

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 REPLY BRIEF

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¹ All statutory citations are to RSMo. 1994.

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.

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

A writ of habeas corpus is not procedurally barred as respondent contends, and is, in fact, the appropriate means at this stage for Corey Green to challenge his sentence on the charge of armed criminal action under Section 571.015, RSMo. 1994.² Mr. Green's sentence is predicated on a conviction of second degree felony murder under Section 565.021(2), RSMo., which was in turn based on a charge of unlawful use of a weapon under Section 571.030, RSMo. These sentences violate the double jeopardy provisions of the United States and Missouri constitutions. U.S. Const. amend. V; Mo. Const. art. I, sec. 19 (1944).

1. Writ of Habeas Corpus is not procedurally barred.

Respondent contends that since Mr. Green did not raise his claim that the sentences assessed against him violate the double jeopardy provisions of the United States and Missouri constitutions in a Rule 24.035 motion, his claim is procedurally barred. An examination of the cases cited by respondent, however, reveals that Mr. Green's claims actually fall precisely within one of the exceptions to the general rule that all claims must be raised in a timely motion for post-conviction relief under Rule 24.035. *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 214-215 (Mo. banc 2001), citing *State ex rel. Simmons v. White*, 866 S.W.2d 443 (Mo. banc 1993) (Court determined that although "it is unusual for a court to consider a prisoner's petition for a writ of *habeas corpus* for claims that should have been raised in post-conviction proceedings," habeas corpus is available to a prisoner "only to raise jurisdictional issues or in circumstances so rare and exceptional that a manifest injustice results."). See also *Brown v. State*, 66 S.W.3d 721, 731 (Mo. banc 2002). Mr. Green's claim falls squarely within the exception set out by this Court in these cases, and previously elaborated upon in *Hagan v. State*, 836 S.W.2d 459, 461 (Mo. banc 1992). The *Hagan* Court determined that there is one exception to the general rule that double jeopardy is a personal defense subject to waiver: "where it can be determined *on the face of the record* that the court had no power to enter the conviction or impose the sentence," such defense is not waived by a plea of guilty. *Id.* It is clear, in examining only the information and the guilty plea transcript in Mr.

² All statutory citations are to RSMo. 1994.

Green's case, that the trial court was without jurisdiction to assess the sentences that it did.

Respondent has suggested that the United States Supreme Court differentiates substantially in its reasoning as to the trial court's jurisdiction between cases involving violations of double jeopardy due to successive prosecutions as opposed to cases involving double jeopardy violations due to cumulative punishments. Respondent, however, has cited no cases whatsoever in support of this proposition, and has pointed to no cases in which the United States Supreme Court has ever ruled that merely because a double jeopardy violation was a result of "only" cumulative punishment rather than a successive prosecution situation, such violation was not jurisdictional for the trial court. Rather, respondent has only cited to this Court's previous decision that violations of double jeopardy – regardless of the method of such violation – are a jurisdictional issue that this Court will address in the context of a writ of habeas corpus. *Hagan v. State*, 836 S.W.2d 459, 461 (Mo. banc 1992).

2. Trial court's entry of sentences exceeded court's jurisdiction.

The United States Supreme Court has, as respondent points out, held that in cases involving cumulative/multiple punishments, the Double Jeopardy Clause can only be used in "ensuring that the total punishment did not exceed that authorized by the legislature." *Jones v. Thomas*, 491 U.S. 376, 381 (1989). As a consequence, where the legislature specifically provides for cumulative punishment under two different statutes, "a court's task of statutory construction is at an end and the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single

trial.” *Missouri v. Hunter*, 459 U.S. 359, 369 (1983). This does not, however, in any way preclude error in sentencing by the trial court from being jurisdictional for the trial court. In fact, Missouri’s courts have held to the contrary, determining that where a trial court’s judgment and sentence exceeded that authorized by law, and such defect is “patent on the face of the record,” the court was without “jurisdiction to render the judgment it did render, and ... he need show no more to entitle him to relief” as such error is a jurisdictional defect. *Merriweather v. Grandison*, 904 S.W.2d 485, 489 (Mo. App. 1995). Thus, where – as was the case here – the trial court is not authorized by the legislature to enter the sentences it did, the error committed is jurisdictional and may be dealt with in the context of a writ of habeas corpus.

