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IN THE SUPREME COURT OF FLORIDA

AFGHARI BOLER, et al.,

Appellants,

vs.

STATE OF FLORIDA,

Appellee.

CASE NO. 85,623

ON APPEAL FROM THE CIRCUIT COURTS
FOR THE EIGHTEENTH AND FIFTH JUDICIAL CIRCUITS

CERTIFIED BY THE FIFTH DISTRICT COURT OF APPEAL

APPELLANTS' REPLY BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

Point one: This court has held that in cases which do not involve a guilty or no contest plea, the issue of double jeopardy is fundamental and may be raised for the first time on appeal. In cases involving guilty pleas, this court's 1994 decision presuming waiver of double jeopardy issues should be applied prospectively only.

This court would in no way violate the doctrine of separation of powers if it receded from its earlier decisions construing the Florida double jeopardy clause in accordance with federal cases construing the federal double jeopardy clause.

Language added in 1988 to Florida's general "rules of construction" statute should be given meaning independent from other language that appeared in that statute both before and after the amendment.

The opinion of the United States Supreme Court in its most recent double jeopardy case is binding precedent, since that opinion was joined by five Justices.

ARGUMENT

POINT ONE

IN REPLY: DUAL CONVICTIONS FOR FELONY MURDER AND ITS UNDERLYING FELONY VIOLATE THE FEDERAL DOUBLE JEOPARDY CLAUSE.

Preservation of the issue for appeal.

As to Mr. Boler's case, the issue now argued on this point is fundamental; it need not be raised in the trial court to be cognizable on appeal. State v. Johnson, 483 So. 2d 420 (Fla. 1986). Perrin v. State, 599 So. 2d 1365 (Fla. 1st DCA 1992), relied on by the State, is inconsistent with this court's decision in Johnson.

As to Mr. Oats's case, the appellant acknowledges this court's March 24, 1994 decision in Novaton v. State, 634 So. 2d 608 (Fla. 1994). The no contest plea in this case was entered August 10, 1993, with the defendant expressly reserving the right to appeal denial of his motion to dismiss the murder charge on the basis that the undisputed facts did not comprise murder. United States v. Dixon, 509 U.S. ___, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993) was decided June 28, 1993. Mr. Oats submits that Dixon established as a matter of law, before he entered his plea, that the predicate felony is included in felony murder for double jeopardy purposes, and that Novaton should be applied prospectively only, because this court's decision in Johnson, supra, did not clearly put criminal defendants and criminal defense lawyers on notice as to when a plea waives a double jeopardy defense.

Florida constitutional law.

Section 9 of the Declaration of Rights in the Florida Constitution provides that "[n]o person shall be...twice put in jeopardy for the same offense." The State argues that this court has no power to interpret the language "the same offense" as it applies to this case and, indeed, that this court would be violating the principle of separation of powers if it did construe that language as it applies to this case. The State's position is inconsistent with Article V, section 1 of this state's Constitution, with the principles announced in Marbury v. Madison, 1 Cranch 137, 5 U.S. 137, 2 L. Ed. 60 (1803) and with this court's decision in Traylor v. State, 596 So. 2d 957 (Fla. 1992). This court *can* recede from State v. Cantrell, 417 So. 2d 260 (Fla. 1982), in which it construed the Florida double jeopardy clause in the same manner that the United States Supreme Court construed the federal double jeopardy clause in Albernaz v. United States, 450 U.S. 333 (1981); the appellants' position is that it should consider doing so, given the confusion that threatens to engulf federal double jeopardy law.

The United States Supreme Court has only in the last few decades held that the federal double jeopardy clause limits only courts, not legislatures, and that accordingly the legislatures can in all situations create unlimited numbers of statutory offenses that all apply to and all can be used, in a single proceeding, to punish a single act. See Missouri v. Hunter, 459 U.S. 359 (1983); Albernaz v. United States, supra. Earlier, in

Gore v. United States, 357 U.S. 386, 389 and n.2, 392 (1958), the Court assumed that Congress is free to establish independent offenses to combat the same problem, *provided it does establish independent offenses rather than giving "different labels to the same thing" or "different descriptions of the same offense."* Nothing in the law of any jurisdiction precludes this court from interpreting Article I, section 9 in a manner consistent with the assumption behind Gore rather than in a manner consistent with Albernaz.

In accordance with Traylor, supra, this court should consider whether Florida constitutional law precludes the multiple convictions and sentences imposed in the appellants' cases. The appellants submit on this point that the dissenting opinion in State v. Smith, 547 So. 2d 613 (Fla. 1989) is correct and should be adopted as the law of this state.

Section 775.021(4), Florida Statutes.

The appellants submit, in the alternative, that this court need not reach a constitutional question in this case since Section 775.021(4)(b)(3) precludes multiple convictions and sentences where one offense is a lesser offense "subsumed by" a greater offense. "Subsumed by" neatly captures the "species of lesser included offense" concept applied in Harris v. Oklahoma, 433 U.S. 682 (1977). That concept was not a new one in 1988, when the Legislature added the "subsumed by" language to the statute. See State v. Enmund, 476 So. 2d 165, 170 (Fla. 1985) (Overton, J., dissenting); State v. Pinder, 375 So. 2d 836 (Fla. 1979);

Ennis v. State, 364 So. 2d 497, 500 (Fla. 2d DCA 1978) (Grimes, C.J., concurring specially). The Legislature is presumed to be familiar with decisional law. Williams v. Jones, 326 So. 2d 425, 435 (Fla. 1975). The Legislature is also presumed not to intend useless acts; when it amends a statute, the courts presume that it intended that statute to have a meaning different from that accorded to it before the amendment. Arnold v. Shumpert, 217 So. 2d 116, 119 (Fla. 1968). The 1988 change to Section 775.021 abrogated Carawan v. State, 515 So. 2d 161 (Fla. 1987), kept the language that was already in the statute setting out the Blockburger[1] rule of construction, and added Section 775.021(4)(b)(1), (2) and (3); those subsections should be presumed to have a meaning different from the Blockburger rule set out at Section 775.021(4)(a).

