IN THE SUPREME COURT OF FLORIDA

LOUIS PINA,	:	
Petitioner,	:	
v.	:	Case No. 67,01[illegible]
	:	and
STATE OF FLORIDA,	:	Case No. 67,109
	:	(Consolidated)
Respondent.	:	
	:	

ON DISCRETIONARY REVIEW
OF THE DECISION OF THE SECOND DISTRICT COURT
OF APPEALS

BRIEF OF RESPONDENT ON MERITS

JIM SMITH
ATTORNEY GENERAL

KATHERINE V. BLANCO
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR RESPONDENT

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PRELIMINARY STATEMENT

LOUIS PINA filed a Notice to Invoke the Discretionary Jurisdiction of this Honorable Court based upon the question certified by the Second District Court of Appeal. The STATE OF FLORIDA likewise submitted a Notice to Invoke the Discretionary Jurisdiction of the this court based upon the same certified question. The cases have been consolidated for appeal and the parties will be referred to as PINA and STATE in the instant brief.

CERTIFIED QUESTION

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

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 also be convicted of and sentenced for an underlying felony.

Pending before this Honorable Court are the following cases which raise the same issue as the present appeal:

State v. Earl Enmund - F.S.Ct. Case No. 66,264

State v. Robert Lee Dixon - F.S.Ct. Case No. 66,405

State v. Johnnie Willis Miller - F.S.Ct. Case No. 67,005

State v. James Michael Snowden - F.S.Ct. Case No. 65,176

[Snowden is not directly on point since Snowden was convicted of Third Degree Murder]

SUMMARY OF THE ARGUMENT

Section 775.021(4), Florida Statutes, does not prohibit the imposition of separate convictions for First Degree Felony Murder and the underlying felony. As evidenced by the statutory sceme, the Florida Legislature intends that a defendant convicted of First Degree Murder can also be convicted of and sentenced for an underlying felony. The application of the Blockburger test supports the imposition of separate convictions and sentences without violating principles of double jeopardy.

Pina's remaining claims are unrelated to the question certified by the Second District Court and do not warrant a second appellate review.

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)

Although the question certified by the Second District Court of Appeal presumes that a defendant convicted of Felony Murder canot be sentenced for the underlying felony, the State submits that a defendant convicted of Felony Murder can be convicted of and sentenced for the underlying felony. First Degree Murder and Robbery are separate and distinct crimes for which both convictions and sentences may be validly obtained without violating principles of double jeopardy.

Section 775.021(4), Florida Statutes (1983), incorporates the test set forth in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932); to-wit:

> "[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determind 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.

Whether separate convictions and sentences are permissible should depend upon the statutory elements of the various cirmes as defined by the Legislature. Offenses are separate if each offense requires proof of a fact that the other does not.

Sub judice, Louis Pina was charged in a seven (7) count Indictment with Conspiracy to Commit Armed Robbery with a Fire-

arm, First Degree Murder (2 counts), Attempted First Degree Murder, and Armed Robbery with a Firearm (3 counts) (R.1362-1366). The two offenses pertinent to the instant case are murder (First Degree) and Robbery.

Under §782.04(1)(a), Florida Statutes, First Degree Murder may be commited in one of two ways: (1) with premeditation under §782.04(1)(a)(1), or (2) during the commission of a felony under §782.04(1)(a)(2). Looking to the statutory elements as required by Blockburger, and not the allegations of proof or actual evidence, it is clear that separate convictions for First Degree Murder and Robbery are appropriate. Under Blockburger, whether the proof at trial that Appellant was guilty of felony murder or guilty of premeditated murder is of no significance. The method of proving First Degree Murder must be disregarded. Because it is possible under the statute to commit First Degree Murder without committing an armed robbery or any other enumerated felony, no double jeopardy problem exists at bar. In determining whether separate convictions are permissible from a single event or episode, one should resort only to the statutory elements of the charged crimes as opposed to the language of the charging document. State v. Baker, 456 So.2d 419 (Fla. 1984). Comparing the statutory elements of the two charged crimes, it is self-evident that a violation of the murder statute does not necessarily involve the commission of a robbery. See e.g. State v. Carpenter, 417 So.2d 986 (Fla. 1982); State v. Gibson, 452 So.2d 553 (Fla. 1984) wherein this court applied the Blockburger test and looked only to the statutory elements and

not to the information or evidence adduced at trial.

