IN THE SUPREME COURT OF FLORIDA

Case No. 63,107
63,258

WILLIE F. VAUSE,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

FILED

AUG 22 1983

SID J. WHITE
CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

STATE OF FLORIDA,

Petitioner,

vs.

WILLIE F. VAUSE,

Respondent.

INITIAL BRIEF OF DEFENDANT VAUSE AS PETITIONER

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PRELIMINARY STATEMENT

In this Brief the Petitioner Willie F. Vause will be referred to by name or as the Defendant. The Respondent State of Florida will be referred to as the State.

Citations to the original four volume record on appeal will be made by the letter "R" and the appropriate page number.

STATEMENT OF THE CASE

This case is before the Court upon an Order granting review of the decision of the First District Court of Appeal in Vause v. State, 424 So.2d 52 (Fla. 1st DCA 1982). The State and the defense each requested review of the decision.

On June 27, 1979 the Grand Jury for Leon County, Florida returned an indictment against the Defendant Willie Vause charging him with the first degree murder of one Randall Mayo. (R-1). The charge alleged that Vause killed Mayo from a "premeditated design" to effect his death. (R-1) In connection with the same incident the Defendant was charged with the offense of shooting into the vehicle occupied by the victim Mayo, and the offense of using a firearm in the commission of Mayo's murder. (R-1).

A written plea of not guilty was filed on behalf of the Defendant (R-14), and his jury trial commenced in Tallahassee

on January, 21, 1981. (R-333) The basis of the defense, supported by the testimony of the Defendant, various members of his family, and several expert witnesses, was that the victim Mayo died as a result of an accident.

The scientific evidence presented by the defense through the testimony of a physics professor, a botanist, and a registered land surveyor, was offered to show that if the bullet fired by the Defendant Vause had not been deflected through the branch of a dogwood tree, it would have passed well over the top of the Mayo vehicle. The nature of the defense and the state's intended response to it, prompted the prosecutor to advise the Trial Judge that the expert witnesses would be the "crux of the case one way or the other." (R-253)

The state was allowed, over the objection of defense counsel to ask a radiologist who had examined the autopsy x-rays to explain why the fatal bullet had become fragmented. (R-299) The theory of the state's doctor was that the bullet was intact upon entry to the body and that its fragmentation was not caused by prior contact with another object. (R-298-301) The defense contention that the witness was not qualified as a ballistics expert was rejected, (R-299-300) and the members of the jury were permitted to hear the doctor's testimony on that point.

At the close of the State's case defense counsel moved for a judgment of acquittal contending that the evidence was

insufficient to support a conviction for first degree murder or any of the lesser degrees of murder. (R-349) The motion was denied at that time, (R-349) and once again when it was renewed at the close of all of the evidence. (R-605)

The case was submitted to the jury on the charge of first degree murder and each of the other charges contained in the indictment. The prosecutor in explaining the lesser included offenses of homicide told the jury his theory as to how the Defendant could be found guilty of third degree murder. (R-620,726) He argued that if the death occured while the Defendant was engaged in the crime of shooting into an occupied vehicle (a felony other than one of those referred to in the first degree felony murder statute) the Defendant would be guilty of third degree murder on the basis of the felony murder rule. (R-620-726)

As to the homicide charge the jury returned a verdict of guilty of the lesser offense of third degree murder. (R-72) Additionally, the jury found the Defendant guilty of the predicate felony of shooting into an occupied vehicle, (R-74) and using a firearm in the commission of a felony. (R-71)

On March 16, following the denial of a Motion for New Trial (R-78,79) the Trial Judge made a formal adjudication of guilt and imposed concurrent sentences on each of the verdicts. (R-81) The Defendant was sentenced to a term of twelve years on the first count (third degree murder), twelve

years on the second count (shooting into an occupied vehicle), and five years on the third count (using a firearm in the commission of a felony). (R-82) Additionally, the Trial Judge applied the three year mandatory minimum sentencing provision of Section 775.087, Florida Statutes (1979). (R-82)

The Defendant contended on appeal to the First District Court of Appeal that the Trial Judge erred in allowing the radiologist called by the State to render an opinion as to the manner in which the bullet fired from the Defendant's rifle became fragmented. He argued that this testimony was beyond the expertise of the witness and that it was extremely prejudical in view of the nature of the defense. The court rejected the argument, however, upon the reasoning that it was within the discretion of the Trial Court to allow the testimony in question. Vause v. State, supra.

