IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-4454
Summary Calendar

HOWARD SYLVESTER IVERY,

Petitioner-Appellant,

VERSUS

JAMES A. COLLINS, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
3:91 CV 26

August 24, 1993

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

Howard Ivery appeals the denial of his state prisoner's petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Finding no error, we affirm.

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[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Ivery was charged with, and found guilty of, under three cause numbers, burglary of a habitation with intent to commit theft, burglary of a habitation with intent to commit sexual assault, and aggravated sexual assault. These offenses were committed in the same criminal episode and were consolidated in one trial. Ivery waived any right to be tried separately.

After exhausting his state-court remedies, Ivery filed a federal petition for writ of habeas corpus, asserting double jeopardy. The magistrate judge recommended denying the petition with prejudice. The district court agreed and dismissed Ivery's petition.

II.

Although Ivery illegally entered the victim's house one time, he was convicted of two separate burglary offenses involving TEX. PENAL CODE ANN. § 30.02, which provides that

> (a) A person commits an offense if, without the effective consent of the owner, he:
>
> (1) enters a habitation . . . with intent to commit a felony or theft; or
>
> (2) remains concealed, with intent to commit a felony or theft; in a . . . habitation; or
>
> (3) enters a . . . habitation and commits or attempts to commit a felony or theft.

TEX. PENAL CODE ANN. § 30.02 (West 1989). Id. Ivery argues that his two convictions for burglary violate the Double Jeopardy Clause.

One of the interests served by the Double Jeopardy Clause is

to protect against "multiple punishments for the same offense." United States v. Berry, 977 F.2d 915, 918 (5th Cir. 1992) (citing Grady v. Corbin, 495 U.S. 508 (1990)). The general test is whether each of the two statutory provisions "requires proof of a fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304 (1932) (citation omitted).

In Blockburger, notably, the Court phrased the test as being applicable "where the same act or transaction constitutes a violation of two distinct statutory provisions . . . ." Id. (emphasis added). Here, as we will explain, only one statutory provision is involved. See United States v. Evans, 854 F.2d 56, 57-58 (5th Cir. 1988) (single violation of statute). In such circumstances, one must determine whether the legislature intended the particular course of conduct to involve one or more distinct offenses under that statute. See Sanabria v. United States, 437 U.S. 54, 69-70 (1978) (single violation of 18 U.S.C. § 1955).

Ivery reasons that evidence showing entry of one habitation on one date at one time could not be used to prosecute both burglaries. He claims that once he was convicted for burglary of a habitation with intent to commit theft, he could not be convicted of burglary of a habitation with intent to commit a felony, sexual assault.

Originally, Ivery was charged with three offenses in three separate indictments alleging

> [that he] did then and there with intent to commit theft, enter a habitation without the effective consent of Jan Hall, the owner,

> And it is further presented . . . that the said Howard Sylvester Ivery . . . did then and there intentionally and knowingly, without the effective consent of Jan Hall, the owner thereof, enter a habitation and did attempt to commit and commit theft. [Cause No. 11,729.]
>
> [that he] did then and there with intent to commit sexual assault, enter a habitation without the effective consent of Jan Hall, the owner,
>
> And it is further presented . . . that the said Howard Sylvester Ivery . . . did then and there intentionally and knowingly, without the effective consent of Jan Hall, the owner thereof, enter a habitation and did attempt to commit and commit sexual assault. [Cause No. 11,730.]
>
> [that he] did then and there intentionally and knowingly, by threats, force, and violence, cause the penitration [sic] of the vagina of Jan Hall, a person not the Defendant's spouse, by the Defendant's penis, without the consent of Jan Hall and the Defendant did then and there by acts and words place Jan Hall in fear that serious bodily injury would be imminently inflicted on Jan Hall. [Cause No. 11,731.]

At the conclusion of the evidence, the state elected to proceed to the jury on only the second paragraphs of the indictments in Cause Nos. 11,729 and 11,730, and on the sole paragraph of Cause No. 11,731, whereupon Ivery was found guilty on all three counts. In addition to the charges under section 30.02, described above, Ivery's charged offenses were defined at the time as follows:

> Aggravated Sexual Assault, TEX. PENAL CODE ANN. § 22.021 (Vernon 1983):
>
> (a) a person commits an offense if the person commits sexual assault as defined in Section 22.011 of this Code and:
>
> . . .
>
> (2) by acts or words places the victim in fear that death, serious bodily injury, or kidnapping will be

imminently inflicted on any person.

. . . .

Sexual Assault, TEX. PENAL CODE ANN. § 22.011 (Vernon 1983):

(a) a person commits an offense if the person:

(1) intentionally or knowingly:

(A) causes the penetration of the anus or vagina of another person who is not the spouse of the actor by any means, without that person's consent . . .

. . . .