A distinction must be made between "lesser included offenses" and "underlying felonies". A lesser included offense[1/] is a different degree of the same crime whereas an underlying felony is a separate and distinct crime which was committed during the commission of some other crime of a different genre. Although a lesser included offense is automatically proved by proof of the greater crime, an underlying felony is not automatically proved by proof of a homicide. Proof of a robbery does not necessarily prove First Degree Murder, nor does proof of First Degree Murder prove a robbery. Looking solely to the statutory elements of First Degree Murder and of Robbery, it is apparent that the commission of First Degree Murder does not require a commission of a robbery and, therefore, separate convictions and sentences may be imposed for both crimes.

In Rotenberry v. State, ___So.2d___, 10 F.L.W. 237, (Case No. 63,719 and 63,720, Opinion filed April 25, 1985), this Honorable Court concluded that the Legislature did not intend the charge of trafficking in cocaine to encompass possession and sale as lesser included offenses. In Rotenberry, this court, applying the Blockburger test, determined that the trafficking statute does not require proof of either

1/ Florida Standard Jury Instructions -- Criminal Cases (2d ed. 1981) page 258 of the Schedule of Lesser offenses lists only Manslaughter (§782.07) as a Category 1 lesser included offense of First-degree (felony) murder §782.04(1).

sale or possession and thus, separate convictions and sentences are not precluded. 10 F.L.W. at 239. See also, Wicker v. State, 462 So.2d 461 (Fla. 1985) wherein the defendant was convicted of three separate counts: First Degree Burglary, Involuntary Sexual Battery, and Robbery. In Wicker, the court examined the statutory elements of burglary and sexual battery and concluded they were separate offenses and that a defendant can be convicted and sentenced for both burglary and sexual battery.

If a State Legislature so intends, a defendant can be convicted of and sentenced to both First Degree Murder and an underlying felony from which the murder results. See Missouri v. Hunter, 459 U.S. 359 , 74 L.Ed.2d 535, 103 S.Ct. 673, (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), Florida Statutes (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. Though Pina's offenses were commited in October of 1982, prior to the Amendment to §775,021(4), Florida Statutes, which became law on June 23, 1983 (Chapter 83-156, Laws of Florida), the State maintains that in amending this section, the legislature merely made its previous intention with respect to the statute unmistakably clear and codified its approval of decisions such as Borges v. State, 415 So.2d 1265 (Fla. 1982) and Carpenter, supra.

ISSUES II - IV

ARGUMENT

THIS COURT SHOULD DECLINE TO REVIEW PINA'S CLAIMS CONCERNING HIS CONFESSION AS THOSE ISSUES ARE NOT INTRINSICALLY INVOLVED IN THE CERTIFIED QUESTION.

The State is not unmindful of the principle that this court may, in its discretion, consider collateral issues raised in an appeal when a case has been accepted for review. Nevertheless, the State suggests that Pina is attempting to "bootstrap" claims unrelated to the certified question. Issues II - IV concerning the admissibility of Pina's two confessions are not irretrievably interwoven with the quesion certified by the Second District Court of Appeal

The Second District did not err or fail to follow precedent from this Court in concluding that there was overwhelming evidence of guilt in the instant case and, error, if any, in the admission of Pina's confession, was harmless. Palmes v. State, 397 So.2d 648, 654 (Fla.) cert. denied, 454 U.S. 882, 102 S.Ct. 369, 70 L.Ed.2d 195 (1981).

The evidence presented at trial overwhelmingly linked Pina to the crimes:

(1) During the week prior to the robbery, Pina and the co-defendants repeatedly used the phrase "five big ones" which was often coupled with a hand gesture indicating a pointed gun (R.217-219).

