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SUPREME COURT OF ALABAMA

OCTOBER TERM, 2014-2015

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Ex parte State of Alabama

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(In re: Phillip Allen Moore

v.

State of Alabama)

(Tuscaloosa Circuit Court, CC-12-2616; Court of Criminal Appeals, CR-13-0113)

BRYAN, Justice.

WRIT DENIED. NO OPINION.

Moore, C.J., and Stuart, Bolin, Parker, Main, and Wise, JJ., concur.

Murdock and Shaw, JJ., dissent.

MURDOCK, Justice (dissenting).

I write separately for what I believe to be two important reasons. First, it is particularly important to note, as Justice Shaw correctly explains in his dissent, that the main opinion in Ex parte Pate, 145 So. 3d 733 (Ala. 2013), was a plurality opinion in which only four Justices concurred and is not binding precedent. ___ So. 3d at ___ n. 5 (Shaw, J., dissenting). The Court of Criminal Appeals concluded its analysis in this case by stating that, if not for the decision in Pate, it would not have reversed the trial court's judgment convicting Phillip Allen Moore of the offense of menacing. Moore v. State, [Ms. CR-13-0113, Nov. 21, 2014] ___ So. 3d ___, ___ (Ala. Crim. App. 2014). That court states, however, that it was "bound by the Pate decision." ___ So. 3d at ___. For the reasons explained by Justice Shaw in his separate writing, that statement is incorrect.

The other reason I write separately is to note that this is the first "menacing case" to come before this Court since Pate was decided and that the facts presented and the result reached in this case corroborate the concern I expressed in Pate as to "the continued viability of the crime of menacing"

if Pate were to be followed. 145 So. 3d at 740 (Murdock, J., dissenting). Indeed, in contrast to Justice Shaw (whose views generally coincide with mine), I believe the present case presents no less a manifestation, and perhaps an even stronger manifestation, of this concern than do the facts and the result in Pate.

Menacing is a Class B misdemeanor and is defined simply as follows: "A person commits the crime of menacing if, by physical action, he intentionally places or attempts to place another person in fear of imminent serious physical injury." § 13A-6-23(a), Ala. Code 1975. To prove that the misdemeanor of menacing has occurred the State must prove simply (1) some "physical action," by which (2) the defendant "intentionally place[d] or attempt[ed] to place" another in fear of "imminent serious physical injury."

The main opinion in Pate took the position that, as a matter of law, the act of retrieving a firearm did not constitute "physical action" for purposes of satisfying the

first element of menacing. Obviously, this is a position with which I strenuously disagreed in Pate and still do.[1]

The facts in Pate (and in turn the factual parallels between Pate and the present case), however, were not limited to the bare act of arming one's self. In Pate, after verbally threatening the victim, the defendant did in fact engage in the "physical action" of walking to his truck and retrieving a shotgun from that vehicle. In addition, however, the defendant in Pate then engaged in the further "physical action" of turning and beginning to advance toward the victim with the weapon in hand. Ex parte Pate, 145 So. 3d at 736 n.2. Here, Moore likewise, after retrieving his weapon, turned and advanced toward the victim with the weapon in hand. Furthermore, the facts of both cases include very explicit,

[1]The judges of the Court of Criminal Appeals, as well as Justice Shaw, also disagree with this position. Both judges of the Court of Criminal Appeals who dissented, Judge Windom and Judge Burke, obviously disagree. See, e.g., Moore, ___ So. 3d at ___ (Burke, J., dissenting). And the other three judges on the Court of Criminal Appeals concurred in a per curiam opinion that states that, "[b]efore Pate," they too "would have been inclined to recognize" what they refer to as "the inherent logic" of the State's position on what constitutes physical action, as well as the type of showing that will satisfy the state-of-mind element of menacing. See Moore, ___ So. 3d at ___.

verbal statements made by the defendants that provide context for their physical actions and from which the jury in each case reasonably could have drawn inferences as to the presence of the state of mind required for an act of menacing. See Ex parte Pate, 145 So. 3d at 736; id. at 741 (Murdock, J., dissenting); Moore v. State, ___ So. 3d at ___; id. at ___ (Burke, J., dissenting).[2]

Bearing in mind the deference accorded the verdict of jurors who have heard and assessed the testimony of witnesses appearing before them, as well as the quantum of proof required in a criminal case, the essential question is whether there is substantial evidence from which the jurors reasonably could have found that Moore intended or attempted to place the victim in fear of imminent serious injury. In the context of preexisting conflict with the victim, a man retrieves a 3-

[2]In the present case, the jury's assessment of both the physical-action element and the state-of-mind element could have been influenced by the general environment and state of conflict created by Moore and his cohort, including the facts that Moore, as well as his cohort and the cohort's girlfriend, had been drinking; that Moore purposefully played music with obscene lyrics loudly enough to be heard by the victim and his wife and teenage daughter; that Moore and his cohort were making lewd gestures directed at the victim; and that Moore's cohort contemporaneously caused physical injury to the victim by running into him with a car.

foot-long metal pipe and then turns and advances to a face-to-face confrontation within 15 to 20 feet of the victim while holding the 3-foot-long pipe in a threatening position ("kind of like a batter" according to one witness). Fifteen to 20 feet simply is not that much distance for an angry man postured as described with a 3-foot-long metal pipe. As the State explained in a passage in its brief quoted with approval by the majority opinion in the Court of Criminal Appeals:

> "'Moore was in a position to inflict lethal damage because he was capable of striking West and crushing his skull in about 3 or 4 seconds. Moore, in the position in which he had the pipe, also could have thrown this weapon at West.'"