Another aspect of the judgment asserted as error on appeal was the Trial Judge's application of the three year mandatory sentencing provision. The basis of this contention was that the statute was intended to provide a form of aggravation for the additional fact that a crime was committed with a gun and therefore that it could not be applied where the use of the gun was an essential element of the offense itself. This contention was rejected as well. Vause v. State, supra.

Timely Petitions for Review were filed by both the State

and the defense. This Court consolidated the Petitions and granted review on July 26, 1983.

STATEMENT OF THE FACTS

Each of the arguments made in this Brief is based upon the assumption that the State's version of the facts is true. The following statement of the facts contains a summary of the evidence presented by both the prosecution and the defense, however, in order to demonstrate the significance of the challenged evidentiary rulings made by the Trial Judge below.

A

THE PROSECUTION

On the evening of June 13, 1979, a group of people gathered together at William's Landing, a small boat lauch on the bank of Lake Talquin, to relax and listen to Randy Mayo play his guitar. (R-136) Most of the eighteen to twenty people who were present, including the Defendant Willie Vause, were drinking beer. (R-152) At one point the Defendant Vause was playing his own guitar with Mayo, and throughout the evening the two appeared to be getting along well. (R-152-241).

Just as Horace Richardson, the owner and operator of the

landing, was about to close up, the Defendant got in to an argument with a cat fisherman named Buddy Rowan. Apparently Rowan, who was ready to leave, could not get his truck out because it was blocked by the Defendant's car. (R-175) According to the State's witnesses, Rowan asked Vause to move the car but Vause just called him an ugly name and told him to get his truck out the best way he could. (R-175)

Joyce Harrell, one of the State's witnesses, testified that the Defendant was standing on the dock looking as if he was ready to leave when he turned around and took a swing at Rowan. (R-176) Rowan raised his hand to stop the blow but as he did so he lost his balance. (R-176) Both men fell into the lake which was about one foot deep at that point. (R-176) Mrs. Harrell saw her husband Tommy go into the lake to break up the ensuing scuffle, and at that time she observed the Defendant Vause reaching into his pocket for something. (R-176) Tommy Harrell said to the Defendant, "Willie when you come out of your pocket come out empty-handed" after which the Defendant Vause reportedly "cussed him" and threatened to kill him. (R-178)

Horace Richardson then walked down to the area of the dock and asked the Defendant to leave. (R-136) According to Richardson the Defendant said that he was going to get his gun and come back down there and kill that son of a bitch, apparently referring to Rowan. (R-136) Richardson, who

characterized the Defendant as being so drunk he could hardly stand up, said that he told Vause he should go home and sober up before he came back. (R-136) He thought that Vause was too drunk to drive so he offered to drive him home. (R-139)

At that point Horace Richardson got into the Defendant's vehicle to drive him to his house. (R-139,140) He asked Tommy Harrell to follow them so that he could get a ride back to the landing, and Tommy, his wife Joyce, and their son got into their truck. (R-140,178) Randy Mayo got into a third vehicle driven by one Johnny Pittman, and the two of them followed Richardson and Harrell. (R-178,201) Richardson said that on the way to the Vause residence, the Defendant told him he was going to get his gun and go back to the landing and "kill every son of a bitch down there". (R-140)

