

IN THE SUPREME COURT OF FLORIDA

Case No. SC01-2315

DEANDRE BAKER,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITIONER'S INITIAL BRIEF

**ON CERTIFIED CONFLICT FROM
THE DISTRICT COURT OF APPEAL
OF FLORIDA, FOURTH DISTRICT**

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STATEMENT OF THE CASE AND FACTS

Deandre Baker pleaded guilty to third-degree felony murder and was sentenced to more than 12 years in prison (A53, 70).¹ Eight months later, he moved for post-conviction relief asserting that his court-appointed lawyer misled him to believe he could be convicted of this crime, when he could not (A74-75). He also alleged that his lawyer was ineffective for not understanding the law of felony murder, not investigating the law and facts, and not realizing that Baker could never be convicted of this crime (A74-75). The State did not disagree that Baker would be entitled to relief if he could show that the record did not support felony murder (A4-7).

The starting point for all this was the theft of Vernon Russell's pickup truck from a parking lot in Boynton Beach — but *not* by Baker (A12-14, 24). Four days later, Baker spotted the already-stolen truck and took it (A24, 33-34, 60-61). He knew it was stolen because the ignition had been destroyed (A61, 63). He drove safely away without chase or pursuit (A33-35, 61).² He had some friends with him: he drove one friend home and then headed for his own home (A35 ["[m]y friend went in, [I] dropped him off at home"], 60). Some time later (the record does not show how much later) Baker made a left turn and collided with motorcyclist John Hall (A24, 61-62).

¹ "A" is the appendix to this brief. Thus A53 is page 53 of the appendix, and so on.

² Baker was a juvenile and did not have a driver's license (A35, 41).

Hall was speeding (A27-30, 60). Baker could not avoid him and Hall was killed (A24, 60).³

Baker explained the accident this way: "[a]nd the motorcycle man was coming, speed'n and I panicked and I, I was, I was nervous and I lost control and he just smashed in front of us. The truck just went spinning around. And spinned this way by the building and I just jumped out and [I] was fin (fixing) to kill myself. I was so scared" (A60).

The trial court denied Baker's motion for post-conviction relief without a hearing (A3). The court necessarily concluded, then, that the facts in the record supported a felony murder conviction. Baker appealed and the Fourth District affirmed, saying the accidental death was felony murder because it occurred near the time of Baker's theft (A80). The court certified conflict with *Lester v. State*, 737 So. 2d 1149 (Fla. 2d DCA 1999). That brought the case to this Court.⁴

³ The Fourth District said the accident occurred moments after Baker took the truck (A80), but there is nothing in the record to show that. Baker said he took his friend home first (A35 ["[m]y friend went in, [I] dropped him off at home"]). So the accident could have occurred minutes or hours after he first got the truck. There was no evidence in the record showing the lapse of time between the felony and the fatal accident.

⁴ For purposes of this appeal, Baker concedes that *his* "theft . . . constituted a theft separate and apart from the original theft . . ." *Baker v. State*, 793 So. 2d 69, 70 (Fla. 4th DCA 2001). Thus — on the conflict certified — we agree that *Lester v. State* was wrong because it overlooked the defendant's separate theft (of an already-stolen car) when deciding whether the felony murder statute applied. *Lester v. State*, 737 So. 2d at 1151-52. *Lester* otherwise announced all the right rules. Yet by missing the
(continued...)

SUMMARY OF ARGUMENT

The State did not dispute that Baker would be entitled to post-conviction relief if the record did not support a felony murder conviction. And it did not. Baker's felony — the theft — was over with as soon as he took the pickup truck. At that point the felony was complete and did not continue forward. Anything occurring later, including Hall's death, was independent of the felony and could not be felony murder.

Nor did the felony *cause* the death. Hall was speeding and Baker could not avoid him. The accident would have happened even had the truck belonged to Baker. The way Baker was driving — his reaction to the speeding Hall — was not dictated by the felony. For this reason too (no causation), Baker could not be convicted of felony murder. Baker's motion for relief, then, should have been granted.

