

SUPREME COURT OF FLORIDA

CASE NO. 88,638

JESUS DELGADO,
Appellant,

-vs.-

THE STATE OF FLORIDA,
Appellee.

APPELLANT'S SECOND SUPPLEMENTAL BRIEF

ROY D. WASSON
Attorney for Appellant
Suite 450 Gables One Tower
1320 South Dixie Highway
Miami, Florida 33146
(305) 666-5053

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STATEMENT OF THE CASE AND OF THE FACTS

This is a direct appeal from the final judgment of conviction and two death penalties imposed by the Dade County Circuit Court following Defendant's/Appellant's trial on charges including first degree murder of two victims. The case was tried on alternative

theories of first degree premeditated murder and first degree felony murder. The only underlying felony which was supported by the evidence was burglary, which the state contended resulted from the Defendant's remaining on the victims' premises without their consent, with the intent to commit the crime of murder.

At the charge conference, trial counsel for the Defendant objected on the felony murder instruction which stated that a defendant may be convicted of felony murder without any finding of intent to kill. Defense counsel argued that, under the facts of this case, the only underlying felony required an intent to kill, negating the language that no intent was required under a felony murder theory. That objection was overruled, and the jury was instructed that it could convict the Defendant without finding any intent to kill.

The Appellant briefed the issue of the confusing jury instruction in his initial brief. Thereafter and prior to oral argument, this Court decided the case of Miller v. State, 713 So. 2d 1008 (Fla. 1998), which held that--where the felony murder charge is premised upon the victims' withdrawal of consent to the Defendants' lawful presence on the premises--some evidence of the withdrawal of consent must be adduced, other than the mere happening of the killings. Otherwise, every case involving the death of victims at the hands of an invitee upon the victims' premises could be prosecuted as a felony murder case, because the withdrawal of consent could be implied from the occurrence of the altercation itself. Thereupon, Appellant filed a Supplemental Brief with leave of this court raising the issue of the substantive error of allowing this case to go to the jury on the felony murder theory, in addition to the error previously raised concerning the jury instructions.

After oral argument, this Court took the case under advisement and eventually issued its order directing the parties to serve supplemental briefs on a related issue concerning the trial of Defendant on alternative theories of premeditated first degree murder and felony murder. That question which this court directed the parties to address in Supplemental Briefs is as follows: "Is there any prohibition to the State charging a

defendant with felony murder when the underlying felony is burglary and when the burglary is premised upon the intent to commit murder?" This Brief is in compliance with that order.

SUMMARY OF THE ARGUMENT

The Defendant should not have been charged with felony murder, under several overlapping analyses. Most fundamentally, the concept of felony murder is that of a crime which can and must be established without the usual element of intent to kill. Under the facts of the present case, where an intent to kill was an essential element of the only felony underlying the felony murder charge, the concept of felony murder is inherently impossible and should not have been included in the indictment. To permit a charge of inapplicable felony murder opens the door to inapplicable and misleading jury instructions (such as the one given here) and argument to the effect that the jury can convict of felony murder upon a lesser showing that is required for intentional murder. A system of law which unfairly permits such prejudicial instructions and argument unconstitutionally denies due process.

Second, this case is within the line of cases which holds that a Defendant may not be charged with felony murder where the underlying felony merges with the principal offense of murder. Here the underlying felony required an intent to kill the victims, as did the principal offense of first degree premeditated murder. Therefore, the two crimes merged and Defendant should not have been tried on alternative theories.

Similarly, the Defendant should not have been tried under the alternative theories because of double jeopardy considerations. Here the crime of burglary, as allegedly established by the evidence, did not require any element other than those established by the proof of the premeditated homicides would have required.

The Defendant never should have been charged with felony murder in the first place because the prosecution's motives in trying the case under such a theory could have only

been for the purpose of obtaining the confusing and incorrect jury instruction which was given, to wit: that no intent to kill need be shown to support a conviction. Therefore, the prosecution's conduct in obtaining an indictment which including the charge of felony murder was prosecutorial misconduct and the indictment should be quashed.

ARGUMENT

I.

**DUE PROCESS CONSIDERATIONS PROHIBIT A
DEFENDANT IN THE POSITION OF MR. DELGADO
FROM BEING INDICTED UNDER THE FELONY MURDER
THEORY, BECAUSE A TRIAL UNDER THAT THEORY
WOULD BE INHERENTLY UNFAIR, REQUIRING JURY
INSTRUCTIONS AND PERMITTING ARGUMENT WHICH
DISPENSE WITH INTENT TO KILL AS AN ELEMENT,
WHEN INTENT TO KILL IS ACTUALLY ESSENTIAL**

The most basic explanation why felony murder could not have been charged in this case is that intent to kill was an essential element of the underlying felony of burglary. That rendered this case one in which felony murder could never have been charged. "Intent to kill . . . is not an element of felony murder." Mapps v. State, 520 So. 2d 92, 93 (Fla. 4th DCA 1988). To the contrary, where a victim dies at the hands of a defendant who intended to kill, those facts are antithetical to a charge of felony murder. Due process considerations compel the conclusion that the State should not be allowed to charge a crime which in theory lacks the element of intent, when the only fact situation which could be developed at trial would require a showing of intent to kill to establish the underlying felony.

