

No. SC85234

IN THE SUPREME COURT OF MISSOURI

In re COREY RYAN GREEN,
Petitioner,

vs.

JIM MOORE, Superintendent,
Northeast Correctional Center in Bowling Green,
Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

PETITIONER'S BRIEF

SMITH LEWIS, LLP

Phebe La Mar, #49777
111 South Ninth Street, Suite 200
P.O. Box 918
Columbia, Missouri 65205-0918
Telephone: (573) 443-3141
Facsimile: (573) 442-6686

Attorneys for Petitioner

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¹ All statutory citations are to RSMo. 1994, unless otherwise noted.

JURISDICTIONAL STATEMENT

This is an original proceeding based on a petition for a writ of habeas corpus challenging the lawfulness of petitioner's confinement in the Northeast Correctional Center, in Bowling Green, Missouri, under the Double Jeopardy Clauses of the United States Constitution and the Missouri Constitution. U.S. Const. amend. V; Mo. Const. art. I, sec. 19 (1944). After the Circuit Court of Pike County and the Western District of the Missouri Court of Appeals denied the petition, it was filed in this Court on April 21, 2003, and this Court issued its show cause order on July 1, 2003. Jurisdiction is proper in this Court under the Missouri Constitution, Article I, section 12, and Article V, section 4, under Section 532.020, RSMo. 2000, and under Civil Rule 91.

STATEMENT OF FACTS

Petitioner Corey Ryan Green was charged, in Count I of the Information filed in Boone County, with the Class A Felony of Murder in the Second Degree in violation of Section 565.021(2) RSMo. 1994.² (Appendix, A1). This charge of felony murder was based on Mr. Green's "perpetration of the Class D Felony of Unlawful Use of a Weapon under Section 571.030.1(4) RSMo." (Appendix, A1). In Count II of this same Information, Mr. Green was charged with the Class A Felony of Armed Criminal Action based on the commission of "the felony of Murder in the Second Degree charged in Count I." (Appendix, A1). On August 3, 1998, and again on September 14, 1998, Mr. Green appeared before the Honorable Frank Conley, Judge of Division II of the Thirteenth Judicial Circuit in Columbia, Missouri, withdrew his pleas of not-guilty to these two Counts, and proceeded to plead guilty to both Second Degree Felony Murder and Armed Criminal Action. (Appendix, A4). The Court then sentenced Mr. Green to two (2) ten (10) year sentences, one based on the charge of felony murder, and one on the charge of armed criminal action, which sentences are to be served consecutively, and which are the minimum sentences allowed under Missouri statute for Class A felonies. (Appendix, A4, A10).

Missouri's legislature adopted a statute, which was signed into law (as written) in 1977, providing that "any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon is also guilty of the crime of armed criminal action.... The provisions of this section shall

not apply to the felonies defined in sections 564.590, 564.610, 564.620, 564.630, and 564.640, RSMo.” Section 571.015 RSMo. (Appendix, A6). At the time this law was passed, Section 564.610, RSMo. 1969 included what is now Section 571.030 RSMo., the statute regarding the crime of unlawful use of a weapon. Missouri statute further provides, in relevant part, that a person has committed murder in the second degree when he “commits or attempts to commit any felony, and, in the perpetration ... of such felony ... another person is killed as a result of the perpetration ... of such felony.” Section 565.021 RSMo. (Appendix, A8).

On January 27, 2003, Corey Green first petitioned for a Writ of Habeas Corpus in the Circuit Court of Pike County, Missouri, arguing that his conviction of the crime of armed criminal action violated the Double Jeopardy Clauses of the United States and Missouri constitutions, U.S. Const, amend. V, and Mo. Const. art. I, sec. 19 (1944). (Appendix, A12). The Circuit Court of Pike County denied the petition on February 5, 2003. (Appendix, A22).

Then, on March 6, 2003, Mr. Green petitioned the Western District of the Missouri Court of Appeals for a Writ of Habeas Corpus, on the same grounds. (Appendix, A23). The Western District denied Mr. Green’s petition on March 31, 2003. (Appendix, A34). Mr. Green then filed his petition in the current proceeding on April 21, 2003. (Appendix, A36). This Court thereafter issued its Show Cause Order on July 1, 2003. (Appendix, A52). A Return to Writ of Habeas Corpus was filed by Respondent on September 10, 2003.

² All statutory citations are to RSMo. 1994, unless otherwise noted.

