IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, :

Petitioner, :

vs. : Case No. 66,264

EARL ENMUND, :

Respondent. :

_____ :

DISCRETIONARY REVIEW OF DECISION OF
THE DISTRICT COURT OF APPEAL
SECOND DISTRICT OF FLORIDA

BRIEF OF RESPONDENT ON MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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ATTORNEYS FOR RESPONDENT

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PRELIMINARY STATEMENT

This brief is filed on behalf of the Respondent, EARL ENMUND. A statement of the case and facts with references to the record on appeal is included in Respondent's brief because the Petitioner failed to do so in its brief on the merits.

References to the record on appeal are designated by the letter "R" followed by the appropriate page number. References to the supplemental record on appeal are designated by the letters "SR" followed by the appropriate page number. References to the second supplemental record on appeal are designated by "2dSR." References to the appendix to this brief are designated by the letter "A" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The Hardee County Grand Jury indicted the Respondent, EARL ENMUND, on May 22, 1974, for the first degree murders of Thomas Henry Kersey and Eunice May Kersey and the robbery of Thomas Henry Kersey on April 1, 1975. (SR1-3) The State's evidence at trial showed that the Kerseys were killed by Sampson Armstrong while he and Jeanette Armstrong were robbing Mr. Kersey and that Respondent aided and abetted the robbery by driving the getaway car. (SR11-15,25) The jury found Respondent guilty and recommended the death penalty. (SR11) On September 30, 1975, Respondent was adjudicated guilty and sentenced to death for the murders and a concurrent term of life imprisonment for the robbery. (SR5,6)

On appeal, this Court affirmed the judgment and sentences on April 16, 1981. (SR11-29) Enmund v. State, 399 So.2d 1362 (Fla. 1981). On certiorari, the United States Supreme Court reversed the death sentences. (SR10) Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). On remand, this Court vacated the death sentences on October 20, 1983, and remanded to the trial court for imposition of life sentences without eligibility for parole for twenty-five years. This Court's decision gave the trial court discretion to decide whether the life sentences would be served concurrently or consecutively. (SR10) Enmund v. State, 439 So.2d 1383 (Fla. 1983).

On March 6, 1984, Respondent's counsel filed a motion to correct illegal sentence urging the court to vacate the sentence

for robbery as the underlying felony for the felony murders on double jeopardy grounds. (R1,2)

A resentencing hearing was held before the Honorable William A. Norris, Jr., Circuit Judge, on April 3, 1984. (R17-33) Relying upon State v. Hegstrom, 401 So.2d 1343 (Fla. 1981), and the State's concession of error, the court granted the motion to correct and vacated Respondent's sentence for robbery. (R5,11, 21-23) Respondent's counsel argued that the murder sentences should be concurrent. (R23-27) The prosecutor argued that they should be consecutive. (R29,30) The court imposed two consecutive life sentences, with twenty-five years minimum mandatory on each sentence so that Respondent would not be eligible for parole for fifty years. (R5-8,31,32;2dSR) The judgment stated that Respondent was adjudicated guilty of the robbery as well as the murders. (R5)

On appeal, the District Court of Appeal, Second District held that Section 775.082(1), Florida Statutes (1983), does not authorize consecutive minimum mandatory terms of twenty-five years each in connection with two consecutive life imprisonments for two murders committed during the same criminal episode, relying upon this Court's decision in Palmer v. State, 438 So.2d 1 (Fla. 1983). The District Court also held that a defendant could neither be convicted nor sentenced for a robbery and also for felony first degree murder for which the robbery is the underlying felony, relying upon this Court's decision in Bell v. State, 437 So.2d 1057 (Fla. 1983). The District Court reversed the conviction for robbery. It also reversed the murder sentences and remanded with

directions to correct the murder sentences so that the mandatory minimum sentences of twenty-five years will be served concurrently. (A3,4) Enmund v. State, Case No. 84-897 (Fla. 2d DCA Nov. 30, 1984).

The District Court certified the following question to this Court as one of great public importance:

> WHEN A DEFENDANT IS CONVICTED OF FELONY MURDER, CAN HE BE CONVICTED OF, ALTHOUGH NOT SENTENCED FOR, THE UNDERLYING FELONY?

(A4) Id. Petitioner, the State of Florida, filed a timely notice invoking this Court's discretionary jurisdiction.

Summary of Argument

Issue I

The double jeopardy clauses of the United States and Florida Constitutions protect against multiple punishments for the same offense. Legislative intent determines which punishments are unconstitutionally multiple. The legislature does not intend separate convictions and sentences for necessarily included lesser offenses. In felony murder cases, the underlying felony is a necessarily included lesser offense. Therefore, separate convictions for both felony murder and the underlying felony are not permitted.

Issue II

Respondent was convicted of two first degree murders committed by an accomplice in a single criminal episode. The legislature had authorized the imposition of a twenty-five year minimum mandatory sentence for first degree murder but had not expressly authorized the imposition of multiple, consecutive twenty-five year minimum mandatory sentences. The penalty statute must be strictly construed to hold that the trial court erred by imposing unauthorized consecutive minimum mandatory sentences.

