12-4-84

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JUL 18 1984
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

STATE OF FLORIDA, Petitioner, vs. JAMES MICHAEL SNOWDEN Respondent.	)	CASE NO. 65,176 5DCA No. 82-1740

PETITIONER'S BRIEF ON MERITS

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TOPICAL INDEX

AUTHORITIES CITED

STATEMENT OF THE CASE AND FACTS

The opinion of the Fifth District Court of Appeals correctly sets forth the facts regarding the offense itself.

Mr. Snowden, the Respondent, was convicted of both third degree murder and grand theft. The District Court agreed with the Respondent that the constitutional prohibition against double jeopardy precluded any conviction (or sentence)for grand theft, noting, in the process, inconsistencies between this decision and decisions of the Supreme Court of Florida.

POINT

THE DISTRICT COURT ERRED IN VACATING THE RESPONDENT'S CONVICTION AND SENTENCE FOR GRAND THEFT

The Fifth District Court of Appeal, expressing much confusion, declared that the Respondent, Mr. Snowden, could not be convicted of, or sentenced for, the crime of grand theft because said crime was the underlying felony in his conviction for third degree murder. The opinion of the District Court openly stated the need for reconciliation of a horde of conflicting and inconsistent opinions in the field of "double jeopardy" law.

In Blockburger v. United States, 284 U.S. 299 (1932) the Supreme Court stated that multiple convictions were possible (even from a single event) if two separate statutory offenses, each bearing unique elements, were committed. Later, in Albernaz v. United States, 450 U.S. 333 (1981) this opinion was refined as being limited to "statutory" elements as opposed to mere evidence in a particular case (again, in deference to the "single transaction" problem).

This constitutional interpretation was followed in Florida in Borges v. State, 415 So.2d 1265, 67 (Fla. 1982) wherein the court said:

> "a less serious offense is included in a more serious one if all of the elements required to

> be proven to establish the former are also required to be proven, along with more, to establish the latter. If each offense requires proof of an element that the other does not, the offenses are separate..."

In State v. Carpenter, 417 So.2d 986 (Fla. 1982) this Court explained that "elements," as used above, refers to the statutory elements of each offense, not the particular evidence of a given case.

It is the confusion of this basic concept which has caused the problem at hand.

In State v. Hegstrom, 401 So.2d 1343 (Fla. 1981) the Blockburger v. Albernaz analysis was initially employed, and notice was taken of § 775.021(4), Fla. Stat., a statute which abolished the "single transaction" rule while still outlawing multiple convictions on lesser included offenses. After this initial statement, however, Hegstrom inexplicabley "jumped" from the correct statutory element analysis to an evidentiary analysis. Instead of contrasting the crimes on a "felony murder vs. robbery" basis, the court looked at the particular case and contrasted "felony-robbery murder" with robbery." By putting the "robbery" factor on both sides of the equation, the court found that robbery was an "included offense" of murder.

This analysis, in truth, was an unintended

"Brown v. State - category 4" analysis![1] That very approach was declared to be improper (incorrect) in Borges, supra, but then utilized again in Bell v. State, 437 So.2d 1057 (Fla. 1983). Bell, in fact, openly questioned the "statutory" or "required evidence" test as "legislative legerdemain," (id, at 1059) opting for an "alleged" or "actual" evidence test.

Bell also questioned the idea that one can realistically have "multiple convictions but not multiple sentences," thus appeasing Blockburger. The realities of our system, Bell notes, are such that the fact of multiple convictions affects one's sentence even if only one sentence is imposed.

It is a small wonder indeed that the District Court (in the case at bar) was confused. Bell, it seems, was joined by Hawkins v. State, 436 So.2d 44 (Fla. 1983). In Hawkins, convictions and sentences for felony-first degree murder and the underlying felony (robbery) were affirmed! The District Court openly wondered whether Bell superceded Hawkins or whether Hawkins was issued in error!

Mr. Snowden, the Respondent at bar, was convicted of grand theft and third degeree murder. Under

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[1] Brown v. State, 206 So.2d 377 (Fla. 1968).

Blockburger-Albernaz, theft would have the separate and distinct elements of "taking," "with intent to permanently deprive the owner" of "said owner's property." Third degree murder requires proof of a death of a person due to the criminal agency of another during the commission of a felony. No particular felony need be proved (i.e. theft, fraud) in the homicide, and death is not an element of grand theft. see generally Hawkins v. State, supra.

If, in compliance with Borges, we look at the schedule of lesser included offense rather than invoke a Brown analysis, we find that there are no "category one" lessers listed for third degree murder. Under "category two" the lessers are attempt, aggravated assault, battery and assault. Neither "grand theft" nor any other specific felony is listed.

At the time review was granted in this case, the state became aware of this Court's opinions in State v. Baker, ___ So.2d ___ (Fla. 1984) [9 FLW 209] and Gibson v. State, ___ So.2d ___ (Fla. 1984) [9 FLW 234]. These cases marked a return to the use of "statutory elements" in conducting a double jeopardy review.

It is submitted that Baker and Gibson, applied to this case, warrant reversal of the decision of the District Court and reinstatement of Snowden's conviction for grand theft and the sentence therefore as well.

CONCLUSION

Grand theft is not a lesser included offense of third degree murder. Thus, a separate conviction and sentence on a charge of grand theft and third degree murder was proper.

Respectfully submitted,

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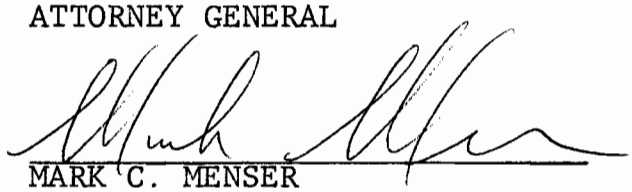

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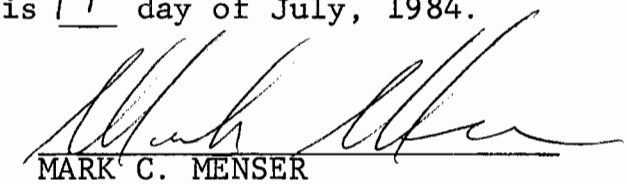
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of foregoing Petitioner Brief on Merits has been furnished by mail to James R. Wulchak, Assistant Public Defender, for Appellant this 17th day of July, 1984.



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