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IN THE SUPREME COURT OF FLORIDA

Case No. 63,107
63,258

WILLIE F. VAUSE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

STATE OF FLORIDA,

Petitioner,

vs.

WILLIE F. VAUSE,

Respondent.

FILED

SEP 6 1983

SID J. WHITE
CLERK SUPREME COURT
Chief Deputy Clerk

ANSWER BRIEF OF DEFENDANT VAUSE AS RESPONDENT

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ARGUMENT

THE DISTRICT COURT CORRECTLY VACATED THE DEFENDANT'S SENTENCES FOR SHOOTING INTO AN OCCUPIED VEHICLE AND USE OF A FIREARM IN THE COMMISSION OF A FELONY ON THE GROUND THAT THOSE OFFENSES WERE NECESSARILY INCLUDED IN THE GREATER OFFENSE OF THIRD DEGREE MURDER

The State contends that the District Court erred in vacating the Defendant's sentences for the crimes of shooting into an occupied vehicle and use of a firearm in the Commission of a felony because it was "statutorily possible" for the Defendant to have committed those offenses without also committing the major offense of third degree murder. The Defendant concedes the theoretical possibility but disputes the argument on the ground that the offenses were not "separate offenses" in view of the allegations and the evidence in this case. Contrary to the State's argument, the law requires more than a legal possibility that the offenses could be separate and distinct under a given set of circumstances.

The State's "statutory possibility" argument was apparently derived from the June 22, 1983 amendment to Section 775.024(4), Florida Statutes (1983).[1] However, this statute cannot be applied to the case before the Court as it is clear that the application of a law imposing an additional punishment constitutes a violation of the ex post facto clause if the law was enacted after the commission of the offense in question. Weaver v. Graham, 450 U.S. 24, 67 L.Ed.2d 17, 101 S.Ct. 960 (1981). Even if this Court were to interpret the law as purely procedural it would not apply for it was enacted long after the procedure i.e. the sentencing, it was intended to govern.

As a secondary position, the State urges that the "statutory possibility" test was embodied in the applicable case law all along. This is simply not the case. Though not named as such, the statutory possibility test has been used exclusively to approve the imposition of separate sentences for separate and distict crimes committed in the course of a

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[1] Effective June 22, 1983, §775.021(4) reads: Whoever, in the course of one criminal transaction or episode commits separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense, and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial.

single criminal transaction. See e.g., Borges v. State, 415 So.2d 1265 (Fla. 1982); State v. Cantrell, 417 So.2d 260 (Fla. 1982); State v. Carpenter, 417 So.2d 986 (Fla. 1982). It has never been applied to support the imposition a separate sentence for an offense which is wholly included as a element of another crime for which the offender has been sentenced. See e.g., State v. Hegstrom, 401 So.2d 1343 (Fla. 1981); Bell v. State, ___ So.2d ____, 8 FLW 199 (Fla. June 9, 1983).

The inapplicability of the test in these instances should be apparent. If the Court were to apply the test to the "lesser included offense" cases as well as the "single transaction" cases the Court would have to overrule State v. Hegstrom, supra. After all, it would have been "statutorily possible" for the offender in that case to have committed the robbery without also committing the murder. Obviously the test can not to be used in the context of an "included offense" case.

The fallacy of the State's argument can be seen by examining the premise upon which it is based. Essentially the State contends that since multiple sentences are not longer prohibited under the "single transaction rule cases" they are also no longer prohibited in the context of a felony murder which is factually dependent upon proof of an otherwise legally discrete felony. The two situations, however, are

simply incomparable.

In Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1431, 63 L.Ed.2d 715 (1980), the Supreme Court of the United Staes concluded that Congress did not intend cumulative punishments for rape and murder committed during the course of a rape because the conviction of the felony murder offense could not be had without proving the lesser included offense of rape. That analysis was not dependent upon whether the crime of rape can technically be referred to as "lesser" than the crime of murder or whether it is "statutorily possible" to commit one offense without committing the other. Rather, the analysis is based upon an application of the double jeopardy test first announced in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932) to the fact that one offense cannot be proven without wholly proving the other. Stated otherwise, it cannot be said that each offense requires proof of a fact not be required of the other.

The Blockburger analysis was carried forward in State v. Hegstrom, supra, where the Court held that a criminal defendant may not be punished separately for the underlying felony used in his conviction for first degree felony murder. The Court analyzed the problem as follows:

> Because the crime of first degree murder committed during the course of a robbery requires, by definition, proof of the

> predicate robbery, the latter is necessarily an offense included within the former. Under Whalen's [Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980)] legislative intent test in our statute it would follow that Hegstrom could not be sentenced for both felony. But we see nothing in Blockburger which bars multiple convictions for lesser included offenses."

Again, the analysis of Hegstrom did not focus upon whether the crime of robbery was theoretically distinct from the crime of murder but rather upon the conclusion that the murder could not be proven under there facts without first proving all of the elements of the robbery. Likewise in this case, the crime of third degree felony murder could not have been proven without first proving all of the elements of the underlying felony of shooting into an occupied vehicle.[2] Obviously that crime cannot be committed without a gun and therefore could not have been proven without also proving that the Defendant used a firearm in the Commission of a felony.

