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# Criminal Law--First Degree Murder--Separate Offenses--Two Sentences Imposed

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reversal of the Supreme Court's decision in the *Civil Rights Cases*.<sup>17</sup> A lease from a state and a deed from a state which contains a reversionary clause have been held to constitute involvement sufficient to be state action. By extension, these holdings have justified finding proof of state action in mere control of land use. Since zoning ordinances universally contain similar controls, this trend may well lead to a later decision that *any* licensing or supervision by a state renders all businesses which serve the public subject to regulation under the fourteenth amendment.

Such decisions as rendered in the instant case indicate that the process of judicial decision may finally settle the rights of our Negro minority in the area of public accommodations — a task which the Congress so far has found impossible.

EUGENE S. BAYER

CRIMINAL LAW — FIRST DEGREE MURDER —  
SEPARATE OFFENSES — TWO SENTENCES IMPOSED

*State v. Ferguson*, 175 Ohio St. 390, 195 N.E.2d 794 (1964).

In *State v. Ferguson*,<sup>1</sup> defendant was charged with two counts of first-degree murder although only one person was killed. The first count encompassed the clause of Ohio Revised Code section 2901.01 dealing with murder while attempting to commit a felony. The second count was a charge of murder with premeditation and malice. Defendant changed his plea to guilty after the impaneling of the jury and testimony by one state's witness. The three-judge court trying him returned a verdict of guilty on both counts, recommending mercy on the second. His life sentence on the latter conviction was to run concurrently with the death sentence on the first count.

On appeal, the defendant argued that the court erred in returning "two verdicts of guilty of first-degree murder when only one general verdict could have been returned, and in imposing two sentences for the commission of but one crime."<sup>2</sup> In a five to two decision, the Ohio Su-

17. The dissent of the first Justice Harlan seems to provide more basis for recent decisions in this area than the majority decision from which he dissented. His prophetic words demanded that the fourteenth amendment be applied to public accommodations. "In every material sense applicable to the practical enforcement of the Fourteenth Amendment . . . keepers of inns and managers of places of public amusement are agents and instrumentalities of the State, because they are charged with duties to the public and are amenable . . . to governmental regulation." *Civil Rights Cases*, 109 U.S. 3, 58-59 (1883). Justice Harlan's present-day counterpart, Justice Douglas, concurs with current decisions containing extensions of the concept of state action, insisting at the same time that "there is no constitutional way . . . in which a State can license and supervise a business serving the public and endow it with the authority to manage that business on the basis of *apartheid* . . ." *Burton v. Wilmington Parking Authority*, 373 U.S. 267, 282-83 (1963) (concurring opinion). Cf. *Simpkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963).

preme Court affirmed the two convictions, holding that each count charged a separate and distinct offense of first-degree murder. The basis of the ruling was that separate facts existed which would support a conviction on each count. Concerning the penalties, the court said:

where two valid sentences have been imposed for a single murder, one of death and one of life imprisonment, that sentence which calls for the highest and most severe punishment — death — will be imposed, with the life sentence, in effect, being surplusage.<sup>3</sup>

Section 2941.04 of the Ohio Revised Code permits an indictment joining under separate counts "two or more different offenses connected together in their commission, or different statements of the same offense, or two or more different offenses of the same class of crimes." This joinder provision helps the prosecution meet problems of proof. Election between the different offenses or counts is not required.<sup>4</sup> It is error, however, to give two sentences for the same offense although it is stated in two different ways in a two-count indictment.<sup>5</sup> The problem for the courts is in determining what is meant by "same offense."

Identity of offenses is basically a double jeopardy problem. Assuming section 2901.01 contains one offense, then defendant was in jeopardy the moment the three-judge court began to consider the two counts as separate offenses. Not being able to foresee that the court would split the offense (a fatal error at common law), defendant had no opportunity to raise an objection of former jeopardy. Had each count been the basis of a separate indictment or trial, the error would become more apparent.

