Florida State University Law Review

Volume 8 | Issue 4 Article 7

Fall 1980

State v. Pinder, 375 So. 2d 836 (Fla. 1979)

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Criminal Law—DOUBLE JEOPARDY—AN EXAMINATION OF SENTENCING IN FLORIDA FOR THE UNDERLYING FELONY IN A FELONY MURDER CASE AFTER *Whalen v. United States*—*State v. Pinder*, 375 So. 2d 836 (Fla. 1979).

The double jeopardy clause of the fifth amendment prohibits both successive prosecutions and multiple punishments for the same offense.[1] A threshold question for all double jeopardy analysis therefore is: what constitutes the same offense?[2] In *State v. Pinder*,[3] the Florida Supreme Court answered that question, deciding that a felony murder and the underlying felony are the same offense.

Pinder, charged with first degree murder, sexual battery, and burglary, was convicted and sentenced for each offense in a single trial.[4] The jury found Pinder guilty of first degree murder under a felony murder theory.[5] Pinder appealed, alleging violation of his

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1. The double jeopardy clause of the United States Constitution provides: "[No person shall] be subject for the same offence to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V. The clause was made applicable to the states through the fourteenth amendment in Benton v. Maryland, 395 U.S. 784 (1969). Florida also has a double jeopardy clause in its constitution which reads: "No person shall . . . be twice put in jeopardy for the same offense . . . ." FLA. CONST. art. I, § 9. The three primary purposes of the double jeopardy clause have been determined as: "First, it protects against a second prosecution for the same offense after an acquittal. Second, it protects against a second prosecution for the same offense after a conviction. Third, it protects against multiple punishments for the same offense." Whalen v. United States, 100 S. Ct. 1432, 1442 (1980) (citing North Carolina v. Pearce, 395 U.S. 711, 717 (1969) and Brown v. Ohio, 432 U.S. 161, 165 (1977)).

2. *See* Comment, *Double Jeopardy—Defining the Same Offense*, 32 LA. L. REV. 87 (1971) and Comment, *Twice in Jeopardy*, 75 YALE L.J. 262 (1965) for thorough discussions of the various tests for determining what constitutes the "same offense."

3. 375 So. 2d 836 (Fla. 1979).

4. Pinder v. State, 366 So. 2d 38 (Fla. 2d Dist. Ct. App. 1978), *aff'd*, 375 So. 2d 836 (Fla. 1979). The trial court sentenced Pinder to life imprisonment for the first degree murder, 30 years for the burglary, and 30 years for the sexual battery. While reversing the conviction and sentence for the burglary, the district court of appeal noted that the 30-year sentence for the burglary conviction was excessive. Since there was no allegation that Pinder was armed or committed an assault during the burglary, he was charged with a second degree felony which has a maximum prison term of 15 years. *Id.* at 39 n.1. *See* Fla. Stat. § 775.082(3)(c) (1979).

5. The felony murder doctrine is a legal fiction which allows the state to prosecute a defendant for homicide without proof that the act was done with the normally required malice aforethought. The policy justification for this constructive malice device is that it is foreseeable that accidental or negligent homicides might occur during the commission of some felonies. It is assumed therefore, that a defendant who commits these felonies has evidenced sufficient malice aforethought to be held liable for murder. Critics of the felony murder rule question the nexus between the felon's implied malice and the homicide. The criticism has led some jurisdictions to limit the applicability of the rule. The country which promulgated the rule, England, has abolished it. *See generally* Perkins, *A Re-Examination of Malice Aforethought*, 43 YALE L.J. 537 (1934); Comment, *Constitutional Limitations Upon the Use of Statutory Criminal Presumptions and the Felony-Murder Rule*, 46 MISS.

fifth amendment guarantee against double jeopardy. He argued that he should not have been convicted and sentenced both for the underlying felony and the felony murder itself.[6] The Second District Court of Appeal agreed with Pinder's arguments because the "proof of the underlying felony is, of course, indispensable to the murder conviction."[7] The district court then vacated Pinder's conviction and sentence for burglary.[8] The Florida Supreme Court adopted the reasoning of the district court and affirmed its decision.[9]

The purpose of this note is to demonstrate that both the district and the supreme court should have vacated Pinder's conviction under a lesser included offense analysis. As indicated in *Whalen v. United States*,[10] a recent Supreme Court decision, the Florida courts improperly relied upon other United States Supreme Court cases to hold that sentencing for both a felony murder and the underlying felony violates the protection of the double jeopardy clause. Before suggesting the proper basis of the *Pinder* decision, especially in view of *Whalen*, the reasoning of the district and the supreme court will be explained.