Mr. Richardson testified that he drove the Defendant's car up under the carport, and that Mrs. Vause came to the door to greet them. (R-141) He said that he helped the Defendant Vause to the door and that he went inside the house where he remained for about ten minutes. (R-141,142) After he explained to Mrs. Vause what had happened she thanked him for driving her husband home. (R-141)

While the other vehicles were in the driveway, Randy Mayo got out of Pittman's car and into the truck driven by Tommy Harrell. (R-201) When Horace Richardson left the house he got into the car with Johnny Pittman. (R-201) Before they left,

the witnesses said that the Defendant Vause came back out on the porch and started using some vulgar language. (R-143) Richardson said that he told Pittman to stop the car so that he could get out and "stop his filthy mouth" referring to Willie Vause, but that Pittman refused to do so. Joyce Harrell testified that she heard Vause say, "I'll beat all of you back down there and I'll blow everybody's brains out that's sitting on the store porch down there". (R-179)

As the witnesses were backing out of the driveway a shot was fired. (R-180) Tommy Harell said that when he heard the shot he saw dirt fly up between his truck and Pittman's car. (R-201) A second shot was fired, and at that time Randy Mayo "kind of grunted" and leaned over against Joyce Harrell. (R-181) Mr. Harrell, who apparently was unaware of the fact that Mayo was hurt stopped his truck to see if Richardson and Pittman were alright. (R-181) They put him in the back of the truck and returned to the landing where they called an ambulance. (R-202) Mayo was transported in the ambulance to the Tallahassee Memorial Regional Medical Center where he died of the bullet wound later that evening. (R-145,146)

Lieutenant Robert Smith and Lieutenant Wilford Jiles of the Leon County Sheriff's Department went to the Defendant's house to speak with him and when they arrived they each noticed two thirty-thirty shell casings lying on the front porch. (R-247,256) The officers mentioned that they thought

the Defendant had been drinking, but neither of them thought that he was drunk at the time they arrived. (R-251,257) They took the shell casings as evidence and placed the Defendant Vause under arrest. (R-256)

The State called the Medical Examiner, Dr. Ernest Craig, who testified that the victim Mayo died from a bullet wound to the upper portion of both the left and right lung. (R-287) The doctor said that he thought that the bullet travelled in a straight line from the point of its entry to the body to its resting place in the victim's upper left arm. (R-287) The State was also able to establish though the testimony of James Walsh, a firearms examiner, that the bullet removed from the victim by Dr. Craig was fired from one of the shell casings found on the Defendant's front porch. (R-313)

In addition to the testimony of the Medical Examiner, the State presented the testimony of Dr. Donald Beeckler, a radiologist who had examined the x-rays made during the autopsy. Dr. Beeckler was allowed, over the objection of defense counsel, to state why the fatal bullet fired from the Defendant's rifle was fragmented when it was finally removed from the victim. (R-301) In Beeckler's opinion the bullet was intact when it entered Mayo's body and began to disintegrate only after it collided with his ribcage. (R-307,308)

B

THE DEFENSE

Willie Vause took the stand in his own defense and testified in essence that the events preceding the homicide caused him to fear that Harrell, Pittman, and Richardson would do harm to him and that he fired the shots in an attempt to scare them away. Three expert witnesses including a physics professor, a botanist, and a registered land surveyor were called by defense counsel to demonstrate that the rifle was not actually aimed at Mayo or at either of the vehicles at the time it was fired.