ARGUMENT

ISSUE I.

WHEN A DEFENDANT IS CONVICTED OF FELONY MURDER, CAN HE BE CONVICTED OF, ALTHOUGH NOT SENTENCED FOR, THE UNDERLYING FELONY?

In Whalen v. United States, 445 U.S. 684, 688, 100 S.Ct. 1432, 63 L.Ed.2d 715, 721 (1980), the United States Supreme Court ruled:

> The Fifth Amendment guarantee against double jeopardy protects not only against a second trial for the same offense, but also "against multiple punishments for the same offense," .... But the question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized.

This Court has repeatedly found that the legislature intends separate convictions and sentences only for separate offenses and does not intend separate convictions and sentences for both a greater and a necessarily included lesser offense. State v. Gibson, 452 So.2d 553, 556-558 (Fla. 1984); Bell v. State, 437 So.2d 1057, 1058 (Fla. 1983); Borges v. State, 415 So.2d 1265, 1267 (Fla. 1982). See §775.021(4), Fla. Stat. (1983). Convictions for lesser included offenses are punitive in effect because they expose the defendant to enhanced sentences under both the sentencing guidelines and habitual offender statutes, they adversely affect parole release dates in those cases where parole remains available, and they may be used as impeachment evidence in subsequent criminal proceedings. Bell v. State, supra, 437 So.2d at 1059; Fla.R.Crim.P. 3.701. Since the legislature does not

intend separate convictions for necessarily included lesser offenses and separate convictions for such offenses are punitive, separate convictions are proscribed by the multiple punishment protection afforded by the double jeopardy clauses of the United States and Florida Constitutions. Portee v. State, 447 So.2d 219, 220 (Fla. 1984); Bell v. State, supra, 437 So.2 at 1058, 1061. See Whalen v. United States, supra, 445 U.S. at 688-690; U.S. Const., amends. V and XIV; Art. I, §9, Fla. Const.

Whether a lesser offense is necessarily included in a greater offense is determined by examining the statutory elements of the two offenses. The two offenses are separate and may be separately punished only if each offense requires proof of a fact the other does not. Whalen v. United States, supra, 455 U.S. at 691-692; State v. Baker, 456 So.2d 419, 420 (Fla. 1984); Bell v. State, supra, 437 So.2d at 1058; §775.021(4), Fla. Stat. (1983).

In a felony murder case, the underlying felony is a statutory element of the felony murder. Thus, the elements of the underlying felony are wholly included within the elements of felony murder, and the underlying felony is a necessarily included lesser offense. Whalen v. United States, supra, 445 U.S. at 693-694; Copeland v. State, 457 So.2d 1012, 1018 (Fla. 1984); State v. Gibson, supra, 452 So.2d at 557 n.6; State v. Hegstrom, 401 So.2d 1343, 1346 (Fla. 1981); §782.04(1)(a), Fla. Stat. (1983). Petitioner argues, at p.11 of Petitioner's Brief on the Merits, that the underlying felony is not a necessarily included lesser offense because it is possible to commit felony murder without committing the particular underlying felony. The same

argument was expressly considered and rejected by the United States Supreme Court in Whalen v. United States, supra, 445 U.S. at 694.

Because the underlying felony is a necessarily included lesser offense to felony murder and the legislature did not intend separate convictions and sentences for necessarily included lesser offenses, the double jeopardy clauses of the United States and Florida Constitutions prohibit the imposition of separate convictions and sentences for the underlying felony. See State v. Gibson, supra, 452 So.2d at 558 n.7; Bell v. State, supra, 437 So.2d at 1058, 1061. However, this Court has created an anomaly in the law by allowing convictions for the underlying felony while reversing sentences for the underlying felony in Copeland v. State, supra, 457 So.2d at 1018; Hawkins v. State, 436 So.2d 44, 47 (Fla. 1983); and State v. Hegstrom, supra, 401 So.2d at 1346. See Snowden v. State, 449 So.2d 332, 335-337 (Fla. 5th DCA 1984), pet.for rev.pending, Fla. Case No. 65,176.

This Court recognized the conflict between State v. Hegstrom, supra, and Bell v. State, supra, in State v. Gibson, supra, 452 So.2d at 558 n.7. This conflict should be resolved by holding that separate convictions for felony murder and the underlying felony are not permitted by section 775.021(4), Florida Statutes (1983), and the double jeopardy clause. Id.

