

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

CASE NO. SC18-1108

L.T. No. 2D16-3542;

532015CF003622A000XX

ELIZABETH F. MARSH,

Respondent.

_____ /

DISCRETIONARY REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

PETITIONER'S REPLY BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Marsh claims the victims made full recoveries “based on information and belief.” The record does not support Marsh’s claim of full recoveries, so this claim should be disregarded. As the State noted in its Initial Brief, the injuries were severe and included skull fractures; one victim still suffered headaches at sentencing and had scarring; and one victim lost a scholarship. R99,107.

Both the judge and the victims’ father noted it was only through luck and the grace of God that Marsh did not kill them all—and next time she might kill someone. R115;161. The judge noted Marsh needed to take responsibility: “I understand all of the difficulties you've had and the struggles... they're never going to go away until you take responsibility... and want to do something about it and then do something about it. But the fact that you were on probation for this very type of offense... I've got to do what I believe is fair and just in this case.” R162. The State noted this was Marsh’s third strike: “She had a judge tell her two times not to drive and not to drive under the influence, and she did it anyway.” R158.

SUMMARY OF THE ARGUMENT

Marsh’s convictions do not violate double jeopardy. The Marsh opinion improperly applied the Single Homicide Rule (SHR) and violated the statutory Blockburger test. Houser and Chapman are obsolete cases because Section 775.021(4) abolished lenity in all forms including the SHR, as it is a form of lenity.

ARGUMENT

ISSUE I

THE SECOND DISTRICT ERRED IN APPLYING THE SINGLE HOMICIDE RULE TO A NON-HOMICIDE CRASH.

A. This appeal is not moot: In her answer, Marsh repeats her argument that the State’s petition is moot because Marsh was already resentenced, per mandate.

This issue has already been litigated: this court denied Marsh’s claim that the appeal was moot. The State filed a “Response to Respondent’s Motion to Dismiss the Petition for Review Because the Case is Now Moot,” on March 14, 2019. The State also filed a Response to Motion for Rehearing on May 6, 2019. (See Docket SC18-1108). As explained in the State’s responses, 1) Marsh has no interest in finality in her resentencing pursuant to a mandate, and 2) the State is not required to re-appeal Marsh’s resentencing and must petition this court as it did.

Marsh cites Hickman v. State, 64 So. 3d 683 (Fla. 2d DCA 2011) to argue the case is moot. The State distinguished Hickman in its March 14, 2019 Response: “In Hickman, the trial court corrected the error and thus the appellant, who was the one complaining of the error, was satisfied... the error was corrected so their appeal became moot. Obviously, the party complaining (Hickman) can concede that the error was moot.” Response, p.4. The State’s petition here is not moot when Marsh v. State, 253 So. 3d 674 (Fla. 2d DCA 2018) is still error and in conflict.

Marsh also argues she has a finality interest in her new sentence. Marsh

states: “The trial court resentenced Elizabeth Marsh. The trial court, per the mandate, thus vacated Ms. Marsh’s adjudications on two counts essentially cutting her extremely heavy 20-year sentence in half. The resentencing judgment is final and was not appealed by either party.” Answer, p.2. Again, the State refuted that argument in its Response to Marsh’s Motion for Rehearing. Case law makes clear Marsh has no finality interest in a resentencing conducted pursuant to a mandate where the State has already sought review and the result is being appealed to this court. This court’s acceptance of discretionary jurisdiction extends the “appellate pipeline” of the proceeding, so Marsh’s resentencing is not final until this review is resolved. Key v. State, 638 So. 2d 1040 (Fla. 1st DCA 1994) (“The pronouncement of the guidelines sentences did not carry the finality. . . . At the time the sentences were imposed, Key knew that the State was seeking discretionary review.”).

Marsh’s mootness argument also makes no sense. Suppose the State was required to appeal Marsh’s re-sentencing in a direct appeal. Marsh’s resentencing was done by a trial court pursuant to a mandate, so there would be nothing to appeal—there would be no new error in the Second District’s eyes, because the trial court followed the mandate. In that scenario, the Second District would be bound by its Marsh opinion and would have issued a PCA in response to the State’s appeal of Marsh’s new sentence. The State cannot seek review of a PCA, so if the State waited until after Marsh’s re-sentencing to appeal, the State’s ability to

challenge the Marsh opinion would die. Marsh attempts to misdirect this Court down a dead-end road; her claim of mootness would result in the State not having any way to review the Marsh opinion. (The State also filed a motion to stay in the DCA, which was denied). This court properly denied Marsh's Motion to Dismiss.

