047

SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO.: 66,264

EARL ENMUND,

Respondent.

FILED
SID J. WHITE
JAN 7 1985
CLERK, SUPREME COURT
By ____ Chief Deputy Clerk

PETITIONER'S BRIEF ON THE MERITS

JIM SMITH
ATTORNEY GENERAL

JAMES H. DYSART
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR PETITIONER

/ech

TABLE OF CONTENTS

	PAGE
STATEMENT OF THE CASE AND FACTS	1
PRELIMINARY STATEMENT	2
ARGUMENT	
ISSUE I.	3-12
WHEN A DEFENDANT IS CONVICTED OF FIRST DEGREE MURDER, CAN HE BE CONVICTED OF AND SENTENCED FOR THE UNDERLYING FELONY FROM WHICH THE MURDER RESULTS?	
ISSUE II.	13-14
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.	
CONCLUSION	15
CERTIFICATE OF SERVICE	15
APPENDIX	

TABLE OF CITATIONS

	PAGE
Albernaz v. United States, 450 U.S. 333 (1981)	3, 9
Bell v. State, 437 So.2d 1057 (Fla. 1983)	7, 10, 11
Blockburger v. United States, 284 U.S. 299 (1932)	3
Borges v. State, 415 So.2d 1265 (Fla. 1982)	6, 7, 8, 10
Brooks v. State, 421 So.2d 829 (Fla. 1st DCA 1982)	13
Bruner v. State, 398 So.2d 1005 (Fla. 1st DCA 1980)	13
Dixon v. State, 339 So.2d 6-8 (Fla. 2d DCA 1976)	13
Enmund v. State, __So.2d__(Fla. 2d DCA 1984)[9 FLW 2506]	1
Hawkins v. State, 436 So.2d 44 (Fla. 1983)	10
Lund v. State, 396 So.2d 255 (Fla. 3d DCA 1981)	14
Miller v. State, 297 So.2d 36 (Fla. 1st DCA 1974)	13
Missouri v. Hunter, __U.S.__, 74 L.Ed.2d 535, 103 S.Ct.__(1983)	8, 9
Palmer v. State, 438 So.2d 1 (Fla. 1983)	13, 14
Scott v. State, __So.2d__(Fla. 1984)[9 FLW 209]	11
Segal v. Wainwright, 304 So.2d 446, 449 (Fla. 1974)	13, 14
State v. Baker, __So.2d__(Fla. 1984)[9 FLW 282]	9, 10, 12, 14
State v. Carpenter, 417 So.2d 986 (Fla. 1982)	6, 7, 8, 10
State v. Charles Baker, __So.2d__(Fla. 1984)[9 FLW 282]	11, 12
State v. Hegstrom, 401 So.2d 1343 (Fla. 1982)	4, 7, 11
State v. Pinder, 375 So.2d 836 (Fla. 1979)	3
State v. Thomas Baker, __So.2d__(Fla. 1984)[9 FLW 209]	11

Whalen v. United States, 445 U.S. 684 (1980) 3, 9

Other Authorities:

Chapter 83-156, Laws of Florida 7

§775.021(4), Florida Statutes (1977) 7, 8, 10, 11

§775.087(2), Florida Statutes (1983) 13

STATEMENT OF THE CASE AND FACTS

This case reaches this Court pursuant to the Court's discretionary jurisdiction to resolve the following question, certified by the Second District to be of great public importance:

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

The opinion of the Second District Court of Appeal in Enmund v. State, __So.2d__ (Fla. 2d DCA 1984)[9 FLW 2506], contains an adequate statement of the facts and history of the case for purposes of this brief. A copy of the opinion is attached as an appendix to this brief.

PRELIMINARY STATEMENT

Although the question certified by the Second District Court of Appeal assumes that a defendant convicted of felony murder cannot be sentenced for the underlying felony, the state takes the position in this brief that a defendant convicted of felony murder can be convicted of and sentenced for the underlying felony.

