

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOEZELL WILLIAMS II,

Defendant-Appellant.

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FOR PUBLICATION

January 27, 2005

9:10 a.m.

No. 246706

Wayne Circuit Court

LC No. 02-004374

Official Reported Version

Before: Schuette, P.J., Sawyer and O'Connell, JJ.

O'CONNELL, J. (*dissenting*).

I respectfully dissent.

Defendant's convictions for both first-degree murder and the "underlying felony" of larceny do not violate double jeopardy principles in this case, because defendant was not convicted merely on a felony-murder theory, but also on a separate, valid theory of premeditated murder. Punishing a defendant once for larceny and once for committing a premeditated murder does not violate the intent of the Legislature, so double jeopardy is not offended unless defendant can demonstrate some fatal flaw in the premeditated murder theory, leaving the sentencing court to rely on the felony-murder theory alone. *People v Calloway*, 469 Mich 448, 450-451; 671 NW2d 733 (2003). To strike the larceny conviction, even at the direction of an analytically deficient precedent, effectively nullifies defendant's conviction and sentence for premeditated murder, notwithstanding the fact that a jury verdict supports the conviction and authorizes the consequent punishment. Therefore, I would validate the jury's guilty verdict by holding that the multiple punishments for the multiple offenses of premeditated murder and larceny do not violate principles of double jeopardy.

My opinion is informed by the historical development of this area of law. In *People v Sparks*, 82 Mich App 44, 53; 266 NW2d 661 (1978), we held that a defendant may not face multiple convictions or sentences based on the different varieties of murder when the defendant killed a single victim. While this made sense, it left prosecutors and courts in a quandary. If the prosecution pursued only a theory of premeditation, despite the fact that a felony-murder theory also applied, it risked the jury finding that the defendant, while certainly the killer, did not premeditate the killing. Because the reverse hypothetical situation was also true, it was hazardous to proceed on any single theory. Prosecutors wisely proceeded on both theories, usually in separate counts, despite the inevitable elimination of one of them. This left to judges the difficult question: Which valid conviction should be forever vacated to appease double

jeopardy? *Sparks* reversed the felony-murder conviction, but only after finding that the facts adequately supported premeditation. *Id.* at 53. This became the trend. See *People v Passeno*, 195 Mich App 91, 95-96; 489 NW2d 152 (1992), overruled by *People v Bigelow (Amended Opinion)*, 229 Mich App 218, 222; 581 NW2d 744 (1998).

In *People v Wilder*, 411 Mich 328, 342; 308 NW2d 112 (1981), our Supreme Court held that separate convictions for felony murder and the underlying felony violated principles of double jeopardy. Later, in *People v Robideau*, 419 Mich 458, 485; 355 NW2d 592 (1984), our Supreme Court distilled multiple-punishment double jeopardy down to the relatively simple concept of legislative intent. If the Legislature did not intend to punish a defendant separately and cumulatively for two different crimes, then the role of the judiciary was to sentence the defendant accordingly. *Id.*

In the meantime, courts eventually recognized the risk of simply dismissing a valid, but seemingly superfluous, murder conviction to satisfy double jeopardy mandates. The failure of the remaining conviction to withstand an appellate challenge could mean that an individual validly found guilty of the discarded variety of first-degree murder would go free. To insulate our system from such an injustice, we extinguished this possibility in the conflict-panel case of *Bigelow, supra* at 222, holding that the proper procedure was to allow a prosecutor to convict a defendant of first-degree murder with alternative supporting theories. Under this approach, a defendant's first-degree murder conviction was undergirded by separate and independent grounds, and a defendant could not obtain reversal of the conviction on the happenstance that a court accidentally vacated the superior, valid theory to placate double jeopardy. To gain a reversal of the murder conviction under the new approach, the defendant needed to demonstrate that neither theory sustaining his murder conviction was valid.

