

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

COURTNEY MITCHELL,

Respondent.

CASE NO.: SC02-2622

DCA case no.: 5D01-957

Circuit court case no.:

CR99-9872

ON REVIEW FROM THE
FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

Convictions for both attempted second degree murder and attempted felony murder are not unconstitutional and do not violate double jeopardy. The Legislature has shown a clear intent that both of these offenses should exist and that both should be punished. The two crimes are distinct because in attempted second degree murder a defendant is being punished for committing an imminently dangerous act which evidences a depraved mind and in attempted felony murder a defendant is being punished for his committing a felony and an unrelated act which could kill. These offenses have separate elements and are not addressing the same evil. Therefore, there is not a double jeopardy violation, and both of Appellant's convictions should be affirmed.

ARGUMENT

POINT OF LAW

CONVICTIONS FOR ATTEMPTED SECOND DEGREE
MURDER, AND ATTEMPTED FELONY MURDER DO NOT
VIOLATE DOUBLE JEOPARDY.

The issue before this Court is whether double jeopardy bars a defendant from being charged and convicted of the offenses of attempted second degree murder and attempted felony murder. For the reasons detailed below, it is the position of the State that these convictions are not unconstitutional.

The standard for determining the constitutionality of multiple convictions for offenses arising from the same criminal transaction is whether the Legislature "intended to authorize separate punishments for the two crimes." M.P. v. State, 682 So. 2d 79, 81 (Fla. 1996); Boler v. State, 678 So. 2d 319, 321 (Fla. 1996), and if the Legislature's intent is clear, no additional review is necessary. Cruller v. State, 808 So. 2d 201 (Fla. 2002). If the Legislature's intent is not clear, then, courts turn to the Blockburger¹ test to determine if the offenses have separate elements.

In his brief the Defendant asserts that the two offenses involved in this case - attempted second degree murder and attempted felony murder - do not have separate elements and are not separate crimes. In fact, he argues that the elements of

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

these offenses are "indistinguishable." (Respondent's brief (AB), page 8). Interestingly, as noted in the State's initial merits brief, this argument was expressly rejected in the majority opinion of the Fifth District Court of Appeal. Mitchell, 830 So. 2d 944, 946 (Fla. 5th DCA 2002). The Fifth District Court of Appeal wrote in its opinion:

The crimes constitute separate offenses under Blockburger because each crime contains an element that the other does not. Attempted second degree murder requires that the perpetrator's act was imminently dangerous to another and demonstrated a depraved mind without regard for human life. Attempted felony murder requires that the act be committed during the course of committing a felony and that it could have resulted in the unlawful death of another.

Mitchell, 830 So. 2d at 946.

Another argument offered by the Defendant is that this was a single attempted homicide because this was "the firing of a single shot, at a single victim." (AB, page 3). If this were the measuring test, then the outcome would have been different in the case of Gordon v. State, 780 So. 2d 17 (Fla. 2001). In Gordon, there was a single shot and a single victim; however, this Court found that double jeopardy did not bar multiple convictions for attempted first degree murder with a firearm, felony causing bodily injury, aggravated battery causing great bodily harm with a firearm, and robbery with a firearm. Gordon, 780 So. 2d at 18.

The problem with the Defendant's argument is that the issue of whether double jeopardy bars dual convictions must be resolved "without regard to the accusatory pleading or the proof adduced at trial." Section 775.021(4)(a), Fla. Stat. (2002). It is not the act which is reviewed. Case law which relied upon this previous approach to resolving double jeopardy issues has been effectively overruled by the Legislature as this Court noted in Gordon: "The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity ... to determine legislative intent." Gordon, 780 So. 2d at 24.

