DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 98-CF-1871

LUIS M. PALACIO, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

APPELLEE'S OPPOSITION TO PETITION FOR REHEARING OR REHEARING EN BANC

COUNTERSTATEMENT OF THE CASE

On June 9, 1998, a Superior Court grand jury in the District of Columbia indicted appellant, Luis M. Palacio, on various crimes related to the stabbing of three victims: Jose Mejia, David Rodriguez, and Omar Gonzalez. Palacio was charged with three counts of assault with intent to murder while armed (AWIMWA); three counts of assault with intent to kill while armed (AWIKWA); three counts of aggravated assault while armed (AAWA); and one count of carrying a dangerous weapon (CDW).[1/]

[1/] All citations to the D.C. Code refer to the 1981 edition. "R." refers to the record on appeal. Transcript cites are by date and page number.

Following a jury trial, appellant was acquitted on all three counts of AWIMWA and all three counts of AWIKWA; but was convicted on one count of assault with a dangerous weapon (ADW) as a lesser-included offense of AWIMWA (as to Rodriguez), two counts of ADW as a lesser-included offense of AWIKWA (as to Rodriguez and Gonzales), one count of AAWA (as to Rodriguez), and CDW.

In a published opinion dated May 10, 2007, a panel of this Court affirmed appellant's convictions for ADW and reversed appellant's conviction for AAWA. See Slip Op. at 23-24.[2/] Thereafter, an amended opinion was issued on June 7, 2007. Appellant filed a petition for rehearing or rehearing en banc, and this Court ordered the government to file a response to the petition. On September 18, 2007, D.C. Lawyers for Youth filed a brief as amicus curiae in support of appellant's petition, with the consent of the parties.

1. Trial Evidence

The evidence at trial established that on April 14, 1998, appellant and a group of his friends attacked Mejia, Gonzalez, and Rodriguez. Appellant initiated the attack by saying to the victims, in Spanish, "If you are looking for a hassle, we can do it right now." (7/21/98 Tr. 74, 154.) In the ensuing fight, appellant pulled out a knife and stabbed Rodriguez (7/22/98 Tr.

[2/] The panel division also ordered the merger of the two ADW convictions that arose from the stabbing of Rodriguez. Slip Op. at 23-24.

232). As appellant struggled with Rodriguez, one of appellant's accomplices stabbed Rodriguez in the stomach, and another accomplice hit him in the head with a bottle (id. at 232, 236). Mejia was attacked by two of appellant's co-defendants, and suffered stab wounds to the chest and right shoulder (7/20/98 Tr. 67). Gonzalez was stabbed by one of the co-defendants, who used a long knife that went through Gonzalez's arm, into his stomach, and reached his intestines (7/21/98 Tr. 77).

2. Arguments Before the Panel Division

On appeal, appellant argued that the AWIMWA charges in the indictment were defective, because "from the text of the indictment it is impossible to determine whether the Grand Jury found all elements of the crime by probable cause." Palacio Panel Brief at 23. Appellant noted that, in order to indict appellant for AWIMWA, the grand jury was required to find that he acted with malicious intent, and that "no justification, excuse or mitigating factor applied." Id.[3/] Appellant speculated that the grand jury did not make the requisite finding regarding the element of malice, because "the indictment did not identify the state of mind [that] the grand jurors believed the defendants exhibited when they committed the alleged crimes," and did not indicate whether the grand jurors

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[3/] Malicious intent is an element of AWIMWA, but such intent may be mitigated by "adequate provocation, justification or excuse." See Logan v. United States, 483 A.2d 664, 671 (D.C. 1984).

found probable cause to believe that there were no mitigating circumstances. Id. Thus, appellant argued, the AWIMWA charges were "fatally flawed," and the Criminal Division of the Superior Court lacked jurisdiction to try appellant as an adult, under D.C. Code § 16-2301(3)(A).[4/] Id.

In response, the government argued that appellant had failed to raise his jurisdictional argument before the trial court, and that it therefore should be reviewed only for plain error. Government's Panel Brief at 16. In any event, the government argued, the indictment was not defective under any standard of review. The AWIMWA counts specified that appellant committed assault "with intent to murder," and cited the applicable code sections, which enumerate the elements of that crime. Id. at 18. Thus, the indictment sufficiently set forth the elements of the offense and sufficiently apprised appellant of what he must be prepared to meet. Id. Moreover, citing Hunter v. United States, 590 A.2d 1048, 1051 (D.C. 1991), the government noted that appellant's challenge to the AWIMWA counts was moot because appellant had been acquitted of AWIMWA. Government's Panel Brief at 19.