Ohio has developed a test for what constitutes the "same offense." In *State v. Rose*,<sup>6</sup> it was said that "if the defendant upon the first charge could have been convicted of the offense in the second, then he has been in jeopardy."<sup>7</sup> This is the traditional statement of the "same evidence" test. In the same opinion, however, the Ohio court gave the following definition: The words "same offense" mean same offense, not the same transaction, not the same acts, not the same circumstances or same situation.<sup>8</sup> With this statement the court may have restricted the interpretation of the "same evidence" test in Ohio.

1. 175 Ohio St. 390, 195 N.E.2d 794 (1964).

2. *Id.* at 391, 195 N.E.2d at 795.

3. *Id.* at 396, 195 N.E.2d at 798. Semantic difficulties hint at the legal problems. Are there now two "murders" when one man is killed or just a "single murder" with two offenses of murder?

4. *Lesslie v. State*, 18 Ohio St. 390, 394 (1868). "[V]arious counts have been introduced . . . for the purpose of meeting any difficulty which might arise on the trial from the misdirection of the offence in a single count. . . ."

5. *State v. Weed*, 110 Ohio App. 186, 169 N.E.2d 39 (1954). See *State v. Greeno*, 89 Ohio App. 241, 101 N.E.2d 259 (1950), *appeal dismissed*, 155 Ohio St. 589, 99 N.E.2d 613 (1951).

6. 89 Ohio St. 383, 106 N.E. 50 (1914).

7. *Id.* at 387, 106 N.E. at 51.

8. *Id.* at 386, 106 N.E. at 51.

Certainly, a strict adherence to the "same evidence" test<sup>9</sup> would result in a finding that section 2901.01 contains at least three offenses: (1) murder with premeditation and malice, (2) murder while in the act of committing rape, arson, robbery, or burglary, and (3) murder by means of poison. An equally valid argument is that 2901.01 was designed to protect against one harm — the taking of a human life. Other statutes found to contain several offenses are designed to protect against several harms.<sup>10</sup>

Restating the problem, whether section 2901.01 calls for one or more offenses is directly related to the question of whether the legislature provided for a substitution or an addition of elements to the offense of first-degree murder. That is, if malice is implied from the fact that defendant was in the act of committing a felony, then that act is being substituted for the element of malice which is required for this offense.

Of course, the legislature may label the various parts of a single transaction as separate offenses.<sup>11</sup> A single act may be an offense under two statutes,<sup>12</sup> a single statute and the common law,<sup>13</sup> or several parts of the same statute.<sup>14</sup>

In *State v. Weed*<sup>15</sup> the Ohio Supreme Court said:

A statute often makes punishable the doing of one thing or another, sometimes thus specifying a considerable number of things. Then, by proper and ordinary construction, a person who in one transaction does all, violates the statute but once, and incurs only one penalty. Yet he violates it equally by doing one of the things.<sup>16</sup>

In the case of *State v. Fillpot*,<sup>17</sup> involving a similar statute in the State of Washington, the court held that killing is one offense whether done while committing robbery or with malice.<sup>18</sup> An Ohio court, however, recently held that habeas corpus was improper to test a conviction for

9. See *Duvall v. State*, 111 Ohio St. 657, 146 N.E. 90 (1924), *State v. Corwin*, 106 Ohio St. 638, 140 N.E. 369 (1922), *Bainbridge v. State*, 30 Ohio St. 264 (1876). See generally 22 C.J.S. *Criminal Law* § 285 (1961).

10. On statutory construction see generally *Ladner v. United States*, 358 U.S. 169 (1958); *Bell v. United States*, 349 U.S. 81 (1955). Concerning the problem of "one transaction," see generally *O'Neill v. United States*, 236 F.2d 636 (6th Cir. 1956) (embezzlement); *People v. Stephens*, 79 Cal. 428, 21 Pac. 856 (1889) (libel); *Griffith v. State*, 93 Ohio St. 294, 112 N.E. 1017 (1915).