One type of harm which results from charging a defendant with felony murder--in a case like this one where intent to kill was an essential element of the underlying felony--is that it will lead to a hopelessly misleading and inapplicable jury instruction that intent to kill need not be proven to support conviction for felony murder. In truth, conviction for murder could not stand under the present facts, absent a finding of intent to kill. The necessity for finding intent obviates and renders harmful the submission of the case to the jury on a felony murder theory.

Similarly, trial of a case like this one on a felony murder theory--where intent to kill is an essential element of the underlying felony--could deprive a defendant of due process by permitting the State to argue the lack of any need to prove intent to kill. The prosecution at trial argued that the evidence supported convictions under either of the State's theories, premeditated murder and felony murder, as if they were two different things:

Burglary was established at that time the defendant chose to remain in that house against the will of Violetta and Tomas Rodriguez. And there can be no question from this evidence that they would not have chosen for him to remain, and to do to them what he did. That is felony murder. It's not just a murder. It's a felony murder. . . .

Tr.1461.

While the prosecution did not expressly argue the lack of any need to prove intent, it did distinguish between the two theories of murder in such a way as to permit the jury to infer that the elements of each theory were different, as the trial court later instructed. The jury was misled by the inference in closing argument that the felony murder and the premeditated murder theories somehow were different. Therefore, the question is answerable in the affirmative: due process of law prohibits the State from charging felony murder, because the necessary result is unfair and inapplicable jury instructions and argument from the prosecution, essentially eliminating an element from the crime of felony murder which the evidence would have required.

II.

**THE DEFENDANT SHOULD NOT
HAVE BEEN CHARGED WITH
FELONY MURDER BECAUSE THE
UNDERLYING FELONY AND THE
MURDERS MERGED INTO ONE ANOTHER**

The question whether there is any prohibition on the State charging felony murder in a case like this should be answered in the affirmative, because the underlying felony merged with the crime of intentional murder. Under the State's theory, that underlying felony--burglary perpetrated with the intent to kill--was not a separate and distinct crime which coincidentally resulted in the victims' deaths. That burglary was part and parcel of the intentional killings themselves, according to the State.

"In several jurisdictions, the rule is that the felony-murder doctrine does not apply unless the felony committed during the homicide is so distinct from it as not to be an ingredient of it, indictable therewith, or convictable thereunder." Annot., Application of Felony-Murder Doctrine Where the Felony Relied Upon is an Includable Offense With the Homicide, 40 ALR 3d 1341, 1343 (1971). Several of the cases cited in that annotation recognized the applicability of the doctrine of "merger" to preclude conviction of felony murder where the underlying felony is not independent.

Cases from other jurisdictions cited in that annotation as holding that the felony murder doctrine does not apply where the felony is an offense included in the charge of homicide include the following:

Arizona-State v Essman (1965) 98 Ariz 228, 403 P2d 540.

Arkansas-Winman v Lockhart (1986, CA8 Ark) 797 F2d 666, cert den (US) 93 L Ed 2d 728, 107 S Ct 678 (applying Ark law).

California-People v Garrison (1989) 47 Cal 3d 746, 254 Cal Rptr 257, 765 P2d 419, reh den; People v Burton, 6 Cal 3d 375, 99 Cal Rptr 1, 491 P2d 793; People v Ireland (1969) 70 Cal 2d 522, 75 Cal Rptr 188, 450 P2d 580, 40 ALR3d 1323; People v Wilson (1969) 1 Cal 3d 431, 82 Cal Rptr 494, 462 P2d 22. . . .

Colorado-People v Angelini (1985, Colo App) 706 P2d 2.

Kansas-State v Lucas (1989) 244 Kan 193, 767 P2d 1308; State v Fisher (1926) 120 Kan 226, 243 P 291; State v Severns (1944) 158 Kan 453, 148 P2d 488

Louisiana-State v Coates (1995, La App 2d Cir) 661 So 2d 571.

Missouri-State v Shock (1878) 68 Mo 552; State v Lindsey (1933) 333 Mo 139, 62 SW2d 420.

New Jersey-State v Hubbard, 123 NJ Super 345, 303 A2d 87.

New York-People v. Huther (1906) 184 NY 237, 77 NE 6; People v Wagner (1927) 245 NY 143, 156 NE 644 . . . People v La Marca (1957) 3 NY2d 452, 165 NYS2d 753, 144 NE2d 420. . . .

This Court first addressed an issue related to the issue at bar in Robles v. State, 188 So. 2d 789 (Fla. 1966). In that case, this Court declined to apply the merger doctrine to a case involving the underlying felony of burglary, in which the Defendant broke into the victim's home with the intent to commit the felony of aggravated assault upon her.

In explaining the basis of its reasoning, this Court distinguished cases like those cited in the A.L.R. annotation by determining that those cases involved felony murder statutes which purported a recognized that felony murder could be established by proof of "any felony." Appellants suggest that the Robles case is distinguishable from the present case and should not be read as requiring the applicability of the felony murder doctrine in every case in which the underlying burglary is inextricably intertwined with the killings of the victims, as is the burglary in the present case.

