IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DONOVAN FOREMAN — APPELLANT

VS. — NO. 2009-KA-1785-SCT

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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PROCEDURAL HISTORY:

On September 30, 2009, Donavan Foreman, "Foreman" was tried for murder, four counts of aggravated assault, and shooting into an automobile before the Circuit Court of Claiborne County, the Honorable Lamar Pickard presiding. R. 1. Foreman was found guilty on all counts. R.117. He was given a life sentence, and five concurrent ten years sentences; all concurrent with the life sentence for murder. R. 123-124.

Mr. Foreman through his appeal counsel filed notice of appeal to the Mississippi Supreme Court. C.P. 87.

ISSUES ON APPEAL

I.

WAS THERE EVIDENCE IN SUPPORT OF MULTIPLE CONVICTIONS? OR DO THEY MERGE BECAUSE ONLY ONE SHOT WAS FIRED?

II.

WAS FOREMAN IMPROPERLY SENTENCED FOR HIS CONVICTION FOR SHOOTING INTO AN AUTOMOBILE?

STATEMENT OF THE FACTS

Mr. Foreman was indicted by a Claiborne County Grand jury for the depraved murder of Mr. Edward Minor, a nineteen year old student at Hinds Community college, four counts of attempted aggravated assault, and shooting into an automobile on or about May 10, 2009. This occurred at Big Son's night club in Claiborne County near Port Gibson. C.P. 3-6.

On September 30, 2009, Donavan Foreman was tried for murder, four counts of aggravated assault, and shooting into an automobile before the Circuit Court of Claiborne County, the Honorable Lamar Pickard presiding. R. 1. Foreman was represented by Mr. Eric Brown.

Dr. Bruce Levy testified that he performed an autopsy on the decedent, Mr. Edward Minor. Levy was accepted as an expert witness, a licensed forensic pathologist. R. 17. Levy testified that he determined the cause of death was a gun shot wound to the back of the decedent's head. R. 18-19. The manner of death was "a homicide." R. 20. Levy testified that he recovered the projectile, or bullet that penetrated the decedent's skull. It was removed from the interior of his skull during the autopsy. R. 18.

It was determined by scientific test that the bullet was fired from a nine millimeter hand gun. R. 18; 24.

Officer Carl Fleming testified that after waiving his **Miranda** rights. Foreman admitted that he had a 9 millimeter handgun. R. 71. He admitted that he fired the gun into the car, but claimed it was an accident. R. 71-72.

Ms. Ashley Jones testified she went to a celebration at "Big Sons," night club. R. 28-29. She was driving her car, a 2005 Chrysler Sebring. After she left, she went to pick up her cousins who needed rides home. They were Jewelisa Kelly, Shanique Kelly, Chantonia and Edward Minor. R.

29. They were down the road from the club talking with other young people. The four relatives were seated inside her car. Ms. Jones was proceeding to drive off. At this time, she testified, "I heard a shot." R. 32; 38. She discovered that Edward Minor in the back seat had been shot.

He was shot in the head. R. 32.

See State's photographic exhibit 4 showing a 2005 Chrysler with the back window shattered. It also shows the interior of the back seat of the car. This was where Mr. Minor was seated. He was in the middle of the back seat. Photographic exhibit 2 and 3 show the bullet entrance wound on the back of the decedent's head. These photographs were taken at the autopsy on May 11, 2009.

Ms. Shanique Kelly testified that she was in the car when the shot was fired. She testified about what she actually "saw from the car." R. 51.. She saw Foreman attempt to fire the handgun once. He failed. After he cocked the handgun, he pulled the trigger successfully. R. 53. Shanique Kelly told her cousins to "duck." R. 51. Her cousin, Edward , in the middle of the back seat, fell forward when the shot was fired..

Ms. Jessica Earls testified that she was present at Big Sons night club. She was standing outside in the parking lot. She testified that she saw "Donavan" shot a handgun into the car driven by Ms. Ashley Jones. R. 61. Earls identified Foreman as the person she saw fire the hand gun into the car. R. 62.