Mr. Vause said that he was on his way home from the landing when Horace Richardson asked him if he would buy some more beer (R-545) and at that time he bought a case of beer for everyone. (R-546) A short time later Buddy Rowan asked him if he would move his car and he said that he was going to go after the next song and that he would move it in a minute. (R-546) Rowan then got into an argument with Vause about the car and threw him over the railing of the dock. (R-546) Tommy Harell came into the water and both he and Rowan were on top of Vause hitting him and choking him. (R-546)

After the fight was broken up the Defendant Vause finally made it to his car and was driven home against his wish by Horace Richardson. (R-547) Shortly after they arrived,

Johnny Pittman and Randy Mayo were standing in the front yard. (R-550) Vause then offered his hand and said, "Randy I enjoyed the music, let's just shake hands and forget the trouble", but nobody would shake his hand. (R-550,551) He told them that he just wanted them to leave and that he had already been hurt enough. (R-552)

As the Defendant was going into the bedroom to get some dry clothes his wife Lila came into the room to say that she thought the men were coming back up to the house. (R-552) He grabbed his rifle and walked out to the front porch and as he did so he heard a voice saying "I'm going to go back up there and finish the old son of a bitch off." (R-533) Vause told his wife that he was going to fire some warning shots and then put the rifle up to his hip and discharged it twice into an "open space". (R-553,554)

The events occuring after the Defendant's arrival at his residence were also witnessed by those already present in the house. As to these events the Defendant's statement was supported by the testimony of his wife Lila Vause, (R-358,361), his son Robert L. Vause (R-496) and his son's fiancee, Lucia McFarland. (R-525)

Lila Vause testified that when her husband was told that a man had been shot he was surprised and told the officers that he hadn't shot anyone. (R-268) When the Defendant Vause was told that the man was Randy Mayo he exclaimed, "Oh my

God". (R-561) Later that evening the officers told Vause that Mayo had died and his reaction was such that he had severe arm and chest pains which required hospitalization. (R-562)

On June 18, 1979 Investigator Theodore Lehman went to the scene of the Vause residence and was shown a dogwood tree about ninety feet from the house. (R-392) One of the tree's limbs had been partially severed and was hanging down. (R-393) Several other branches had been completely severed and were lying on the ground near the base of the tree. (R-393) Investigator Lehman decided to call in a botanist and a land surveyor in an attempt to determine how and when the branches were damaged. (R-403)

Dr. Loran B. Anderson, a botanist from Florida State University, testified that by performing an experiment designed to measure the rate at which a branch from that tree would become dehydrated, he was able to determine that the damage to the tree was done on June 13, 1979, the day of the homicide. (R-411) It was also shown by expert testimony that the limb removed from the tree contained quantity of lead. (R-442) Dr. Rhonda Ryder, a physics professor at Tallahassee Community College, said that she was certain the lead passed through the tree and that it was not absorbed as a result of any natural process. (R-442)

Dr. Ryder also reconstructed the path of the bullet fired

from the Defendant's porch. Based upon an examination of the severed limb and an application of the laws of physics, it was proven that the bullet struck the limb and was deflected to the left and downward about four degrees. (R-447) The path of the bullet after it had changed course carried it approximately four and one half feet above the road on which the Mayo vehicle was travelling. (R-447) If the bullet had not been deflected by the tree, Dr. Ryder said it would have passed approximately fifteen feet over the road. (R-448) Apart from these calculations Dr. Ryder said it would be physically impossible, because of an intervening retaining wall, for a bullet to travel in a straight line from the Vause porch to the site of the Mayo Vehicle. (R-449)

Larry Davis, a registered land surveyor called by the defense, also concluded that if the bullet had not been deflected by the dogwood tree it would have passd well overhead of those in the vehicles. First Davis measured the elevation of the break in the tree and found it to be 7.87 feet above the level of the ground. (R-468) By projecting a straight line from the porch through the location of the tree at that elevation he was able to demonstate that the bullet would have passed the road at an elevation of about fourteen feet. (R-468)

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN ITS CONCLUSION THAT THE RADIOLOGIST WAS PROPERLY QUALIFIED AS AN EXPERT WITNESS TO TESTIFY AS TO THE MANNER IN WHICH THE FATAL BULLET BECAME FRAGMENTED

The District Court held that it was proper to allow a radiologist to testify as to the manner in which the fatal bullet became fragmented, rejecting the Defendant's claim that such testimony should have been within the exclusive expertise of a ballistics specialist. The Court was in error for the opinion was clearly beyond the scope of the radiologist's medical expertise.[1] The error was predudicial as the challenged "expert opinion" contradicted the basic premise upon which the defense in this case was founded.

