IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,	)	NOT FOR PUBLICATION
	)	
Appellant,	)	
	)	
v.	)	Case No. S-2004-1009
	)	
DONALD ISAIAH PHARES,	)	
	)	
Appellee.	)	

SUMMARY OPINION

C. JOHNSON, JUDGE:

Appellant, the State of Oklahoma, appeals an order of the District Court of Pottawatomie County, Case No. CM-2004-23, dismissing prosecution for Negligent Homicide (47 0.S.2001, § 11-903) on grounds that it violates the Appellee's statutory protection from being punished twice for the same offense The district court made its ruling September 17, 2004, and the State gave oral notice of its intention to appeal. Written notice of intent to appeal was timely filed in the district court, and the appeal was timely perfected in this Court.

The record shows that on September 15, 2003, Appellee was involved in a two-vehicle collision. The other driver died at-the scene. Appellee was cited for Failing to Stop at a Stop Sign (47 0.S.2001, § 11-403). The ticket was filed with the Pottawatomie County Court Clerk on October 7, 2003 (Case No. TR-2003-4453). On October 21, 2003, Appellee waived his right to a hearing, entered a *nolo contendere* plea to the charge, and paid a fine and court costs totaling $132.00. On January 13, 2004, the State filed the instant charge for Negligent Homicide, alleging that Appellee's failure to stop at a stop sign preceding the September 15, 2003 accident amounted to "reckless disregard of others." Appellee filed a motion to dismiss this prosecution, contending it violated both his constitutional protection from double jeopardy, as well as his

statutory protection from double punishment. On September 17, 2004, the Honorable J. David Cawthon, Special Judge, agreed, ordered the case dismissed, and exonerated Appellee's bond.

In its sole proposition of error, the State claims that the district court erred in concluding that the instant prosecution amounted to double punishment under 21 O.S.2001, § 11, and in dismissing the prosecution for that reason. The State contends that the district court's interpretation of § 11 is inconsistent with this Court's own interpretation in Davis v. State, 1999 OK CR 48, ¶¶ 9-11, 993 P.2d 124, 126.

After thorough consideration of the entire record, and the briefs of the parties, we affirm. The district court's interpretation of 21 O.S.2001, § 11 is consistent not only with Davis, but with the plain language of the statute itself.' Both of the prosecutions at issue here were based on a single "act or omission" allegedly committed by Appellee. Without the traffic offense, the State's allegation of homicide caused by criminally negligent operation of a motor vehicle could not have been proven. The traffic offense was "necessarily included" within the charge of negligent homicide. The instant prosecution clearly amounted to a successive prosecution based on the same culpable act or omission, and a conviction therefor would have resulted in double punishment. 21 O.S.2001, § 11(A); Davis, 1999 OK CR 48 at ¶ 13, 993 P.2d at 126; Peacock v. State, 2002 OK CR 21, ¶¶ 4-5, 46 P.3d 713, 714. We find no reason to disturb the district court's conclusions. State v. Love, 1998 OK CR 32, ¶ 2, 960 P.2d 368, 369.

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1 Section 11 provides, in pertinent part:: "[A]n act or omission which is made punishable in different ways by different provisions of this title may be punished under any of such provisions, . . . but in no case can a criminal act or omission be punished under more than one section of law; and an acquittal or conviction and sentence under one section of law, bars the prosecution for the same act or omission under any other section of law."

DECISION

The Order of the district court is **AFFIRMED.** Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2005), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF POTTAWATOMIE COUNTY
THE HONORABLE J. DAVID CAWTHON, SPECIAL JUDGE

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OPINION BY C. JOHNSON, J.

CHAPEL, P.J.:	CONCURS
LUMPKIN, V.P.J.:	DISSENTS
A. JOHNSON, J.:	CONCURS

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LUMPKIN, VICE-PRESIDING JUDGE: DISSENT

Interestingly, the Court relies on Davis v. State, 1999 OK CR 48, 993 P.2d 124, yet seems to disregard controlling language from that case, together with the import of its holding.

As I review the discussion of the application of the language of 21 O.S., § 11, as interpreted in Hale v. State, 1995 OK CR 7, 888 P.2d 1027 and Davis v. State, 1999 OK CR 48, 993 P.2d 124, I find an interesting parallel to the metamorphosis experienced by the United States Supreme Court in their interpretation of the federal double jeopardy clause as expressed in Grady v. Corbin, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990) and U.S. v. Dixon, 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993). This is especially enlightening since the fact situation in Grady almost parallels the fact situation presented to us in this particular case, i.e. initial arrest with a traffic citation issued, defendant speedily heads to the courthouse to enter a *nolo* contendere plea and pay a small fine, and subsequently the more serious charge is filed arising from that traffic stop to which the defendant claims jeopardy precludes prosecution. In Grady, the Supreme Court made the mistake of attempting to create precedent rather than following precedent, and three years later had to admit the error of their ways and revert to the tried and true established application of the Blockburger [1] test for determination of whether a subsequent prosecution would be barred.