3. Mr. Green has not waived his claim for violation of the Double Jeopardy Clauses.

Mr. Green’s plea of guilty does not operate as a waiver of the trial court’s violation of the double jeopardy clause, as respondent contends. In support of this argument, respondent has pointed to the United States Supreme Court’s holding in *United States v. Broce*, 488 U.S. 563 (1989), which in turn distinguished that Court’s prior holdings in *Menna v. New York*, 423 U.S. 61 (1975), and *Blackledge v. Perry*, 417 U.S. 21 (1974). It is important to view these cases in context, however, and to look to the complete holdings rather than merely portions thereof. The *Broce* Court did determine, as respondent states, that the defendant in that case could not challenge his guilty plea, distinguishing its holding from the prior holding in *Blackledge* because the challenge in *Blackledge* was based on the defendant’s “right not to be haled into court at all upon the

felony charge.” *Broce*, 488 U.S. at 574-75, *quoting Blackledge*, 417 U.S. at 30-31. The Court then went on to state, however, that they were not holding that a plea of guilty could never be waived. *Id.* at 575, *quoting Blackledge*, 423 U.S. at 63, n. 2. In fact, there is no reference by the Court to the fact that *Blackledge* was a case of subsequent prosecution, suggesting that this fact played no role in that Court’s decision. Rather, the defendant in *Broce*, as contrasted with those in *Blackledge* and *Menna*, was requesting that the Court look beyond the face of the record in determining the constitutionality of the prosecution and sentencing, and the Court specifically stated that a “plea of guilty does not waive a claim that – *judged on its face* – the charge is one which the State may not constitutionally prosecute.” *Id.* (emphasis in original). In contrast to *Broce*, and as was the case in both *Blackledge* and *Menna*, it is clear *on the face* of the record below – the indictment and the plea hearings – that the Court acted outside its jurisdiction in sentencing Mr. Green as it did. The facts upon which the State charged Mr. Green, and to which Mr. Green entered his plea of guilty, are essentially irrelevant. The only issue is whether the trial court followed the direction of the legislature in its judgment and sentencing. Mr. Green’s plea of guilty, therefore, did not operate as a waiver of his claim for double jeopardy.

B. The trial court’s sentencing of Green violated the constitutional preclusion against double jeopardy.

Petitioner Corey Green and respondent are in agreement that the central issue in this case is whether the Double Jeopardy Clause of the United States Constitution precludes conviction of a criminal defendant under Missouri’s armed criminal action

statute, Section 571.015, RSMo., where the underlying felony for the armed criminal action charge was second degree felony murder, which in turn has an underlying felony of unlawful use of a weapon. Mr. Green, however, can – and should – prevail on his claim that such convictions, and the sentences associated with them, violate his right to be free from double jeopardy.

The standard this Court must follow in determining whether the trial court has violated the Double Jeopardy Clause of the United States Constitution in this case is, as respondent has stated, that this Court must determine whether the legislature has specifically authorized cumulative punishment under the statutes, and if so, there is no violation. *Missouri v. Hunter*, 459 U.S. 359, 367-69 (1983). The opposite is also true, however: “Courts may not ‘prescrib[e] greater punishment than the legislature intended.’” *Rutledge v. United States*, 517 U.S. 292, 297 (1996), *citing Missouri v. Hunter*, 459 U.S. at 366. As a consequence, respondent’s assessment that this case turns on the Missouri General Assembly’s authorization – or lack thereof – for the cumulative punishments in this case is accurate.

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” (among other things) 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). In other words, 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 may be convicted of and sentenced for both armed criminal action and the underlying felony without such sentence/conviction violating the Double Jeopardy Clauses. Section 571.015, RSMo. A defendant may not, however, be convicted of armed criminal action premised on unlawful use of a weapon as the underlying felony. *King*, 748 S.W.2d at 49-51.

Respondent points to the language regarding “any” felony in the armed criminal action statute as support for the contention that the trial court’s sentences in this case did not violate Mr. Green’s constitutional rights. Respondent, however, focuses far less on the relevant portion of that statute, which states that “the provisions of this section shall not apply” to the unlawful use of a weapon. Section 571.015, RSMo. This is the portion of the statute that must be interpreted and construed by this Court. It is clear that in order for Mr. Green to be convicted and sentenced for armed criminal action, there must have been an underlying felony. Section 571.015. It is also clear that although the trial court’s conviction and sentence were technically premised on the charge of felony murder, without a finding that Mr. Green committed the underlying felony for felony murder – unlawful use of a weapon – there could have been no felony murder. As a consequence, the trial court’s conviction and sentence for armed criminal action in this case required that the trial court apply the provisions of the armed criminal action statute to unlawful use of a weapon. The legislature has not only not specifically authorized this – the legislature specifically prohibited this application of the statute. Respondent has cited to