The Florida Supreme Court expressly approved the holding and rationale of the Second District Court of Appeal.[11] The district court in turn had based its decision on a progression of Supreme Court "same offense" decisions that began in 1932 with *Blockburger v. United States*[12] in which the Court held: "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[13]

L. REV. 1021 (1975); Comment, *Felony Murder—Happy Hunting Ground of Prosecutors*, 21 U. MIAMI L.Q. 457 (1966); V. Reber, Felony Murder: The Rule, Its Relation to the Underlying Criminal Act, and Liability of One Who Does Not Perpetrate the Homicidal Act (August 4, 1977) (unpublished manuscript on file at the University of Florida Spessard Holland Law Center).

6. Pinder v. State, 366 So. 2d 38, 39 (Fla. 2d Dist. Ct. App. 1978), *aff'd*, 375 So. 2d 836 (Fla. 1979).

7. *Id.* at 40.

8. *Id.* at 42. The court vacated Pinder's conviction and sentence for the second degree burglary rather than the rape since the burglary was the less serious offense. *Id.*

9. 375 So. 2d at 837.

10. 100 S. Ct. 1432 (1980).

11. 375 So. 2d at 837.

12. 284 U.S. 299 (1932). The defendant was charged with violating provisions of a narcotics act by selling morphine to one person on different days. He was also charged with selling differing amounts of the drug from different packages. *Id.* at 301.

13. *Id.* at 304 (citation omitted).

Forty-five years later, *Brown v. Ohio*[14] extended *Blockburger* by holding that statutory crimes need not be identical in constituent elements or in proof to be considered the same for double jeopardy purposes.[15]

The defendant in *Brown* was first convicted of joyriding, and then of stealing the same car.[16] The Ohio Court of Appeals correctly held that the misdemeanor of joyriding was a lesser included offense within the felony of auto theft, but it nevertheless affirmed the defendant's two convictions because they were directed at different points of his lengthy joyride.[17] The United States Supreme Court reversed the second conviction, ruling that the defendant's fifth amendment rights had been violated.[18]

Although Brown was first convicted of the lesser offense of joyriding before being tried and convicted for auto theft, the Court ruled that this sequence was immaterial. The Court stated that, "Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense."[19] It is apparent that neither the fortuity of the state's first obtaining the conviction for the lesser included offense, nor the division of a crime into distinct units, can operate to nullify the protections of the double jeopardy clause. Even though proof of auto theft requires proof of intent, and joyriding does not, the Court ruled that both offenses were the "same" for purposes of double jeopardy.[20]

While the *Blockburger* test was first used to determine when the violation of two statutes constituted the "same offense" in cumulative sentence cases,[21] the *Brown* Court applied *Blockburger* to a

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14. 432 U.S. 161 (1977).

15. *Id.* at 164.

16. *Id.* at 162.

17. *Id.* at 164. The defendant's use of the car spanned nine days. *Id.* at 162.

18. *Id.* at 170. The Supreme Court acknowledged that the result might have been different "if the Ohio legislature had provided that joyriding is a separate offense for each day in which a motor vehicle is operated without the owner's consent." *Id.* at 169 n.8.

19. 432 U.S. at 169 (footnote omitted).

20. *Id.* at 168. The Court stated:

> This conclusion merely restates what has been this Court's understanding of the Double Jeopardy Clause at least since *In re Nielsen* was decided in 1889. In that case the Court endorsed the rule that "where . . . a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offence."

Id. (quoting *In re* Nielsen, 131 U.S. 176, 188 (1889)).