[4/] Under D.C. Code § 16-2301(3)(A), juveniles "sixteen years of age or older" who are charged with "assault with intent to commit . . . murder" may - in the discretion of the United States Attorney - be prosecuted in the Criminal Division of the Superior Court as adult criminal defendants. Here, the Criminal Division had jurisdiction to try appellant as an adult based on the AWIMWA charges.

3. The Panel Decision

The panel division rejected appellant's argument that the indictment was defective. The panel noted that an indictment must allege all of the essential elements of a crime "so that the indictment accurately reflects the intent of the grand jury and the facts on which the grand jury based its probable cause determination." Amended Slip Op. at 17 (citing Cain v. United States, 532 A.2d 1001, 1004 (D.C. 1987)). The panel then enumerated the elements of AWIMWA: "(1) defendant assaulted the complainant; (2) defendant did so with specific intent to kill the complainant; (3) there were no mitigating circumstances . . . ; and (4) that at the time of the commission of the offense the defendant was armed." Amended Slip. Op. at 17 (citing Howard v. United States, 656 A.2d 1106, 1114 (D.C. 1995)).

The panel noted, however, that the government is not obligated to present evidence of mitigation to the grand jury. Amended Slip. Op. at 17, 18 (citing Miles v. United States, 483 A.2d 649, 654-55 (D.C. 1984) (government "ordinarily is not obligated to present [to] a grand jury all evidence that is favorable to an accused"); United States v. Williams, 504 U.S. 36, 46-47 (1992) (accused does not have right to testify or to have exculpatory evidence presented to grand jury)). The panel also noted that, even assuming that such an obligation existed, appellant was not prejudiced by the alleged error here because "there were no mitigating circumstances

or other evidence presented at trial that would have led the grand jury not to indict." Amended Slip Op. at 19.

ARGUMENT

Appellant argues that rehearing or rehearing en banc is necessary, essentially because (1) the government was obligated to present evidence regarding mitigating circumstances to the grand jury (at 4); and (2) the panel's decision "effectively overrules" Logan v. United States, 483 A.2d at 664, in that it "lowers the threshold for prosecuting juveniles in the Superior Court as adults" and allows the government to seek an indictment for AWIMWA without presenting "any more or different evidence" than is required to obtain an indictment for AWIKWA (at 5). Appellant's arguments lack merit.

Appellant's claim is, at bottom, an attack on the sufficiency of the AWIMWA charges in the indictment. As the government argued before the panel, however, the indictment was not defective. By specifying in the AWIMWA counts that appellant committed assault "with intent to murder," and by citing the relevant code provision for murder, the indictment sufficiently set forth the elements of AWIMWA. See Indictment at R. 8. In particular, the element of malice is included in D.C. Code § 22-2403 ("Whoever with malice aforethought . . . kills another, is guilty of murder in the second degree."), which is cited in each count of AWIMWA.

Appellant speculates (at 4) that the grand jury failed to adequately consider whether appellant acted with malice, which may be mitigated by "adequate provocation, justification or excuse." See Logan, 483 A.2d at 671. Because the indictment is sufficient on its face, however, that claim should not be entertained. See Costello v. United States, 350 U.S. 359, 363 (1956) ("An indictment returned by a legally constituted and unbiased grand jury, like an information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on its merits."); see also Amended Slip Op. at 18 (citing Bruce v. United States, 617 A.2d 986, 993 (D.C. 1992) ("In general . . . courts will not entertain the contention that the evidence before the grand jury was insufficient to indict."), cert. denied, 507 U.S. 1042 (1993)).[5/]

In any event, the panel division correctly held that (1) the government is not required to present evidence of mitigating circumstances to the grand jury, Amended Slip Op. at 17 ; and (2) there were no mitigating circumstances in this case, id. at 19.

[5/] To the extent that appellant is suggesting that the government failed to instruct the grand jury about the elements of AWIMWA, the government had no obligation to give legal instructions to the grand jury at all. See Hunter, 590 A.2d at 1051 ("the prosecutor has no obligation to give the grand jury legal instructions"). Moreover, appellant errs in asserting (at 4, 8) that the panel decision allows a grand jury to indict a defendant for AWIMWA without finding probable cause to believe that the defendant acted with malice. To the contrary, a facially valid charge of AWIMWA - such as the ones at issue here - indicates that the grand jury found sufficient evidence to support every element of that offense, including the element of malice.