This Court previously upheld Respondent's convictions for first degree murder on the ground that he aided and abetted the robbery which resulted in the murders and was therefore guilty of felony murder. (SR25) Enmund v. State, 399 So.2d 1362, 1370

(Fla. 1981). Following reversal of Respondent's death sentence (SR10) in Enmund v. Florida, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), and this Court's remand for resentencing (SR10) in Enmund v. State, 439 So.2d 1383 (Fla. 1983), the trial court vacated the robbery sentence, but not the conviction, in reliance upon State v. Hegstrom, supra. (R5,11,21-23) The District Court of Appeal, Second District, reversed the robbery conviction in reliance upon Bell v. State, supra. (A3,4) Enmund v. State, Case No. 84-897 (Fla. 2d DCA Nov. 30, 1984). The decision of the District Court reversing the conviction for the underlying felony was correct and must be affirmed.

ISSUE II.

WHETHER THE TRIAL COURT ERRED BY IMPOSING CONSECUTIVE MINIMUM MANDATORY SENTENCES OF TWENTY-FIVE YEARS FOR TWO MURDERS COMMITTED IN THE COURSE OF ONE CRIMINAL EPISODE?

Respondent was adjudicated guilty of two counts of first degree murder. (R5,SR5) The murders occurred during the course of a single criminal episode on April 1, 1975. Sampson Armstrong shot the Kerseys while he and Jeanette Armstrong were robbing Mr. Kersey. (SR11-15) Enmund v. State, 399 So.2d 1362, 1363-1365 (Fla. 1981). Respondent's convictions for felony murder were upheld on the ground that he aided and abetted the robbery by driving the getaway car. (SR25) Id., 399 So.2d at 1370.

The first degree felony murders were capital felonies. §782.04(1)(a), Fla. Stat. (1973). The penalty statute in effect at the time the murders occurred, Section 775.082(1), Florida Statutes (1973), provided, "A person who has been convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than twenty-five calendar years before becoming eligible for parole unless...such person shall be punished by death."

In 1974, the legislature enacted rules of statutory construction, Section 775.021, Florida Statutes (1974 Supp.), effective July 1, 1975. Section 775.021(1), provided, "The provisions of this code and offenses defined by other statutes shall be strictly construed; when the language is susceptible of differing constructions, it shall be construed most favorably to

the accused." The legislature did not add the rule authorizing separate, consecutive sentences for multiple offenses committed during the course of one criminal episode, Section 775.021(4), Florida Statutes (1976 Supp.), until 1976.

Applying the rule that the penalty statute must be strictly construed in favor of the accused, Section 775.021(1), Florida Statutes (1974 Supp.), the trial court was not authorized to impose consecutive twenty-five minimum mandatory terms of imprisonment upon Respondent, requiring him to serve fifty years before he became eligible for parole. (R5-8,31,32,2dSR) The legislature had only authorized the court to require Respondent to serve twenty-five years without eligibility for parole. §775.082 (1), Fla. Stat. (1973).

In Palmer v. State, 438 So.2d 1 (Fla. 1983), this Court applied the strict construction rule in holding that the legislature had not authorized the imposition of multiple, consecutive three year minimum mandatory sentences for multiple armed robberies committed in the course of a single criminal episode. Palmer had been convicted of the armed robbery of thirteen different victims in the course of a single criminal episode and was sentenced to thirteen consecutive terms of seventy-five years imprisonment with a mandatory minimum of three years on each count. Palmer v. State, 416 So.2d 878 (Fla. 4th DCA 1982). This Court quashed the Fourth District's affirmance of the imposition of cumulative mandatory minimum sentences. Palmer v. State, supra, 438 So.2d at 2. This Court rejected the State's argument that the legislature had authorized imposition of

separate, consecutive sentences for multiple offenses during a single episode in Section 775.021(4), Florida Statutes (1981). Id., 438 So.2d at 3. This Court reasoned that the legislature had authorized the imposition of a three year mandatory minimum term of imprisonment for robbery with a firearm, Section 775.087(2), Florida Statutes (1981), but had not expressly authorized sentences of thirty-nine years without eligibility for parole. Id., 438 So.2d at 3-4.

Just as the legislature did not expressly authorize imposition of multiple, consecutive three year mandatory minimum sentences for multiple offenses committed in a single episode in Section 775.087(2), the legislature did not expressly authorize imposition of multiple, consecutive twenty-five year mandatory minimum sentences for multiple offenses committed in a single episode in Section 775.082(1). Therefore, under the rationale of Palmer, the trial court exceeded its statutory authorization and committed reversible error when it imposed two consecutive twenty-five year mandatory minimum sentences upon Respondent. The District Court of Appeal, Second District, correctly reversed the sentences for the murders and remanded with directions to correct the sentences so that the mandatory minimum sentences of twenty-five years will be served concurrently. (A3,4) Enmund v. State, Case No. 84-897 (Fla. 2d DCA Nov. 30, 1984). The decision of the District Court must be affirmed.

CONCLUSION

Respondent respectfully requests this Honorable Court to affirm the decision of the District Court of Appeal, Second District.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the Attorney General, Park Trammell Bldg. 8th Floor, 1313 Tampa Street, Tampa, FL 33602, this 18th day of January, 1985.

Paul C. Helm
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PCH:rkm