Unfortunately, *Bigelow* also held, without the benefit of any substantive legal analysis, that the felony underlying defendant's felony-murder conviction must be vacated to satisfy the requirements of multiple-punishment double jeopardy. *Id.* at 221-222. *Bigelow* cites *People v Gimotty*, 216 Mich App 254, 259-260; 549 NW2d 39 (1996), a felony-murder case that did not deal with a conviction supported by the separate theory of premeditation. It is clear to me from reading the *Bigelow* opinion that the members of the conflict panel, myself included, applied *Gimotty* as binding precedent to a situation where it simply did not apply. Because I can find no case that analyzes this issue, I would treat it as an issue of first impression and hold that principles of double jeopardy are not offended as long as an alternative theory adequately supports the conviction, independently satisfies double jeopardy review, and withstands appellate scrutiny in all other respects.

This approach would validate the jury's finding that defendant premeditated the murder *and* committed a larceny. Similarly, it would not require us to choose between vacating defendant's valid felony-murder theory or vacating the valid conviction for the underlying felony, because it recognizes that defendant has failed to propose any substantial challenge to the validity of either verdict. The felony-murder theory stands merely as an alternative ground for affirming the first-degree murder conviction, and the theory alone does not receive a punishment (exclusive of the premeditation theory) that would require us to question whether the punishment assigned was more than the Legislature intended. Without multiple punishments stemming particularly and exclusively from defendant's convictions for larceny and felony murder, we do not need to vacate the felony-murder theory. Rather, we may wisely preserve it for its original

purpose: to uphold defendant's valid conviction for first-degree murder should the premeditation theory fail. This, I think, upholds the paramount legislative intent of having the criminal statutes enforced.

The majority apparently assumes that the Legislature intended for us to trim off and discard a valid conviction and sentence whenever a formulaic application of judicial precedent makes paring the convictions easier than rooting out and applying double jeopardy's fundamental principles. I would rather assume that the Legislature intended to punish every violation of every law assembled and enumerated in the criminal code, including the meager larceny conviction at issue here. Because I do not perceive any reason why the Legislature would want a sentencing judge to refrain from punishing a larceny merely because the judge has already sentenced the defendant for committing premeditated murder, I would affirm the separate convictions and the multiple punishments those convictions fairly garnered.

The majority's holding also perpetuates the existence of another senseless quandary—if the prosecution proceeds on two probably valid, but vulnerable, theories of murder, does it risk having its entire case disposed of piecemeal on appeal, including its airtight conviction on the "underlying" felony of armed robbery or, perhaps, aggravated criminal sexual conduct.<sup>1</sup> Absent a compelling directive from the Legislature, I would not require prosecutors and sentencing courts to jettison valid charges and convictions to protect their cases and decisions from potentially irreversible erosion.<sup>2</sup>

In sum, defendant argues, and the majority holds, that the underlying larceny conviction must be dismissed because the Legislature did not intend to punish him for both the underlying larceny and felony murder. Of course, neither defendant nor the majority explains how that lack of intent prevents us from punishing him for committing a larceny and a *premeditated* murder. I would hold that because defendant has been convicted under each theory, he must first demonstrate some fatal flaw in the premeditation theory before advancing his double-jeopardy claim. He has not. Therefore, defendant's separate sentences for first-degree premeditated murder and larceny remain valid, and I would affirm in all respects.

/s/ Peter D. O'Connell

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<sup>1</sup> For those who would argue that conviction of an underlying felony is certainly superfluous to a murder conviction, I cite *Wilder* in which the underlying felony was the only conviction left standing after the Supreme Court reversed the defendant's felony-murder conviction. As explained in *Bigelow, supra* at 220-221 n 1, the perfunctory reversal of a valid conviction to satisfy double jeopardy requirements unnecessarily risks the irremediable disposal of the only valid conviction.

<sup>2</sup> I must note that the line of reasoning adopted by the majority has the ironic effect of decreasing the amount of punishment received by the most dangerous and contemptible class of criminals imaginable—those found guilty of planning to murder their victim in the course of committing another serious crime. As individuals charged with dispensing justice, we should carefully review our actions when they lead to such anomalous results.