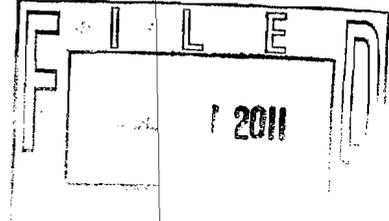


**IN THE SUPREME COURT OF APPEALS OF WEST
VIRGINIA**



STATE OF WEST VIRGINIA,

Vs.

Supreme Court No. 11-0362

**HENRY C. JENKINS,
Appellant.**

Petitioner's Reply Brief

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ARGUMENT

I.

Appellant's Reply to State's Response to Argument A

The trial court erred by allowing the prosecution of Henry Jenkins for both “death of a child by a parent, guardian or custodian” and “felony-murder with the underlying felony being delivery of a controlled substance” because prosecution for both offenses is barred by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. Felony-murder with the underlying felony being delivery of a controlled substance in this case contains no elements that the offense of “death of a child by a parent, guardian or custodian or other person by child abuse” does not contain.

The Supreme Court of the United States held in *Blockburger v. United States* that “[t]he 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.” *Blockburger*, 284 U.S. 299, 304 (1932). For instance, if Offense Number One requires proof of elements A, B and C, and the elements of Offense Number Two requires proof of elements A, B and D, then each offense requires proof of an element that the other does not. The *Blockburger* test would not bar prosecution of this hypothetical offense.

However, if Offense Number One required proof of elements A and B, and Offense Number Two required proof of elements A, B and C, then the *Blockburger* analysis would bar prosecution of both offenses because Offense Number Two does not require proof of an element that Offense Number One does not. In this hypothetical, Offense Number One would be a lesser-included offense of Offense Number Two. This is the situation in the case *sub judice*.

The trial court allowed the prosecution to go forward with both the theory of “felony-murder with the underlying felony being the delivery of a controlled substance” and “death of a child by a parent, guardian or custodian by child abuse.” The elements of felony-murder under W. Va. Code § 61-2-1 are:

- 1) Death of a person
- 2) during the commission of a felony (in this case, delivery of a controlled substance, oxycodone).

The elements of “death of a child by a parent, guardian or custodian or other person by child abuse” codified in W. Va. Code § 61-8D-2a as charged against Henry Jenkins are:

- 1) Death of a child
- 2) by a parent, guardian or custodian, or other person
- 3) by any impairment of physical condition maliciously and intentionally inflicted upon the child under his or her care (in this case, by delivery of oxycodone)
- 4) other than by accidental means.

In this case, “death of a child by a parent, guardian or custodian” requires that the person causing the death be a parent, guardian or custodian and the death be by other than accidental means. Otherwise, the elements are the same as those found in felony-murder with the underlying felony being the delivery of a controlled substance. The “impairment of physical condition” is presumably the delivery of oxycodone, the same underlying felony in the felony-murder charge. Prosecution for both of these offenses arising out of the same transaction is barred by *Blockburger* because felony-murder does not require proof of an element that “death of a child by a parent, guardian or custodian” does not. In this case, felony-murder with the underlying felony being delivery of a controlled substance is a lesser-included offense of “death of a child by a parent, guardian or custodian.”

In the Respondent's Brief, the State recognizes that *Blockburger* is the rule to be applied to the specific facts of this case, however, it fails to apply *Blockburger* correctly. The State argues:

Two obvious additional facts are required to prove [the crime of death of a child by a parent]: 1.) That the defendant had care, custody or control of the victim; and 2.) That the death in question was by other than accidental means. If the State had failed to prove either of the aforementioned facts, a conviction could not have been had. However, *the existence or non-existence of either of these facts would have had no bearing on a conviction for the murder of C.C.J. pursuant to the felony murder rule.*

(Resp. Brief, p. 4) (emphasis added). The State recognizes that the added elements required to prove "death of a child by a parent, guardian or custodian" are only extra elements related to that offense, and that felony-murder with the underlying felony being delivery of a controlled substance does not require proof of an element that is not included in "death of a child by a parent, guardian or custodian" when "delivery of a controlled substance" is the "impairment of physical condition." Therefore, the State, while recognizing the correct law to be applied to the question, does not apply the law correctly.