The trial court denied a motion to dismiss all of the counts except murder. R. 95. Foreman argued the five counts involving aggravated assault and shooting into a vehicle should "merge" with the murder count. He argued that the evidence only supported the fact that one shot was fired into the automobile. This bullet struck and killed Mr. Edward Minor. The bullet that killed Minor was recovered from his skull. The trial court denied the motion. R. 95.

The defendant decided, after being advised of his right, not to testify. R. 93.

The jury found Foreman guilty on all counts. R.117. He was given a life sentence, and five concurrent ten years sentences; all concurrent with the life sentence for murder. R. 123-124.

SUMMARY OF THE ARGUMENT

1. The record reflects that the trial court correctly denied a motion to dismiss all the counts except depraved heard murder. R. 95. The elements needed for establishing firing a hand gun into a automobile, and by doing so threatening the lives of four other persons present in the moving car were different from the elements needed for establishing depraved heart murder. See jury instruction 5 which states the different elements for depraved heart murder, aggravated assault, and shooting into a automobile. C.P. 61-65.

The Mississippi Supreme Court has not accepted "the doctrine of merger," as best the appellee understands it. **Faraga v. State** 514 So.2d 295, 302 -303 (Miss. 1987);certiorari denied **Faraga v. U.S.**, 487 U.S. 1210 (U.S. Ms. 1988) , June 20, 1988.

See also **Graves v. State** 969 So.2d 845, 848 (¶13-¶14) (Miss. 2007), also **Readus v. State** 997 So.2d 941, 945 (¶15)(Miss. App. 2008). The Supreme Court and Appeals Court found no violation of the **Blockburger** "different elements test" where a defendant was convicted of murder along with aggravated assault, or shooting into a motor vehicle.

2. The appellee agrees with the appellant that the maximum sentence for shooting into a vehicle is five years. However, in the instant cause, the erroneous ten year sentence ran concurrent with the ten year sentences for aggravated assault as well as the life sentence for murder. In addition, under M. C. A. Sect. 97-37-37(2) an additional five years can be added to a inmate's sentence when a handgun was used in the process of committing his crime.

ARGUMENT

PROPOSITION I

THE TRIAL COURT PROPERLY DENIED FOREMAN'S MOTION TO DISMISS.

Mr. Donavan argues he was denied a fair trial. He was denied a fair trial because the prosecution allegedly charged him with as many offenses as possible for a single action. He believes the trial court erred when he failed to dismiss all the charges against him except for the murder. Donavan argues all charges save murder "merge" because they allegedly violated **Blockburger**, 284 U.S. 299, 301 (1932), different elements test for each separate felony. He believes these other charges were all the result of a single action. The evidence indicates this was firing one shot into the back of a 2005 Chrysler automobile. This was at "Big Sons" nightclub near Port Gibson in Clairborne County. Appellant's brief page 2-5.

To the contrary, the record reflects the trial court overruled Foreman's motion for a directed verdict. R. 95. This was based upon the argument that one shot could not produce six separate felonies.

> Brown: May I be heard? I also at this time would like to request that my motion earlier for the dismissal based on the basis of multiplicity and double jeopardy be renewed at this time for purposes of the record. The same motion I made at pretrial I would like to renew at this time based on the fact that the state has shown witnesses that only heard-only heard one shot. There's been no evidence that any other shot had been fired. It was just all one shot, which produces the six felonies that were included in the indictment.
>
> Arrington: **Our response is the same thing. We believe that this bullet could have killed two people. Bullets can kill two, and I think aggravated assault, shooting into a vehicle I think is a separate crime against each one of them.**
>
> Brown: Your Honor, there was no evidence to that fact. Your Honor, there was nothing that says that this bullet could have hit more than one person. In fact, the state's own expert witness said it hit one person and it did not go anywhere else at that time, and it's only intention was to hit one if there was any at all.

> Court: All right. **Well, again, the court-when I look at the standard the court is required to use at this point, I'll overruled your motion, counsel.** R. 95. (Emphasis by appellee).

In **Faraga v. State** 514 So.2d 295, 302 -303 (Miss. 1987), the Mississippi Supreme Court declined to adopt "the merger doctrine." The Court affirmed the trial court in finding that Faraga could be found guilty of both murder and "felonious child abuse" under the facts of that case. Certiorari was denied by the United States Supreme Court, **Faraga v. U.S.**, 487 U.S. 1210 (U.S. Ms. 1988) , June 20, 1988.

