation, during which Nolan was knocked to the ground by McPeak. *State v. Nolan*, 2013-Ohio-2829, 995 N.E.2d 902, ¶ 5-8 (11th Dist.). As Nolan was standing up, he took a gun from his pocket and immediately fired it in McPeak's general direction. *Id.* at ¶ 9. McPeak was shot in the thigh. *Id.* All of the relevant witness testimony at trial was that Nolan was pointing the firearm downward, and not at McPeak's head or torso. *Id.* at ¶ 10, 19. Upon being shot, McPeak ran away on his wounded leg. *Id.* at ¶ 11. Nolan yelled at McPeak as he was running, but did not fire the gun again or chase McPeak. *Id.* Thirty minutes later, McPeak went to a local convenience store and asked to use the phone to call his brother. *Id.* While McPeak was trying to call his brother, the store clerk called the police on her cell phone. *Id.* The police arrived and, upon noticing McPeak's injury, transported him to a local hospital. *Id.*

After a jury trial, Nolan was found not guilty of the charge of attempted murder, which alleged that Nolan purposefully attempted to cause McPeak's death. R.C. 2923.02; R.C.

2903.02(A). However, Nolan was found guilty of a charge of attempted felony murder which alleged that he knowingly engaged in behavior that, if successful, would have caused McPeak's death as a proximate cause. R.C. 2923.02; R.C. 2903.02(B). Nolan was also found guilty of felonious assault and having a weapon under disability.

Nolan was also charged with attempted involuntary manslaughter as a lesser-included offense to attempted felony murder. (Vol. III, Tr.p. 60.) The jury convicted Nolan of attempted felony murder, so they did not rule on the lesser-included offense of attempted involuntary manslaughter.

### **RESPONSE TO THE STATE'S PROPOSITION OF LAW**

#### **Attempted felony murder is logically impossible and not a cognizable crime.**

Attempted felony murder is logically impossible. Attempt requires a defendant to knowingly engage in conduct that, if successful, would constitute or result in a criminal offense. R.C. 2923.02(A). The Oxford dictionary defines success as "[t]he accomplishment of an aim or purpose."<sup>1</sup> Thus attempt liability requires the defendant to intend the criminal result. Felony murder, however, does not require any intent to cause a death. Felony murder involves an unintended death resulting from the commission of a dangerous felony. *See e.g. State v. Mays*, 2d Dist. Montgomery No. 24168, 2012-Ohio-838, ¶ 6. A defendant cannot intend to cause an unintended result. Put another way, that which is accidental cannot also be intended.

The trial court's recognition of attempted felony murder has led to a logically impossible result in this case. The jury acquitted Nolan of attempted murder, defined as purposefully trying to bring about the death of another. R.C. 2923.02; R.C. 2903.02(A). Still, Nolan was found guilty of attempted felony murder defined as knowingly engaging in conduct which would, if

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<sup>1</sup> [http://www.oxforddictionaries.com/us/definition/american\\_english/success](http://www.oxforddictionaries.com/us/definition/american_english/success) retrieved March 6, 2014.

successful, bring about McPeak's death. R.C. 2923.02; R.C. 2903.02(B). But at worst, Nolan was trying to shoot McPeak in the leg, and was successful. Nolan was never trying to kill McPeak. The jury's finding that Nolan did not act with the purpose to kill McPeak makes it logically impossible to find that if Nolan's conduct were successful, he would have killed McPeak.

**A. Recognizing attempted felony murder would permit convictions for attempted accidents.**

As a lesser-included offense to attempted felony murder, Nolan was charged with attempted involuntary manslaughter. This illustrates the logical absurdity of attempted felony murder. Attempted involuntary manslaughter is similarly logically impossible because that which is attempted cannot also be involuntary. Attempted involuntary manslaughter has the same inherent logical contradiction as attempted felony murder: it involves an attempt to do what is not intended. *See State v. Kimbrough*, 924 S.W.2d 888, 891 (Tenn. 1996)(citing decisions rejecting attempted involuntary manslaughter in analysis of why attempted felony murder is not cognizable). Because a greater offense cannot be committed without the lesser offense, the jury effectively found that the State had proved the logically absurd crime of attempted involuntary manslaughter.

Recognizing attempt liability for crimes with unintended results would create a massive and unclear expansion of what constitutes attempted homicide. Attempted murder would no longer require proof of an attempt to murder. Dangerous, reckless activity becomes attempted involuntary manslaughter. Dangerous driving becomes attempted vehicular manslaughter. Dangerous negligent behavior becomes attempted negligent homicide. And both lower and reviewing courts would most likely be uncertain about when these new crimes apply. How dangerous must the conduct be? How narrowly must victim escape death? Is bodily injury

required; and, if so, how bad must it be? Recognizing the inherently contradictory nature of attempted accidents as crimes would raise these perplexing questions. Holding that a death must occur before the felony-murder doctrine applies maintains that simple bright-line rule to guide lower courts. *See* 76 N.C.L. Rev. 2360, 2383.

**B. There is virtual consensus in other jurisdictions that crimes involving attempted accidents are not cognizable.**

As the appellate court below noted, the overwhelming majority of state courts that have addressed the issue that is presented by this case have found that attempted felony murder is not a cognizable crime. *State v. Nolan*, 2013-Ohio-2829 at ¶ 50-52. Other jurisdictions have also overwhelmingly rejected attempted involuntary manslaughter for the same reason: it requires proof of intent to cause an unintended result.

