

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

DONNIE D. PHILLIPS,

Appellant,

v.

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

CASE NO. 1D11-6419

STATE OF FLORIDA,

Appellee.

_____ /

Opinion filed October 24, 2012.

An appeal from the Circuit Court for Walton County.
Kelvin C. Wells, Judge.

Donnie D. Phillips, pro se, Appellant.

Pamela Jo Bondi, Attorney General, and Jay Kubica, Assistant Attorney General,
Tallahassee, for Appellee.

PER CURIAM.

The appellant appeals the denial of the motion to correct illegal sentence pursuant to Florida Rule of Criminal Procedure 3.800(a). For the reasons discussed below, we reverse and remand for the trial court to grant relief.

The appellant was convicted of first-degree felony murder (count one), kidnapping (count two), robbery with a firearm (count three), and possession of a firearm during the commission of a felony (count four). The appellant was

sentenced to life imprisonment with a twenty-five year minimum mandatory sentence for the murder conviction, seventeen years' imprisonment for the kidnapping, fifteen years' imprisonment for the robbery with a three-year minimum mandatory, and fifteen years' imprisonment for the possession charge. Counts two through four were imposed concurrently with each other, but consecutively to the life sentence imposed for count one. Thus, the twenty-five year minimum mandatory sentence for murder and the three-year minimum mandatory sentence for the robbery were imposed consecutively to each other.

The appellant asserts that the consecutive minimum sentences imposed in counts one and three (25 for murder, 3 for possession of a firearm during robbery) are illegal because the robbery was the underlying felony supporting his felony murder conviction. When a defendant is convicted of felony murder and the underlying felony involving the same victim, the crimes necessarily occur during the same criminal episode. See § 784.04(1)(a)2., (stating that in order to be convicted of felony murder, the murder must be committed by a person “engaged in the perpetration of, or in the attempt to perpetrate, any [enumerated crime]”). Thus, a trial court cannot impose the minimum mandatory portions of those sentences consecutively to each other. See Boler v. State, [678 So. 2d 319](#) (Fla. 1996); Hall v. State, [14 So. 3d 1081](#) (Fla. 1st DCA 2009).

The State asserts that the felony murder and the robbery were in fact two separate criminal episodes. Specifically, the record indicated that the appellant and his co-defendant robbed a convenience store and kidnapped the clerk. After kidnapping the clerk the defendants drove to an isolated area where the clerk was shot and killed. Thus, the trial court held that the murder was a separate criminal episode from the earlier armed robbery. If the robbery conviction was not the underlying felony to support the felony murder conviction, we might agree that the robbery and murder occurred during separate criminal episodes. See Parker v. State, [633 So. 2d 72](#), 75-76 (Fla. 1st DCA 1994); Murray v. State, [491 So. 2d 1120](#) (Fla. 1986); Etienne v. State, [15 So. 3d 890](#) (Fla. 4th DCA 2009). However, in this case the appellant was charged with felony murder during the perpetration of the “kidnapping and/or robbery.” The record in this case does not conclusively demonstrate what crime the jury found to be the underlying felony supporting the felony murder conviction. In such instances, this Court cannot assume that the jury found the appellant guilty of felony murder during the perpetration of the kidnapping, rather than during the perpetration of the robbery. Cf. Traylor v. State, [785 So.2d 1179](#) (Fla.2000) (holding that a trial court could not reclassify attempted first-degree murder conviction to a life felony based on use of a deadly weapon where verdict did not establish whether conviction was based on premeditation or felony murder theory, and where use of a weapon was an essential element of the

underlying charge of armed robbery); Webb v. State, [997 So. 2d 469](#) (Fla. 2d DCA 2008) (where verdict did not establish whether jury found defendant guilty of aggravated battery based on causing great bodily harm or based on use of deadly weapon, trial court could not assume jury found defendant guilty of aggravated battery causing great bodily harm, and thus, trial court could not reclassify offense based on use of weapon); Cabral v. State, [944 So. 2d 1026](#) (Fla. 1st DCA 2006) (same). Because the appellant was convicted of felony murder and the robbery conviction was potentially the underlying felony, we reverse and remand for the trial court to impose the appellant's minimum mandatory sentences for felony murder and robbery concurrently with each other. See See Boler v. State, [678 So. 2d 319](#) (Fla. 1996); Hall v. State, [14 So. 3d 1081](#) (Fla. 1st DCA 2009).

REVERSED and REMANDED with directions.

PADOVANO and CLARK, JJ., CONCUR; THOMAS, J., DISSENTS WITH OPINION.

