IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
Petitioner,)
vs.) CASE NO. 66,150
FREDERICK P. CHAPIN, III,)
Respondent.)
)

PETITIONER'S BRIEF ON THE MERITS

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TOPICAL INDEX

AUTHORITIES CITED

STATUTES

SUMMARY OF ARGUMENT

THE DISTRICT COURT ERRED IN HOLDING THAT CHAPIN'S DRUG TRAFFICKING CONVICTION AND SENTENCE MUST BE VACATED BECAUSE IT CONSTITUTED THE UNDERLYING FELONY FOR THE THIRD DEGREE FELONY MURDER FOR WHICH HE WAS ALSO CONVICTED AND SENTENCED.

As recognized by both this Court and the United States Supreme Court, the double jeopardy protection against cumulative punishments is essentially one of legislative intent, and the test as mandated by the Florida Legislature and applied by this Court for determining whether two offenses may be separately punished is that adopted in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), to wit: where each offense has at least one statutory element that the other does not, the offenses are considered separate crimes even when based on the same act or factual event. Ohio v. Johnson, ___ U.S. ___, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984); State v. Gibson, 452 So.2d 553 (Fla. 1984). Furthermore, this Court has recently made it clear that in determining whether separate convictions may flow from a single event one looks only at the statutory elements of the charged crimes rather than the language of the charging document. State v. Baker, 456 So.2d 419 (Fla. 1984). Here, the drug trafficking offense is distinguishable upon its statutory elements from the third degree felony murder such that no double jeopardy proscription against multiple punishments for the same crime is implicated and the sentencing proscription of Section 775.021(4), Florida Statutes (1983), is of no import.[1]

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[1]This same issue is pending before this Court in State v. Snowden, No. 65,719 (oral argument heard December 4, 1984).

STATEMENT OF THE CASE AND FACTS

The Respondent was charged with and convicted of third degree felony murder under Section 782.04(4), Florida Statutes (1979), and with trafficking in cannabis in violation of Section 893.135(1)(a)(1), Florida Statutes (1979), arising from a shooting incident on December 1, 1980, during which the Respondent shot and killed one Larry Talbot with a pistol (R 377-378, 457-458).[2] The Respondent's convictions resulted from a negotiated plea of nolo contendere to both offenses wherein the Respondent reserved for appeal only the denial of a motion to suppress the cannabis which was discovered in his home after the shooting in question (RS 2-10). Chapin raised no double jeopardy challenge to the propriety of his two convictions which in fact resulted from his own nolo contendere plea although there was some discussion as to the propriety of two sentences (RS 10-11). The trial court noted that for sentencing purposes the third degree felony murder constituted a second degree felony for which imprisonment was not to exceed fifteen (15) years while the trafficking charge constituted a first degree felony for which the term of imprisonment could not exceed thirty (30) years and for which a three year mandatory prison sentence and a mandatory twenty-five thousand dollar ($25,000) fine was applicable (RS 10). He further noted that because the third degree felony murder charged was perpetrated with a firearm a three year mandatory minimum prison

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[2](R) refers to the record on appeal; (RS) refers to the supplemental record on appeal - Volume Four - dated August 13, 1983.

sentence was also applicable to that offense. Id. The judgment and sentence actually rendered indicated that the felony murder for which Chapin was sentenced constituted a second degree felony for which he received a ten year term of imprisonment and one with a three year mandatory minimum due to his use of a firearm (R 457-460). This sentence was to be served concurrently with the ten year term of imprisonment (with three year mandatory minimum) imposed for the drug trafficking count which the judgment listed as a first degree felony; however, the sentence for the trafficking offense also included the mandatory twenty-five thousand dollar ($25,000) fine also required under the drug trafficking statute as well as a one thousand two hundred fifty dollar ($1,250) surcharge (R 457-458, 461-462).

On appeal, the District Court affirmed the lower court's denial of Chapin's motion to suppress; however, the conviction and sentence were vacated for the drug trafficking offense because it constituted a necessarily lesser included offense of the third degree murder conviction such that double jeopardy precluded convictions and sentences for both offenses. In doing so, however, the District Court acknowledged the obvious uncertainty in the case law surrounding this issue and certified the following question as one of great public importance:

> DOES THE DOUBLE JEOPARDY CLAUSE OF THE STATE CONSTITUTION OR THE UNITED STATES CONSTITUTION BAR CONVICTION AND SENTENCING FOR BOTH THE UNDERLYING FELONY AND A FELONY MURDER CHARGE BASED ON THE SAME FELONY IN THE CONTEXT OF A SINGLE (RATHER THAN SUCCESSIVE) CRIMINAL PROCEEDING?