B. The SHR must be abandoned as it is a product of lenity. There is no valid basis to distinguish or isolate the SHR from the obsolete doctrine of lenity that was abolished by 775.021(4).

In her issue title, Marsh describes her “with injury” traffic crimes as “non-fatal homicide[s],” and seeks application of the Single Homicide Rule (SHR) to her crimes (see Answer, p.i). Marsh is ineligible to use the SHR for two reasons. First, if the rule continues to exist, it must surely be limited to homicides and not injury crimes. Second, the SHR did not survive 775.021(4) nor the Valdes holding.

Houser: In her Answer Marsh relies on Houser, but Houser contains the same error this court found unacceptable in Valdes v. State, 3 So. 3d 1067 (Fla. 2009). Houser relied on the obsolete idea that 775.021/Blockburger are “aids” of statutory interpretation. Houser reasoned: “Blockburger and its statutory equivalent in section 775.024(1), Fla. Stat. (1983), are only tools of statutory interpretation which cannot contravene the contrary intent of the legislature.” Houser v. State, 474 So. 2d 1193, 1196 (Fla. 1985). The problem with this rationale is that this court abandoned that position in Valdes, finding the statute is binding, not a mere tool or “aid.” Further, there is no longer any assumed “contrary” legislative intent

prohibiting dual punishment. Section 775.021(4) codified an intent to punish all eligible crimes twice, other than listed exceptions. Houser was a 1985 case (pre-dating the 1988 amendment) which should never have survived the amendment.

The “contrary intent” that Houser was talking about was the policy of lenity, namely the assumption that unless the legislature clearly states an intent to punish an act/crime twice, under lenity we assume they do not so intend. So said Houser: “[t]he *assumption* underlying the Blockburger rule is that [the legislative body] *ordinarily does not intend* to punish the same offense under two different statutes... This assumption should apply generally to statutory construction. While the legislature is free to punish the same crime under two or more statutes, it cannot be assumed that it ordinarily intends to do so.” Houser, at 1196 (emphasis added).

There is no coherent distinction between Houser’s above interpretation of legislative intent and the Carawan interpretation, as rejected in Valdes. Note how Carawan used the same language as Houser: “When confronted with a facially ambiguous statute, the court begins its analysis by *assuming* that the legislative branch *ordinarily* does not intend to punish the same offense under two different statutes.” Carawan, at 167. Houser’s identical reasoning confirms the SHR is also a form of lenity and relies on the same assumption of legislative intent.

Houser’s reasoning was only valid under a policy of lenity, so like Carawan it became obsolete in 1988 when the legislature passed a statute stating the court’s

“assumption” that they ordinarily did not intend to punish the same act twice was wrong. The abolition of Carawan’s lenity in 775.021(4) also abolished Houser.

Moreover, Houser was probably always wrong, as explained by the dissent in Houser, who found the intent was already clear even under the pre-1988 version:

“I do not agree, however, that a defendant may not be sentenced for both DWI manslaughter and vehicular homicide... These are separate and distinct offenses, each requiring proof of an element which the other does not. That being the case, the imposition of sentences for both offenses would not violate protections against double jeopardy. *The intent of the legislature is clear.*

(4) Whoever, in the course of one criminal transaction or episode, commits separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each . . . For the purposes of this subsection, offenses are separate if each offense requires proof of an element that the other does not...

Section 775.021(4), Florida Statutes (1983).

I would approve the decision of the district court and hold a defendant may be sentenced for both DWI manslaughter and vehicular homicide for a single death.”

Houser, at 1197–98 (Fla. 1985) (Alderman, J., dissenting) (emphasis added).

The SHR arises from Lenity: Marsh’s Answer relies on the “well accepted principle that the legislature does not intend to punish the same offense under two different statutes.” (Answer p.10). As stated, this assumption was abolished by the 1988 amendment of 775.021(4). A related principle is cited in Houser, Chapman,

and other cases: the claim the SHR is based on the premise “that the legislature did not intend to punish a single homicide under two different statutes,” Marsh, at 676.

