IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT JANUARY TERM 2012

CHARLES M. MENDENHALL,

Petitioner,

v. Case No. 5D11-2681

STATE OF FLORIDA,

Respondent.

_____/

Opinion filed March 9, 2012.

Petition Alleging Ineffectiveness
of Appellate Counsel,
A Case of Original Jurisdiction.

Jack R. Maro, Ocala, for Petitioner.

Pamela Jo Bondi, Attorney General,
Tallahassee, and Kristen L. Davenport,
Assistant Attorney General, Daytona
Beach, for Respondent.

PER CURIAM.

Petitioner, Charles Mendenhall, has filed a petition for writ of habeas corpus alleging ineffective assistance of counsel. Mendenhall claims his appellate counsel was ineffective for failing to argue that the instruction given to the jury on attempted manslaughter was erroneous pursuant to State v. Montgomery, 39 So. 3d 252 (Fla. 2010). We agree and grant the petition.

In 2007, Mendenhall was tried for attempted first-degree murder, and the jury received instructions on attempted first-degree murder, attempted second-degree murder, and attempted voluntary manslaughter. The instruction on attempted manslaughter was standard instruction 6.6:

> 6.6 Attempted Voluntary Manslaughter
>
> To prove the crime of attempted voluntary manslaughter, the State must prove the following element beyond a reasonable doubt.
>
> Charles Michael Mendenhall committed an act, which was intended to cause the death of Russell Gay and would have resulted in the death of Russell Gay except that someone prevented Charles Michael Mendenhall from killing Russell Gay or he failed to do so.
>
> However, the Defendant cannot be guilty of attempted voluntary manslaughter if the attempted killing was either excusable or justifiable as I have previously explained those terms.
>
> It is not an attempt to commit manslaughter if the Defendant abandoned the attempt to commit the offense or otherwise prevented its commission under circumstances indicating a complete and voluntary renunciation of his criminal purpose.
>
> In order to convict of attempted voluntary manslaughter, it is not necessary for the State to prove the defendant has a premeditated intent to cause death.

(emphasis added). The jury ultimately convicted Mendenhall of attempted second-degree murder.

On direct appeal, Mendenhall's appellate counsel only raised a sentencing issue and this court affirmed Mendenhall's conviction. Mendenhall v. State, 999 So. 2d 665 (Fla. 5th DCA 2008). This court's mandate with respect to that opinion was issued on February 16, 2009. Mendenhall then sought discretionary review in the Florida

Supreme Court, and in Mendenhall v. State, 48 So. 3d 740 (Fla. 2010), the supreme court approved this court's decision. Its mandate with respect to that opinion was issued on November 18, 2010.

It is undisputed that, pursuant to Montgomery, the wrong instruction on attempted manslaughter was given in Mendenhall's case. The instruction erroneously suggested that the State was required to prove intent to kill, a requirement not imposed by the manslaughter statute. See Montgomery, 39 So. 3d at 256-57 (The standard jury instruction on manslaughter by act required the jury to find that the defendant intended to kill the victim whereas the relevant intent was the intent to commit an act which caused death.). Such an erroneous instruction has been held to constitute fundamental error. See id. at 258 (holding that fundamental error occurred where Montgomery was tried for first-degree murder and convicted of second-degree murder after the jury was given an erroneous instruction on the lesser-included offense of manslaughter); Burton v. State, 36 Fla. L. Weekly D738, D739 (Fla. 5th DCA Apr. 8, 2011) (applying the Montgomery rationale to attempted manslaughter instruction requiring proof of intent to kill).

The trouble with Mendenhall's claim is that his conviction was affirmed on direct appeal before either the First District or the Florida Supreme Court issued their opinion in Montgomery. However, Mendenhall's conviction was not final until after Montgomery was decided and, thus, the holding applied to his case.[1] See Minnich v. State, 36 Fla.

[1] The First District Court of Appeal decided Montgomery v. State, 70 So. 3d 603 (Fla. 1st DCA 2009) on February 12, 2009, four days before this court's mandate in Mendenhall was issued on February 16, 2009. Further, the Florida Supreme Court issued its Montgomery opinion on April 8, 2010, whereas Mendenhall's judgment and

L. Weekly D216, D217 (Fla. 1st DCA Jan. 28, 2011). Typically, it would be appropriate to file a motion to recall mandate under such circumstances; however, a complicating factor in this case is that the mandate was issued from this court on February 16, 2009. Thus, this court cannot recall the mandate because it is now in a new term. Nonetheless, Mendenhall falls into the category of cases where the remedy for the relief that he is seeking is by habeas corpus petition. See id.

This case is one of several cases that have been before this court on the issue of Montgomery. See Lopez v. State, 68 So. 3d 332 (Fla. 5th DCA 2011); Hodges v. State, 64 So. 3d 142 (Fla. 5th DCA 2011); Dill v. State, 37 Fla. L. Weekly D247 (Fla. 5th DCA Jan. 27, 2012). Again we cite conflict with Williams v. State, 40 So. 3d 72 (Fla. 4th DCA 2010), rev. granted, 64 So. 3d 1262 (Fla. 2011).

The Writ of Habeas Corpus is GRANTED and this matter is REMANDED for a new trial.

PALMER, TORPY and JACOBUS, JJ., concur.

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sentence became final when the supreme court's mandate in Mendenhall was issued on November 18, 2010.