ISSUE

THE DISTRICT COURT ERRED IN HOLDING THAT DOUBLE JEOPARDY BARRED CONVICTION AND SENTENCING FOR BOTH THE UNDERLYING FELONY AND A THIRD DEGREE FELONY MURDER CHARGE BASED ON THE SAME FELONY IN THE CONTEXT OF A SINGLE CRIMINAL PROCEEDING.

ARGUMENT

The question certified by the District Court involves an issue which despite frequent consideration by the appellate courts of this state, including this Court, has not been consistently or conclusively decided; i.e.,

> DOES THE DOUBLE JEOPARDY CLAUSE OF THE STATE CONSTITUTION OR THE UNITED STATES CONSTITUTION BAR CONVICTION AND SENTENCING FOR BOTH THE UNDERLYING FELONY AND A FELONY MURDER CHARGE BASED ON THE SAME FELONY IN THE CONTEXT OF A SINGLE (RATHER THAN SUCCESSIVE) CRIMINAL PROCEEDING?

Chapin v. State, No. 83-548 (Fla. 5th DCA October 11, 1984) [9 FLW 2152].

The District Court's determination that double jeopardy bars both convictions and sentences for both the underlying felony and a felony murder charge based on the same felony in a single criminal proceeding is clearly erroneous and apparently arises from the "uncertainty in the case law" on this issue referred to by the District Court in its opinion. Id. As this Court noted in State v. Hegstrom, 401 So.2d 1343 (Fla. 1981), in receding from its previous opinion in Pinder,[3] there is no double jeopardy proscription against

[3] State v. Pinder, 375 So.2d 836 (Fla. 1979)

legislatively authorized prosecution and punishment for differing offenses arising from a single act or factual event. Rather, relying upon the decision in Whalen v. United States, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (Fla. 1980), and Albernaz v. United States, 450 U.S. 333, 100 S.Ct. 1137, 67 L.Ed.2d 275 (1981), the Court correctly noted that the sole inquiry necessary in determining whether a defendant may be convicted and sentenced for both a felony murder and its underlying felony is one of legislative intent. The Hegstrom Court, after paying lip service to the Blockburger[4] test, then determined that Section 775.021(4), Florida Statutes (1979), evinced a legislative intent to preclude sentencing for "lesser included offenses" committed during a single criminal episode but that there was no proscription under that section or the Blockburger test, precluding convictions for both the felony murder and its underlying felony. The State submits however that the Hegstrom Court erroneously evaluated both the charging document and the evidence adduced at trial in concluding that a separate sentence for the underlying felony could not be imposed along with a felony murder sentence. This analysis is inconsistent with the legislative intent behind the addition of the words "excluding lesser included offenses" to Section 775.021(4), for in evaluating "lesser included offenses" the Blockburger test is the one both intended by the legislature and adopted by this Court. See, § 775.021(4), Fla. Stat. (1983); State v. Baker, 456 So.2d 419 (Fla. 1984); State v. Gibson, 452 So.2d 553 (Fla. 1984); Borges v. State, 415 So.2d 1265

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

(Fla. 1982).

Furthermore, and most importantly, this Court has now made it clear that in applying the Blockburger test intended by the legislature a court must focus only on the statutory elements of the offense and not on the actual evidence to be presented at trial or the specific allegations in the information. State v. Baker, 456 So.2d 419 (Fla. 1984); State v. Baker, 452 So.2d 927 (Fla. 1984); Scott v. State, 453 So.2d 798 (Fla. 1984); State v. Carpenter, 417 So.2d 986 (Fla. 1982). Thus, under the Blockburger analysis, the two statutory offenses at issue here - third degree felony murder and drug trafficking - are considered independent and distinct if each offense can possibly be committed without committing the other offense based upon their respective statutory elements. See, State v. Baker, 456 So.2d at 421.

Applying the statutory elements test here, it is clear that drug trafficking is but one of many felony offenses that could support a third degree felony murder conviction under Section 782.04(4), Florida Statutes (1979)[5]; i.e., any felony not specifically named in that section (e.g., false imprisonment, grand theft, etc.), would also suffice to support such a conviction. Accordingly, since under the Blockburger/statutory elements test applied by this Court and mandated by the legislature (in determining whether the proscription of Section 775.021(4) should apply), the specific allegations of the information or proof at trial are of no import; the offenses at bar are clearly not lesser included offenses

[5]Drug trafficking has since been moved into that group of felonies that will support a first degree felony murder conviction. § 782.04(1)(a), 2.a., Fla. Stat. (1983)

for each contains at least one statutory element that makes it possible to prove one without proving the other. Third degree felony murder under Section 782.04(4) requires, inter alia, proof of an unlawful killing of a human being while that element is clearly not included in the statutory definition of drug trafficking contained in Section 893.135(1)(a)(1), Florida Statutes (1979). Furthermore, the third degree murder statute does not require that the statutory elements of a drug trafficking offense be proven in order to obtain a conviction for the felony murder charge because any of a number of other felonies would adequately support such a conviction. Thus, looking only to the statutory elements of the two crimes at issue it is obvious that it is quite possible to prove the commission of a third degree felony murder without also proving the drug trafficking charge at issue.