21. 432 U.S. at 166.

multiple prosecution case.[22] The Court stated: "Where the judge is forbidden to impose cumulative punishment for two crimes at the end of a single proceeding, the prosecutor is forbidden to strive for the same result in successive proceedings."[23] Thus, defendants are afforded double jeopardy protection against both cumulative sentences and multiple prosecutions.

Shortly after deciding *Brown*, the Court went one step further in broadening the "same offense" rule when it applied a lesser included offense analysis to a felony murder case, *Harris v. Oklahoma*,[24] which also involved successive prosecutions. The defendant was first convicted of felony murder. At a later trial, he was convicted of robbery with firearms, the felony upon which his murder conviction was based.[25] The *Harris* Court concluded that where conviction of the greater crime cannot be had without conviction of the lesser crime, "the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one."[26] As a result, double jeopardy protection was extended to preclude prosecution for a lesser included offense after defendants have been convicted of the greater crime.

The Florida Supreme Court and the district court relied upon the *Brown* and *Harris* cases for the *Pinder* ruling.[27] That reliance, however, is misplaced. The issue in *Brown* and *Harris* was whether successive prosecutions are prohibited by the double jeopardy clause[28] and not, as in *Pinder*, whether concepts of double jeopardy prohibit cumulative punishments.[29] The Florida courts should have begun their analysis by referring to *Blockburger*.

The error of the Florida courts is understandable. *Blockburger* was not even cited in Florida case law until 1978.[30] Prior to that time, Florida judicially created its own version of the *Blockburger*

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22. *Id.* at 168. The *Brown* Court noted that *Blockburger* is not the only standard for deciding when "successive prosecutions impermissibly involve the same offense." *Id.* at 166 n.6. The other test which can be applied to bar successive prosecutions is "where the second prosecution requires the relitigation of factual issues already resolved by the first." *Id.* The Court explained that applying the *Blockburger* test meant that it need not decide whether Brown qualified for the additional repetition of proof standard. *Id.*

23. *Id.* at 166.

24. 433 U.S. 682 (1977). *Brown* was decided on June 16, 1977. *Harris* was decided less than two weeks later on June 29, 1977.

25. *Id.* at 682-83.

26. *Id.* at 682 (footnote omitted).

27. 375 So. 2d at 837; 366 So. 2d at 40.

28. 432 U.S. at 162; 433 U.S. at 682.

29. 375 So. 2d at 837.

30. Ennis v. State, 364 So. 2d 497 (Fla. 2d Dist. Ct. App. 1978).

test, the single transaction rule, to protect defendants from double jeopardy violations in multiple sentence cases.[31] The single transaction rule created conflicting opinions and results,[32] which eventually prompted the legislature to enact a statute to protect defendants from being punished separately for lesser included offenses.[33] The statute reads:

> Whoever, in the course of one criminal transaction or episode, commits an act or acts constituting a violation of two or more criminal statutes, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense, excluding lesser included offenses, committed during said criminal episode, and the sentencing judge may order the sentences to be served concurrently or consecutively.[34]

The lesser included offense analysis, as exemplified by this statute, could have and should have been the basis for the *Pinder* decision. Unfortunately, the supreme court ignored a district court case, *Ennis v. State*,[35] in which a sentence for the underlying felony was vacated under a statutory lesser included offense analysis.

In *Ennis*, the defendant was convicted in a single trial of first degree felony murder and robbery as well as conspiracy to commit robbery. Ennis appealed, arguing that the robbery sentence was violative of the double jeopardy clause of the fifth amendment under *Brown* and *Harris*.[36] The district court disagreed that *Brown* and *Harris* were applicable, correctly reasoning that those cases involved successive prosecutions and not multiple punishments re-

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31. The single transaction rule is illustrated by the court's decision in Cone v. State, 285 So. 2d 12 (Fla. 1973). In reversing the sentence of the defendant, who had been convicted both of robbery and the separate crime of displaying or using a firearm during the robbery, the supreme court said that since the two crimes were part of the same criminal transaction, only one sentence could be imposed for the higher offense. *Id.* at 13.