The Florida Evidence Code provides that a witness may give an opinion as to a matter which requires scientific, technical or other specialized knowledge, if the witness can be qualified as an expert by training, skill, knowledge, education or experience. §90.702, Fla. Stat. (1979) It is

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[1] The Defendant contended in the Jurisdictional Brief that the conclusion of the Court was in conflict with the opinion of the Third District Court of Appeal in Salinetro v. Nystrom, 341 So.2d 1059 (Fla. 3rd DCA 1977) wherein the Court held that a medical witness was not qualified to give "expert testimony" outside his particular field of medical expertise.

the responsibility of the trial judge to determine the admissibility of the testimony of an expert and also to determine the scope of the subjects regarding which he may testify. Mills v. Redwing Carriers, Inc., 127 So.2d 453 (Fla. 2d DCA 1961).

It is conceded that trial judges have some degree of discretion in deciding the permissible range of testimony to be given by an expert witness, but that discretion is not absolute. The courts have made it clear that the practice of allowing a witness qualified as an expert in a given field to render an opinion about something which is beyond the scope of his expertise will be considered an abuse of discretion and therefore reversible error. See, e.g., Prohaska v. The Bison Co., 365 So.2d 794 (Fla. 1st DCA 1978); Kelley v. Kinsey, 362 So.2d 402 (Fla. 1st DCA 1978); and Fisher v. State, 361 So.2d 203 (Fla. 1st DCA 1978).

In Wright v. State, 348 So.2d 26 (Fla. 1st DCA 1978) the court held that it was reversible error to allow a medical examiner to testify that the victim had suffered injuries prior to the time she was buried into the ground by her husband's bulldozer. That conclusion was reached after the court looked at the common definitions of the terms "forensic" and "pathology", and determined that the witness was not qualified to give such an opinion. In this case, as in the Wright case, an application of common definitions will

demonstrate that the lower court erred. A radiologist is one who is trained to use x-rays for the diagnosis or treatment of diseases.[2] This type of training and experience does not qualify one to venture an opinion as to why a projectile fired from a rifle has taken a certain course or why it has changed its composition.

The testimony given by the radiologists in this regard would have been more properly given by an expert in the field of ballistics. That discipline is defined as the science of the motion of projectiles in flight.[3] Perhaps if the prosecutor had asked a ballistics expert to give his opinion as to the course the bullet traveled, and the reason for its fragmentation, the answer would have been different. In any case, the premise of the defense was that the bullet was deflected from (and therefore damaged by) the dogwood tree. Dr. Beeckler should not have been allowed to provide an explanation for the damage to the bullet.[4] because that was

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[2] Webster's New Collegiate Dictionary p. 952 (1977)

[3] Id at p. 85.

[4] In Munson v. State, 33 So.2d 463 (Ala. 1948) an expert witness was permitted to testify that the bullet removed from the victim had damage which was consistent with contacting a hard substance such as a bone, but the expert was an FBI ballistics specialist, not a doctor.

plainly beyond the area of his expertise.

Doctors are required to undergo a rigorous course of education and practical training, but we should not be so impressionable as to think that they are automatically qualified to give us an answer to any question we might ask simply because it has some remote connection to the human body. Indeed, the cases have held that a doctor may even by unqualified to give a medical opinion if he is testifying out of his particular field. For example, in Salinetro v. Nystrom, supra, the court held that it was error to allow a doctor who was specialist in obstetrics and gynecology to testify that a radiologist was negligent in failing to determine that his female patient was pregnant before he gave her abdominal x-rays. Although the permissible range of subjects upon which an expert may testify is a matter of discretion of the trial judge under Mills v. Redwing Carriers, Inc. supra, the court in Salinetro had little difficulty in determining that it was reversible error to allow the plaintiff's doctor to give that particular medical opinion.

