Supreme Court of Florida

No. 67,282

STATE OF FLORIDA, Petitioner/Cross-Respondent,

vs.

W.S.L., a child, Respondent/Cross-Petitioner.

[March 27, 1986]

PER CURIAM.

This case is before us on petition to review a decision reported as W.S.L. v. State, 470 So. 2d 828 (Fla. 2d DCA 1985), in which the Second District Court of Appeal certified the following question as being of great public importance:

> When a defendant is guilty of felony murder, can he be convicted of, although not sentenced for, the underlying felony?

Id. at 830. We have jurisdiction. Art. V, § 3(b)(4), Fla. Const.

The district court held that the trial court erred in adjudicating respondent guilty on both the felony murder and the underlying felony of sexual battery, and reversed the conviction and sentence for sexual battery. We answered the same certified question contrary to this ruling in State v. Enmund, 476 So. 2d 165 (Fla. 1985), by holding that the underlying felony is not a necessarily lesser included offense of felony murder and that a defendant can be convicted of and sentenced for both felony murder and the underlying felony.

The district court also held that the trial court erroneously denied respondent's motion for a determination of his

competency to stand trial, and it remanded to the trial court for an evidentiary hearing on the matter. We agree with the district court that respondent was entitled to a hearing on his competency to stand trial. We find, however, in accordance with our recent decision in Hill v. State, 473 So. 2d 1253 (Fla. 1985), that a hearing to determine whether respondent was competent at the time he was tried cannot be held retroactively because respondent's "due process rights would not be adequately protected" under such a procedure. Drope v. Missouri, 420 U.S. 162, 183 (1975). Such a hearing must be conducted contemporaneously with the trial. Pate v. Robinson, 383 U.S. 375, 387 (1966).

Accordingly, we quash those portions of the district court's decision which hold that respondent cannot be convicted and sentenced for both first-degree felony murder and the underlying felony, and that respondent's competency to stand trial can be determined retrospectively. We vacate the convictions and sentences and remand with directions that the state may proceed with a new trial if the trial court determines that respondent is competent to stand trial.

It is so ordered.

BOYD, C.J., and McDONALD, EHRLICH and SHAW, JJ., Concur
OVERTON, J., Concurs in part and dissents in part with an opinion
ADKINS, J., Dissents

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

OVERTON, J., concurring in part, dissenting in part.

I dissent from the part of this opinion that reaffirms our decision in State v. Enmund for the reasons expressed in my dissent in that case. I concur with the majority's findings that a hearing must be held to determine respondent's competency to stand trial and that a new trial may be held if respondent is found to be competent.

Notice and Cross-Notice for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

Second District - Case No. 84-1214

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