Interestingly, had the State proceeded against the Defendant as a first degree murder rather than a felony murder resulting from a drug delivery, their response would hold more merit. First degree murder includes the elements that the act be "willful, deliberate and premeditated." W. Va. Code § 61-2-1 (2011). None of those elements are included in W. Va. Code § 61-8D-2a. A parent who plans and intentionally, maliciously and deliberately murders his or her ward could conceivably be prosecuted under both statutes. The State forfeited that option by indicting the Defendant as they did and proceeding under a felony-murder theory.

Because prosecution for both offenses is barred by the Fifth Amendment to the United States Constitution and *Blockburger v. United States*, this Court should rule that the trial court erred by allowing the prosecution to proceed with both counts.

II.

Appellant's Reply to State's Response to Argument B

The Respondent deftly attempts to reduce the Appellant's "Argument B" into a simple "sufficiency of the evidence" argument. In so doing, the Respondent tacitly admits the State failed to prove the death of Christian was caused by a delivery of oxycodone. The Respondent's contention that no "irregularity existed with the jury in this matter" (Resp. Brief; p. 6) is not accurate. The jury specifically raised a question about whether or not the underlying felony "caused" or "contributed" to the death. Although the State had submitted an instruction correctly stating the law, that the drug had to "cause" the death, the State argued against using that language in response to the jury's question. (See App. Brief.; pp.28-30) Clearly the jury was confused.

W. Va. Code § 61-8D-2a specifically uses the words "causing the death of such child." Since the State could present no evidence that the alleged delivery of oxycodone "caused" the death, they decided to proceed on a kind of "contributory negligence" theory. This may be applicable in a prosecution of "Child abuse resulting in injury" under W. Va. Code § 61-8D-3, but not in a prosecution for murder, felony based or otherwise.

The fact remains this young man had valium in his system at considerably higher levels than oxycodone, and the only person possessing valium in that home on the night in question was the State's main witness, Holly Burdette. The Defendant's actions in this case are certainly regrettable, perhaps reprehensible. They certainly do not rise to the level of murder.

III.

Appellant's Reply to State's Response to Other Arguments

The Appellant believes that all arguments made in reply to the Respondent's Brief are sufficiently covered in his original brief and no further argument in response is necessary.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

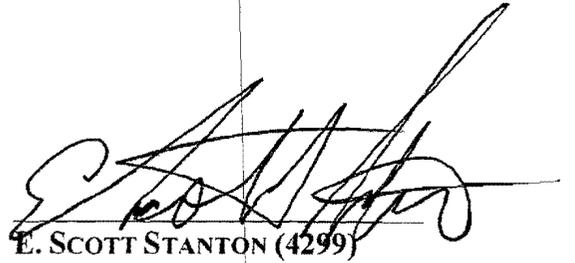
Counsel for the Appellant states that this matter is appropriate for oral argument in accordance with Rule 20 of the Rules of Appellant Procedure. The issues raised in the Appellant's brief concerning interpretations of certain West Virginia Code provisions are matters of first impression. Interpreting these code provisions, along with long standing laws and principles, involves constitutional questions concerning the validity of the Circuit Court's ruling. Furthermore, the facts of this case involving the drug transactions, the death of a child, and the ramifications of murder convictions under these circumstances is of supreme fundamental public importance. The standard amount of time allowed for such oral argument should be sufficient. Counsel believes an opinion issued by this Honorable Court after consideration of the merits in accordance with Rule 20 of the Rules of Appellant Procedure would be appropriate.

CONCLUSION

The Circuit Court erred by allowing the State to proceed with both felony murder and death of a child by a parent, guardian, or custodian because the Fifth Amendment to the United States Constitution prevents a criminal defendant from being placed twice in jeopardy for the same offense when neither charge contains an element that the other does not. Further, the State failed to prove that the delivery of oxycodone caused the death of C.C.J. The Petitioner

respectfully requests that this Court find that the trial court should have forced the State to proceed with either felony murder or death of a child by a parent, and that the trial court should have granted the Defendant's motion for judgment of acquittal because the State failed to prove the essential element of causation.

Respectfully submitted,



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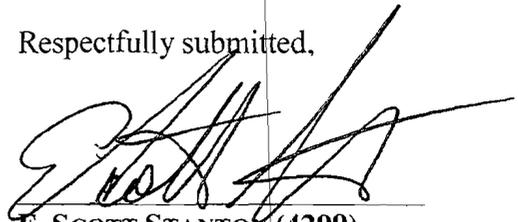
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APPELLANT.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Reply Brief was hand delivered by E. Scott Stanton, attorney for the Appellant, on this 30th day of June, 2011, to the below listed:

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