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IN THE SUPREME COURT OF FLORIDA

FILED

AUG 15 1983

SID J. WHITE
CLERK SUPREME COURT
By _____ Chief Deputy Clerk

WILLIE F. VAUSE,

PETITIONER,

-VS-

STATE OF FLORIDA,

RESPONDENT. /

CASE NOS. 63,107 & 63,258

STATE OF FLORIDA,

PETITIONER,

-VS-

WILLIE F. VAUSE,

RESPONDENT.

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INITIAL BRIEF OF THE STATE, AS PETITIONER

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PRELIMINARY STATEMENT

The State of Florida, the prosecuting authority and appellee below in Vause v. State, 424 So.2d 52 (Fla.1st DCA 1982), the petitioner here in Case No. 63,258 and the respondent here in Case No. 63,107, will be referred to as "the State." Willie F. Vause, the criminal defendant and appellant below, the respondent here in Case No. 63,258 and the petitioner here in Case No. 63,107, will be referred to as "Vause."

The State submits this initial brief pursuant to its status as petitioner in Case No. 63,258.

References to the four-volume record on appeal will be designated "(R)."

STATEMENT OF THE CASE AND FACTS

The only matters relevant to a resolution of the issues presented on certiorari may be summarized as follows:

On June 27, 1979, an indictment was returned in the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, charging Vause with first degree murder in violation of §782.04, Fla.Stat., with shooting into an occupied vehicle in violation of §790.19, Fla.Stat., and with use of a firearm in the commission of a felony in violation of §790.07(2), Fla.Stat. (R 1-2). At trial, the evidence showed that Vause, following a drunken altercation at a gathering, killed Randy Mayo, a passenger in a departing truck, with a rifle shot. Over defense objection, the trial court permitted Dr. Donald Beeckler, a radiologist, to testify for the State that in his expert opinion, judging from autopsy X-rays, the bullet which killed Mayo had entered his body intact (R 294-309). This testimony was submitted to refute a defense claim that the bullet had ricocheted off a tree and fragmented before striking the victim.

The jury found Vause guilty of third degree murder in violation of §782.04(4), Fla.Stat., and of shooting into an occupied vehicle and use of a firearm in the commission of a felony as charged (R 71-74). He was so adjudicated, and received separate concurrent sentences of twelve, twelve, and five years imprisonment on these counts (R 81-82,86). In addition, Vause was sentenced to a mandatory minimum imprisonment of three years based upon his possession of a firearm during the murder in violation of §775.087(2)(a), Fla.Stat. Upon timely appeal (R 87), the First District affirmed the trial court's decision that Dr. Beeckler was qualified to express his expert opinion that the rifle bullet had entered the victim's body intact, and also affirmed the trial court's imposition of the mandatory minimum three years of imprisonment under §775.087(2)(a). Vause successfully invoked this Court's conflict certiorari jurisdiction over these dispositions, Case No. 63,107. The First District also affirmed Vause's convictions for third degree murder, shooting into an occupied vehicle, and use of a firearm in the commission of a felony, but reversed the separate sentence for shooting into an occupied vehicle on the basis that this crime was "an element" of third degree murder, and also reversed the separate sentence for use of a firearm in the commisssion of a felony on the basis that this crime was a "necessarily included" offense of shooting into an occupied vehicle. The State successfully invoked this Court's conflict certiorari jurisdiction over these dispositions, Case No. 63,258.

ISSUE

THE FIRST DISTRICT ERRED IN HOLDING THAT VAUSE COULD NOT RECEIVE SEPARATE SENTENCES UPON HIS CONVICTIONS FOR THIRD DEGREE MURDER, SHOOTING INTO AN OCCUPIED VEHICLE, AND USE OF A FIREARM IN THE COMMISSION OF A FELONY, SINCE IT IS STATUTORILY POSSIBLE TO COMMIT EACH OF THESE OFFENSES WITHOUT COMMITTING EITHER OF THE OTHERS.

ARGUMENT

When may a criminal defendant who has been charged and convicted for committing multiple criminal violations in the course of a criminal transaction receive separates sentences for each conviction? Commencing with State v. Pinder, 375 So.2d 836 (Fla.1979),running through State v. Hegstrom, 401 So.2d 1343 (Fla.1981); 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); State v. Gibson, ___ So.2d ___ (Fla. Feb. 17, 1983), 8 F.L.W. 76, reh.pending; Smith v. State, 430 So.2d 448 (Fla. May 12, 1983); Bell v. State, ___ So.2d ___ (Fla. June 9, 1983), 8 F.L.W. 199, reh.pending; and concluding, for the time being, with State v. Getz, ___ So.2d ___ (Fla. July 14, 1983), 8 F.L.W. 233, this Court has struggled with this question. The recent enactment into law of an amended §775.021(4), Fla.Stat.[1], renders

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[1] Effective June 22, 1983, §775.021(4) reads:

775.021 Rules of construction.--
(4) Whoever, in the course of one criminal transaction or episode, commits separate criminal offenses, upon conviction

it unnecessary to revisit all of the aforecited decisions in all of their twists and turns. Here, it need be noted only that the more recent and hence controlling aforecited cases collectively establish in principle, although some unfortunately misapply in practice, that neither obsolete "single transaction" principles, nor double jeopardy principles, nor the unamended §775.021(4)[2] prevent a criminal defendant from receiving separate sentences upon conviction for commission of multiple criminal violations in the course of a criminal transaction unless it is statutorily impossible to violate one statute without violating one or more of the others. Whether it would have been impossible for the defendant to have committed one offense without having committed one or more of the others, as the offenses were charged, is irrelevant. Whether it would have been impossible for the defendant to have committed one offense without having committed

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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.