The Defendant's argument for reversal in this case is even stronger than the one which was accepted by the court in Salinetro for in the latter case the witness was at least confining his testimony to the general subject of medicine. If a doctor cannot properly testify about something which is outside his chosen field of medical specialization, he surely

should not be permitted to testify about something which is not even within the general field of medicine.

Part of the reason for the District Court's failure to apply the correct rule of law was that the Court apparently misunderstood the issue. For example, the Court noted in the opinion that "contrary to Defendant's argument, a ballistics expert is not qualified to interpret x-rays." That erroneous characterization of the Defendant's contention undermines the force of the argument. The Defendant did not, at any time, suggest that a ballistics expert could usurp the obvious function of a radiologist by reading and interpreting x-rays.

The Defendant would concede that a radiologist is the only qualified person to read and interpret x-rays, but the point of the argument here was that the factual issue of how the bullet became fragmented was not a radiological subject to begin with. Questions relating to the manner in which a projectile discharged from a firearm changes its composition upon impact with an object are questions which are solely within the province of a ballistics expert.

Another reason for the failure to apply the correct rule of law was that the Court apparently had an incorrect or incomplete understanding of the applicable facts. For example, the Court stated that the radiologist had testified "hundreds of times" in cases involving gunshot wounds. While this would seem to support the Court's opinion, it is evident

that the Court overlooked the portion of the radiologist's testimony wherein he conceded that he had never given testimony of this nature before. (R-296)

This Court would probably have very little difficulty with the proposition that an FBI ballistics specialist is not qualified to establish a cause of death or the nature of an injury to the human body. The reverse situation presented by this case is no more complex. A doctor trained in the healing arts simply should not be permitted, because of his wisdom in that field, to give opinions as to how and why a bullet travels the way it does.

For these reasons the Defendant respectfully submits that the opinion of the Court below is in conflict with the opinion of the Third District Court of Appeal in Salinetro, supra, and that the Salinetro case represents the correct statement of the law. Thus, the Court should enter an Order vacating the decision of the District Court below and directing that the case be remanded to the Trial Court for a new trial.

POINT II

THE DISTRICT COURT ERRED IN APPROVING THE IMPOSITION OF AN ENHANCED PENALTY FOR THE USE OF A FIREARM AS THE FIREARM WAS AN ESSENTIAL ELEMENT OF THE OFFENSE ITSELF

The District Court held that it was not error for the Trial Judge to impose a three year mandatory minimum sentence under Section 775.087(2), Florida Statutes (1979) for the use of firearm, even though the firearm was a necessary element of the crime of shooting into an occupied vehicle which was in turn the predicate felony for the Defendant's conviction of third degree felony murder. That conclusion is erroneous, however, for it effectively allows a separate punishment for the underlying felony in violation the rule in State v. Hegstrom, 401 So.2d 1343 (Fla. 1981).[5]

In Hegstrom the court concluded that a criminal defendant could not be separately punished for both felony murder, and the underlying felony. The decision was based upon the recent double jeopardy precedents set by the United States Supreme Court in Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980) and Albernaz v. United States, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981), and the

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[5] The Defendant contended in the jurisdictional brief that the decision of the District Court in this case was in conflict with the Hegstrom case.

intent of the Florida Legislature in enacting Section 775.021(4), Florida Statutes (1979).

The District Court in this case agreed that the predicate felony (shooting into an occupied vehicle) cannot be committed unless the offender uses a firearm, and that the firearm was therefore an essential element of the offense in this case. The Court avoided the rule in Hegstrom, however, by concluding that the penalty was not actually increased by the imposition of the three year mandatory minimum provisions of Section 775.087(2), Florida Statutes. That conclusion is erroneous for the penalty was in fact increased by the addition of the three year mandatory sentence.

