

IN THE FLORIDA SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,
v.
ROBERT LEE DIXON,
Respondent.

Case No. 66,405

FILED
SID J. WHITE
MAR 11 1985
CLERK, SUPREME COURT
By
Chief Deputy Clerk

PETITIONER'S REPLY BRIEF

JIM SMITH
ATTORNEY GENERAL

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

COUNSEL FOR PETITIONER

/ech

TABLE OF CONTENTS

	<u>PAGE</u>
ARGUMENT	
<u>ISSUE</u>	1-3
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)	
CONCLUSION	4
CERTIFICATE OF SERVICE	4

TABLE OF CITATIONS

	<u>PAGE</u>
Amlotte v. State, 435 So.2d 249 (Fla. 5th DCA 1983)	1
Copeland v. State, 457 So.2d 1012 (Fla. 1984)	3
Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977)	2
Payne v. Virginia, 468 U.S. __, 104 S.Ct. __, 82 L.Ed. 2d 801 (1984)	2
Scott v. State, __So.2d__ (Fla. 1984)[9 FLW 207]	2
State v. Carpenter, 417 So.2d 986 (Fla. 1982)	2
State v. Charles Baker, __So.2d__ (Fla. 1984)[9 FLW 282]	2
State v. Thomas Baker, __So.2d__ (Fla. 1984)[9 FLW 209]	2
Wicker v. State, __So.2d__ (Fla. 1985)[10 FLW 33]	2
 <u>Other Authorities:</u>	
Section 775.021(4), Florida Statutes (1983)	1, 3
Section 775.021(4), Florida Statutes (1977)	3

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)

Petitioner completely agrees with Respondent that "Whether a lesser offense is necessarily included in a greater offense is determined by examining the statutory elements of the two offenses (Respondent's brief, page 3). However, Petitioner disagrees with Respondent that the two offenses that must be examined in this case are "felony murder" and robbery.

Petitioner contends that the two offenses are murder in the first degree and robbery.

As the court said in Amlotte v. State, 435 So.2d 249 (Fla. 5th DCA 1983):

There is no crime of "felony murder" but there is a crime of murder in the first degree which includes what we lawyers commonly call "felony murder"...

First degree murder has two alternative methods of proof: (1) premeditation, and (2) felony murder. To determine which method of proof is used by the State in a given case, either the accusatory pleading or the proof adduced at trial must be considered. Yet Section 775.021(4), Florida Statutes (1983) provides:

...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 recent cases that for sentencing 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 207]; State v. Charles Baker, __ So.2d __ (Fla. 1984)[9 FLW 282]; Wicker v. State, __ So.2d __ (Fla. 1985)[10 FLW 33].

Only by considering the specific theory on which a murder rests can it be concluded that an underlying felony is a necessarily lesser included offense of the murder. Yet examining the accusatory pleading or the proof adduced at trial to determine the theory on which a murder rests is prohibited by statute and case law. Because first degree murder can be committed either by premeditation or by the commission of a specified felony, an underlying felony can never be a necessarily lesser included offense of first degree murder (assuming only statutory elements are considered).

Respondent relies upon Payne v. Virginia, 468 U.S. __, 104 S.Ct. __, 82 L.Ed.2d 801 (1984), and Harris v. Oklahoma, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977), but those cases involved multiple prosecutions and, consequently, are inapposite.

Respondent also cites Copeland v. State, 457 So.2d 1012 (Fla. 1984), but in Copeland the Court had to deal with §775.021(4), Florida Statutes (1977) rather than §775.021(4), Florida Statutes (1983). The Court considered the accusatory pleading and the proof adduced at trial in reaching its decision, which would be prohibited under the new statute.

In summary, cases such as Hegstrom, Bell and Copeland are obsolete. The Florida Legislature has made its intention clear that for sentencing purposes only the statutory elements of offenses may be considered. By enacting §775.021(4), Florida Statutes (1983), and by continuing to list the different species of "felony murder" in the murder statute instead of proscribing the different species of "felony murder" under separate statutory provisions, it is apparent that the Florida Legislature intended separate convictions and sentences in first degree murder/underlying felony situations.

CONCLUSION

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,

JIM SMITH
ATTORNEY GENERAL

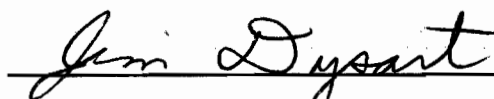


JAMES H. DYSART
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammel Building
Tampa, Florida 33602
(813) 272-2670

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



OF COUNSEL FOR PETITIONER