THOMAS, J. DISSENTING.

I respectfully dissent.

The consecutive sentences imposed on Appellant are not illegal as defined under Florida Rule of Criminal Procedure 3.800(a). See generally Wright v. State, 911 So. 2d 81 (Fla. 2005) (holding that a sentence is only illegal if it imposes a punishment that, under the entire body of sentencing statutes, no judge could possibly inflict under any set of factual circumstances). The trial court could properly impose a 25-year minimum mandatory prison term based on Appellant's felony murder of the victim during the course of the kidnapping, and the trial court could also lawfully impose a consecutive three-year minimum mandatory term for the armed robbery that preceded the kidnapping and murder. Thus, Appellant's consecutive sentences for felony murder and armed robbery are not illegal, based on the undisputed facts of this case.

Those undisputed facts are: In 1989, Appellant and his co-defendant walked into a liquor store and robbed the cashier at gunpoint. Appellant and his co-defendant then forced the victim into their car. As she was "screaming and crying," they forcibly drove her away from the scene of the robbery and out of town. After a near head-on collision, Appellant and his co-defendant eventually left the highway, and drove down a dirt road into the woods. Appellant and his co-defendant then forced the victim out of the car, forced her to disrobe and then walk

into a wooded area. The victim was then fatally shot four times.

As stated in the majority opinion, Appellant was convicted of and sentenced to the following: count one, first-degree felony murder (life imprisonment with a 25-year minimum mandatory); count two, kidnapping (17 years' imprisonment, consecutive to the life sentence); count three, robbery with a firearm (15 years' imprisonment with a 3-year minimum mandatory); and count four, possession of a firearm during the commission of a felony (15 years' imprisonment). Count four was later vacated.

For count three, robbery with a firearm, the trial court imposed a term of seven years, with a three-year minimum-mandatory term, consecutive to the 25-year minimum-mandatory term for felony murder. The trial court rejected defense counsel's arguments that Appellant's crime spree constituted a "single criminal episode."

This court affirmed Appellant's convictions and sentences on direct appeal. Phillips v. State, 650 So. 2d 995 (Fla. 1st DCA 1995).

Appellant engaged in separate criminal episodes when he and his co-defendant robbed the victim, then kidnapped her by forcing her to leave the robbery site, took her to a remote location, forced her to disrobe, and then murdered her. The kidnapping and murder occurred in a separate location from the robbery, and there was a temporal break between the robbery and the kidnapping

and felony murder. Woods v. State, 615 So. 2d 197 (Fla. 1st DCA 1993) (holding that defendant could be sentenced to consecutive terms for offenses involving separate location and separate victim, but not for two victims shot in same location); Vasquez v. State, 778 So. 2d 1068, 1070 (Fla. 5th DCA 2001) (“The proper analysis to determine whether offenses arise from the same criminal episode requires consideration of the following factors: 1) whether separate victims are involved; 2) whether the crimes occurred in separate locations; and 3) whether there has been a temporal break between the incidents.”). Thus, the trial court here could impose consecutive minimum mandatory sentences for felony murder and use of a firearm during the robbery, because the felony murder occurred in a separate location, after a temporal break. See also Etienne v. State, 15 So. 3d 890 (Fla. 4th DCA 2009) (holding that trial court could impose consecutive sentences where facts demonstrated defendant attempted to murder first victim, left scene, and then returned and committed another offense).

Minimum mandatory sentences can be imposed consecutively, if such sentences are imposed for separate criminal episodes. In Parker v. State, 633 So. 2d 72, 75-76 (Fla. 1st DCA 1994), we recognized that the proper evaluation of whether separate crimes occurred requires a close examination of the entire nature of the offenses. In Parker, the offender tied the victim, an elderly woman, to her bed, sexually battered her, and then robbed her. As he left her home, he set her

back porch on fire in an attempt to murder her. This court properly held that the defendant could be subject to consecutive sentences for attempted murder and arson, which followed his offense of sexual battery.

Here, Appellant took the victim away from the robbery scene, and then murdered her during the kidnapping. These crimes were sufficiently separated in time and location from the robbery to justify the imposition of consecutive minimum mandatory sentences.

The decision of the Florida Supreme Court in Downs v. State, 616 So. 2d 444 (Fla. 1993), is controlling. In Downs, the supreme court held that a 25-year minimum mandatory term as part of a life sentence could be imposed consecutively to a three-year minimum mandatory term for aggravated assault, because the defendant committed a murder and then an aggravated assault on a witness to the murder. Id. at 446. The court stated, “The applicable minimum mandatory sentences . . . address two separate and distinct evils -- killing someone and using a firearm. We see no reason why a trial court cannot, in its discretion, stack those minimum mandatory sentences.” Id. Here, the trial court did just that--stacked minimum mandatory prison terms for Appellant’s separate evils of killing the victim during a kidnapping after previously robbing her with a firearm.

