

IN THE FLORIDA SUPREME COURT

FILED

SID J. WHITE

JUL 9 1984

IRA MARTIN AMAZON, :

Appellant, :

vs. :

STATE OF FLORIDA, :

Appellee. :

Case No. 64,117

CLERK, SUPREME COURT

By *Amya*
Chief Deputy Clerk

APPEAL FROM THE CIRCUIT COURT
IN AND FOR PINELLAS COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant Amazon relies on his initial brief to respond to the arguments presented in the State's answer brief, except for the following additions on Issues I and II:

ISSUE I.

ARGUMENT IN REPLY TO THE STATE
AND IN SUPPORT OF THE PROPOSITION
THAT THE TRIAL COURT ERRED IN
DENYING AMAZON'S MOTION TO DIS-
MISS THE MURDER CHARGES ON THE
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OR ALTERNATIVELY, THE TRIAL COURT
ERRED IN ALLOWING THE MURDER PRO-
SECUTION TO PROCEED UNDER A FELONY
MURDER THEORY.

The State's contention that first degree felony murder and the underlying sexual battery and burglary are separate offenses under the test established in Blockburger v. United States, 284 U.S. 299 (1932) is without merit. As this Court said in State v. Hegstrom, 401 So.2d 1343 (Fla.1981),

...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. (Emphasis added.)

Ibid. at 1346. The statutory elements of first degree murder under the felony murder theory includes all of the elements of the underlying felony. §782.04(1)(a), Fla.Stat. (1981). There is no element of burglary and sexual battery which is not also included within the elements of the first degree felony murder in this case. Furthermore, the State's suggestion that the 1983

amendment to Section 775.021(4) somehow changes this conclusion is incorrect. State v. Gibson, ___So.2d___, 9 FLW 234,236, notes 6 and 7 (Fla.1984).

On page 21 of the answer brief, the State claims that this case involves a single trial setting for double jeopardy purposes. This position is untenable. The State commenced prosecution of these charges via two separate charging documents, an indictment (R8-9) and an information. (DCR1-2) The State never exercised its right to move to consolidate the cases under Fla.R.Crim.P. 3.151(b). During the plea hearing where Amazon pleaded guilty to the burglary and sexual battery, the State was aware that those crimes were part of the same criminal transaction as the murders. (DCR17-18) However, the State did not object to the guilty pleas at that time. (DCR12-20) If the State intended to have these cases tried together, that intent was never demonstrated in the State's handling of the cases.

The suggestion that Amazon caused these cases to be prosecuted separately (State's brief, pages 23-27) is without foundation. The exceptions to a double jeopardy bar provided for in Jeffers v. United States, 432 U.S. 137 (1977) are not applicable. Amazon never asked for separate trials or prosecutions on these charges; the State made the election by charging the crimes in two separate cases via two separate charging documents. (R8-9)(DCR1-2) Amazon never objected to a single trial on all the charges because the State never asked for such a single trial. The State could have obtained consolidation of the cases for trial. Fla.R.Crim.P. 3.151(b), or at the very

least, objected to acceptance of the guilty pleas to burglary and sexual battery. Neither of those actions were taken. The State, not Amazon, is completely responsible for these cases proceeding separately.

Next, the State argues that Amazon waived his right to dismissal of the murder charges because he did not move for consolidation of the charges pursuant to Fla.R.Crim.P. 3.151. (State Brief, pages 25-26) This rule of criminal procedure does not control a defendant's protections against double jeopardy. The rule provides for dismissal of related charges under certain circumstances, but it is a right independent of the constitutional double jeopardy prohibition. Failure to invoke the rule by a request for consolidation does not waive a defendant's right to be free from double prosecution for the same offense.

Amazon is also aware of the recent case from the United States Supreme Court on this subject, Ohio v. Johnson, __U.S.__, 35 Cr.L. 3130 (1984). Johnson was indicted, in a single indictment, for murder; grand theft; involuntary manslaughter and aggravated robbery as the result of a criminal transaction in which a single victim was killed. Johnson offered to plead guilty to manslaughter and grand theft but pleaded not guilty to murder and robbery. The State objected to the guilty pleas. Over those objections, the court accepted the guilty pleas, and later, granted Johnson's motion to dismiss the murder and robbery counts on double jeopardy grounds. The Ohio appellate courts approved the decision of the trial court. The United States Supreme Court reversed, holding that double jeopardy

protections did not bar the prosecution for the murder and robbery.