ARGUMENT

Baker could not be convicted of felony murder and was therefore entitled to relief from his plea and conviction. The State did not disagree this was so, as long as

(...continued)

defendant's felony, the *Lester* court was led to the wrong result. The resolution of *Lester* and the certified conflict, however, has no bearing on the merits of Baker's petition. Baker could *not* be convicted of felony murder regardless of whether *Lester* was right or wrong.

the record did not support felony murder (A4-7). And it did not. At the moment Baker took control of the truck, his felony had been perpetrated — it had been committed.⁵ He was not being pursued or chased and there was no other evidence of flight (A33-35, 37, 60-62).⁶ Thus the felony was complete and did not continue forward. Everything *later*, including Hall's death, was separate from the felony and could not be felony murder. *Allen v. State*, 690 So. 2d 1332, 1333-35 (Fla. 2d DCA 1997) (felony murder not possible under facts almost identical to Baker's case).

Grand theft of a vehicle is not a continuing crime in the context of felony murder. Once the vehicle is taken without chase or pursuit — and where there is no other evidence of flight — the felon is said to be at a point of temporary safety. At that moment, the felony is complete and does not continue on. A death that happens later — even minutes later — is considered to be independent of the felony and not within the ambit of the felony murder statute. *Allen*, 690 So. 2d at 1333-35 (grand

⁵ We concede that Baker's taking of the truck was an independent act of theft — separate from the original taking. *State v. Williams*, 776 So. 2d 1066, 1071 (Fla. 4th DCA 2001); *Allen v. State*, 690 So. 2d 1332, 1333-35 (Fla. 2d DCA 1997); *but see Lester v. State*, 737 So. 2d at 1151-52 (court overlooks fact that defendant's theft was an independent felony — distinct from the original taking — and thus overlooked that the killing occurred during the defendant's perpetration of a felony, as he was in flight from the scene and the police).

⁶ Had there been flight, the "perpetration" would be deemed to continue during "the period of time [Baker was] attempting to escape from the scene of the crime." *Allen v. State*, 690 So. 2d 1332, 1334 (Fla. 2d DCA 1997).

theft of car complete when defendant took possession — defendant was not in flight and was therefore at a point of safety; death occurring minutes *later* was separate from felony and could not support felony murder conviction); *State v. Williams*, 776 So. 2d 1066, 1071-72 (Fla. 4th DCA 2001) (grand theft of car complete when defendant took car and gained place of temporary safety; death occurring *later* was separate from felony and could not support a felony murder conviction); *State v. Pierce*, 23 S.W.3d 289, 293-97 (Tenn. 2000) (if felon has gained place of temporary safety, felony murder rule generally does not apply, citing *Allen*, 690 So. 2d at 1333); *Doane v. Commonwealth*, 237 S.E.2d 797, 798 (Va. 1977) (theft of car was complete with defendant's taking of the car; death occurring thereafter was separate from the felony); *see also* Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 7.5, at 224-25 (1986) (most important factor in determining whether felony has been completed is whether felon is being pursued and chased, or instead, whether felon has reached a place of temporary safety); *compare with Parker v. State*, 641 So. 2d 369, 376 (Fla. 1994) (felony continues during *flight* from crime scene; thus a killing during *flight* is part of the felony and will support a felony murder conviction); *State v. Hacker*, 510 So. 2d 304, 305-06 (Fla. 4th DCA 1986) (same); *cf. O'Malley v. Mounts*, 590 So. 2d 437, 438 (Fla. 4th DCA 1991) (grand theft is not a continuing crime for purposes of statute of limitation).

Here, Baker gained complete control of the truck *before* the accident (A33-35,

60-61). He was not pursued or chased. He was therefore at a point of temporary safety as soon as he took the truck. His safety point continued as he drove his friend home — the felony had been perpetrated by that time (A35). The later-occurring death could not be felony murder.

Allen v. State makes the very point. In that case, Dale Allen took a car that was already stolen. There was no pursuit or chase — he was therefore at a point of safety as soon as he took the car. Anything later, even by minutes, was independent of the felony and could not be felony murder. *Allen*, 690 So. 2d at 1333-35; *see also* Section 782.04(4), Fla. Stat. (1998) (for felony murder to apply, killing must occur during "perpetration" of the felony); *State v. Williams*, 776 So. 2d at 1070 (if felony murder statute can reasonably be construed in favor of the accused, a court must do so).⁷

There is more. Baker's felony was not the cause of John Hall's death. The accident would have occurred anyway even if the truck belonged to Baker. Baker was not being chased, was not trying to escape, and was not speeding (A33-35, 37, 60-62). His driving behavior was not dictated by the felony. Instead, it was dictated by Hall's