(2) Nancy Gaona heard Pina refer to "five big ones" more than a dozen times prior to the robbery (R.230), and also heard Pina say "if he had to kill; he'd kill". (R.234)

(3) Pina was with Ribas, Torres, and Garcia in Garcia's car on the morning of the shooting, and Nancy Gaona saw the men with two hand guns; Torres had Pina's gun (R.231,234)

(4) Prior to the robbery, Javier Hernandez saw Pina with a gun and saw him leave the house with the other three co-defendants going in the direction of the West Farm Market (R.249-250).

(5) Rudolpho Gaona recognized Garcia and Pina as two of the men who were spray painting the getaway car following the robbery (R.259-263). Gaona heard Pina say they had "killed a cow" (R.262).

(6) Police Officer Alderman stopped the car which matched the B.O.L.O. description of the suspects' vehicle. Ricky Garcia was the driver of the car and Louis Pina was the passenger (R.272-274).

(7) Rosena Welch, who was familiar with co-defendant Benny (Torres) and who had been left for dead at the scene, positively identified Pina as the man who helped Benny take the money from the cash register (R.532; 542-544).

(8) Pina went behind the counter, and was approximately 18 inches away from Rosena Welch; Rosena looked at Pina's face and saw Pina take the money tray from the cash register (R.532, 533, 529, 542; 543).

(9) Subsequent to Pina'a initial confession at the time of his arrest and in response to a letter from Pina, Investigator Foy went to see Pina; and, after Miranda warnings were again given to him, Pina repeated his version of the robbery and murders on tape (R.1123;1583-1615)

The Second District court correctly applied the precedent from this court to the facts adduced at trial in concluding that Pina was not entitled to relief on this claim.

ISSUE V

ARGUMENT

THIS COURT SHOULD DECLINE TO REVIEW PINA'S CLAIM CHALLENGING THE IMPOSITION OF CONSECUTIVE LIFE SENTENCES BASED UPON HIS TWO CONVICTIONS FOR FIRST DEGREE MURDER.

Pina received consecutive life sentences for his two first-degree murder convictions. The Second District Court found no merit in Pina's claim that he was penalized for standing trial and their opinion does not elaborate on this issue. (Appendix, slip opinion at 6)

Once again, Pina relies on the certified question as his authority for review of an unrelated issue. State submits that if the Second District erred with respect to Pina's consecutive sentences, such error was related solely to the direction that the 25-years minimum mandatory sentences be served concurrently. (Appendix, slip opinion at 5); citing Enmund v. State, 459 So.2d at 1161 (Fla. 2d DCA 1984).

In State v. Enmund, currently pending review in this court in case §66,264, this court is being asked to consider whether the imposition of consecutive minimum mandatory sentences for two murders committed in the course of one creminal episode is prohibited under §775.082 (1) Florida Statutes and Palmer v. State, 438 So.2d 1 (Fla.1983)

Sub judice, the instant case is on point with Enmund. In Segal v. Wainwright, 304 So.2d 446,449 (Fla.1974) this court ruled that a defendant who receives two consecutive sentences must complete the first sentence before commencing to serve the second. It is illogical that a defendant could serve out a condition of a sentence before he has begun serving the sentence itself. Cf. Miller v. State, 299 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. No error occured with respect to the trial court's imposition of consecutive sentences for the two first degree murder convictions.

CONCLUSION

Based on the forgoing arguments and authorities, this court should affirm Pina's convictions and sentences for robbery and affirm the trial court's imposition of consecutive minimum mandatory sentences for the two murder convictions.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

Katherine V. Blanco

KATHERINE V. BLANCO
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by regular U.S. mail this ~~27th~~ 28th day of June, 1985, to Douglas A. Wallace, Esquire, P. O. Box 9032, 920 Manatee Avenue, West, Bradenton, Florida 33506.

K Blanco
Of Counsel