IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

ROBERT LEE DIXON,

Respondent.

CASE NO.: 66,405

PETITIONER'S BRIEF ON MERITS

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STATEMENT OF THE CASE AND FACTS

A two-count indictment charging Respondent, Robert Lee Dixon, with first-degree murder and attempted robbery with a firearm was returned on June 24, 1981 in Hillsborough County Circuit Court. (R 690, 691) Respondent was convicted on both counts at trial. On appeal, the Second District Court of Appeal reversed the judgments and ordered that Respondent be granted a new trial. Dixon v. State, 426 So.2d 1258 (Fla. 2d DCA 1983). (R 692-697)

Retrial was before the Honorable Robert Bonanno and a jury on February 20 through 24, 1984. (R 1-599)

The testimony at trial was that on June 5, 1981, at approximately 10:00 a.m., Giovanni Piazza approached the Blue Diamond Bar which he owned, carrying over $28,000 because he regularly cashed paychecks at the bar. (R 31, 32, 42, 77) A man accosted Mr. Piazza and said "hand it over" while a second man stood apart looking around. (R 58, 59) Piazza refused to part with his money and was shot twice in the chest causing his death. (R 61, 178) Piazza shot back at his attacker. (R 231) The two confederates ran away together leaving the money at the scene. (R 63, 42)

Substantial evidence was presented showing that Willie B. Waldron was the man who shot Piazza. Shortly after the shooting, Waldron turned up at a Plant City hospital emergency room with a gunshot wound. (R 180) The bullet removed from Waldron was identified as having been fired from the pistol belonging

to Piazza found at the scene. (R 207) An eyewitness to the shooting, Bobby Timmons, knew Waldron as "Willie B." and had been a neighbor of his. (R 58, 59)

The theory of the prosecution was that Respondent was the man present at the scene aiding Waldron. Bobby Timmons selected Respondent's picture from a photopack but said he would need to see Respondent in person to be sure he was Waldron's confederate. Timmons identified Respondent at the trial. (R 74, 75)

Michael Piazza, the victim's son, was ten years old when he witnessed the crime. (R 225) On November 24, 1981 (over six months after the incident), he selected Respondent's photo from a photopack. (R 235)

Juanita Warren, Willie B. Waldron's girlfriend, testified that on the morning of the crime she and Waldron were driving on 22nd Street when Waldron told her to stop and pickup a man she didn't know. (R 256, 257) She identified Respondent as the man who got into the car and later exited with Waldron. (R 262)

Gail Anderson, Respondent's former girlfriend, testified that she received a phone call from an unidentified person who told her that Willie Waldron had talked and that Respondent should be careful because the police were looking for him. (R 334) Respondent subsequently told her that he planned the crime, but he wasn't present when it occurred. (R 335)

Appellant presented an alibi defense. (R 390-408)

The jury returned verdicts of guilty as charged to both counts. (R 595)

At Respondent's sentencing hearing the prosecutor and defense counsel informed the court that under the then current case law, Respondent could be adjudicated guilty of attempted robbery with a firearm but could not be sentenced for that offense. (R 596) The court then sentenced Respondent to imprisonment for life with a twenty-five year mandatory minimum sentence on the first-degree murder count, and adjudicated Respondent guilty of attempted robbery with a firearm but withheld sentence on that count. (R 598)

On appeal, the Second District Court of Appeal held that Respondent could not be convicted of both first degree murder and attempted robbery. (A copy of the opinion is attached as an appendix to this brief.)

The 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?

PRELIMINARY STATEMENT

Although the question certified by the Second District Court of Appeal assumes that a defendant convicted of first-degree murder cannot be sentenced for an underlying felony from which the murder results, the State takes the position in this brief that a defendant convicted of first-degree murder can be convicted of and sentenced for an underlying felony.

SUMMARY OF ARGUMENT

As evidenced by the statutes it has promulgated, the Florida Legislature intends that a defendant convicted of first-degree murder can also be convicted of and sentenced for an underlying felony from which the murder results. That intention should be recognized and put into effect by the decision of this Court, since to do so would not violate double jeopardy principles.

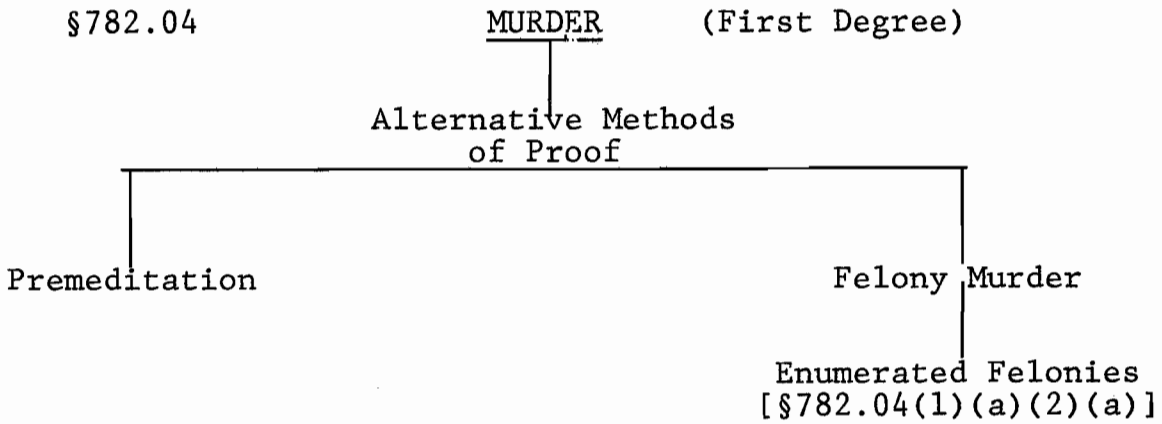
ARGUMENT

ISSUE

WHEN A DEFENDANT IS CONVICTED OF FELONY MURDER, CAN HE BE CONVICTED OF, ALTHOUGH NOT SENTENCED FOR, THE UNDERLYING FELONY? (As stated by the Second District Court of Appeal)

The Second District's certified question is a "loaded" question because it assumes that a defendant cannot be sentenced for an underlying felony in a "felony murder" case, and because it assumes that the two offenses that must be considered in a double jeopardy analysis are "felony murder" and the underlying felony instead of simply murder (first degree) and the underlying felony.