⁷ There is nothing in the record showing whether the accident occurred minutes or more after Baker's theft. The time span was overlooked in the trial court proceedings (a reason, by itself, for further proceedings on Baker's post-conviction motion). The Fourth District's observation that the grand theft occurred "moments before the fatal collision" is makeweight because there is nothing about *time* in the record (A80). Baker told the court he drove his friend home before the accident occurred (A35). So as far as the record shows, there may have been a significant gap between the car theft and the accident.

speed (A27-30, 60). The accidental death, then, was not caused by the felony. *Allen*, 690 So. 2d at 1334-35 (no proof that car theft caused accidental death and thus no basis for felony murder); *Gomez v. State*, 496 So. 2d 982, 982-83 (Fla. 3d DCA 1986) (no proof that robbery caused death and thus no basis for felony murder); *Garcia v. State*, 439 So. 2d 328, 329 & n.1 (Fla. 3d DCA 1983) (no proof that felony caused death); *see also Mahaun v. State*, 377 So. 2d 1158, 1160 (Fla. 1979) (element of causation must be established in any felony murder conviction); *Penton v. State*, 548 So. 2d 273, 275 (Fla. 1st DCA 1989) (law imposes a high causation threshold in criminal cases).

Here, the Fourth District overlooked the issue of causation and determined, without record support, that the closeness of time between the felony and death was enough for felony murder. *Baker*, 793 So. 2d at 70-71. On that score, the court was wrong: closeness in time is not a substitute for causation. *Allen v. State*, 690 So. 2d 1332, 1334 (Fla. 2d DCA 1997) ("[t]he fact that the felony and the death were close in time does not in itself establish causation"); *Gomez v. State*, 496 So. 2d 982, 983 (Fla. 3d DCA 1986) (same); *Mumford v. State*, 313 A.2d 563, 566 (Md. Ct. Spec. App. 1974) (coincidence of time and place does not establish causation).

Allen v. State makes the point again. There, the accident occurred minutes after the car theft — still, there was no felony murder. *Allen* was not fleeing the scene of any crime; he was not trying to escape the police. He was driving the way he would

have driven any car — just like Baker. His driving behavior was not dictated by the felony. Thus the felony was not the cause of the accident. *See also* LaFave & Scott, *Substantive Criminal Law* § 7.5 at 227 (causation depends on whether felony dictated the conduct that caused the death).

If there was no causation and no felony murder in *Allen*, there could be no felony murder here. The defendants in both cases were doing exactly the same thing, driving exactly the same way — they were not in flight, but were headed for home (A60, 63). Their felonies did not dictate the way they drove. Thus their felonies did not cause their accidents. *Compare Allen*, 690 So. 2d at 1333-35, *with Jones v. State*, 502 So. 2d 1375, 1376-77 (Fla. 4th DCA 1987) (felony murder supported by fact that killing occurred as defendant was *fleeing* from scene of car theft, where he ran into a car and fence, collided with a truck and then hit another car, killing its driver); *but see Lester v. State*, 737 So. 2d 1149, 1150-52 (Fla. 2d DCA 1999) (no felony murder even though killing occurred during reckless out-of-control flight from police and from the scene of the grand theft).⁸

⁸ As we've explained in a series of footnotes, the *Lester* court overlooked the independent felony perpetrated by the defendant. Thus the court missed the fact that the killing occurred during the perpetration of the *defendant's* felony (as he recklessly took flight from the crime scene). The principles announced in *Lester* are otherwise correct. But the mistake on the second felony — the defendant's felony — led the court to the wrong result. The Court, then, should disapprove of *Lester's* outcome.

CONCLUSION

Baker could not be convicted of felony murder and was misled by his court-appointed lawyer on that critical issue and denied effective assistance of counsel. Thus, for the reasons stated, the Court should quash the decision of the Fourth District with directions that the cause be remanded so that Baker's guilty plea and conviction may be set aside.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I certify that a copy of this brief was mailed on May 2, 2002 to Celia Terenzio, Counsel for the State of Florida, 1655 Palm Beach Lakes Blvd., Suite 300, West Palm Beach, Florida 33401-2299.

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements set forth in Rule 9.210 of the Florida Rules of Appellate Procedure because it has been prepared in Times New Roman 14-point font.

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