No fewer than 19 jurisdictions have addressed the issue of whether attempted felony murder is a viable crime, and all but one have found that it is not. *State v. Darby*, 200 N.J. Super. 327, 491 A.2d 733, 736 (N.J. Super. Ct. App. Div. 1984) (“‘attempted felony murder’ is a self-contradiction, for one does not ‘attempt’ an unintended result”); *State v. Bell*, 785 P.2d 390, 394 (Utah 1989) (“[T]he crime of attempted murder requires proof of intent to kill. Therefore, we also hold that attempted felony-murder does not exist as a crime in Utah.”); *State v. Kimbrough*, 924 S.W.2d 888, 890 (Tenn. 1996) (“Obviously, a charge of ‘attempted felony-murder’ is inherently inconsistent, in that it requires that the actor have intended to commit what is deemed an unintentional act.”); *People v. Patterson*, 209 Cal. App. 3d 610, 257 Cal. Rptr. 407 (Cal. Ct. App. 1989); *State v. Gray*, 654 So. 2d 552 (Fla. 1995); *State v. Pratt*, 125 Idaho 546, 873 P.2d 800 (Idaho 1993); *People v. Viser*, 62 Ill. 2d 568, 343 N.E.2d 903 (Ill. 1975); *Head v. State*, 443 N.E.2d 44 (Ind. 1982); *State v. Robinson*, 256 Kan. 133, 883 P.2d 764 (Kan. 1994); *Bruce v. State*, 317 Md. 642, 566 A.2d 103 (Md. 1989); *State v. Dahlstrom*, 276 Minn. 301, 150 N.W.2d

53 (Minn. 1967); *State v. Price*, 104 N.M. 703, 726 P.2d 857 (N.M. Ct. App. 1986); *People v. Burress*, 122 A.D.2d 588, 505 N.Y.S.2d 272 (N.Y. App. Div. 1986); *Commonwealth v. Griffin*, 310 Pa. Super. 39, 456 A.2d 171 (Pa. Super. Ct. 1983); *State v. Carter*, 44 Wis. 2d 151, 170 N.W.2d 681 (Wis. 1969); *State v. Lea* 126 N.C. App. 440, 485 S.E.2d 874 (1997); *State v. Moore*, 218 Ariz. 534, 189 P.3d 1107 (Ariz. Ct. App. 2008); *In re Pers. Restraint of Richey*, 175 P.3d 585 (Wash. 2008). *But see White v. State* 585 S.W.2d 952, 954 (Ark. 1979) (recognizing attempted felony murder because the defendant took “a substantial step in a course of conduct intended to culminate in [the] commission of the offense’ of murder”).

As with attempted felony murder, jurisdictions have overwhelmingly rejected the viability of attempted involuntary manslaughter for the same reasons. In *State v. Holbron*, the Supreme Court of Hawaii noted: “Our research efforts have failed to discover a single jurisdiction that has recognized the possibility of attempted involuntary manslaughter. On the other hand, the cases holding that attempted involuntary manslaughter is a statutory impossibility are legion.” *State v. Holbron*, 904 P.2d 912, 920 (Haw. 1995). That court then cited cases from 15 jurisdictions rejecting the viability of attempted involuntary manslaughter and similar crimes involving attempted reckless killings. *Id.* at 920-22. *See also United States v. Turner*, 436 Fed. Appx. 631 (6th Cir. 2011) (finding that a charge of attempted murder based on shooting a victim with a depraved heart invalid because attempted murder requires intent to kill). *But see People v. Thomas*, 729 P.2d 972 (Colo. 1986). Colorado is the only state which recognizes a form of attempted reckless homicide.

In sum, the issue of whether one can attempt an unintended result has come before other jurisdictions dozens of times, and they have overwhelmingly rejected the concept. Given how many times this issue has been before courts, it is telling that the State’s brief relies solely on

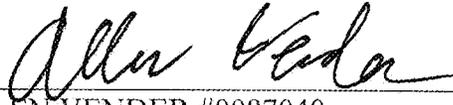
*State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937, where the issue before this Court was whether felonious assault and attempted murder were allied offenses of similar import; not whether a person may be convicted of an intended accident. Other jurisdictions have virtually always rejected the idea that one can attempt the unintended, and accordingly, held that attempted felony murder is not cognizable. This Court should join the all but unanimous consensus of other states and hold that crimes involving unintended results cannot be intended.

### CONCLUSION

For the reasons explained above, this Court should join the overwhelming majority of states and hold that attempted felony murder is logically impossible and not cognizable, and the affirm the court below.

Respectfully submitted,

OFFICE OF THE  
OHIO PUBLIC DEFENDER



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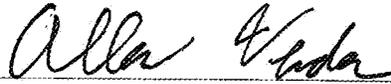
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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing *Brief of Amicus Curiae Office of the Ohio Public Defender in Support of Appellee Bobby Nolan* was sent by regular U.S. mail, postage prepaid to the offices of Pamela Holder, Assistant Prosecuting Attorney, Portage County Prosecutor's Office, 241 S. Chestnut Street, Ravenna, Ohio 44266, Counsel for Appellant State of Ohio; and Richard E. Hackerd, Attorney at Law, 2000 Standard Building, 1370 Ontario Street, Cleveland, Ohio 44113, Counsel for Appellee Bobby Nolan, this 11th day of March, 2014.



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