In later cases the courts have indicated that the merger doctrine may be applicable to preclude conviction of both felony murder and a related offense, whether or not that related offense is strictly speaking, a lesser-included offense. See Knowles v. State, 476 So. 2d 172 (Fla. 1985); Doyle v. State, 513 So. 2d 188 (Fla. 4th DCA 1987).

In the present case, the alleged burglary with intent to kill and the resulting killings are hopelessly intertwined with one another. The felony murder charge is hopelessly

intertwined with the premeditated murder charge. Therefore, conviction should not be permitted on both of the theories and the question should be answered in the affirmative.

III.

THE DEFENDANT SHOULD NOT HAVE BEEN CHARGED UNDER THE FELONY MURDER THEORY BECAUSE THAT TACTICS SUBJECTED HIM TO DOUBLE JEOPARDY

The Defendant should not have been charged with this burglary and felony murder because that combination of counts subjected Mr. Delgado to double jeopardy. A Defendant cannot be tried, convicted, and sentenced in a single trial for felony murder and the felony underlying felony murder where one of those crimes includes a necessarily-included offense of the other under the test of Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Under Blockburger, the same conduct can support conviction under two different criminal statutes only if “each [statutory] provision requires proof of an additional fact which the other does not.” *Id.* at 304, 52 S. Ct. at 182, 76 L. Ed. 2d at 309.

In the present case, the crime of burglary as charged and posited by the State in this case, does not include any element absent from the crime of felony murder. Likewise, the crime of premeditated murder as presented by the State does not include any element absent from the burglary as charged. Therefore, the theories should not have been charged and tried together. See Gonzalez v. State, 449 So. 2d 882 (Fla. 3d DCA 1984). Cf. Doyle v. State, 513 So. 2d 188 (Fla. 4th DCA 1987) (no double jeopardy problem where Defendant convicted only on felony murder and not of underlying felony as well).

IV.

THE INDICTMENT WHICH IMPROPERLY CHARGED THE DEFENDANT WITH FELONY MURDER WAS OBTAINED THROUGH PROSECUTORIAL MISCONDUCT AND SHOULD BE QUASHED

This Court's question should be answered in the affirmative because the indictment was an impermissible exercise of the prosecutor's power to obtain an unfair advance over the Defendant. As such, the act of obtaining the indictment on the felony murder doctrine constituted prosecutorial misconduct which should result in quashing the indictment.

Even under conservative Federal law, the misconduct of a prosecutor in connection with grand jury proceedings can constitute prosecutorial misconduct sufficient to warrant dismissal of the indictment where that misconduct prejudices the Defendant and "if it is established that the violations substantially influenced the grand jury's decision to indict," or there is "grave doubt" that the decision to indict was free from the substantial influence of such violations. United States v. Mechanik, 475 U.S. 66, 78 (1986).

In a case like this one, where the misconduct was not in the calling of witnesses or in the proceedings before the grand jury, but was in formulation of the theories of prosecution and the drafting of the indictment itself, there can be no doubt but that the actions of the prosecutor directly resulted in the indictment for felony murder, in addition to the premeditated murder theory. The prosecutor's influence over the grand jury's decision to indict that way could only have been motivated by the unfair prospect of obtaining the jury instruction which dispensed with intent as an element.

If the prosecution knew that it had to establish the intent to kill the victims to obtain a finding of guilt on the felony murder theory (because the underlying burglary could not be established without proving intent to kill), then there could be no valid prosecutorial reason for including the felony murder theory in the indictment. Instead, the prosecutorial's reasoning could only have been that the State would gain some sort of trial advantage by having the case go to the jury on both theories.

That advantage was the hopelessly confusing and inapplicable jury instruction which was given over Defendant's objection in this case. That instruction, which purported to dispense with intent as an element of establishing felony murder, was everything the State hoped for when it convinced the grand jury to indict under both felony murder and premeditated murder theories. Such an indictment is tainted by prosecutorial misconduct, and it was subject to dismissal.

CONCLUSION

WHEREFORE, because due process considerations prohibit the State from indicting a person like Mr. Delgado for felony murder where the underlying felony requires an intent to kill, because the underlying felony and the murder were inextricably intertwined and the crimes merged into one another, because charging the Defendant and convicting him of the underlying felony and the murder incorrectly subjected him to double jeopardy, and because the indictment was improperly obtained as the result of prosecutorial misconduct, this Court's question is respectfully answered in the affirmative and this Court should reverse the Defendant's conviction on the ground that the indictment erroneously permitted trial on the inapplicable felony murder theory.

Respectfully submitted,

ROY D. WASSON
Attorney for Appellant
Florida Bar No. 332070
Suite 450, Gables One Tower
1320 South Dixie Highway
Miami, Florida 33146
(305) 666-5053

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof was served via U.S. Mail, upon Fariba
N
day of March, 1999.

ROY D. WASSON
Attorney for Appellant
Florida Bar No. 332070
Suite 450, Gables One Tower
1320 South Dixie Highway
Miami, Florida 33146
(305) 666-5053