> Faraga next argues that Miss.Code Ann. § 97-3-19(2)(f) is void because the merger doctrine applies. The merger doctrine, which developed as a limitation of the felony-murder doctrine, applies when the underlying felony is "merged" with the killing and cannot be treated as a separate crime. Faraga asserts the merger doctrine should apply in his case because the underlying felony (felonious child abuse) was an aggravated battery necessarily included in the killing.
> Recently this Court declined to adopt the merger doctrine in **Smith v. State**, 499 So.2d 750 (Miss.1986). In that case the (Cite as: 514 So.2d 295, *303)
> jury found that Grady Smith forcibly entered a home (burglary) where he shot William Carter. Smith was convicted of capital murder based on the underlying felony of burglary. See Miss. Code Ann. § 97-3-19(2)(e) (Supp.1986). This Court, through Justice Walker, stated:
> We decline to adopt the merger doctrine and hold that under our felony-murder statute, the underlying felony does not merge into the murder. Our statutory provisions dealing with murder in the particular felony in this case, burglary, are intended to protect different societal interests.

In **Graves v. State** 969 So.2d 845, 848 (¶13-¶14) (Miss. 2007), the Supreme Court found that no violation of double jeopardy. Graves was indicted and found guilty of both aggravated assault and shooting into a vehicle. The court found that even if separate criminal acts occurred close in time and/ or at the same place, a person could be found guilty of more than one crime. Since the elements for firing a hand gun into a car were different from the elements needed for convicting one of aggravated assault, there was no violation of "double jeopardy."

> ¶ 13. Given the elements required to prove each of these crimes, **Blockburger** instructs us to determine whether there are elements in each offense not contained in

> the other. We find that there are. To prove aggravated assault, no element requires proof of a firearm being shot into a vehicle. To prove shooting into a vehicle, there is no requirement of proof of bodily injury.
> ¶ 14. It is true that these two crimes were committed almost simultaneously. However, this Court has made clear that "[t]emporal proximity does not generate a juridical union of separate and distinct criminal acts, nor does the presence of a common nucleus of operative facts." **Pharr v. State**, 465 So.2d 294, 301 (Miss.1984) (quoting **Ball v. State**, 437 So.2d 423, 425 (Miss.1983)). As it is inconsequential that these two crimes took place at the same time, so is it unimportant that the same evidence was used to convict Graves of both of these crimes. Clearly, aggravated assault and shooting into a vehicle each requires proof of facts the other does not. Therefore, we find that Graves's argument is without merit.

In **Readus v. State** 997 So.2d 941, 945 (¶15)(Miss. App. 2008), the Court found that Readus was guilty of both "depraved heart murder" and "aggravated assault." In that case, Readus fired a hand gun inside an apartment. There were children present along with his wife who was struck by a bullet and died as a result.

> We fail to see how this is any different from the classic example of depraved heart murder of shooting into a crowd. Though Readus claims that the gunshots were accidental, his statement to police contradicts that assertion. On the day that he was questioned by police Readus stated, "we were still tussling and I pulled the pistol and shot Marlow Jackson and Sherry Readus." He never expressed to police that he did not mean to shoot the two victims. Further, Readus testified at trial that he pulled out the gun with the intention of shooting it. In either event, whether the shooting was accidental was a question for the jury. In light of the evidence presented, we find that a rational juror could conclude that Readus committed both depraved heart murder and aggravated assault.

Ms. Shanique Kelly testified that she was one of the five people in the car. Ms. Ashley Jones was the driver. No one in the car was armed. Shanique testified to hearing Foreman "cussing." R. 41. She did not hear any argument between him and anyone in the car. She testified to seeing Foreman pull a hand gun out from "under his shirt." R. 43-44. She also testified to actually seeing him "pull the trigger" on the firearm. R. 43. This was after he had attempted to fire it. He failed because the gun had not been cocked into a ready for firing position. R. 44.

