STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v ELIJAH MONROE FORD, Defendant-Appellant.	FOR PUBLICATION June 15, 2004 9:20 a.m. No. 246136 Berrien Circuit Court LC No. 00-405750-FC Official Reported Version

Before: White, P.J., and Markey and Owens, JJ.

WHITE, P.J. (*concurring in part and dissenting in part.*)

I respectfully dissent from the majority's double jeopardy analysis. I concur in the remainder of the opinion.

Application of the *Blockburger*[1] test is not appropriate in a multiple punishment case. *People v Robideau*, 419 Mich 458, 485-486; 355 NW2d 592 (1984). As the majority states, *ante* at ___, defendant's only double jeopardy interest in a multiple punishment case is in not having more punishment imposed than intended by the Legislature. *Robideau, supra* at 485. The issue is solely one of legislative intent, and *Robideau* sets forth guidelines for determining whether multiple punishment was intended. *Ante* at ___.

The majority concludes, in accord with *People v Witt*, 140 Mich App 365; 364 NW2d 692 (1985), that the Legislature intended multiple punishment under the armed robbery and bank robbery statutes because the statutes are intended to protect different social norms—the protection of persons (armed robbery), and the protection of property in a bank, vault, safe, or other depository (bank robbery). I would hold, however, in accord with *People v Campbell*, 165 Mich App 1; 418 NW2d 404 (1987), that the Legislature did not intend multiple punishment. I read both statutes as expressing legislative intent to protect both persons from assault, and property from theft. I note that *Witt* appears to be the only case where dual convictions of armed robbery and bank robbery were sustained. And, although the *Witt* Court engaged in a *Robideau* analysis of the two statutes, *Witt* involved a fact situation where the armed robbery involved the

[1] *Blockburger v Untied States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932).

separate larcenous act of taking the guard's gun. *Witt*, *supra* at 373 (Shepherd, P.J., concurring in part).[2]

I do not regard *People v Shipe*, 190 Mich App 629; 476 NW2d 490 (1991), or *People v Davis*, 468 Mich 77; 658 NW2d 800 (2003), as controlling or instructive here. The question whether the Legislature intended multiple punishments under the bank robbery statute (*Shipe*), or the carjacking statute (*Davis*), where one bank or one car was involved, but two victims were present, is a separate question from the question whether the Legislature intended that a defendant would be convicted of both carjacking and armed robbery, or bank robbery and armed robbery for the same assault and theft.

An examination of the chapter of the penal code entitled "Robbery" supports the conclusion that the statutes in that chapter are directed towards protecting both persons from assaults and property from theft.[3] Such an examination also supports the conclusion that *Shipe* and *Davis* are consistent with *Campbell*'s conclusion that multiple punishment under the armed robbery and bank robbery statutes was not intended.

Armed robbery requires an assault, with a dangerous weapon, or article used or fashioned to lead the person to believe it to be a dangerous weapon, and a completed larceny. It is punishable by life imprisonment. Unarmed robbery requires assaultive conduct (force and violence, putting in fear) and a completed larceny, but without a dangerous weapon. It is punishable by imprisonment of not more than fifteen years. The carjacking statute was enacted in 1994, and was placed in the robbery chapter. Although like armed robbery, carjacking is a life offense, the Legislature relaxed the requirements for conviction from those found in the armed robbery statute. If the object of the larceny is a car that is taken from a person in lawful possession, only force or violence is required, not the use of a dangerous weapon.

The bank, safe, and vault robbery statute is also found in the robbery chapter, and it is also a life offense. One part of the statute requires that the accused engage in assaultive conduct (confine, maim, injure, wound, or attempt or threaten to confine, kill, maim, injure, wound, or put a person in fear) for the purpose of stealing from any building, bank, safe, or other depository of money, or compelling any person to disclose or surrender the means of opening any building, bank, safe, or vault. An accused is also guilty if he attempts to break, burn, blow up, or

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[2] This was also the case in *People v Parker*, 230 Mich App 337; 584 NW2d 336 (1998), where convictions of armed robbery and carjacking were sustained on the basis that the defendant took the victim's car and also stole the victim's money at gunpoint.

[3] The prosecution argues, erroneously, that the *Campbell* Court was mistaken in grouping the bank robbery statute with the armed and unarmed robbery statutes, arguing that while they are grouped together now, they were not originally enacted as a group or at the same time. I find the date of enactment to be irrelevant. The prosecution further asserts that in the Compiled Laws of 1897, the three statutes appeared as §§ 11484, 11486, and 506, respectively. However, the bank robbery statute appeared as § 11506, was included in the chapter entitled "Offenses against lives and persons," as were the armed and unarmed robbery statutes. In my view, this legislative history does not support, but rather undermines, the prosecutor's argument.

otherwise injure or destroy any safe, vault, or other depository. Guilt is established without regard to whether the larceny is successfully accomplished. Thus, to be guilty of this life offense, the accused must either assault or in some fashion put another in fear for the purpose of gaining entry into a bank or vault, or must attempt to break, burn, blowup, etc, the depository. The Legislature did not require the use of a dangerous weapon, or that the offense be complete.

In enacting the carjacking and bank robbery statutes, the Legislature recognized two distinct types of robberies that it perceived to constitute particular threats that were not adequately deterred or punished under the armed robbery statute, which requires use of a dangerous weapon and a completed larceny. In enacting these statutes, the Legislature tailored the statutory requirements to the specific harms perceived. More particularly, the Legislature determined that if a perpetrator takes a car from someone's lawful possession by force, the perpetrator should be subject to life imprisonment, whether or not a dangerous weapon was employed, and when a perpetrator uses force or threats to steal from, or gain access to, a depository, or tries to break or otherwise injure that depository, the perpetrator should also be subject to life imprisonment without regard to whether a dangerous weapon is employed and without regard to whether the efforts are successful. Because these two species of robbery are focused on the special circumstances presented, i.e., the theft of a car and the threat to the person in possession, or the threat to a depository and the persons present or with access, the statutes have been construed to contemplate only a single conviction for a single car (*Davis*), or a single depository (*Shipe*), regardless of the number of persons present.[4] It does not follow, however, that the Legislature intended that where the facts of the offense also constitute armed robbery, the person be convicted of both armed robbery and bank robbery or carjacking.[5]

I conclude that under *Robideau,* the Legislature did not intend multiple punishment under the armed robbery and bank robbery statutes. Both statutes are regarded by the Legislature as robbery statutes and express legislative intent to protect both persons from assault and property from theft. I would remand with instructions to vacate whichever conviction the prosecution chooses.

/s/ Helene N. White

[4] Presumably, the prosecutor could choose in such cases between multiple counts of armed robbery, if all the elements of that offense are present, or a single count of carjacking or bank robbery, if armed robbery cannot be established. The prosecutor could also charge under both statutes and seek a jury verdict on all counts, leaving it to the court to enter the appropriate convictions after taking into account double jeopardy concerns.

[5] I note that in *Davis*, the defendant took the car at gunpoint, yet he had not been convicted of both armed robbery and carjacking, and in *Shipe,* the defendant brandished a BB handgun, yet he had not been convicted of both armed robbery and bank robbery.