Md. high court reconsiders its felony-murder precedent

By: Steve Lash Daily Record Legal Affairs Writer September 9, 2016

Judge Clayton Greene Jr. (File photo)

ANNAPOLIS – A criminal defense attorney urged Maryland's high court Friday to overturn its controversial 2005 decision permitting a first-degree assault to be a predicate offense for second-degree felony murder if the victim dies.

The Court of Appeals' ruling in Roary v. State "essentially allows every shooting death in Maryland to be a second-degree felony murder" regardless of the circumstances of the gun having been fired, John N. Sharifi told the Court of Appeals. So long as they can prove the commission of a first-degree assault – an act dangerous to human life – prosecutors need not charge a lesser offense, such as manslaughter, Sharifi told the court.

The defense attorney's call drew mixed reactions from the bench.

Judge Clayton Greene Jr., who wrote majority opinion in Roary and is the only active judge remaining from that case, noted the first-degree-assault-turned-felony murder in that case involved the victim being struck twice on the head with a boulder. In the case before the court Friday, Sharifi is defending a man accused of using a handgun in an act of violence that led to a man's death.

"Why wouldn't [these assaults] be something the law would want to discourage?" Greene asked.

By contrast, Judge Irma S. Raker, who wrote the dissent in Roary, said sardonically that Maryland criminal law can “be easy” under Roary.

“Every death by a firearm can be felony murder,”said Raker, a retired judge sitting by special assignment.

But Assistant Maryland Attorney General Daniel J. Jawor urged the high court to hold fast to Roary, saying that second-degree felony murder is an appropriate charge against a defendant who engages in an inherently dangerous act, such as intentionally waving a gun.

Second-degree felony murder resulting from a first-degree assault is “a cognizable crime,” Jawor added.

Judges’ own motion

The two lawyers presented their arguments by order of the high court. The judges, on their own motion, told the lawyers in May to reargue a case from January and address whether the court should reconsider Roary, a 4-3 decision holding that a felonious, first-degree assault – one “dangerous to human life” – can lead to a charge of second-degree felony murder if the victim dies regardless of whether the defendant delivered the deadly blow.

Raker, in her dissent, voiced concern that “an accomplice who may not have inflicted the harm personally, had no knowledge that the ultimate perpetrator had a deadly weapon, and had no intent to commit murder” could nevertheless be convicted of murder.

Neither Sharifi nor Jawor had urged the high court to reassess the Roary decision during their earlier argument.

That argument specifically addressed whether Tyshon Leteek Jones’ constitutional right against being placed on trial twice for the same crime would be violated if he is tried for second-degree felony murder after the jury acquitted him of second-degree murder but failed to reach a verdict on the predicate offense of first-degree assault.

A Montgomery County Circuit Court judge had answered “no” but the intermediate Court of Special Appeals said the defendant’s right against double jeopardy would be violated, prompting the state

to seek review by the high court.

Double jeopardy?

Appearing before the judges Friday, Jawor argued that double jeopardy does not apply. Jones can be retried for first-degree assault because the jury reached no verdict on that charge, Jawor said. If the second jury finds Jones guilty of the predicate first-degree assault, the jurors can then consider for the first time a second-degree felony murder charge against him, Jawor added.

Sharifi countered that the constitutional prohibition on double jeopardy bars Jones from being tried for second-degree felony murder after having been acquitted of second-degree murder.

In addition, the double jeopardy issue does not even arise if the high court holds that first-degree assault cannot be a predicate offense for second-degree felony murder, said Sharifi, a Rockville solo practitioner.

That argument prompted a question from the bench as to why Sharifi had not asked the high court to overturn its Roary decision in his initial filing.

When Sharifi responded he was being “careful,” an apparently sympathetic Chief Judge Mary Ellen Barbera acknowledged telling the high court it was wrong would have been “a bold move.”

Jones was among five men accused in the beating, robbery and shooting death of Julian Kelly shortly before midnight on Aug. 20, 2010. He was charged with first-degree murder, second-degree murder with intent to cause grievous bodily injury, armed robbery, robbery and use of a handgun in a crime of violence.

The circuit court jury was unable to reach a verdict on the handgun charge, a first-degree assault, but acquitted Jones on all other charges. The state successfully moved for a retrial on the handgun charge, as well as moving forward with a charge of second-degree felony murder.

The Court of Appeals is expected to render its decision by Aug. 31 in the case State of Maryland v. Tyshon Leteek Jones, No. 52 September Term 2015.