POINT RELIED ON

Petitioner is entitled to a judgment that he is unlawfully confined and an order granting him a writ of habeas corpus and releasing him from respondent's custody because his sentence for Armed Criminal Action under Section 571.015, RSMo., is in violation of the Double Jeopardy Clauses in the United States Constitution, U.S. Const. amend. V, and the Missouri Constitution, Mo. Const. art. I, sec. 19 (1944), in that petitioner's conviction of Armed Criminal Action is ultimately based on the unlawful use of a weapon, which is the underlying felony upon which his conviction of second degree felony murder is completely based, and Section 571.015 specifically prohibits a conviction of Armed Criminal Action from being predicated upon unlawful use of a weapon.

Ivy v. State, 81 S.W.3d 199 (Mo. App. 2002)

State v. King, 748 S.W.2d 47 (Mo. App. 1988)

Missouri v. Hunter, 459 U.S. 359 (1983)

Section 571.015, RSMo.

ARGUMENT

Petitioner is entitled to a judgment that he is unlawfully confined and an order granting him a writ of habeas corpus and releasing him from respondent's custody because his sentence for Armed Criminal Action under Section 571.015, RSMo., is in violation of the Double Jeopardy Clauses in the United States Constitution, U.S. Const. amend. V, and the Missouri Constitution, Mo. Const. art. I, sec. 19 (1944), in that petitioner's conviction of Armed Criminal Action is ultimately based on the unlawful use of a weapon, which is the underlying felony upon which his conviction of second degree felony murder is completely based, and Section 571.015 specifically prohibits a conviction of Armed Criminal Action from being predicated upon unlawful use of a weapon.

This is an original writ proceeding, so there is no applicable standard of review to set forth, as is otherwise required by Rule 84.04(e).

A. Habeas Corpus is the proper mechanism for seeking relief.

As an initial procedural matter, a petition for a writ of habeas corpus is the appropriate means, at this stage, of challenging the lawfulness of Corey Green's sentence because "although generally a double jeopardy claim is waived where it is not timely raised in a post-conviction motion (which Petitioner admits is the case here), and even where a plea of guilty has been entered, a claim of double jeopardy is not waived if, *on the face of the record*, 'the charge is one which the State may not constitutionally prosecute.'" *Ivy v. State*, 81 S.W.3d 199, 206 (Mo. App. 2002) (emphasis in original).

See also Reuscher v. State, 887 S.W.2d 588, 591 (Mo. banc 1994) (“state habeas corpus may not be used to challenge a final judgment after an individual’s failure to pursue appellate and post-conviction remedies *except to raise jurisdictional issues.*”) Although Mr. Green did plead guilty to both felony murder and armed criminal action charges, and did not file a Rule 29.15 motion based on the allegations in this writ, the “usual rule [is] that jurisdictional defects are not, and cannot, be waived.” *Merriweather v. Grandison*, 904 S.W.2d 485, 489 (Mo. App. 1995), *citing State v. Mitchell*, 563 S.W.2d 18, 23 (Mo. banc 1978); *State v. Douglas*, 904 S.W.2d 383, 384 (Mo. App. 1992). *See also State ex rel. Dutton v. Sevier*, 83 S.W.2d 581 (Mo. banc 1935) (Writ of habeas corpus granted to petitioner who pled guilty because “While the court had jurisdiction of the crime charged against petitioner, it did not have jurisdiction to assess punishment in excess of that provided by law.”). The trial court in this case acted outside its jurisdiction in entering a judgment assessing punishment that exceeds that authorized by law. As a consequence, a writ of habeas corpus is appropriate.

B. Green’s guilty plea violated the constitutional preclusion against Double Jeopardy.

The essential issue is whether Green’s convictions of armed criminal action based on the felony murder, which is based on the underlying felony of unlawful use of a weapon, violate the double jeopardy provisions of the United States and Missouri constitutions. Because the Missouri legislature has explicitly stated that an armed criminal action conviction may not be based on an underlying felony of unlawful use of a weapon, the Double Jeopardy Clause precludes the imposition of the sentence for armed

criminal action in this case. *See Missouri v. Hunter*, 459 U.S. 359, 367-69 (1983) (Court held that convictions of first-degree robbery and armed criminal action did not violate double jeopardy provisions, as an examination of the legislative history revealed that Congress intended to impose multiple punishments, and where such is the case, “imposition of such sentences does not violate the Constitution.”) (internal citations and emphasis omitted).