2 The unamended §775.021(4) read:

775.021 Rules of construction.--
(4) Whoever, in the course of one criminal transaction or episode, commits an act or acts constituting a violation of two or more criminal statutes, upon conviction and adjudication or guilt, shall be sentenced separately for each criminal offense excluding lesser included offenses, committed during said criminal episode, and the sentencing judge may order the sentences to be served concurrently or consecutively.

one or more of the others, under the proof adduced at trial, is also irrelevant. All the Court need ask is whether it is statutorily impossible to violate one statute without violating one or more of the others. See particularly Borges v. State, State v. Cantrell, State v. Carpenter, and State v. Getz; cf. Strickland v. State, ___ So.2d ___ (Fla. July 28, 1983), 8 F.L.W. 282.

In the instant case, it is statutorily possible to "shoot into an occupied vehicle" in violation of §790.19, Fla.Stat., without committing a third degree murder in violation of §782.04(4), Fla.Stat., and vice versa[3]. For example, one may shoot into an

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[3] These statutes read as follows:

790.19 Shooting into or throwing deadly missiles into dwellings, public or private buildings, occupied or not occupied; vessels, aircraft, buses, railroad cars, streetcars, or other vehicles.-- Whoever, wantonly or maliciously, shoots at, within, or into, or throws any missile or hurls or projects a stone or other hard substance which would produce death or great bodily harm, at, within, or in any public or private building, occupied or unoccupied, or public or private bus or any train, locomotive, railway car, caboose, cable railway car, street railway car, monorail car, or vehicle of any kind which is being used or occupied by any person, or any boat, vessel, ship, or barge lying in or plying the waters of this state, or aircraft flying through the airspace of this state shall be guilty of a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

792.04 Murder.--
(4) The unlawful killing of a human being, when perpetrated without any design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than any arson, sexual battery, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb, shall be murder in the third degree and shall constitute a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

The latter statute has since been slightly amended.

occupied vehicle, and miss or only wound the victim, and thus not commit a third degree murder; and one may commit a third degree murder by killing someone in the course of committing a false imprisonment in violation of §787.02, Fla.Stat., rather than by shooting into an occupied vehicle. Thus, the First District's conclusion that Vause could not be separately sentenced for shooting into an occupied vehicle because this crime was "an element" of third degree murder, was incorrect.

It is also statutorily possible to "use a firearm in the commission of a felony" in violation of §790.07(2), Fla.Stat., without "shooting into an occupied vehicle" in violation of §790.19, Fla.Stat., and vice versa[4]. For example, one may display a firearm while committing a kidnapping in violation of Chapter 787, Fla.Stat., rather than while shooting into an occupied vehicle in violation of §790.19; and one may violate § 790.19 by hurling a stone into an occupied vehicle without displaying a firearm. Thus, the First District's conclusion that Vause could not be separately sentenced for using a firearm in the commission of a felony because this crime was a "necessarily included" offense of shooting into an occupied vehicle, was

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4 Section 790.07(2) reads as follows:

790.07 Persons engaged in criminal offense, having weapons.--
(2) Whoever, while committing or attempting to commit any felony or while under indictment, displays, uses, threatens, or attempts to use any firearm or carries a concealed firearm is guilty of a felony of the second degree, punishalbe as provided in s. 775.082, s. 775.083, and s. 775.084.

incorrect. Moreover, it is also statutorily possible to "use a firearm in the commission of a felony" in violation of §790.07(2) without committing a third degree murder in violation of §782.04(4), and vice versa. For example, one may display a firearm in the course of committing a robbery in violation of Chapter 812, Fla. Stat., and not kill anyone, and thus not commit a third degree murder; and one may kill someone in the course of committing a false imprisonment in violation of §787.02 without displaying a firearm. Thus, the First District's conclusion that Vause could not receive a separate sentence for use of a firearm in the commission of a felony could not be alternatively justified on the basis that such was a lesser included offense of third degree murder.

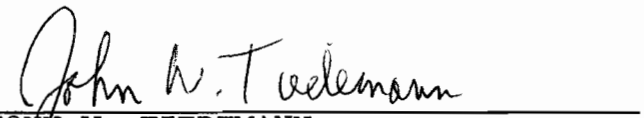
In sum, the First District erred in holding that Vause could not receive separate sentences upon his convictions for third degree murder, shooting into an occupied vehicle, and use of a firearm in the commission of a felony, since it is statutorily possible to commit each of these offenses without committing either of the others. This Court must therefore quash these dispositions with directions that the separate sentences imposed by the trial court be reinstated.

CONCLUSION

WHEREFORE, the State submits that the indicated sentencing dispositions of the First District must be quashed with directions that the separate sentences imposed by the trial court be reinstated.

Respectfully submitted,

JIM SMITH
Attorney General



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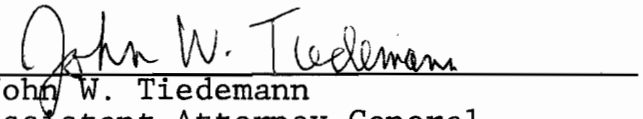
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief has been forwarded to Mr. Philip J. Padovano, Post Office Box 873, Tallahassee, FL 32302, via U. S. Mail, this 15th day of August 1983.



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