32. *See* J. Hatchett & B. Norton, *1977 Developments in Criminal Law*, 32 U. MIAMI L. REV. 1007, 1051-53 (1977) for a discussion of the difficulty encountered by the Florida courts in applying the single transaction rule.

33. Ch. 76-66, § 1, 1976 Fla. Laws 115 (current version at FLA. STAT. § 775.021(4) (1979)).

34. FLA. STAT. § 775.021(4) (1979).

35. 364 So. 2d 497 (Fla. 2d Dist. Ct. App. 1978). *See also* Todd v. State, 369 So. 2d 95 (Fla. 2d Dist. Ct. App. 1979), which reaches the same result.

36. 364 So. 2d at 498. The defendant also contended that his sentence for conspiracy to commit robbery was excessive. The supreme court agreed because the indictment failed to allege that Ennis conspired to carry a firearm during the robbery, which is an essential element of robbery in the first degree. *Id.* at 500. *See* FLA. STAT. § 812.13(2)(a) (1979). The court held that because the robbery was only a second degree felony, the conspiracy was thus a third degree felony for which the maximum sentence is five years. 364 So. 2d at 500. *See* FLA. STAT. § 775.082(3)(d) (1979).

sulting from a single prosecution.[37] The district court based its holding on the Florida statute mentioned above that permits separate sentences for violations of two statutes, excluding lesser included offenses.[38] The *Ennis* court reasoned that the robbery was a lesser included offense because the robbery was alleged in the charging language of the murder count and was proven at trial.[39]

When *Pinder* was before the Second District Court of Appeal, the district court stated that:

> We think that these United States Supreme Court decisions [*Brown v. Ohio* and *Harris v. Oklahoma*] require that where (as here) the defendant is convicted of felony-murder, and there is no evidence of premeditation other than the fact that the killing occurred during the perpetration of the underlying felony, he cannot also be convicted and sentenced for the underlying felony.[40]

Although resting its decision on double jeopardy grounds, the district court also claimed that sexual battery or burglary could not be lesser included offenses of premeditated murder.[41] The court explained that the fact that the lesser offense is part of the greater offense must not only be proved, but also must be alleged in the charging documents.[42]

In actuality, the lesser included offense analysis would be appropriate in *Pinder* to bar cumulative sentences. The Florida Supreme Court has interpreted the statute to require that a category three lesser included offense "be *necessarily* included in the major offense *charged* by the accusatory pleading."[43]

Pinder was charged with premeditated murder and not felony murder,[44] so the district court ignored *Ennis*. Instead, the court

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37. 364 So. 2d at 499.
38. FLA. STAT. § 775.021(4) (1979).
39. 364 So. 2d at 500.
40. 366 So. 2d at 41.
41. *Id.* at n.3.
42. *Id.*
43. Brown v. State, 206 So. 2d 377, 381 (Fla. 1968) (emphasis in original).
44. 366 So. 2d at 40. Pinder argued that since the indictment charged him with premeditated murder, he was found guilty under the felony murder theory because no evidence of premeditation existed. The state challenged Pinder's argument, using the following passage from Pinder's own brief to support its claim that evidence of premeditation *did* exist:

> Dr. Horn, a pathologist, testified that he went to Mary Baker's apartment on July 19 and found the unidentified corpse of an elderly lady lying face down. The hands were bound, with the binding passing around the neck. The cause of death was strangulation . . . . Dr. Horn found the manner in which the bindings had been tied remarkable, effective, time consuming. Any pressure on the arms would

conveniently applied case law which permits conviction under a felony murder theory even though the defendant has been charged with premeditated murder.[45] Consequently, despite the fact that the true basis of Pinder's conviction is felony murder, the court expediently reasoned that the lesser included offense analysis could not be applied because of the technicality that Pinder was charged with premeditated murder. The emphasis should not be upon the technicality of the charging language, especially when the jury is permitted to convict under another charge.