1. Armed Criminal Action.

Missouri’s legislature has provided that “any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon is also guilty of the crime of armed criminal action, ... [except] the provisions of this section shall not apply” to what is now section 571.030, pertaining to unlawful use of a weapon. Section 571.015, RSMo.; *State v. Davis*, 849 S.W.2d 34, 44 (Mo. App. 1993), *citing State v. King*, 748 S.W.2d 47, 50 (Mo. App. 1988). Stated differently, where a person commits a felony by use of a weapon, so long as that felony is not unlawful use of a weapon (or one of the other felonies specified in the statute), that person is also guilty of armed criminal action, and the sentence to be imposed for the armed criminal action is to be imposed in addition to the sentence for the underlying felony. Section 571.015, RSMo. A defendant may not, therefore, be convicted of armed criminal action in addition to unlawful use of a weapon, where such armed criminal action conviction is premised on unlawful use of a weapon as the underlying felony. *King*, 748 S.W.2d at 49-51.

Conversely, Missouri's courts have determined that where an "armed criminal action conviction rests on some offense other than unlawful use of a weapon, conviction and punishment in the same trial of both armed criminal action and unlawful use of a weapon does not offend general cumulative punishment section 556.041 or the principle of double jeopardy." *State v. Madison*, 997 S.W.2d 16, 21 (Mo. banc 1999). Thus, convictions of armed criminal action and unlawful use of a weapon, where the armed criminal action charge is based on additional charges/convictions of first degree child endangerment, rather than on the charge of unlawful use of a weapon, have been upheld. *Id.* Similarly, a conviction of armed criminal action predicated on the underlying felony of assault, rather than on the charge/conviction of unlawful use of a weapon, has been determined not to violate the Double Jeopardy Clause. *State v. McKee*, 826 S.W.2d 26, 29 (Mo. App. 1992) ("Here, the armed criminal action charge was not based on the unlawful use of a weapon offense. For that reason, *King* has no application. When tested by the standard of §556.014, armed criminal action based on another offense and unlawful use of a weapon may be punished by cumulative sentences for the same conduct in the same trial."). In each of the above-cited cases, the felony charge/conviction upon which the armed criminal action conviction is based would stand independently on other grounds, regardless of the existence of the unlawful use of a weapon charge/conviction.

2. Second Degree Felony Murder.

Missouri statute further provides that second degree murder is a Class A felony, and that a person has committed second degree murder where he either:

- (1) Knowingly causes the death of another person or, with the purpose of causing serious physical injury to another person, causes the death of another person; or
- (2) Commits or attempts to commit any felony, and, in the perpetration ... of such felony ... another person is killed as a result of the perpetration ... of such felony.

Section 565.021, RSMo.

Missouri's courts have determined that the underlying felony in a felony murder charge is not merely an element of the felony murder, "but rather a means of proving the felonious intent for murder." *State v. Gheen*, 41 S.W.3d 598, 605 (Mo. App. 2001). Essentially, this allows a conviction for murder rather than merely manslaughter, even if such homicide is unintentional, if it occurred during the commission of a felony. *State v. Williams*, 24 S.W.3d 101, 110 (Mo. App. 2000), *citing State v. Clark*, 652 S.W.2d 123, 125-26 (Mo. banc 1983). Thus, whereas the gravamen of the crime of manslaughter is the actual killing, "it is the intent to commit the underlying felony, not the intent to commit the killing, which is the gravamen of the offense" of second degree felony murder *State v. Whitley*, 382 S.W.2d 665, 667 (Mo. 1964); *State v. Lassen*, 679 S.W.2d 363, 369 (Mo. App. 1984), *citing Clark*, 652 S.W.2d at 126-27. *See also Williams*, 24 S.W.3d at 110. In fact, any underlying felony can supply the required *mens rea* for second degree felony murder. *State v. Pembleton*, 978 S.W.2d 352, 356 (Mo. App. 1998), *citing State v. Mannon*, 637 S.W.2d 674, 677 (Mo. banc 1982).

Petitioner, Corey Green, was charged with second degree felony murder premised upon the underlying felony of unlawful use of a weapon. (Statement of Facts, 6).

According to the reasoning of Missouri's courts, there can be no conviction of second degree murder if not for the commission of the underlying felony, as the requisite intent is not present. As a consequence, in this case, the conviction of the crime of second degree murder is completely dependent upon commission of the underlying felony of unlawful use of a weapon.

3. The sentencing court violated the Double Jeopardy Clauses of the United States Constitution and the Missouri Constitution.

The State, in the instant case, has attempted to circumvent the requirement that an armed criminal action conviction not be predicated on an underlying felony of unlawful use of a weapon, by purporting to base the charge for armed criminal action on the second degree felony murder charge. (Statement of Facts, 6). The second degree felony murder charge, however, is completely dependent upon the underlying felony of unlawful use of a weapon. (Statement of Facts, 6). As a result, the offense upon which Mr. Green's armed criminal action conviction was predicated is simply unlawful use of a weapon. *Ivy*, 81 S.W.3d at 207-208. Although the State's method of attempting to circumvent the armed criminal action statute's express exclusion of application to offenses under the unlawful use of a weapon statute is ingenious, it nonetheless violates the Double Jeopardy Clause, and should not be allowed. *Id.* at 206-208.