Indeed, given the absence of any mitigating circumstances here - which appellant apparently does not dispute - it is difficult to imagine what additional evidence could have been presented in that regard, or what additional finding could have been made by the grand jury. Accordingly, the panel division correctly concluded that, even assuming arguendo that the government is required to present evidence of mitigation to the grand jury, appellant was not prejudiced by any failure by the government to do so in this case.

Appellant errs in suggesting (at 5) that the evidence underlying an AWIMWA charge must necessarily be "more" or "different" from the evidence underlying an AWIKWA charge. In a case such as this one - where there are no mitigating circumstances - the manner in which the attack was carried out may support an inference of both specific intent to kill and malice. See Logan, 483 A.2d at 671 (standard of malice "will be met in most cases if the jury finds that the defendant acted with a specific intent to kill."). Here, the trial evidence established that appellant initiated a vicious knife attack on the victims, and then personally stabbed Rodriguez. The group attack resulted in serious injuries to all three victims. That evidence, if presented to the grand jury, would support charges of both AWIMWA and AWIKWA as to all three victims.[6/]

[6/] Appellant was charged as an aider and abettor with respect to the stabbings of Gonzalez and Mejia, and the panel division (continued...)

Contrary to appellant's contention (at 5), the fact that the same set of facts may give rise to charges of both AWIMWA and AWIKWA does not "lower[] the threshold for prosecuting juveniles in the Superior Court as adults without review by a Judge of the Family Division." Appellant was not indicted on evidence that supported only an AWIKWA charge - he was indicted on evidence that also supported an AWIMWA charge. Because the AWIMWA charge was valid, appellant was properly tried as an adult under Section 16-2301(3)(A).[7/]

Appellant further errs in asserting that the panel decision "overrules" Logan, 483 A.2d at 664. In Logan, the juvenile defendant was charged with AWIKWA - not AWIMWA - and the question before the Court was whether the charge of AWIKWA vested the trial court with jurisdiction to try the defendant as an adult. Id. at 666, 670. In answering that question in the negative, the Court noted that the relevant statute specifies that an AWIMWA charge confers such jurisdiction, not an AWIKWA charge, id. at 666; and that the elements of those two offenses are different, id. at 671-

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[6/](...continued)
rejected appellant's contention that the evidence was insufficient to support his conviction for ADW as to Gonzalez. See Amended Slip Op. at 14-16.

[7/] Appellant cites Logan (at 5-6) for the proposition that there may be factual scenarios that support a charge of AWIKWA, but not AWIMWA. We agree that under such factual scenarios, it would be improper to charge a defendant with AWIMWA. This case, however, does not present such a problem.

73. Here, appellant was properly charged with AWIMWA, and thus there is no question that the trial court had jurisdiction to try appellant as an adult under Section 16-2301(3)(A).[8/]

CONCLUSION

WHEREFORE, the government respectfully submits that this Court should deny appellant's petition for rehearing or rehearing en banc.

Respectfully submitted,

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[8/] Amicus does not mount any substantive challenge to the sufficiency of the AWIMWA charges. Rather, amicus relies only on a typographical error from the original opinion. Compare Amicus Brief at 1 (quoting original Slip Opinion at 18: "the trial court erred in failing to dismiss the AWIMWA indictments") with Amended Slip Opinion at 18-19 ("the trial court did not err in refusing to dismiss the AWIMWA indictments"). The remainder of amicus's brief is an irrelevant summary of the policies underlying the juvenile justice system. Although amicus generally asserts (at 2, 5, 7, 9) that the panel decision expands the discretion of prosecutors to prosecute juveniles as adults, those assertions are not supported by any argument or legal authority, and therefore should be considered abandoned. See Bardoff v. United States, 628 A.2d 86, 90 n.8 (D.C. 1993) (where appellant "provide[s] no supporting argument in [his] brief for [a] general assertion[,] [the Court should] . . . consider [the claim] to be abandoned").

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused two copies of the foregoing Opposition to Petition for Rehearing or Rehearing En Banc to be served by mail on counsel for appellant, Robert S. Becker, Esquire, 5505 Connecticut Avenue, NW, No. 155, Washington, DC 20015; and on counsels for amicus curiae, Paul S. Lee, Esq., Howrey LLP, 1299 Pennsylvania Avenue, N.W., Washington, DC 20004, and Sara Peters, Esq., D.C. Lawyers for Youth, 1445 P Street, N.W., Apt. 211, Washington, DC 20005, on this 28th day of September, 2007.

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