The State replies that this “legislative intent not to punish homicide twice” is a legal fiction. The underpinnings of the SHR are enmeshed with lenity. This court in Gordon acknowledged the SHR’s origin in common law equity (judge made law), revealing that the SHR is not validated by actual legislative intent: “the rule is based on notions of fundamental fairness which recognize the inequity that inheres in multiple punishments for a singular killing.” Gordon v. State, 780 So. 2d 17, 25 (Fla. 2001). Gordon reveals that the SHR is not rooted in “real” legislative intent, but judicial equity and lenity (assumptions about intent): “Physical injury and physical injury causing death merge into one and it is *rationaly defensible to conclude* that the legislature did not intend to impose multiple punishments.” Id.

This confirms the legislature never said anything affirmative about not intending dual punishments on homicides. The above rationale is a form of lenity: *assuming* an intent not to dual punish homicide in the absence of contrary intent.

It was never literally true that “the legislature does not intend to punish homicide twice.” No case applying the SHR has cited to a legislative history, a preamble to a statute, a committee notes from a legislative session, or a transcript of a debate in which a legislative body actually said they “did not intend to punish a homicide twice.” Cases such as Marsh, Chapman, and Houser have been

repeating that same conclusory statement of intent, but that holding is a legal fiction and merely a shorthand for the policy of lenity in action, more fully fleshed out in Houser and Gordon. A close read of those cases reveals the courts were just assuming, under a principle of lenity, that *unless* a clear intent to punish twice is stated, the “default” legislative *assumption* is an intent not to punish twice.

As explained in Smith, that assumption was made obsolete by § 775.021(4), Fla. Stat. (1988), wherein lenity in all forms was abolished. “Absent a statutory degree crime or a contrary clear and specific statement of legislative intent in the particular criminal offense statutes, *all* criminal offenses containing unique statutory elements shall be separately punished... Section 775.021(4)(a) should be strictly applied.” State v. Smith, 547 So. 2d 613 (Fla. 1989). Smith said “all” crimes, leaving no exemption for homicides, so Chapman was incorrectly decided.

State v. Chapman, 625 So.2d 838 (1993) held that the legislature’s abolition of lenity overruled Carawan, but did not overrule the SHR, because Chapman drew an arbitrary distinction between lenity and the SHR. Chapman is not well-reasoned nor is its logic explained in the one-page opinion. Chapman just repeats the conclusory chant: ‘the legislature did not intend to punish homicide twice’—without examining where that principle came from, and whether the “intent” is actual or presumed under lenity. If there is any doubt the SHR is a form of lenity, Carawan itself admits this point blank, explaining that Houser was based on lenity:

Several other decisions fall into the second category [discussing lenity]. That is, *even though legislative intent was not clear*, we found that *reason dictated* that the punishments *were not meant* to be cumulative. . . .

Similarly, in Houser v. State, 474 So.2d 1193 (Fla.1985), we noted that the legislature *is presumed not to intend to punish a single homicide* under two separate statutes. We thus found dual convictions for DWI manslaughter and vehicular homicide improper... the two statutes addressed essentially the *same evil*, i.e., driving a vehicle in a manner likely to cause a fatal injury to another human being. *Finding no legislative intent to the contrary*, we therefore resolved all doubts in favor of **lenity**.

Carawan, 515 So.2d at 170 (emphasis added). Carawan admitted Houser's legislative intent not to punish homicides twice was merely “presumed.” Carawan also categorized the SHR as a form of lenity and used an obsolete “same evil” test.

Thus, Chapman was wrong to distinguish the SHR as different from lenity or Carawan. Carawan itself listed the SHR as a form of lenity in its analysis, which culminated in employing lenity. Id. at 170. When the legislature passed 775.021(4) and explicitly abolished Carawan and lenity and the same evil test (as this court acknowledged they did in Valdes), that statute also necessarily abolished the SHR.

Another case, Goodwin v. State, 634 So. 2d 157 (Fla. 1994), confirms we must recede from the SHR. In Goodman, this court found two homicides violated double jeopardy by using the core evil test from Sirmons (a non-homicide case). Sirmons v. State, 634 So. 2d 153 (Fla. 1994). Sirmons used Carawan's core

evil/lenity test, so Goodman's reliance on Sirmons again confirms that the underlying basis for the SHR is inextricable from the core-evil/Carawan school of lenity that was abolished. And Valdes directly overruled Sirmons. Valdes, at 1073.