Ohio v. Johnson is distinguishable from Amazon's case. First, all the charges in Johnson were alleged in a single indictment; the State was seeking four convictions in a single prosecution and trial. Two separate prosecutions were proceeding against Amazon. Second, the State in Johnson objected to the trial court's acceptance of guilty pleas from the defendant. The State in Amazon's case never voiced any objections, even though it was aware that the burglary and sexual battery were lesser included offenses of the murders. Unlike the defendant in Johnson, Amazon pleaded guilty to all the counts charged in a single information without objection from the State. The defendant in Johnson, pleaded guilty to two of four counts in an indictment over strenuous State objections. The circumstances in Johnson and the circumstances in Amazon's case are distinguishable.

Brown v. Ohio, 432 U.S. 161 (1977) controls this case. Like the defendant in Brown, Amazon pleaded guilty to lesser included offenses which had been charged in a separate charging document and handled as a separate prosecution. Double jeopardy barred the prosecution of the greater offense in a separate proceeding in Brown and that constitutional protection should likewise bar the murder prosecution in Amazon's case. The trial court should have dismissed the murder indictment in this case, and Amazon asks this Court to reverse the lower court's ruling.

ISSUE II.

ARGUMENT IN REPLY TO THE STATE
AND IN SUPPORT OF THE PROPOSITION
THAT IRA AMAZON'S ABSENCE FROM
THE JURY VIEW OF THE SCENE, WHERE
TESTIMONY AND OTHER EVIDENCE WAS
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STAGES OF HIS TRIAL.

The State has missed the threshold question involved in this argument--whether Amazon validly waived his right to be present. Only if this Court concludes that a valid waiver exists, does the question of a capital defendant's legal right to waive his presence become an issue. This is precisely the manner in which this Court decided a similar issue in Francis v. State, 413 So.2d 1175 (Fla.1982). Since this Court concluded the defendant in Francis did not waive his presence, the question of the defendant's legal right to waive his presence was left undecided. Ibid. at 1178.

Amazon did not validly waive his presence at the portion of his jury trial conducted at the crime scene. His lawyer represented to the trial court that Amazon waived his presence. (R1044) But, this representation occurred in chambers without Amazon's personal presence, much less his personal waiver. (R1007, 1044) Amazon's silence is not a waiver. Boykin v. Alabama, 395 U.S. 238,243 (1969); Francis v. State, 413 So.2d 1175,1178 (Fla. 1982). There has been no showing of "...an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458 (1938).

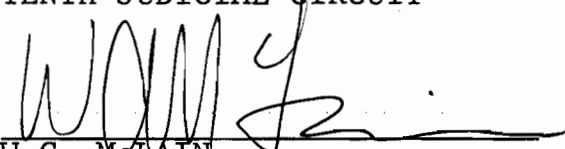
CONCLUSION

Upon the reasons and authorities in this Reply Brief and in the Initial Brief, Ira Amazon asks this Court to reverse his convictions with directions that he be discharged, or alternatively, granted a new trial. Assuming this Court does not reverse his convictions, Amazon further asks that his death sentences be reduced to life imprisonment in accordance with the jury's recommendation.

Respectfully submitted,

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

BY:

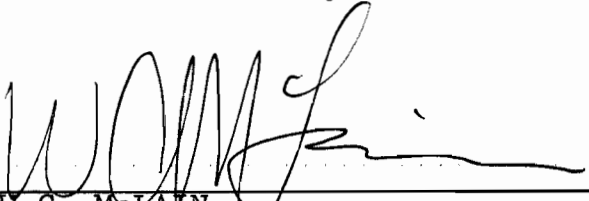

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Attorney General's Office, Park Trammell Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602 by mail on this 6th day of July, 1984.


W.C. McLain

WCM:js