IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JUL 25 1985
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

STATE OF FLORIDA,

Petitioner,

v.

W.S.L., a child,

Respondent.

Case No. 67,282

BRIEF OF ~~APPELLEE~~ Appellant

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SUMMARY OF THE ARGUMENT

There is no statutory prohibition to the imposition of separate convictions for first degree felony murder and the underlying felony. See, §775.021(4), Florida Statutes (1983); thus, it is safe to conclude that the legislature intends for an individual to be convicted for the felony which underlies the felony murder. The application of the Blockburger test supports the imposition of separate convictions and sentences with violating principles of double jeopardy.

STATEMENT OF THE CASE

The State Attorney for the Sixth Judicial Circuit filed a Petition for Delinquency charging the Respondent, W.S.L., with the following offenses: (1) first degree murder; (2) sexual battery; (3) two counts of attempted sexual battery; and, (4) aggravated battery. (R10,11). Respondent filed a Motion for Determination of Competency to Stand Trial which was denied. (R21-23, 80, 281). After completion of the delinquency hearing, Respondent was found guilty as charged on all counts; and, he was adjudicated delinquent. Respondent has been committed to the Department of Health & Rehabilitative Services for an indefinite period of time or until his 19th birthday--whichever occurs first. (R48, 51, 426).

Respondent then prosecuted a timely appeal to the District Court of Appeal, Second District. The appellate court rendered it's opinion on June 12, 1985 (attached hereto as Appendix). The appellate court reversed the conviction for sexual battery. The remaining convictions are affirmed subject to a remand for nunc pro tunc findings on competency.

The Second District certified the following question to this Court:

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

Petitioner filed his Notice to Invoke Discretionary

Jurisdiction and Motion to Stay Mandate on June 21, 1985; and, on June 26, 1985, Respondent filed her Cross-Notice to Invoke Discretionary Jurisdiction urging intra-district conflict of decisions. The Second District rendered an Order on July 3, 1985, staying its mandate. This timely appeal now ensues.

STATEMENT OF THE FACTS

For purposes of brevity, clarity, and good taste, Petitioner incorporates the factual portion of the opinion filed by the Second District written by Judge Lehan: "The facts of this tragic case involve defendant's mother babysitting a neighbor's eight month old baby girl. The baby was put in the bedroom shared by defendant, a nine year old boy, and his brother, who was seven years old. When the baby's mother returned later in the evening, she discovered that the baby had a black eye and that her nose, lips and head were bleeding. Paramedics were called when the baby began turning blue, and the child was transported to the hospital."

"The baby subsequently died. The medical expert testimony was that the child died from blunt trauma to the lower chest and upper abdomen, which damaged internal organs and caused internal bleeding. The medical evidence also indicated several bruises on the child's face and head, a tear to the lips, a bite mark on the stomach, a tearing injury to the thumb, and tearing to the anus and vaginal tissues. Testimony indicated that some of the injuries could have been caused by the sharp end of a coat hanger or a pencil."

"Defendant's brother testified that he and defendant had thrown the baby onto the bed several times, with the baby bouncing onto the floor once. The brother testified that defendant had knelt on the baby's arms and chest, had

hit the baby in the stomach and had hit the baby in the head with a belt buckle. The brother also testified that he and defendant had apparently inserted or tried to insert a coat hanger in the baby's anus and a pencil in the baby's vagina. The brother also said that defendant put his penis in the baby's mouth and urinated. The brother's testimony indicated that he and defendant had seen pictures of some of those types of conduct in pornographic material that was in the house." (Appendix; Slip Opinion pp. 1-2)

CERTIFIED QUESTION

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

ARGUMENT

Petitioner would alert this Court that presently pending, on the same point, are the following cases: (1) State of Florida v. Earl Enmund, Case No. 66,264; (2) State of Florida v. Robert Lee Dixon, Case No. 66,405; (3) State of Florida v. Johnnie Willis Miller, Case No. 67,005. Briefs have been filed in these cases; and, Petitioner does adopt the arguments from those briefs.

Under §782.04(1)(a), Florida Statutes, First Degree Murder may be committed 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 v. United States, 284 U.S. 299, 76 L.Ed. 306 (1932) and not the allegations of proof or actual evidence, it is clear that separate convictions for First Degree Murder and sexual battery are appropriate. Under Blockburger, whether the proof at trial that Respondent 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 a sexual battery or any other enumerated felony, no double jeopardy problem exists at bar. In determining whether separate convic-

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 one of the enumerated felonies. 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.

Significantly, the United States Supreme Court decided Whalen v. United States, 445 U.S. 684, 63 L.Ed. 2d 715, 100 S.Ct. 1432 (1980) and Albernaz v. United States, 450 U.S. 333 67 L.Ed. 2d 775, 101 S.Ct. 1137, (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, this Court in State v. Hegstrom, 401 So.2d 1343 (Fla. 1982), receded from its prior position. 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.
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> * * *
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> ...[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 guilty, 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 perhaps 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 viable Blockburger analysis, first-degree murder is a separate offense from robbery or here, sexual battery.

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 under-

[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).

lying felony is not automatically proved by proof of a homicide. Proof of a sexual battery does not necessarily prove First Degree Murder, nor does proof of First Degree Murder prove a sexual battery. Looking solely to the statutory elements of First Degree Murder and of Sexual Battery, it is apparent that the commission of First Degree Murder does not require a commission of a sexual battery and, therefore W. S. L. may receive separate convictions and sentences for both crimes.

In Rotenberry v. State, 468 So.2d 971, (Fla. 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 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);

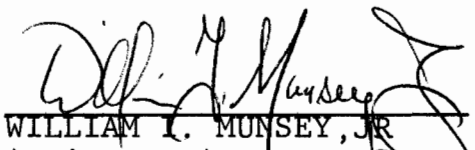
Albernaz v. United States, 450 U.S. 333 (1981); and Whalen v. United States, 445 U.S. 684 (1980). As evidenced by the statutes it has promulgated, §782.04 and 775.021(4), Florida Statutes (1983), the Florida Legislature does intend that because Respondent is convicted of First Degree Murder, he can also be convicted of and sentenced for an underlying felony.

CONCLUSION

WHEREFORE, based on the foregoing argument, reason, and authority, Petitioner would urge this Court to render an opinion deciding the question certified in the affirmative.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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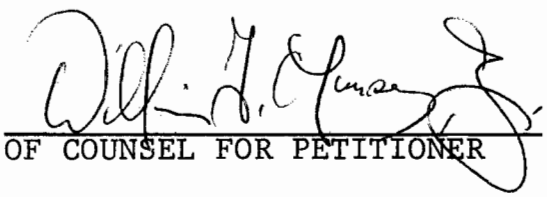
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to Deborah K. Brueckheimer, Assistant Public Defender, Criminal Courts Complex, 5100-144th Avenue N., Clearwater, Florida 33520 this day of July, 1985.



OF COUNSEL FOR PETITIONER