The fact that the SHR arises from lenity is confirmed by the Colorado Supreme Court in People v. Lowe, 660 P.2d 1261 (Colo. 1983). In Lowe, the court used lenity (which had not been abolished there, unlike in Florida after the 1988 statute) to adopt a one-death rule. Id. at 1268. The Colorado court analyzed the history of lenity under federal law, finding it a rule that requires courts to resolve ambiguities in a penal code in a defendant's favor. Id. "Under lenity... courts are required to adhere to the legislative schemes for... punishments that are clear and unmistakable. However, courts are authorized to... invalidate convictions and/or punishments whenever the evidence for their existence is less than clear." Id.

That policy mirrors Florida's policy prior to 1988, where any ambiguity in legislative intent was resolved in a defendant's favor. Carawan, at 167 ("the court begins by assuming that the legislative branch ordinarily does not intend to punish the same offense under two different statutes."); Houser ("While the legislature is free to punish the same crime under two or more statutes, it cannot be assumed it ordinarily intends to do so."). All these cases confirm the SHR rests on the doctrine of lenity, even if some Florida cases using the SHR (like Chapman) did not use the word "lenity" and did not scrutinize the SHR's origins. Lowe also notes that many

states allow dual murder convictions if they satisfy Blockburger, demonstrating the SHR is not required by the federal constitution. See Lowe, at n.10.

Lenity: Marsh next attempts to invoke statutory lenity under 775.021(1) (stating ambiguous statutory language shall be construed favorably to the accused). The State responds that lenity and 775.021(1) were explicitly disallowed from double jeopardy analysis under 775.021(4). Section 775.021(4) is clear, and there is no ambiguous language Marsh can point to that suggests a desire not to punish her crimes twice. Carawan, at 168, explains that punishment-lenity derived from 775.021(1). The legislature's abolishment of all lenity in 775.021(4) was absolute.

The Three Exceptions: Marsh next attempts to argue her convictions violate Double Jeopardy by using the exceptions in 775.021(4). Marsh first claims that Driving While License Suspended (DWLS) and Driving Under the Influence (DUI) loosely "involve driving when one is not authorized to drive." This conceptual blurring does not make these crimes "degrees" of the same general offense, so Marsh's argument amounts to the abolished core evil test.

Valdes mandates the degree variant exception cannot be used to grandfather the SHR because that exception only prohibits degree variants of the same offense *as provided by statute*, which means they must be in the same section. Valdes, at 1077. Only dual convictions for homicides/crimes in the same section are prohibited. Valdes even suggested which homicides would be prohibited from dual

punishment: “[775.021(4)(b)(2)] prohibits separate punishments only when a criminal statute provides for variations in degree... one example is the theft statute... another is *the homicide statute*, which expressly identifies three degrees of murder as well as multiple forms of manslaughter. *See* 782.04,782.07.” Id at 1076. This exception only bans dual convictions for degrees in the same section.

Next, Marsh claims DWLS “can be said to be subsumed” by DUI. The State responds that no, it cannot: each has a unique element and is part of a unique statute. Finally, Marsh claims “this is a non-exclusive list of protections.” This fails for two reasons. First, even if it was a non-exclusive list, the SHR should not be a non-statutory exception because it is a child of lenity, and lenity was explicitly abolished. Any non-listed exceptions could not include a lenity-based exception. Second, legislative lists are presumed exhaustive. See Thayer v. State, 335 So. 2d 815 (Fla. 1976). The legislature adopted Blockburger as the sole test of double jeopardy and its enumeration of three exceptions abolishes any alternative common law exceptions not codified in the list. The statute omits the SHR as an exception.

Finally, in rebutting this claim we should confront the canon that “The legislature is presumed not to intend to overturn long established principles of law unless an intention to do so plainly appears by express declaration *or the language employed admits of no other reasonable construction.*” George W. Watkins Family v. Messenger, 797 P.2d 1385 (Idaho 1990) (emphasis added). This canon is used

in Florida, though Idaho's above iteration more clearly stresses the 'or no other reasonable construction' clause. See Doolittle v. Morley, 77 Idaho 366, 372 (1956) citing 50 Am. Jur., Statutes, sec. 340, p.333: ("the legislature will be presumed not to intend to overturn long-established principles of law... unless an intention to do so plainly appears by express declaration or necessary or unmistakable implication, and the language employed admits of no other reasonable construction.").

