

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, )  
 )  
 Petitioner, )  
 )  
 vs. )  
 )  
 JAMES MICHAEL SNOWDEN, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

CASE NO. 65,176

**FILED**

SID J. WHITE

AUG 8 1984

CLERK, SUPREME COURT

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Chief Deputy Clerk

RESPONDENT'S BRIEF ON THE MERITS

JAMES B. GIBSON  
PUBLIC DEFENDER  
SEVENTH JUDICIAL CIRCUIT

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\_\_\_\_\_                                  )

CASE NO. 65,176

RESPONDENT'S BRIEF ON THE MERITS

STATEMENT OF THE CASE AND FACTS

As stated in the district court's opinion, the defendant was charged with first degree murder and armed robbery. The jury was instructed on the various degrees of homicide from first degree premeditated murder to third degree felony murder and manslaughter. At the request of defense counsel and with the consent of the prosecutor, the trial court instructed the jury that grand theft was a crime which could be considered as the underlying felony of third degree murder. The jury, clearly finding the evidence insufficient to support a higher degree murder conviction and a robbery, returned verdicts of guilty on third degree felony murder and grand theft. Snowden v. State, 449 So.2d 332, 335 (Fla. 5th DCA 1984).

The district court was presented with the question of "whether the defendant may legally be convicted of third degree (felony) murder and also be convicted of the underlying felony on which the murder conviction is based." Id. In deciding this question in the negative, the court carefully analyzed the line of cases from this Court dealing with double jeopardy and concluded that, based upon the test enumerated in these cases (as clarified and modified by the later cases), the underlying felony of grand theft is a lesser included offense of third degree felony murder (during the perpetration of a grand theft), thereby precluding both a conviction and a sentence on the lesser offense. Snowden, supra at 335-337.

SUMMARY OF ARGUMENT

Both Bell v. State, 437 So.2d 1057 (Fla. 1982), and Section 775.021(4), Florida Statutes (1981), prohibit multiple convictions and sentences for both the greater and the lesser included offense. Under the Blockburger test, as utilized by this Court in cases including State v. Hegstrom, 401 So.2d 1343 (Fla. 1981), the underlying felony is a lesser-included offense of felony murder. Therefore, no conviction or sentence for the underlying felony can properly result.

ARGUMENT

THE DISTRICT COURT OF APPEAL,  
FIFTH DISTRICT, CORRECTLY  
VACATED THE RESPONDENT'S CON-  
VICTION AND SENTENCE FOR  
GRAND THEFT SINCE THE GRAND  
THEFT IS A LESSER INCLUDED  
OFFENSE OF THIRD DEGREE  
FELONY MURDER DURING THE  
PERPETRATION OF THE GRAND  
THEFT.

As this Court unequivocally stated in Bell v. State, 437 So.2d 1057, 1061 (Fla. 1983), the double jeopardy clauses of the United States Constitution (Amendment 5) and of the Florida Constitution (Article I, Section 9) prohibit multiple convictions and sentences for both greater and lesser included offenses:

In conclusion, based on an appreciation of the history of the policies behind protecting against double jeopardy for the same offense, and motivated by a desire for consistency and fairness, we hold that once it has been established that an offense, whether charged or not, and whether in single or separate proceedings, is a lesser included offense of a greater offense, also charged, then the double jeopardy clause proscribes multiple convictions and sentences for both the greater and lesser included offenses. (emphasis added)

See also § 775.021(4), Fla.Stat. (1981), wherein the legislature explicitly excluded lesser included offenses from separate punishment (i.e., multiple convictions and sentences); Bell v. State, supra at 1058.

This Court in Bell, supra, set forth the convincing rationale for the prohibition of multiple convictions as well as multiple sentences:

Arguments that multiple convictions in a single trial setting do not produce detrimental effects, and therefore do not punish multipliciously, are misplaced unless we are willing to close our eyes to the realities of the criminal justice system. Convictions for lesser included offenses clearly have detrimental effects on the person convicted. Bell v. State, supra at 1059.