The recent United States Supreme Court case of *Whalen v. United States* certainly supports the assertion that the Florida Supreme Court should have vacated Pinder's sentence through the lesser included offense analysis. In *Whalen,* the defendant was convicted and sentenced in a single trial for a rape and a killing committed during the rape.[46] The Supreme Court reversed, holding that the lower court erred in construing District of Columbia statutes to allow cumulative punishments.[47]

The *Whalen* decision attempted to clarify the scope of double jeopardy. According to the majority, the question of whether a court's imposition of multiple punishments is a violation of double jeopardy can only be resolved by first construing the appropriate statute to determine what punishment the legislative branch authorized.[48] Justice Blackmun concurred in the judgment of the court, but claimed that prior dicta of the Court wrongly suggested that "the Double Jeopardy Clause may prevent the imposition of cumulative punishments in situations in which the Legislative Branch *clearly intended* that multiple penalties be imposed for a single criminal transaction."[49] Thus, where a state statute clearly allows such cumulative punishments, the *Whalen* majority decision

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strangle the victim . . . .

Brief of Petitioner at 4, State v. Pinder, 375 So. 2d 836 (Fla. 1979) (quoting Brief of Appellant at 8) (citations omitted). The state asserted that this was "gruesome and unbelievable evidence of premeditation." Brief of Petitioner at 3-4. The supreme court evaluated the record on its own and found no evidence of premeditation. 375 So. 2d at 839.

45. 366 So. 2d at 40. Both courts cited Knight v. State, 338 So. 2d 201 (Fla. 1976), for the proposition that established precedent allows the state to prosecute a first degree murder charge under a felony murder theory although the indictment charges premeditated murder. 375 So. 2d at 839; 366 So. 2d at 40.

46. 100 S. Ct. at 1434.

47. *Id.* at 1437.

48. 100 S. Ct. at 1436. The Court defined the scope of the double jeopardy clause by stating that the clause "at the very least precludes federal courts from imposing consecutive sentences unless authorized by Congress to do so." *Id.*

49. *Id.* at 1441 (emphasis in original).

does not prohibit the imposition of multiple punishments for a felony murder and the underlying felony.

Justice Blackmun also pointed to the unrepudiated dicta as the source of confusion among the states and of their incorrect reliance upon *Harris*, which involved successive prosecutions.[50] In a footnote, Justice Blackmun bluntly criticizes *Pinder* and similar cases from other states because they "erroneously I believe, gave controlling effect to *Harris* in challenges to cumulative punishments for felony murder and the underlying felony."[51] According to Blackmun, *Harris* stands only for the proposition that it is "*successive prosecutions* for felony murder and the underlying predicate felony [that] are constitutionally impermissible."[52]

While the Supreme Court's decision in *Whalen* highlights some important issues concerning the scope of double jeopardy protection, it also serves to eliminate any further confusion in Florida about the appropriate rationale for prohibiting cumulative sentences for a felony murder and the underlying felony. Clearly in Florida, when a defendant is charged with felony murder, the underlying felony is a lesser included offense, and cumulative sentencing may not be imposed. It is just as clear that the Florida Legislature did *not* intend that multiple penalties be imposed in a felony murder case, because it specifically prohibited punishment for lesser included offenses.[53] The logic should be no different in a case such as *Pinder*. Since Florida law allows a defendant to be found guilty of felony murder when he is charged with premeditated murder, the lesser included offense analysis is entirely appropriate. The well-reasoned approach that Florida courts should now follow is obvious: the lesser included offense analysis should be applied to prevent the imposition of cumulative sentences for felony murder and the underlying felony.

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50. *Id.* In fact, Justice Blackmun cited Ennis v. State as a case in which the members of the state court disagreed about the meaning of the Supreme Court's decisions concerning the prohibition of the double jeopardy clause against multiple punishments. *Id.* at n.2.

51. *Id.* at 1442 n.3. The other state cases are Mitchell v. State, 382 N.E.2d 932 (Ind. 1978); State v. Frye, 393 A.2d 1372 (Md. 1978); State v. Innis, 391 A.2d 1158 (R.I. 1978), *vacated and remanded*, 100 S. Ct. 1682 (1980); and Briggs v. State, 573 S.W.2d 157 (Tenn. 1978).

52. *Id.* at 1441 (emphasis in original).

53. *See* FLA. STAT. § 775.021(4) (1979).