11. *State v. Benjamin*, 102 Ohio App. 14, 132 N.E.2d 761, *appeal dismissed*, 165 Ohio St. 455, 135 N.E.2d 765, *cert. denied*, 352 U.S. 933 (1956).

12. *City of Akron v. Kline*, 165 Ohio St. 322, 135 N.E.2d 265 (1956).

13. See generally 22 C.J.S. *Criminal Law* § 285 (1961).

14. *State v. Meadows*, 105 Ohio App. 86, 148 N.E.2d 345 (1957) (cutting with intent to wound and intent to kill). See *State v. Benjamin*, 165 Ohio St. 455, 132 N.E.2d 761 (1956), *appeal dismissed*, 165 Ohio St. 455, 135 N.E.2d 765, *cert. denied*, 352 U.S. 933 (1956).

15. 110 Ohio App. 186, 169 N.E.2d 39 (1954). See Herman, *Criminal Law and Procedure, 1960 Survey of Ohio Law*, 12 WES. RES. L. REV. 502-04 (1961).

16. *State v. Weed*, 110 Ohio App. 186, 191, 169 N.E.2d 39, 42 (1954).

17. 51 Wash. 223, 98 Pac. 659 (1908).

18. *State v. Hall*, 185 Wash. 685, 56 P.2d 715 (1936).

first-degree murder where the defendant was given two life sentences.<sup>19</sup> A two-count indictment, one charging murder while in perpetration of a felony and the other charging murder with premeditation and malice, resulted in a verdict of guilty on first-degree murder on one count and second-degree murder on the other. The court said: "Even conceding that the sentence on one count would be void on the grounds alleged [double jeopardy] . . . he is still properly incarcerated on . . . the other . . ." <sup>20</sup> When the same problem was properly brought before the same court in the present case, it was no longer willing to concede the error and recognize jeopardy.

This case presents a somewhat different problem in that the court did not recommend mercy on one count. If the perpetration of or attempt to perpetrate a felony is a substitution for premeditation and malice,<sup>21</sup> it is logical that a recommendation of mercy on one count should apply to the other. This argument is advanced by Judge Gibson in the dissent:

The only conceivable area of difference in the circumstances encompassed by the two counts for the single homicide is that of the defendant's intention.

It seems to me that under Section 2901.01, Revised Code, as at common law, the enormity of the specific intent to kill evidenced by premeditation and deliberation is far greater than the intent derived from the fact that the actor was engaged in a specified felony at the time of the killing. To recommend mercy where there must have been a finding of deliberate and premeditated intention to kill and yet no mercy where the guilty intent derived from the attempt to perpetrate robbery is substituted for deliberate and premeditated malice, in my opinion, is possible solely because of a failure to recognize that only one felonious homicide was committed.<sup>22</sup>

There is authority for the court to impose the highest sentence,<sup>23</sup> but it is unjust to do so here. "To assume that the life sentence is 'mere surplusage' may appear to ease the resolution of a difficult problem but it places a low value on human life as well as logic."<sup>24</sup> Any dealing in assumptions should be in defendant's favor. Although the prosecution need not elect between various counts of an indictment, this freedom ought not operate to deprive defendant of his Constitutional rights.<sup>25</sup>

#### NORMAN J. RUBINOFF

19. *Lowther v. Maxwell*, 175 Ohio St. 39, 191 N.E.2d 172 (1963).

20. *Id.* at 40, 191 N.E.2d at 173.

21. CLARK & MARSHALL, CRIMES 248 (6th ed. 1952).

22. *State v. Ferguson*, 175 Ohio St. 390, 399, 195 N.E.2d 794, 800 (1964) (dissenting opinion).

23. See *Green v. United States*, 365 U.S. 301 (1960); *State v. Weed*, 110 Ohio App. 186, 169 N.E.2d 39 (1954).

24. *State v. Ferguson*, 175 Ohio St. 390, 399, 195 N.E.2d 794, 800 (1964) (dissenting opinion).

25. OHIO CONST. art. 1, § 10. "No person shall be twice put in jeopardy for the same offense."