Moore, ___ So. 3d at ___ (quoting the State's brief, p. 15).

Considering the evidence of Moore's physical actions, Moore's demeanor, including the verbal abuse that preceded and accompanied his physical actions, and other evidence of the volatility of the situation heard by the jury, I cannot say -- or more appropriately, I do not believe the Court of Criminal Appeals was correct in saying -- that, as a matter of law, reasonable jurors were foreclosed from finding that Moore engaged in an act of "menacing." Because I believe that the petition presents a probability of merit, I respectfully

dissent from this Court's decision today not to grant that petition.

SHAW, Justice (dissenting).

In the instant matter, the State of Alabama petitions this Court for certiorari review of the decision of the Court of Criminal Appeals in Moore v. State, [Ms. CR-13-0113, Nov. 21, 2014] ___ So. 3d ___ (Ala. Crim. App. 2014), reversing Phillip Allen Moore's conviction for menacing. For the reasons discussed below, I dissent from denying the State's petition.

The crime of "menacing" is statutorily defined as follows: "A person commits the crime of menacing if, by physical action, he intentionally places or attempts to place another person in fear of imminent serious physical injury." Ala. Code 1975, § 13A-6-23(a). The main opinion in Ex parte Pate, 145 So. 3d 733 (Ala. 2013), held that the act of arming one's self with a firearm was not sufficient to constitute the crime of menacing. Specifically, the main opinion stated that such action, as a matter of law, was not a "physical action" for purposes of menacing. 145 So. 3d at 738.

In the instant case,[3] Moore, the defendant, armed himself with a pipe. This act, although threatening in nature, was less likely than the act in Pate to place a victim in fear of imminent serious physical injury: Moore was too far away from the victim to hit him with the pipe, while the victim in Pate was well within range of the defendant's much more dangerous weapon.[4] That Moore approached the victim and taunted him makes no difference; the defendant in Pate also approached the victim after threatening the victim with actual physical harm and then arming himself with a much more dangerous weapon than did Moore. If Pate is to be followed, then there is no probability of merit in the argument that the Court of Criminal Appeals erred in reversing Moore's conviction. See Rule 39(f), Ala. R. App. P. ("If the Supreme Court, upon preliminary consideration, concludes that there is a probability of merit in the petition and that the writ should issue, the Court shall so order ...."). Indeed, if Pate is to

[3]The Court of Criminal Appeals described the facts in the instant case in Moore, supra, and I see no need to repeat them here.

[4]Moore could have been within range to throw the pipe at the victim, but such possibility only shows that the facts of this case are more similar to Pate, where the menacing conviction was reversed.

be followed, it is difficult to imagine that § 13A-6-23(a) has any meaningful field of operation. However, I do not believe that Pate is binding precedent.

In Pate, four members of the Court concurred in the main opinion, one concurred in the result, two dissented, and two did not sit in the case. Only four Justices--not a majority of the Court--joined the main opinion, and it is not binding precedent. See Ala. Code 1975, § 12-3-16 ("The decisions of the Supreme Court shall govern the holdings and decisions of the courts of appeals ...."), and KGS Steel, Inc. v. McInish, 47 So. 3d 780, 781 (Ala. Civ. App. 2009) (noting that only "'decisions of the majority' of the Supreme Court" are "decisions" for purposes of § 12-3-16) (quoting Willis v. Buchman, 30 Ala. App. 33, 40, 199 So. 886, 892 (1940) (opinion after remand)). See also Jones v. City of Huntsville, 288 Ala. 242, 244, 259 So. 2d 288, 290 (1972).[5]

[5]Rule 16(b), Ala. R. App. P., provides that, when, by reason of disqualification, the number of Justices competent to sit in the determination of a cause is reduced, a majority shall suffice, but at least four Justices must concur. The concurrence of four Justices of a seven-member court "would suffice" as a majority only when the Court is reduced to seven members by reason of disqualification. The opinion in Pate does not state that the two Justices who did not vote in that case had recused themselves from consideration of the case. Thus, it cannot be said that the number of Justices competent

I dissented in Pate, and I remain convinced that Pate was wrongly decided. In my opinion, both the facts in Pate and the facts in the instant case show acts--physical action--that could place, or constitute an attempt to place, another person in fear of imminent serious physical injury. In the instant case, I would decline to follow the nonbinding decision in Pate, reverse the Court of Criminal Appeals' decision, and affirm Moore's menacing conviction.

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to sit was reduced by "disqualification," and the number of Justices required to constitute a majority was five, not four. See also Ala. Code 1975, § 12-2-14.