ARGUMENT

ISSUE I.

WHEN A DEFENDANT IS CONVICTED OF FIRST DEGREE MURDER, CAN HE BE CONVICTED OF AND SENTENCED FOR THE UNDERLYING FELONY FROM WHICH THE MURDER RESULTS?

The first major case in Florida addressing this issue was State v. Pinder, 375 So.2d 836 (Fla. 1979). There, this Court held that the double jeopardy clause of the fifth amendment to the Constitution prohibits multiple convictions and punishments in the same trial for both first-degree murder and the underlying felony from which the murder results.

Following Pinder, the United States Supreme Court decided Whalen v. United States, 445 U.S. 684 (1980) and Albernaz v. United States, 450 U.S. 333 (1981), in which the Court refuted the notion that the double jeopardy clause limits a legislature's power to prescribe multiple punishments for a single act. Speaking for six members of the Court, Justice Rehnquist stated in Albernaz:

> ...the question of what punishments are constitutionally permissible is not different from the question of what punishment the Legislative Branch intended to be imposed.

450 U.S. 333 at 334.

The Supreme Court found in Whalen and Albernaz, supra, that the legislative intent was embodied in the rule of statutory construction announced in Blockburger v. United States, 284 U.S. 299 (1932):

> ...[The] applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to

> be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

Id. at 284 U.S. 304.

After Whalen and Albernaz, supra, were decided, the Florida Supreme Court in State v. Hegstrom, 401 So.2d 1343 (Fla. 1982), receded from its holding in Pinder, supra. The Court said:

> In the absence of a clear contrary legislative intent, the Blockburger test must be met before multiple punishments are permissible. Under Blockburger, the same act violates two statutes only if "each [statutory] provision requires proof of a fact which the other does not." Id. at 304, 52 S.Ct. at 182.
>
> * * *
>
> ...[U]nder Whalen and Albernaz, it is now clear that the fifth amendment presents no substantive limitation on the legislature's power to prescribe multiple punishments, and that double jeopardy seeks only to prevent courts either from allowing multiple prosecutions or from imposing multiple punishments for a single, legislatively defined offense. To hold that the legislature might violate the Constitution by authorizing too many punishments for a single act "demands more of the Double Jeopardy Clause than it is capable of supplying."
>
> In light of Whalen and Albernaz, we have reconsidered our Pinder decision and now believe our reliance on successive prosecution cases was misplaced....
>
> Our sole inquiry now is to determine what punishment our legislature authorized for a single criminal transaction involving two or more separate, statutory offenses. Section 775.021(4), Florida Statutes (1979), supplies the answer. It states:
>
>> Whoever, in the course of one criminal transaction or episode, commits an act or acts constituting a violation of two or more criminal statutes, upon conviction and adjudication of guilt, shall

> be sentenced separately for each criminal offense, excluding lesser included offenses, committed during said criminal episode....

> Because 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. Under Whalen's legislative intent test and our statute, it would follow that Hegstrom could not be sentenced both for felony murder and for the underlying felony. But we see nothing in Blockburger which bars multiple convictions for lesser included offenses.

> * * *

> Although our opinions have not been entirely consistent on whether double jeopardy forbids double convictions as well as double sentencing, the absence of double jeopardy and Blockburger constraints in this situation returns our attention to an analysis of legislative intent. Section 775.021(4), of course, expressly bars only multiple sentences. An implication exists that the legislature did not intend to prohibit multiple convictions, one which is bolstered by the designation of robbery and of felony murder as separate and discrete criminal acts. Accordingly, we reverse the district court's decision vacating Hegstrom's conviction.