If a separate concurrent sentence for the underlying felony is impermissible under the rule in Hegstrom then it follows that the imposition of three year mandatory minimum sentence for conduct required to prove the underlying felony is also impermissible. It should be apparent that the offense of shooting into an occupied vehicle cannot be committed without the use of a gun.

Stated otherwise, if the position of the District Court were correct then every third degree felony murder based upon the predicate felony of shooting into an occupied vehicle would absolutely require the imposition of the three year mandatory minimum sentence. The underlying felony would invariably involve the use of a weapon. That construction of

the law overlooks the fact that Section 775.087(2), Florida Statutes (1979) was obviously intended to provide a form of aggravated penalty for the additional fact that the crime was committed with a gun.

The same District Court held in Harper v. State, 386 So.2d 808 (Fla. 1st DCA 1979) that the use of a firearm cannot double as an element of the crime and as a means of increasing the maximum term of the sentence under the enhancement provisions of Section 775.087(1). If that is true then it follows logically that the use of a firearm cannot double as an element of the crime and as a means of enhancing the sentence by imposing a mandatory minimum sentence. The result does not turn upon the form of the enhancement. Rather it should turn upon the prohibition against using an element of the crime as means of aggravating the penalty.

The Blockburger[6] test applies to this case just as it applied to Whalen and Hegstrom, supra. All of the elements of using a firearm in the commission of a felony must have been proven in order to prove the crime of shooting into an occupied vehicle. Likewise, all of the elements of the crime of shooting into an occupied vehicle must have been proven in order to prove the crime of third degree murder.[7] It cannot

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[6] Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932)

be said that each of the crimes contains an element not required to prove one of the others.

The Defendant's argument is further supported by the recent decision of this Court in Bell v. State, _____ So.2d _____, 8 F.L.W. 199 (Fla. 1983). In that case the Court noted that:

> If two statutory offenses have the exact same constituent elements, or when one statutory offense includes all of the elements of the other, those two offenses are constitutionally "the same offense" and the person cannot be put in jeopardy as to both such offenses unless the two offenses are based on two separate and distinct factual events.

It is clear that the offenses in this case are included within each other and that they are not based upon "distinct factual events". Contrary to the argument of the State and the holding of the District Court below, it makes no difference that the offenses could theoretically be separate. As the Court in Bell observed:

> The mere existence of two statutory offenses does not establish that the

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[7] The shooting charge and the weapon charge are completely subsumed within the charge of third degree felony murder. This is not merely a "single transaction" case where similar but discrete crimes are proven upon overlapping evidence. Compare State v. Cantrell, 417 So.2d 260 (Fla. 1982) and Borges v. State, 415 So.2d 1265 (Fla. 1982)

> legislature intended each to be independently convictable and punishable when both are committed in a single course of conduct...
>
> The fact that a single indictment or information charges both the greater and the lesser included offenses should not change the result regarding the propriety of multiple convictions. To hold otherwise would allow prosecutors to obtain multiple convictions based upon a charging decision, an unjust result which we decline to ligitimize.

The imposition of the mandatory sentence in this case was based upon an indispensable element of the predicate felony. Since that felony was used once to obtain the conviction for third degree murder the firearm element cannot again be used to aggravate the sentence by imposing a mandatory minimum sentence. Thus, the decision of this District Court is erroneous.

CONCLUSION

The Defendant respectfully submits that the Court should enter an Order vacating the Judgment of the District Court of Appeal and remanding the case for a new trial, or in the alternative, this Court should enter an Order vacating the three year mandatory minimum sentence.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 22nd day of August, 1983, by U.S. Mail to: Honorable Jim Smith, Attorney General, ATTN: John W. Tiedeman, Esquire, Assistant Attorney General, 1502 The Capitol, Tallahassee, Florida 32301.

Attorney