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[1] *Blockburger* v. *United States*, 284 *U.S.* 299, 304, 52 S.Ct. 180, 182, 76 L.Ed.306, 309 (1932).

This Court experienced much the same type of metamorphosis as it realized the error of its ways arising from language used in the Hale decision, which expanded the application of the plain language of Section 11 to encompass unintended circumstances analogous to what the U.S. Supreme Court did in Grady. In Davis, we stated, "Hale wrongly expands the Section 11 prohibition to crimes which are mere means to some other ultimate objective, or part of some primary offense." 993 P.2d at 126. As a result of that acknowledgment, the Court then stated; "we specifically reject our prior cases which rely on an 'ultimate objective' or 'primary offense' test." Id. Davis appears to have left for interpretation at a later time the language from Hale that "Section 11 is violated when a defendant is convicted of two offenses, one of 'which is a lesser offense included in some other offense.''

The appellee seeks to draw support for his argument from *Illinois v.* Vitale, 447 U.S. 410, 65 L.Ed 2d 228, 100 S.Ct. 2260 (1980). In that case, as appellee acknowledges, the U. S. Supreme Court did not rule on the merits, but remanded the matter to the Supreme Court of Illinois for determination of issues. Appellee argues that even though the double jeopardy claim was not resolved, the Supreme Court gave an indication of how it would rule once the remanded matters were determined. The alluded to interpretation was subsequently enacted in Grady v. Corbin. However, that interpretation was rejected three years later in Dixon. Therefore, I find appellee's reliance on Vitale not persuasive.

That leaves us with the issue of whether or not Section 11 applies in the present case. In Davis, this Court stated:

> The proper analysis of a claim raised under Section 11 is then to focus on the relationship between the crimes. If the crimes truly arise out of one act as they did in Hale, then Section 11 prohibits prosecution for more than one crime. One act that violates two criminal provisions cannot be punished twice, absent specific legislative intent. This analysis does not bar the charging and conviction of separate crimes which may only tangentially relate to one or more crimes committed during a continuing course of conduct.

993 P.2d at 126-127.

To understand the import and the proper interpretation of that language from Davis, it is imperative that we reflect upon the fact situation in Hale. The issue in Hale was whether the defendant in that case, who had committed one act of forceful sexual intercourse with his sister, could have been charged both with the crime of Incest and the crime of Rape. The determination was that it was one act which could be charged in one of two ways, but not both, because Section 11 prohibits the dual charging of that one act. The facts of the present case do not present such a situation.

While admittedly occurring during a continuing course of conduct, the facts of the present case involve two separate and distinct crimes, running a stop sign and negligent homicide. Section 11 does not apply where there is a series of separate and distinct crimes. Davis, 993 P.2d at 126.

When Section 11 is not applicable, as in this case, we conduct a traditional double jeopardy analysis pursuant to Blockburger. See Mooney v.

State, 1999 OK CR 34, ¶ 17, 990 P.2d 875, 883. Under Blockburger, the following test to be used to determine if the Double Jeopardy provision applies:

> "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." *Blockburger*, 284 U.S. at 304, 52 S.Ct. at 180.

Davis, 993 P.2d at 125.

The Blockburger test is a pure test of the elements of the crimes involved and whether or not all of the elements of the one offense are included within the elements of the other offense. No one, in viewing the elements of running a stop sign and the elements of negligent homicide can legitimately say that the elements are the same. The offense of running a stop sign and negligent homicide each require proof of an additional fact which the other crime does not.

Those who are familiar with the procedures employed by law enforcement on a day in and day out basis will recognize the fact that traffic tickets are often issued at the scene by law enforcement officers as a part of their standing operating procedure. Investigations of accidents, which relate to the death of human beings involved in those accidents, are not subject to finalization in minutes or hours. Just as the United States Supreme Court talked about the evaluation of effective assistance of counsel and admonished courts not to review such actions based upon the benefit of 20/20 hindsight, this Court should adhere to the same admonition as it reviews the chronology of events and the procedures utilized for the investigation of cases of this type on our

streets and highways in the state of Oklahoma. Justice is not served by allowing an individual who receives a ticket for a minor traffic offense to speed to the courthouse, enter a *nolo* contendere plea, pay a small fine and bar accountability for the taking of a human life by their actions on the highway. That was the fallacy recognized in the application of Grady v. Corbin. The U. S. Supreme Court, realizing that fallacy, sought to correct the error of their ways in United States *v. Dixon*. This Court has already recognized the legal error of its ways and clarified the language and application of 21 0.S.2001, § 11, through our decision in Davis. We should now apply that language in a logical and pragmatic way and determine that pursuant to Davis, the crime of running a stop sign was separate and distinct from the negligent homicide.

I also believe this case is distinguished from *Harris* v. Oklahoma, 433 U.S. 682 (1977), due to the fact merger has not taken place by the prosecution of the negligent homicide first in time. This is not an application of the felony murder doctrine nor is it barred by collateral estoppel. See Ash *v.* Swenson, 397 U. S. 436 (1970). For these reasons, I find this case should be reversed and remanded to allow the State to proceed with its prosecution.