Although the Court in Hegstrom correctly recognized the authority and applicability of Whalen and Albernaz, the Court misapplied the Blockburger test. After initially stating that "Under Blockburger, the same act violates two statutes only if 'each [statutory] provision requires proof of a fact which the other does not,'" the Court looked not to the statutory elements of each offense (first-degree murder and robbery), but instead looked at the charging document or the evidence adduced at trial to conclude that a separate sentence for robbery could not be imposed along with a first-degree murder sentence. Instead of contrasting

the crimes on a "first-degree murder vs robbery" basis, the court looked at the particular case and contrasted "first-degree murder committed during the course of a robbery" with "robbery". By putting the "robbery" factor on both sides of the equation, the Court found that robbery was an "included offense" of first-degree murder.

If the Blockburger test had been correctly applied in Hegstrom (without regard to the accusatory pleading or the proof adduced at trial), the Court would have held that Hegstrom could be convicted of and sentenced for both first-degree murder and robbery. Obviously, each statutory provision requires proof of a fact which the other does not. Under a correct Blockburger analysis, first-degree murder is a separate offense from robbery.

In discussing Section 775.021(4), Florida Statutes (1977), this Court in Borges v. State, 415 So.2d 1265 (Fla. 1982), stated:

> 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 and discrete and one is not included in the other.

Thus Borges indicated that whether an offense is a lesser included offense of a greater offense is determined by comparing the elements of the two crimes, and if a less serious offense is not necessarily included in a more serious offense, separate sentences for each offense may be imposed.

Borges was followed by State v. Carpenter, 417 So.2d 986 (Fla. 1982), in which the Court said:

> In applying the Blockburger test the courts look only to the statutory elements of each offense and not to the actual evidence to be presented at trial or the facts as alleged in a particular information.

The holding in Carpenter was embodied in an amendment to §775.021(4), Fla. Stat. (1977), which become law on June 23, 1983. Chapter 83-156, Laws of Florida. Section 775.021(4) now reads:

> Whoever, in the course of one criminal transaction or episode, commits separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense and the sentencing judge may order the sentences to be served concurrently or consecutively. For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial. (Emphasis supplied)

Petitioner submits that in amending §775.021(4), Fla. Stat. (1977), the legislature made its previous intention with respect to the statute unmistakably clear. It codified its approval of Borges and Carpenter, supra, and its disapproval of such decisions as Hegstrom, supra.

After Borges and Carpenter were decided and §775.021(4), Fla. Stat. (1977) was amended, the law concerning multiple convictions and sentences for separate criminal offenses committed in one criminal episode appeared to be clear. But then came Bell v. State, 437 So.2d 1057 (Fla. 1983) in which the Court once more incorrectly applied the Blockburger test.

The Court sought to "give teeth" to the test, and announced an "alleged evidence test" which looked at the charging instrument and an "actual or same evidence test" which looked to the

evidence adduced at trial. Thus, the Court reverted to an application of the Blockburger test that was employed in Hegstrom, but which was rejected in Borges and Carpenter, supra, and in §775.021 (4), Florida Statutes, as amended.

Instead of looking solely to legislative intent to determine whether multiple convictions and sentences were permissible for both greater and lesser included offenses, the Court in Bell held that the double jeopardy clause proscribed such convictions and sentences. To the extent that Bell suggests that looking either to the charging instrument or to the evidence presented is relevant to a double jeopardy analysis, it is mistaken.

In Missouri v. Hunter, __U.S__, 74 L.Ed.2d 535, 103 S.Ct.__ (1983), the Missouri Supreme Court had refused to permit cumulative sentences in a single trial because the two offenses were the same offense under the Blockburger test, notwithstanding the legislature's intent for multiple punishment. In reversing the state court, the United State Supreme Court said:

> With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does not more than prevent the sentencing court from prescribing greater punishment than the legislature intended.
>
> Our analysis and reasoning in Whalen and Albernaz lead inescapably to the conclusion that simply because two criminal statutes may be construed to proscribe the same conduct under the Blockburger test does not mean that the Double Jeopardy Clause precludes the imposition, in a single trial, of cumulative punishments pursuant to those statutes. The rule of statutory construction noted in Whalen is not a constitutional rule requiring courts

> to negate clearly expressed legislative intent....
>
> *   *   *
>
> Where, as here, a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the "same" conduct under Blockburger, a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial.