The Court then listed some of the detrimental effects such multiple convictions have, including parole release dates, impeachment evidence in subsequent proceedings, and enhancement under habitual offender statutes. Id. Add to that list now the substantial increase in points scored when calculating the presumptive sentence under Florida's relatively new sentencing guidelines (Fla.R.Crim.P. 3.701).<sup>1/</sup>

For these reasons, then, this Court receded from State v. Monroe, 406 So.2d 1115 (Fla. 1981), and hence from State v. Hegstrom, 401 So.2d 1343 (Fla. 1981), upon which Monroe exclusively relied. Bell v. State, supra at 1058, 1060; Snowden v. State, supra at 336.

<sup>1/</sup> Under these guidelines, the addition of the additional separate conviction of grand theft in a third degree felony murder situation would automatically increase a defendant's point total 10 points and could add five years to the presumptive guidelines sentence.



Under the Blockburger<sup>2/</sup> test as applied by this Court to determine lesser included offenses in Bell, supra; Borges v. State, 415 So.2d 1265 (Fla. 1982); and even State v. Hegstrom, supra, the underlying felony of grand theft is a lesser included offense of third degree felony murder occurring in the commission of a grand theft. Blockburger indicates that a less serious offense is included in a more serious one if all of the elements required to be proven to establish the lesser offense are also required to be proven, along with more, to establish the greater offense. Borges v. State, supra at 1267; Bell v. State, supra at 1058; Scott v. State, \_\_\_ So.2d \_\_\_, 9 FLW 209 (Fla. Sup. Ct. Case No. 63,878, 6/7/84).<sup>3/</sup> Here, the greater offense of third degree felony murder requires proof of the grand theft and that the killing took place during the perpetration of the grand theft. § 782.04(4), Fla.Stat. The Hegstrom court, in applying this test, clearly held that where a felony murder is predicated on the proof that it was committed during the course of a robbery, the underlying robbery

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<sup>2/</sup> Blockburger v. United States, 284 U.S. 299 (1932).

<sup>3/</sup> But see State v. Gibson, \_\_\_ So.2d \_\_\_, 9 FLW 234, 235 (Fla. Sup. Ct. Case No. 61,325, on rehearing 6/14/84), wherein this Court indicates that Blockburger might not be the test to be utilized in double jeopardy situations.

is necessarily a lesser included offense of the felony murder. State v. Hegstrom, supra at 1346. See also Harris v. Oklahoma, 433 U.S. 682 (1977); (the underlying felony is a lesser included offense of felony murder); State v. Gibson, 9 FLW at 234 and 236 n.6 (explaining that in a situation such as Pinder and Hegstrom, supra, the underlying felony is a lesser included offense of the felony murder for double jeopardy purposes). The petitioner even admits that grand theft is a lesser included offense of felony murder where, in its jurisdictional brief at p. 2, it states that "(by definition) theft is an 'element' of third degree murder...."

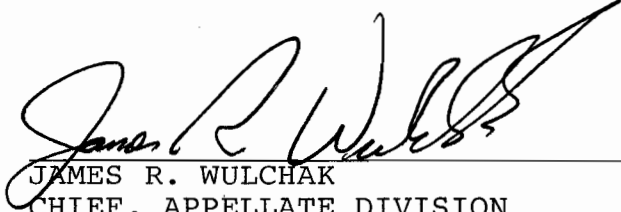
Since Bell, applying double jeopardy prohibitions and Section 775.021(4), Florida Statutes (1981), clearly holds that multiple convictions (as well as sentences) on lesser included offenses are prohibited, the district court was correct in vacating the respondent's conviction (and sentence) for grand theft as the lesser included offense of third degree felony murder.

CONCLUSION

BASED UPON the foregoing cases, authorities, and policies, the respondent requests that this Honorable Court affirm the decision of the District Court of Appeal, Fifth District, and vacate both the conviction and sentence for grand theft.

Respectfully submitted,

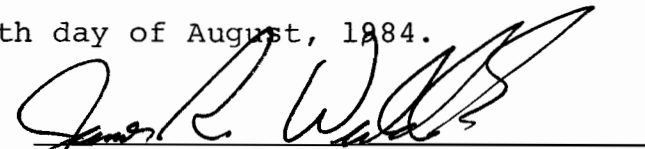
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to: The Honorable Jim Smith, 125 N. Ridgewood Avenue, Daytona Beach, FL 32014 and Mr. James M. Snowden, Inmate No. 087411, P. O. Drawer 1072, Arcadia, FL 33821 on this 6th day of August, 1984.



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