Theft, TEX. PENAL CODE ANN. § 31.03 (Vernon Supp. 1989):

(a) A person commits an offense if he unlawfully appropriates property with intent to deprive the owner of property.

. . . .

"The Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." Corbin, 495 U.S. at 521. Corbin applies to successive prosecutions stemming from the same occurrence, see Ladner v. Smith, 941 F.2d 356, 359 (5th Cir. 1991), cert. denied, 112 S. Ct. 1665 (1992), and not "to multiple punishments imposed in a single prosecution," United States v. Parker, 960 F.2d 498, 501 (5th Cir. 1992).

As the Court stated in Corbin, Blockburger does apply "`in the context of multiple punishments imposed in a single prosecution.'"

495 U.S. at 516 (quoting Garrett v. United States, 471 U.S. 773, 778 (1985)). "With adequate preparation and foresight, the State could have prosecuted Corbin for the offenses charged in the traffic tickets and the subsequent indictment in a single proceeding, thereby avoiding this double jeopardy question." Id. at 524. Corbin "leaves undisturbed the prior law of double jeopardy as applied in the context of multiple punishments imposed in a single prosecution." Parker, 960 F.2d at 502 (finding Corbin inapplicable in a single prosecution and conducting a Blockburger analysis instead).

In Blockburger, the court held that

> where 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 a fact which the other does not.

284 U.S. at 304 (citing Gavieres v. United States, 220 U.S. 338, 342 (1911)). "In that context, the `Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended . . . .' The Blockburger test is simply a `rule of statutory construction,' a guide to determining whether the legislature intended multiple punishments." Corbin, 495 U.S. at 516-17 (quoting Missouri v. Hunter, 459 U.S. 359, 366 (1983) (footnote omitted)).

Ivery contends that the state's use of the act of entry of the habitation to prove intent in both burglaries is double jeopardy. The requirement to prove intent was removed, however, when the state elected to proceed to the jury on only the second paragraph

of Cause Nos. 11,729 and 11,730, describing offenses under section 30.02(a)(3).

> Section 30.02(a)(3) includes as burglary the conduct of one who enters without effective consent but, lacking intent to commit any crime upon his entry, subsequently forms that intent and commits or attempts a felony or theft. This provision dispenses with the need to prove intent at the time of entry when the actor is caught in the act.

TEX. PENAL CODE ANN. § 30.02 practice comment. (West 1989).

The emphasis thereby shifted to the separate acts, i.e., the felony and theft, which, rather than entry with intent to commit, became the crimes of conviction. We have referred to this as the "allowable unit of prosecution" that the legislature intended, and which we must identify, when a single statutory provision is violated. Evans, 854 F.2d at 59.

Accordingly, the entry of the habitation and subsequent commission of theft constitute a separate offense from the entry and the subsequent commission of sexual assault. Although one of the facts proved in both cases is the same, i.e., the entry of the house, the factual overlap does not constitute double jeopardy. See Ladner, 941 F.2d at 363 (citing Corbin, 495 U.S. at 522-23 & n.15).

The state habeas court concluded that "the burglaries of a habitation in Cause Nos. 11,729 and 11,730 each require proof of an additional fact that the other does not; Cause No. 11,729 requires proof of attempt to commit or commit theft and Cause No. 11,730 requires proof of attempt to commit or commit sexual assault, a felony." In habeas corpus matters, we defer to a state court's

interpretation of state law. Fierro v. Lynaugh, 879 F.2d 1276, 1278 (5th Cir. 1989) (citing Seaton v. Procunier, 750 F.2d 366, 368 (5th Cir. 1985)), cert. denied, 494 U.S. 1060 (1990); Moreno v. Estelle, 717 F.2d 171, 179 (5th Cir. 1983) (citing Skipper v. Wainwright, 598 F.2d 425, 427 (5th Cir.), cert. denied, 444 U.S. 974 (1979)), cert. denied, 466 U.S. 975 (1984).

The Texas Court of Criminal Appeals, however, did not adopt the findings of the trial court but, instead, dismissed the habeas application "without written order." In this circumstance, it is not evident what weight is to be applied to the trial court's findings. See Micheaux v. Collins, 944 F.2d 231, 232 (5th Cir. 1991) (per curiam) (en banc) (if Texas Court of Criminal Appeals denies habeas "without written order," no presumption of correctness to state trial court's findings applies under 28 U.S.C. § 2254(d)), cert. denied, 112 S. Ct. 1226 (1992).

We need not resolve this issue here, however, as we do not need the presumption of correctness to make our own determination that, as the state habeas trial court decided, each burglary required proof of an additional fact that the other did not. This is not, strictly speaking, a finding of fact but only application of the obvious: that intent to convict rape and intent to commit theft are different enough offenses that the same facts do not establish both of them.

Accordingly, we apply Blockburger and conclude that there is no double jeopardy. The judgment of the district court, denying the petition for writ of habeas corpus, is AFFIRMED.