Without the underlying felony of unlawful use of a weapon, there is no second degree felony murder charge in this case. Instead, the homicide committed by Green

would be some form of manslaughter. The only means by which the State has deemed this unintentional killing murder is reliance upon the underlying felony of unlawful use of a weapon. (Statement of Facts, 6). This is vastly different than the cases cited previously in subsection 1 in which Missouri's courts have deemed armed criminal action convictions to be acceptable as not violating double jeopardy. In this case, the armed criminal action charge is not based on a felony separate from or independent of the charged unlawful use of a weapon, but rather, is completely dependent upon the charged unlawful use of a weapon. This Court is, therefore, being asked to rely upon the underlying felony of unlawful use of a weapon in upholding the conviction for armed criminal action. *Ivy*, 81 S.W.3d at 208. Such reliance, however, has been specifically disallowed by the Missouri legislature, and therefore violates the Double Jeopardy Clauses. *Id.*

This being said, the State had a wide variety of charges/convictions that would not have violated the Double Jeopardy Clauses, some of which would have resulted in petitioner's conviction of armed criminal action, or even of armed criminal action *and unlawful use of a weapon*. Such convictions, however, would have required that the State charge/convict petitioner of a lesser form of homicide than second degree felony murder based solely on the petitioner's unlawful use of a weapon, as this combination is unconstitutional. Regardless of the proper combination of charges, it is entirely possible and probable that petitioner's sentence should have been shorter. If, for example, the State had desired to pursue second degree felony murder and unlawful use of a weapon convictions, even with the maximum sentence for the unlawful use of a weapon, and with

the length of sentence for the felony murder that was agreed to by the State in this case, petitioner could have had a sentence as short as 14 years. Sections 558.011, 565.021(2), and 571.030, RSMo. Similarly, had the State pursued a first degree involuntary manslaughter charge, or a voluntary manslaughter charge, in addition to an armed criminal action charge based on the commission of the manslaughter, even if the maximum sentences were imposed for the manslaughter, petitioner could have had a sentence of between 10 and 18 years. Sections 558.011, 565.024, and 571.015, RSMo. And, if a charge of unlawful use of a weapon were included, petitioner's sentence could have still easily been as short as 17 years (even with the maximum sentences for involuntary manslaughter and unlawful use of a weapon) – and it would have been possible for the sentence to be shorter still if less than the maximum sentence were imposed for manslaughter and unlawful use of a weapon. *Id.* See also Section 571.030, RSMo. These sentences are certainly less than the sentences equaling 20 years actually imposed on petitioner after his guilty pleas to the crimes of second degree felony murder and armed criminal action.

CONCLUSION

Because it is clear that Missouri's legislature did not intend that an armed criminal action conviction be based upon an underlying felony of unlawful use of a weapon, and because it is just as clear that the armed criminal action charge in this case is ultimately based upon the underlying felony of unlawful use of a weapon, petitioner Corey Green's sentences are invalid. The trial court's judgment and sentence, therefore, should be reversed.

Respectfully submitted,

SMITH LEWIS, LLP

Phebe La Mar, #49777
111 South Ninth Street, Suite 200
P.O. Box 918
Columbia, Missouri 65205-0918
Telephone: (573) 443-3141
Facsimile: (573) 442-6686

Attorneys for Petitioner

CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Petitioner's Substitute Brief complies with the limitations set forth in Rule 84.06(b), contains 3,584 words, as counted by the word-processing software used, Microsoft Word, and that the floppy disk filed together with this Brief in accordance with Rule 84.06(g) has been scanned for viruses and is virus-free.

SMITH LEWIS, LLP

Phebe La Mar, #49777
111 South Ninth Street, Suite 200
P.O. Box 918
Columbia, Missouri 65205-0918
Telephone: (573) 443-3141
Facsimile: (573) 442-6686

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that one copy of Petitioner's Substitute Brief and one copy of the disk required by Rule 84.06(g) were served by sending the same by FedEx this 9th day of October, 2003 on Mr. Andrew W. Hassell, Assistant Attorney General, Office of the Attorney General, State of Missouri, Supreme Court Bldg., 207 W. High Street, Jefferson City, MO 65102, Attorneys for respondent.

Phebe La Mar