The Defendant continues his argument when he writes that "[A]ny criminal **act** punished under the Felony Murder Statute is, by definition, a distinct **act**, separate and apart from the underlying felony." (AB 10). The test is not what **act** was committed; the test is Legislative intent and whether each offense has a separate element. For example, case law is clear that a defendant can be convicted of felony murder and the underlying felony because of Legislative intent and separate elements. Boler v. State, 678 So. 2d 319 (Fla. 1996); see also Lukehart v. State, 776 So. 2d 906 (Fla. 2000) (Double jeopardy principles do not prohibit dual convictions for first-degree felony murder and aggravated child abuse arising from death of five-month-old child.)

The Defendant also writes that section 782.051, Fla. Stat., "allows a conviction (but not two convictions), for attempted felony murder." (AB 12). The State agrees; however, in addition, to Legislative intending the one conviction for attempted felony murder under section 782.051 a defendant can also be convicted of attempted second degree murder. When a defendant commits a felony listed under section 782.04, Fla. Stat. (2002), such as arson, sexual battery, or robbery, the Legislature has decided that such defendant is in essence strictly liable for a resulting death. See State v. Hubbard, 751 So. 2d 552 (Fla. 1999) (This Court noted that strict liability crimes like felony murder are clearly constitutional writing "[t]here need by no showing of causation or active participation by the defendant by the defendant in the homicide so long as he is proven to have been a participant in the felony out of which the homicide occurred."); see also Lockett v. Ohio, 438 U.S. 586 (1978) (United States Supreme Court held that felony murder statutes were constitutional.) Under the attempted felony murder statute, a defendant who commits one of the enumerated felonies is held strictly responsible for any intentional act which could cause the death of another if that act is not an essential element of the underlying felony. Section 782.051, Fla. Stat. (2002). This is different than attempted second degree murder which requires proof of a depraved mind.

As recognized in the State's initial brief, there is case law that prohibits multiple convictions for a singular homicide.² For example, an aggravated battery which results in a death cannot lead to a defendant being convicted for aggravated battery and murder. See Campbell-Eley v. State, 718 So. 2d 327 (Fla. 4th DCA 1998); Laines v. State, 662 So. 2d 1248 (Fla. 3d DCA 1995), receded from on other grounds, Greene v. State, 702 So. 2d 510 (Fla. 3d DCA 1996). In distinguishing the law in those cases, this Court wrote "[T]hat rationale is not applicable here, **where an actual homicide did not occur as a result of Gordon's criminal actions.**" Gordon, 780 So. 2d at 25; (emphasis added). Of course, "an actual homicide" did not occur in the instant case either.

Lastly, the defense argues that the State has already conceded this issue in the case of Gordon and should be barred by *res judicata* from now arguing differently. The language being relied upon in Gordon was a reference in this Court's opinion that the State had conceded that convictions for attempted premeditated murder and attempted felony murder are impermissible. Gordon, 780 So. 2d at 25. Not only were those two offenses not the two being addressed in Gordon, they are

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However, even this approach does not seem to be followed in every State. See Chao v. Delaware, 604 A.2d 1351 (Del. 1992) (Delaware Supreme Court held imposition of multiple punishments for intentional murder and felony-murder arising from same homicides did not violate double jeopardy.)

also not the two being addressed in this case. This reference would therefore be dicta and should not be found to bar the State from raising an issue which this Court has not previously addressed.

It is the position of the State that convictions for both attempted second degree murder and attempted felony murder are not unconstitutional and do not violate double jeopardy. The Legislature has shown a clear intent that both of these offenses should exist and that a jury can find a defendant committed both offenses. The two crimes are distinct because in attempted second degree murder a defendant is being punished for committing an imminently dangerous act which evidences a depraved mind and in attempted felony murder a defendant is being punished for his committing a felony and an unrelated act which could kill.

CONCLUSION

Based on the arguments and authorities presented above, the State respectfully prays this Honorable Court reverse the decision of the Fifth District Court of Appeal and reinstate the judgments and sentences imposed by the trial court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Merits Brief has been furnished by delivery via the basket of the Office of the Public Defender at the Fifth District Court of Appeal to Noel A. Pelella, counsel for the Respondent, 112 Orange Ave. Ste. A., Daytona Beach, FL 32114, this _____ day of March 2003.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

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