Premeditated murder and felony murder are not separate statutory offenses. The generic statutory offense is simply murder, and first degree murder has two alternative methods of proof: (1) premeditation, and (2) felony murder. The following diagram illustrates this:



Because it is possible to commit first degree murder without committing an underlying felony, a felony used to prove "felony murder" can never be a necessarily lesser included offense of first degree murder.

Section 775.021(4), Florida Statutes (1983) provides:

> 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 requires proof of an element that the other does not, without regard to the accusatory pleading or the proof adduced at trial. (Emphasis supplied)

This Honorable Court has held in several cases 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. State v. Carpenter, 417 So.2d 986 (Fla. 1982); State v. Thomas Baker, __So.2d__(Fla. 1984)[9 FLW 209]; Scott v. State, __So.2d__(Fla. 1984)[9 FLW 209]; State v. Charles Baker, __So.2d__(Fla. 1984)[9 FLW 282]; Wicker v. State, __So.2d__ (Fla. 1985)[10 FLW 33].

In State v. Charles Baker, supra, this Court said (quoting Judge Cowart, 425 So.2d at 50):

> ...two statutory offenses are essentially independent and distinct if each offense can possibly be committed without committing the other offenses.

The Court also said in Baker:

> We hold that Bell v. State, 437 So.2d 1057 (Fla. 1983), is limited to necessarily lesser included offenses. (Emphasis supplied)

In its opinion sub judice, the Second District Court of Appeal relied on Bell v. State, supra, to hold that Respondent, who was convicted of first degree murder under a "felony murder" theory, could not be convicted of or sentenced for the underlying felony of attempted robbery from which the murder resulted. But attempted robbery is not a necessarily lesser included offense of first-degree murder. It is obviously possible to commit first-degree murder without also committing attempted robbery. Thus Respondent could be convicted of and sentenced for both offenses.

This Court's recent decision in Wicker v. State, __So.2d__ (Fla. 1985)[10 FLW 33] supports Petitioner's analysis. Wicker was convicted of three separate counts: first degree burglary, involuntary sexual battery, and robbery. The Second District Court of Appeal set aside the sexual battery conviction, reasoning that a defendant could not be convicted of both the first degree felony burglary and the assault which served as the basis therefor, because finding that the defendant committed the assault was indispensible to the conviction of first degree felony burglary. The State argued that Wicker could be convicted of both burglary and sexual battery. This Court agreed with the State, stating that the district court erroneously analyzed the allegations in the charging document to determine whether the convictions could stand instead of

analyzing the offenses' statutory elements. This Court examined the statutory elements of burglary and sexual battery and concluded that they were separate offenses.

If the analysis applied by this Court in Wicker is applied in the present case, it will be found that the two offenses to be examined are murder (first degree) and attempted robbery (not "felony murder" and attempted robbery), and that they are separate offenses.

If a state legislature so intends, it is clear that a defendant can be convicted of and sentenced for both first degree murder and an underlying felony from which the murder results. See Missouri v. Hunter, __U.S.__, 74 L.Ed.2d 535, 103 S.Ct.__(1983); Albernaz v. United States, 450 U.S. 333 (1981); and Whalen v. United States, 445 U.S. 684 (1980). As evidenced by the statutes it has promulgated, §§782.04 and 775.021(4), Fla. Stat. (1983), the Florida Legislature does intend that a defendant convicted of first-degree murder can also be convicted of and sentenced for an underlying felony from which the murder results.

If the Florida legislature did not intend separate convictions and sentences in first-degree murder or "felony murder"/underlying felony situations, it could have legislated that result by proscribing the different species of felony murder under separate statutory provisions instead of listing the different species in the alternative in the murder statute.

The Second District sub judice recognized an apparent conflict between this Court's decision in Bell v. State, supra, and the Court's decisions in Hegstrom v. State, 401 So.2d 1343 (Fla. 1981), and Hawkins v. State, 436 So.2d 44 (Fla. 1983). Petitioner contends that neither Bell, Hegstrom, nor Hopkins is consistent with this Court's holding in State v. Charles Baker, Wicker, et.al., supra, that 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. Bell, Hegstrom, and Hopkins should be overruled to the extent they conflict with Baker, Wicker, et.al.

CONCLUSION

The case law in this area of the law is rife with confusion and inconsistency. If this Court sticks to its decisions in such cases as Carpenter, Baker, Scott, Baker, and Wicker, surpa, the confusion will be cleared up, consistency will be achieved and the intention of the legislature will be fulfilled.

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

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 U.S. Mail to Douglas S. Connor, Assistant Public Defender, Courthouse Annex, Tampa, Florida 33602 on this 8th day of February, 1985.

Jim Dysart

OF COUNSEL FOR PETITIONER