Conversely, this case is not controlled by Boler v. State, 678 So. 2d 319 (Fla. 1996), cited in the majority opinion, as Boler involved a felony murder

conviction where the perpetrator killed the store clerk “during an armed robbery.” Id. at 320.

Similarly, this court’s decision in Hall v. State, 14 So. 3d 1081 (Fla. 1st DCA 2009), is not controlling for two reasons. First, Hall does not cite to an underlying factual basis, but refers only to the defendant’s assertions and allegations that the convictions of first-degree felony murder and robbery involved the same victim. Even assuming Hall cites to a factual basis, this court stated that its decision was controlled by Boler, which involved a similar factual scenario. Here, however, there were separate criminal episodes in which Appellant first committed the robbery, then kidnapped the victim, and finally participated in the victim’s murder. Thus, Appellant’s felony murder conviction based on kidnapping can support a separate minimum mandatory term.

The Florida Supreme Court’s opinion in Traylor v. State, 785 So. 2d 1179 (Fla. 2000), does not mandate reversal here. In Traylor, the only possible underlying felony conviction which formed the predicate for the attempted felony murder conviction was attempted sexual battery with a deadly weapon. There, the supreme court held that because the defendant was charged with both attempted premeditated murder and attempted felony murder, it would be error to assume the jury convicted the defendant of attempted premeditated murder, rather than the attempted felony murder. Id. at 1182. Because the underlying felony could not be

enhanced for the use of a weapon, which was an element of the crime, the court reasoned that the attempted felony murder conviction could not be enhanced. Id. Of course, it is logical that the court there held it could not assume the jury found premeditation, as that requires proof of an element of a crime, to wit: premeditation.

Here, however, Appellant was charged and convicted of felony murder based on the underlying felony of either robbery or kidnapping. There is no dispute that Appellant committed both crimes. The only reasonable interpretation of the facts and the charging document, however, is to assume that the jury found the murder occurred during the course of the kidnapping, not the robbery. See generally, Burnette v. State, 157 So. 2d 65, 70 (Fla. 1963) (noting that courts must assume that a juror, properly instructed, will render a true verdict ““according to the law and the evidence.””) (citation omitted). Here, based on the evidence, it is clear beyond a reasonable doubt that the victim was murdered during the kidnapping, not the robbery. See generally, Crain v. State, 894 So. 2d 59, 67-71 (Fla. 2004) (discussing elements of kidnapping statute in context of claim of fundamental error in felony murder instruction, where jury found child victim murdered during course of kidnapping).

This is not a case of an armed robbery and a kidnapping occurring at the robbery scene. See, e.g., Rimmer v. State, 825 So. 2d 304 (Fla. 2002) (robbery

and kidnapping victims murdered at robbery scene lying on ground with hands tied with duct tape). Nor is this a case where a kidnapping victim is robbed *during* the kidnapping. See, e.g., Caraballo v. State, 39 So. 3d 1234 (Fla. 2010) (victim robbed during kidnapping, sexually battered and murdered); but cf. Baker v. State, 71 So. 3d 802, 822 n.6 (Fla. 2011) (trial court need not have merged aggravating factors in case where home invasion robbery victim was kidnapped and murdered away from home, because aggravating factors of “murder in the course of a felony” and “pecuniary gain” referred to different aspects of the crime, because kidnapping was the means to facilitate the robbery (citing Francis v. State, 808 So. 2d 110, 136-37 (Fla. 2001))). Therefore, Appellant’s consecutive minimum mandatory terms under these factual circumstances are not “illegal,” as defined under Florida Rule of Criminal Procedure 3.800(a), meaning that no court could impose such sentence under any factual circumstances.

The issue is not whether a rational jury could find Appellant guilty of felony murder based on either robbery or kidnapping, because a rational jury could render such a verdict; the issue is whether a trial court could lawfully impose consecutive minimum mandatory terms where, based on the undisputed facts, it is most likely and logical to assume the jury found the murder occurred during the kidnapping, not during the robbery, which was separated in both time and location from the kidnapping and murder. Therefore, because the consecutive terms here could be

lawfully imposed for separate crimes, the sentences are not illegal. Downs, 616 So. 2d at 446. I would affirm the trial court's order denying relief and, therefore, I respectfully dissent.