Under the authority of <u>Whalen</u>, <u>Albernaz</u>, and <u>Hunter</u>, supra, the only question that should be asked in a single trial setting is whether the legislature intends multiple punishments for the offenses proscribed. If the legislature so intends, it is clear that a defendant can be convicted of and sentenced for both first-degree murder and the underlying felony from which the murder results.

The Court cleared up the confusion and conflict created by <u>Bell</u> when it decided <u>State v. Baker</u>, __So.2d__ (Fla. 1984)[9 FLW 282]. The Court said:

> In determining whether separate convictions may flow from a single event one looks at the <u>statutory</u> elements of the charged crimes, as opposed to the language of the charging document. If each crime, under the respective statutes, requires an element of proof that the other does not, then one is not an included offense of the other. They are separate offenses.
>
> *   *   *
>
> ...<u>Blockburger</u> "means that two statutory offenses are essentially independent and distinct if each offense can <u>possibly</u> be committed without committing the other offenses." 425 So.2d at 50 (Cowart, J., dissenting)(emphasis in original). The <u>Blockburger</u> test is a rule

> of statutory construction which "should not be controlling where, for example, there is a clear indication of contrary legislative intent." Albernaz v. United States, 450 U.S. 333, 340 (1981).
>
> In Borges v. State, we held that separate convictions and sentences did not violate the double jeopardy clause. We relied on Albernaz to reach the conclusion that
>
> > where the legislature has expressed its intent that separate punishments be imposed upon convictions of separate offenses arising out of one criminal episode, the Double Jeopardy Clause is no bar to such imposition.
>
> 415 So.2d at 1267. Shortly after Borges, we acknowledged the Iannelli explanation of Blockburger: "In applying the Blockburger test the courts look only to the statutory elements of each offense and not to the actual evidence to be presented at trial or the facts as alleged in a particular information." State v. Carpenter, 417 So.2d 986, 988 (Fla. 1982) (emphasis supplied).
>
> * * *
>
> ...We hold that Bell v. State, 437 So.2d 1057 (Fla. 1983), is limited to necessarily lesser included offenses... (emphasis supplied)

After Baker, supra, was decided, it again appeared that this area of the law was settled. However, in the instant case, the Second District Court of Appeal relied on Bell v. State, supra, in holding that a defendant could be neither convicted of nor sentenced for a robbery and also for "felony first degree murder" for which the robbery is the underlying felony. The Second District noted conflict between Bell and Hawkins v. State, 436 So.2d 44 (Fla. 1983). In Hawkins the Court said:

> We also find, as conceded by the state, that the sentence for robbery was improper because the robbery was the underlying felony specified by

> the jury as justifying the conviction for the first-degree murder. Appellant cannot be sentenced for both robbery and the first-degree murder under the rule we established in State v. Hegstrom, 401 So.2d 1343 (Fla. 1981). See also Faison v. State, 426 So.2d 963 (Fla. 1983). The robbery conviction is proper, but we vacate the separate sentence for robbery. [Emphasis supplied].

Petitioner contends that neither Bell nor Hopkins is correct. Since Bell and Hawkins were decided, this Court has in at least three cases held that for double jeopardy purposes a court may consider only the statutory elements of the offenses the defendant is convicted of and not the language of the charging document or the evidence adduced at trial. See State v. Thomas Baker, __So.2d__ (Fla. 1984)[9 FLW 209]; Scott v. State, __So.2d__ (Fla. 1984)[9 FLW 209]; and State v. Charles Baker, __So.2d__ (Fla. 1984) [9 FLW 282]. If these cases, as well as Borges and Carpenter, supra, are applied to the instant case, as they should be, it will be found that Enmund's conviction for robbery is proper, since first-degree murder and robbery each require proof of a fact which the other does not. It also would have been proper for the trial court to sentence Enmund for robbery.