Florida's rule operates essentially the same. See ContactPoint Florida Parks, LLC v. State, 958 So. 2d 1035, 1037 (Fla. 1st DCA 2007)("the legislature is presumed to know the judicial construction of existing law... [and] is presumed to have adopted prior judicial constructions of a law unless a contrary intention is expressed in the statute."); Brannon v. Tampa Tribune, 711 So. 2d 97, 100 (Fla. 1st DCA 1998) (legislature is presumed to have adopted prior judicial constructions of law unless a contrary intention is expressed in new version); City of Hollywood v. Lombardi, 770 So. 2d 1196 (Fla. 2000) (finding "nothing in the legislative changes that would, either expressly *or by implication*, overturn this Court's holding.").

Here, the iron-hard language in 775.021(4) leaves absolutely no room for a "grandfathered" non-listed exception, and certainly not for the SHR. The statute makes clear an intent to abolish lenity. Carawan itself states that the SHR is a form of lenity, so if the legislature intended to abolish Carawan they would know this includes the SHR. This statute is also, on its face, a complete and comprehensive

scheme on Florida's double jeopardy rule as mandated by the legislature. To be clear: 775.021(4) allows no scenario where legislative intent is ambiguous and thus no scenario where the courts are free to use any non-listed common law exception *due to that ambiguity*. The statute does not leave room to "grandfather" the SHR as a fourth, non-statutory exception. Not when the exception at issue (the SHR) is at odds with the clearly-stated legislative intent of abolishing lenity, because it is based on lenity and based on Carawan's same obsolete assumed/presumed intent.

Section 775.021(4) also expressed a clear intent to punish twice and abolished any contrary intent. Courts cannot simply wave a hand and say, "but surely they did not intend to abolish the Single Homicide Rule." Grandfathering the SHR is not only expressly abolished by the statute, it is contrary to the statute's intent to make Blockburger *the sole test*. Marsh's argument for a non-listed exception is not a "reasonable interpretation," given the lenity-based origins of the SHR and the explicit, closed-ended nature of the statute. Further, the legislature already enumerated an exception to prevent multiple degrees of crimes if they are contained in the same statutory section, so multiple degrees of the same *type* of murder (e.g., two 782.04 murders) will still be prohibited by the second exception.

The statute necessarily abolishes both Carawan's lenity and Houser's identical "assumptions" about intent. Houser is just another branch on the tree of lenity and relies on an identical presumed legislative intent not to punish twice.

Valdes governs this case: The inescapable conclusion of the above arguments is that there is no coherent distinction between the SHR and lenity as abolished in 775.021(4). Valdes declared the full abolition of Carawan and lenity. Valdes dictates that this Court recede from Chapman, Houser, *et al.*, and this Court should clarify that Valdes overrules those cases. Even if the Court attempted to locate some distinction between the SHR and the lenity abolished in 775.021(4), the State suggests this Court should not engage in creative endeavors to “save” the SHR when the legislative intent to embrace Blockburger and abandon Carawan is unqualified. Section 775.021(4) is a blanket mandate to impose dual punishment and abolished all forms of lenity including, necessarily, the SHR and its fiction of presumed intent, as revealed in Carawan and Houser. If the legislature wishes for a non-statutory fourth exception (the SHR) to exist *despite* its lenity-based origins, and *despite* it being a form of the abolished core evil doctrine, the legislature alone will have to codify the Single Homicide Rule in the list of exceptions.

If the Court rejects this direct application of Valdes, the State reiterates that the SHR must be limited to homicides and cannot apply to Marsh’s injury crimes.

CONCLUSION

The State respectfully requests this court quash the opinion in Marsh (and recede from Houser and Chapman) and reinstate all counts of Marsh’s original dual convictions and dual sentences for DWLS with injury and DUI with injury.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Lee Levenson, 1500 Gateway Blvd., Suite 220, Boynton Beach, Florida 33426, ll@gonzlevlaw.com, lee@keepcalmlaw.com, by email (via the court's e-filing portal service), on this 16 day of Oct, 2019.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY the size and font used in this brief complies with Fla. R. App. P. 9.210(a)(2).

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