Q. **And Donavan, what made–you said you saw Donavan do what?**

A. **Pull the trigger.**

Q. Do you know where he pulled it from?

A. Up under his shirt.

Q. **And he pulled the gun up under his shirt. What did he do?**

A. **He shot it, but it didn't shoot, so he cocked it back and he shot it again.** R. 43-44. (Emphasis by appellee).

Ms. Shanique Kelley testified that when she realized Foreman had a fire arm and intended to use it, she told all of her cousins to "get down."

Q. And that's all you said, just duck?

A. **Yeah, but I said, "Get down. He's got a gun. Duck."** R. 52-53. (Emphasis by appellee).

In the instant cause, the elements for "firing a hand gun into an auto" were different from "attempted aggravated assault," and "depraved heart murder." See jury instruction 5 , C.P. 61-64 and M. C. A. Sect. 97-3-7 (1)(b) and M. C.A. Sect. 97-3-19. The elements for depraved heart murder are different from those required for firing a hand gun into an automobile. M. C. A. Sect. 97-3-19 and M. C.A. sect. 97-25-47. The elements of shooting a hand gun into automobile and attempted aggravated assault are different because there were five human beings in the car. Only one of whom was shot.

The other four passengers in Jones' Chrysler were placed in fear for their lives. Ms. Shanique Kelly warned them to "duck down." This was when she saw Foreman pointing, and then firing his hand gun. The gun was pointed directly in the direction of the car in which they four victims were seated. R. 41-44; 52-53. They could not move; all they could do was "duck" down, or move their heads down out of harms way.

This was when Foreman fired his handgun which placed four lives in danger from not only

the bullet but from possible consequences of his having shot into the interior of a moving automobile occupied by the driver and numerous persons on a public highway. R. 32; 86. As stated in **Farraga, supra**, the different felonies were "intended to protect different societal interests."

The appellee would submit that each of the felonies required "proof of a fact" that was different from the others charged.

In addition, the record reflects all of Foreman's sentences were "concurrent" with his life sentence for murder. R. 123-124.

> The court's going to order that all these sentences run concurrently with one another, and they also run concurrently with count I. And the purpose for that is the court has not had the opportunity to review the merger situation, but if, in fact, these counts have merged, that would be one life sentence to serve. R. 123.

The appellee would submit that this issue is lacking in merit.

PROPOSITION II

FIVE YEARS IS THE MAXIMUM FOR A CONVICTION UNDER M. C. A. Sect. 97-25-47(Supp.1981).

Foreman argues that his sentence for shooting into an automobile exceeded that provided by statute. He argues that the maximum by statute was five rather than ten years. Appellant's brief page 6-8.

The record reflects that the sentences for attempted aggravated assault and shooting into a vehicle were all run "concurrent" with the life sentence for murder. R. 123-124.

In **Jefferson v. State** , 958 So.2d 1276, 1281 (¶16) (Miss. App. 2007), the Court found plain error in imposing a sentence which exceeded that provided for the felony by statute. The court remanded for a new sentencing hearing.

> ¶ 16. Because the circuit court sentenced Jefferson to a greater sentence than was allowed by statute, we find plain error in the sentence imposed by the circuit court. Therefore, we vacate the sentence previously imposed and remand this matter to the Circuit Court of Marion County for a new sentencing hearing at which time the court may impose a sentence not to exceed ten years in accordance with section 97-21-33 of the Mississippi Code.

The appellee would agree with the appellant that the sentence for shooting into an automobile can not exceed five years. Under M. C. A. Sect. 97-25-47, the sentence for shooting into "a transportation facility," which includes "motor vehicles," is "not less than one year nor more than five years." Fines can also be imposed, of "not less than one hundred and not more than two hundred fifty."

The appellee would point out that M. C. A. Sect. 97-37-37 provides for an additional five year sentence which can not be reduced or suspended as an enhanced sentence when a firearm is used in the commission of a felony.

The appellee would acknowledge the maximum sentence is five years, and a fine of no more than $250.00. A remand would seem to be an appropriate remedy for this sentencing error.

CONCLUSION

Foreman's convictions should be affirmed for the reasons cited in this brief. A remand for sentencing on the shooting into a transportation facility would seem to be appropriate under the facts of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, W. Glenn Watts, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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