Petitioner would point out that even if one does not contrast the generic offense of first-degree murder with one of the possible underlying felonies in a felony murder, but instead contrasts felony murder with one of the possible underlying felonies, section 775.021(4), Fla. Stat. (as amended), does not prohibit multiple convictions and sentences, since it is possible to commit felony murder without committing the particular underlying felony. In other words, if one does not look to the charging document or

the proof adduced at trial when contrasting felony murder with a particular underlying felony, multiple convictions and sentences are possible. State v. Charles Baker, supra.

If this Court rejects petitioner's argument as to how Baker, supra, and §775.021(4), Fla. Stat., should be applied in this case, Petitioner maintains that the reasoning of the Court in Hegstrom, supra, is more persuasive than the reasoning in Bell, supra, as to whether a defendant can be convicted of an underlying felony after having been convicted of felony murder. The Double Jeopardy Clause does not prohibit such a conviction (as was suggested by the Court in Bell), and an implication exists that the legislature did not intend to prohibit multiple convictions. See Hegstrom.

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.

In Palmer v. State, 438 So.2d 1 (Fla. 1983), this Court held that Florida law does not authorize a trial court to impose consecutive three-year minimum mandatory sentences under section 775.087(2), Florida Statutes (1983), for offenses arising from a single transaction or episode. In the instant case, the Second District believed that the Court's reasoning in Palmer, supra, applied to consecutive minimum mandatory sentences of twenty-five years for two murders committed in the course of one criminal episode. Petitioner respectfully contends that Palmer should be overruled because it conflicts in effect with Segal v. Wainwright, 304 So.2d 446, 449 (Fla. 1974), and because it essentially continues the "single transaction rule" in the context of when a defendant may receive separate consecutive mandatory minimum sentences, notwithstanding the fact that the "single transaction rule" has been otherwise repudiated.

In Segal v. Wainwright, supra, this Court held that a defendant who receives two consecutive sentences must complete the first sentence before commencing to serve the second. It is not logical that a defendant could serve out a condition of a sentence before he has begun serving the sentence itself. Cf. Miller v. State, 297 So.2d 36 (Fla. 1st DCA 1974); Bruner v. State, 398 So.2d 1005 (Fla. 1st DCA 1980); Brooks v. State, 421 So.2d 829 (Fla. 1st DCA 1982); Dixon v. State, 339 So.2d 688

(Fla. 2d DCA 1976), and Lund v. State, 396 So.2d 255 (Fla. 3d DCA 1981). Yet, this is what happens when a trial judge who imposes multiple consecutive sentences directs that the mandatory minimums he is required to impose as conditions thereof be served concurrently. Palmer v. State thus conflicts with Segal v. Wainwright, and should yield to it.

This Court repudiated the "single transaction rule" in the context of when a defendant may receive separate consecutive sentences for distinct offenses committed in the course of a single criminal episode. See e.g., State v. Baker, __So.2d__ (Fla. 1984)[9 FLW 282]. Palmer v. State, supra, essentially continues the "single transaction rule" in another context. The state submits that there is no logical rationale for such an inconsistent approach, and asks the Court to overrule Palmer accordingly.

CONCLUSION

Based on the foregoing facts, arguments and authorities, the decision of the Second District Court of Appeal should be reversed. Enmund's conviction for robbery should be affirmed; the case should be remanded to the trial court so that Enmund may be sentenced pursuant to his robbery conviction; and Enmund's consecutive minimum mandatory sentences should also be affirmed.

Respectfully submitted,

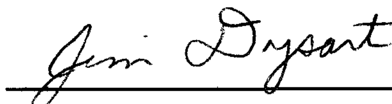
JIM SMITH
ATTORNEY GENERAL

JAMES H. DYSART
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Paul C. Helm, Assistant Public Defender, Hall of Justice Building, 455 North Broadway Avenue, Bartow, Florida 33830 on this 31st day of December, 1984.



OF COUNSEL FOR PETITIONER