a number of cases in support of his argument that armed criminal action may be predicated upon second degree felony murder – a contention with which Mr. Green does not disagree, in theory. These cases, however, do not then support respondent’s contention that an armed criminal action conviction that is based on second degree felony murder with an underlying felony of unlawful use of a weapon does not violate the Double Jeopardy Clause. In fact, an examination of the cases cited by respondent reveals that in three of the five cases, it is unclear from the opinions handed down by the Court of Appeals precisely what the underlying felony for the felony murder conviction was. *See State v. Hodges*, 66 S.W.3d 83 (Mo. App. 2001); *State v. Gilmore*, 22 S.W.3d 712 (Mo. App. 1999); *State v. Boyd*, 992 S.W.2d 213 (Mo. App. 1999). In addition, the opinion in *State v. Dudley*, 51 S.W.3d 44 (Mo. App. 2001), makes clear that the underlying felony for the felony murder was burglary. The only case cited to by petitioner that is even arguably relevant to the issue in this case, as the underlying felony for the felony murder was unlawful use of a weapon, is a case in which the Court was never asked to address the issue – and did not do so – of whether the armed criminal action conviction predicated on felony murder with an underlying felony of unlawful use of a weapon violated the defendant’s constitutional rights under the Double Jeopardy Clause. *State v. Gheen*, 41 S.W.3d 598 (Mo. App. 2001). As a consequence, the only Court of Appeals opinions pertaining to issues similar to those in this case that are even relevant as persuasive authority to the ultimate issue here are those that respondent prefers to ignore and which include reasoning with which respondent disagrees. *See Ivy v. State*, 81

S.W.3d 1999 (Mo. App. 2002); *Couts v. State*, No. WD61714 (Slip Opinion) (Mo. App. 2003), *Motion for Transfer granted*.

2. Second Degree Felony Murder.

Respondent finally moves on to contend that felony murder is a “separate and distinct offense from unlawful use of a weapon because it requires an additional element: a human death.” Resp. Br., p. 26. Petitioner Corey Green does not necessarily dispute this claim, and has not argued that he could not be convicted of both felony murder and unlawful use of a weapon – the legislature’s intent in that regard is very clear. Section 565.021.1(2), RSMo. This is not the issue in this case. Rather, an examination of the law regarding second degree felony murder is important only insofar as it reveals that a conviction of second degree felony murder is absolutely and completely dependent upon the underlying felony, which in this case is unlawful use of a weapon. *See State v. Whitley*, 382 S.W.2d 665, 667 (Mo. 1964) (Court determined that where 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). *See also State v. Lassen*, 679 S.W.2d 363, 369 (Mo. App. 1984), *citing State v. Clark*, 652 S.W.2d 123, 126-27 (Mo. banc 1983); *State v. Williams*, 24 S.W.3d 101, 110 (Mo. App. 2000). Thus, without the underlying felony of unlawful use of a weapon in this case, there could have been no conviction or sentence for second degree felony murder. Respondent has presented no argument to the contrary, and seems to argue that this is simply “irrelevant.” It is absolutely relevant to this case, however, that the trial court, even if in a slightly circuitous fashion, is ignoring the specified intent

of the legislature that the armed criminal action statute does not apply to the underlying felony of unlawful use of a weapon, which is precisely what has occurred in Mr. Green's case. Such application of the armed criminal action statute to an underlying felony of unlawful use of a weapon is a violation of Mr. Green's constitutional right to be free from double jeopardy.

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

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 Mr. Green would have had to have been 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. This Court is, therefore, being asked to allow the trial court to apply the armed criminal action statute to the underlying felony of unlawful use of a weapon, which has been specifically disallowed by the Missouri legislature. Such reliance, therefore, violates the Double Jeopardy Clauses. *Rutledge*, 517 U.S. at 297, citing *Missouri v. Hunter*, 459 U.S. at 366. As set out in Petitioner's Brief, it is entirely possible and probable that Mr. Green's cumulative sentence should have been shorter had it not been for the violations of the Double Jeopardy Clauses.

C. Conclusion.

Because it is clear that Missouri's legislature did not intend that the armed criminal action statute be applied to an underlying felony of unlawful use of a weapon, and because it is just as clear that the armed criminal action conviction in this case is

ultimately based upon the underlying felony of unlawful use of a weapon (even if such application of the statute is slightly circuitous), petitioner Corey Green's sentence for armed criminal action based on an underlying felony of second degree felony murder, which in turn has an underlying felony of unlawful use of a weapon, is invalid and violates the Double Jeopardy Clauses. Because these issues were jurisdictional for the trial court in entering these sentences (and in fact the trial court imposing sentences not authorized by – and actually prohibited by – the Missouri legislature), this Court should reverse the trial court's judgment and remand this case for entry of a new sentence(s).

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Petitioner's Reply Brief complies with the limitations set forth in Rule 84.06(b), contains 3,553 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.

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CERTIFICATE OF SERVICE

I hereby certify that one copy of Petitioner's Reply Brief and one copy of the disk required by Rule 84.06(g) were served by sending the same by United States mail, postage prepaid, this 7th day of November, 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, attorney for respondent.

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