This is not therefore a case where two offenses have the exact same essential statutory constituent elements or a situation where one statutory offense includes all of the elements of the other such that it must be considered a necessarily lesser included offense. Indeed, the example of such lesser included offenses provided in the Gibson decision - i.e., aggravated battery and simple battery, serves to clearly illustrate that the offenses at issue are not necessarily lesser included ones. Id. at 557. It is at all times impossible to prove an aggravated battery without first proving a simple battery because the same constituent statutory elements necessary to show the commission of a battery must in all cases be proven to show, with an additional element (the use of a weapon), any aggravated battery; however a third degree murder charge may be proven without specifically proving a drug trafficking

offense (since any of a number of non-enumerated felonies will suffice).

Each of the crimes at issue contain in their statutory frameworks at least one potential statutory element that the other does not, and the two offenses must be considered separate crimes for double jeopardy purposes - including the application of the sentencing proscription of Section 775.021(4). To reach a different conclusion would be to reject the legislature's clear purpose and intent that drug traffickers be convicted and suffer the full mandatory sentences [in this case a three year term of imprisonment and a fine of twenty-five thousand dollars ($25,000) for the first degree felony that they have committed] in addition to the conviction and penalty for the separate and distinct third degree murder perpetrated [which is normally only a second degree felony]. Can it be logically argued that the legislature intended that a defendant suffer no conviction or penalty whatsoever on a drug trafficking charge, simply because the defendant also perpetrated a third degree murder when in fact the drug trafficking offense is the greater offense both in terms of sentencing classification (first degree versus second degree felony) and in terms of punishment [mandatory minimum three years imprisonment and a twenty-five thousand dollar ($25,000) fine versus a possible fifteen (15) year term of imprisonment and a possible ten thousand dollar ($10,000) fine]? How can it be said that the drug trafficking charge is a lesser included offense of what is in fact a statutorily mandated lesser crime in punishment and degree. See, State v. Carpenter, supra, at 987 - where two crimes carry the same penalty, Section 775.021

(4) does not prohibit consecutive sentencing since one is not the lesser of another.

Can it rationally be said that the legislature intended that a defendant should get a lesser sentence (as was the case here[6] for perpetrating an additional crime - the third degree felony murder - which in fact resulted in the death of a human being? Here, because Chapin murdered the victim he assured himself of a lesser penalty (in terms of the possible fine that could be imposed by the sentencing judge and the mandatory minimum terms of imprisonment at issue); indeed, any individual involved in the perpetration of a drug trafficking offense might, under the rationale applied by the district court below, have found it to his benefit to perpetrate a third degree felony murder if the circumstances presented themselves so as to in fact mitigate his potential sentence if tried.

Certainly, the legislature did not intend to make the perpetration of a drug trafficking offense (or for that matter any other felony offense) a "freebie" merely because a defendant chose to engage in additional felony conduct resulting in the death of a human being (i.e., a third degree felony murder).

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[6]The drug trafficking sentence at issue provided for a ten (10) year term of imprisonment with a mandatory three (3) year minimum and the mandatory twenty-five thousand dollar ($25,000) fine while the third degree murder sentence provided only a ten (10) year term of imprisonment with a three (3) year mandatory (for the use of a weapon) with no accompanying fine. Each sentence was to run concurrent with the other, and the district court, by striking the drug trafficking conviction and sentence, necessarily lessened the penalty to be suffered by the Respondent.

CONCLUSION

Based on the arguments and authorities presented herein, Petitioner respectfully prays this Honorable Court reverse the decision of the District Court of Appeal of the State of Florida, Fifth District and reinstate the conviction and sentence for drug trafficking.

Respectfully submitted,

JIM SMITH
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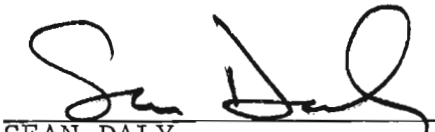

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing Petitioner's Brief on the Merits has been furnished, by mail, to Chobee Ebbets, Esquire, Counsel for Respondent, at P. O. Box 390, Daytona Beach, Florida 32015, this 19th day of December, 1984.

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