Section 782.04(1), Florida Statutes.

The State argues that if the Legislature had passed twelve separate felony murder statutes, each incorporating one of the twelve predicate offenses enumerated in Section 782.04(1)(a)(2), then it would be clear that the intent was for each of the predicate felonies to "merge" into the murder for double jeopardy purposes; but that since they are listed in the same subsection the intent is for them *not* to merge. (Answer brief at 10) The United States Supreme Court rejected the identical argument in Whalen v. United States, 445 U.S. 684 (1980) as follows:

It is doubtful that Congress could

[1]Blockburger v. United States, 284 U.S. 299 (1932).

> have imagined that so formal a difference in drafting had any practical significance, and we ascribe none to it.

445 U.S. at 694. Along the same line of reasoning the State points out that Section 782.04(1)(a)(3), another subsection of the first-degree felony murder statute, expressly incorporates the single predicate felony of drug trafficking; the Fifth District Court of Appeal has held that the formal distinction between the listed predicate felonies in subsection (1)(a)(2) and the additional predicate felony in (1)(a)(3) has no substantive significance. State v. Ingleton, 20 Fla. L. Weekly D803, D804 (Fla. 5th DCA March 31, 1995).

Federal constitutional law.

The appellants further submit in the alternative that United States v. Dixon, 509 U.S. ___, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993) is binding precedent and that it applies to this case. The opinion of the Court, at Part IV, expressly states that "the same offense" means the same thing in both the multiple-punishment and successive-prosecution contexts. 113 S. Ct. at 2860, 125 L. Ed. 2d at 573. Five Justices--Justice Scalia, Justice Kennedy, Chief Justice Rehnquist, Justice O'Connor, and Justice Thomas--joined in Part IV of the Court's opinion. 113 S. Ct. at 2853, 2865, 125 L. Ed. 2d at 564, 579. Dixon accordingly stands for the rule that the presumption created in Harris v. Oklahoma applies to both successive-prosecution and multiple-punishment cases. That presumption, which is a corollary or exception to the Blockburger presumption, is not overcome by any express statement of legisla-

tive intent in Florida.

The State argues that Dixon does not create binding precedent, relying on Texas v. Brown, 460 U.S. 730 (1983) and Horton v. California, 496 U.S. 128 (1990). In Texas v. Brown and in Coolidge v. New Hampshire, discussed in Horton at n.2, the Court announced its judgment but issued no opinion of the Court, only opinions joined by four or fewer members of the Court. It is in cases like Texas v. Brown and Coolidge, where no opinion of the Court is issued, that the precise nature of the precedent created by the Court's judgment has to be determined by the laborious process of comparing the various opinions issued by the Justices and concluding that the judgment is limited to the narrowest basis discernible from those opinions. See Note, The Precedential Value of Supreme Court Plurality Decisions, 80 Columbia L. Rev. 756, n.1 and 761-67 (1980).

The State also suggests that the precedent of Dixon ought to be limited to the facts of that case. (Answer brief at p.11, n.5) As one federal Court of Appeals has noted,

> In cases of doubt, the institutional role of the Supreme Court weighs in favor of considering its rulings to be general rather than limited to the particular facts. The Supreme Court, unlike the lower federal courts, is given a largely discretionary jurisdiction which is used when areas of the law require clarification.... It does not sit to adjudicate individual disputes .... Rather it uses individual cases and controversies to shape and guide the development of the law.... When the Court wishes to make a narrow, fact-bound holding,

> typically it says so. When it does not say so, the rebuttable presumption is that a general rule has been enunciated.

Cowin v. Bresler, 741 F. 2d 410, 425 (D.C. Cir. 1984).

The appellants have not argued that the predicate felony is an element of felony murder, nor that it is a lesser included offense of felony murder for jury-alternative purposes. Their position on this point is that the predicate felony is a species of lesser included offense of felony murder for federal double jeopardy purposes. See Dixon and Harris v. Oklahoma.

CONCLUSION

Mr. Boler requests this court to affirm the District Court's decision in his case. If that relief is not granted, he requests this court to strike the mandatory minimum sentence he received for use of a firearm.

Mr. Oats requests this court to reverse the District Court's decision in his case, and to vacate his conviction and sentence for third-degree murder on the grounds argued in Point III of the appellants' initial brief. If that relief is not granted, he requests this court to vacate his conviction and sentence for theft on the grounds argued in Point I.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing has been served on Robert A. Butterworth, Attorney General, of 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118, by way of his basket at the Fifth District Court of Appeal, and mailed to Mr. Afghari U. Boler, No. 780961, Apalachee C. I., P. O. Box 699, Sneads, FL 32460-0699 and Sonny Boy Oats, III, Rt 4, Box 293, Holly Lane, Humboldt, TN 38343 on this 17th day of July, 1995.

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