The State is plainly incorrect in its assumption that the resolution of this issue is not dependent upon the allegation

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[2] The rule in Pinder v. State, 375 So.2d 836 (Fla. 1979) modified by the Court's more recent decision in Hegstrom, supra, applies to third degree felony murder just as it applies to first degree felony murder. See, Mahaun v. State, 377 So.2d 1159 (Fla. 1979).

or the proof. In Bell v. State, ____ So.2d ____, 8 FLW 199 (Fla. June 9, 1983) the Court referred to the "alleged evidence test" wherein the offenses are the same if there is sufficient similarity between allegations of two indictments or informations or even two counts within a single indictment or information and the "actual evidence test" wherein the offenses are the same if there is sufficient similarity in the evidence actually presented either at two trials or among two or more counts in a single trial. The unambiguous language used by the Court in the Bell case establishes that the determination should be made upon more than a mere theoretical possibility that the offenses could be separate under a given set of facts.

Moreover, it appears that the State is now estopped from arguing the points of law presented in its Petition for the reason that the State took the position during the trial that the offenses were in fact included within each other. Basic principles of appellate practice which should apply with equal force to attorneys for the State as attorneys for the defense ought to prohibit the presentation of a new point for the first time on appeal. The State Attorney, in his closing argument to the jury in this case, analyzed the matter as follows:

> Now the Judge is also going to instruct

> you on what are known as lesser included offenses. A lesser included offense is again a legal term, and I think the best way to describe it is to describe it by using an analogy of children's building blocks. If you pile four blocks, one on the other, and say that the top one is murder in the first degree. You couldn't get to the top one without having the next one there to support it. (R-616...)
>
> The third building block is third degree murder. The Judge will also instruct you on third degree murder. He's going to supply you with these instructions so that you don't have to keep them in your mind right now. Third degree murder is the unlawful killing of a human being done without any design to effect death. So up to there, it's like second degree, no premeditated intent but an unlawful killing, an unlawful killing done by a person engaged in the act of or with the intent to perpetrate a felony. That is a felony here of shooting at or into an occupied vehicle which is Count II of the Indictment or committing or attempting to commit the felony of possession of a firearm during the commission of a felony Count III of the Indictment. So if you find the Defendant was in the act or was committing either Count II or Count III, and you determine that Randy Mayo died as a result of the acts forming either Court II or Count III, that's third degree murder. (Emphasis supplied. R-619)

Thus, it is clear that the State once took the position that these offenses were wholly included within each other. The State should not be allowed to change that position by arguing at this point that one is not technically "lesser" than the

other.

The single transaction rule cases relied upon by the State simply have nothing to do with the situation before the Court. It may be true under State v. Carpenter, supra, that a defendant can be separately punished for the crimes of resisting arrest with violence and battery on a law enforcement officer when those offenses arise out of the same transaction, but to use the State's own argument those offenses are separate offenses which cannot be used as "building blocks" one upon another. For the same reason it may be true under State v. Cantrell, supra, and Borges v. State, supra, that a defendant may be separately sentened for the crimes of burglary and possession of burglary tools. Again, these are distinct offenses the elements of which cannot be combined to form a single offense.[3]

In this case we are not merely dealing with the same criminal episode or overlapping evidence. On the contrary, the Court is confronted with three cases which are to each

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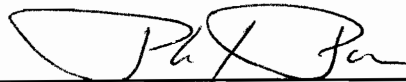
[3] The cases cited by the State are similar to the decision of the Supreme Court in Albernaz v. United States, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981) holding that the double jeopardy clause does not prohibit separate penalties for conspiracy to import marijuana and conspiracy to distribute marijuana. These may have been similar offenses committed in the same transaction and proven by overlapping evidence but unlike the instant offenses the elements of one case are not entirely subsumed within another.

other no more than a set of concentric circles. All of the elements of using a weapon in the commission of a felony are necessarily required to prove the offense of shooting into an occupied vehcile which is necessarily required to prove third degree murder. Therefore, even though it may be true that the case law permits similar offenses arising out of the same transaction to be punished separately those decisions have no effect upon the case before the Court.

The State's argument in this case must fail as it is now settled that a criminal defendant cannot be punished separately for both felony murder and the underlying felony.

CONCLUSION

The State's Petition for Review should be denied and the portion of the District Court's Judgment vacating the sentences for the crimes of shooting into an occupied vehicle and use of a firearm in the commission of a felony should be affirmed.



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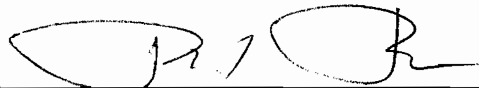
CERTIFICATE OF SERVICE

HEREBY CERTIFY that a true copy of the foregoing has been furnished to John W. Tiedemann, Esquire, Assistant Attorney General, The Capitol, Tallahassee, Fl 32301 by U.S. Mail this 5th day of September, 1983.



Attorney