

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-5060
Conference Calendar

FLORAIN GUIDEN, JR.,

Plaintiff-Appellant,

versus

JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary,

Respondent-Appellee.

- - - - -
Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 90-cv-513
- - - - -
(January 5, 1994)

Before GARWOOD, JOLLY, and BARKSDALE, Circuit Judges.

PER CURIAM:*

Florain Guiden, Jr. was convicted for the attempted armed robbery and attempted murder of a taxicab driver and is serving a 40-year term of imprisonment at the Louisiana State Penitentiary in Angola, Louisiana. Guiden appeals the dismissal of his petition for a writ of habeas corpus.

Guiden contends that, on December 3, 1979, he was subjected to an impermissibly suggestive pre-trial identification procedure without the presence of his attorney, in violation of his Sixth

*Local Rule 47.5 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Amendment right to counsel, and that the State should not have been permitted to elicit any identification testimony from the victim because the testimony was tainted by the unconstitutional identification procedure. Assuming without deciding that the victim's identification testimony was improperly admitted and that a constitutional violation occurred, the error did not have a "substantial and injurious effect or influence" on the jury's verdict. Brecht v. Abrahamson, ___ U.S. ___, 113 S. Ct. 1710, 1714, 123 L. Ed. 2d 353 (1993) (internal quotations omitted). Guiden gave a full confession and was positively identified by a third-party who had known him since high school and with whom he was related by marriage. Therefore, Guiden's identity as the person who shot the victim was established independently and the constitutional violation did not substantially or injuriously influence the jury's verdict.

Guiden contends that he was subjected to double jeopardy because his convictions for attempted armed robbery and attempted murder were based upon the same set of facts and circumstances.

[W]here the two offenses for which the defendant is punished or tried cannot survive the "same-elements" test, the double jeopardy bar applies. The same-elements test, sometimes referred to as the "Blockburger" test, inquires whether each offense contains an element not contained in the other; if not, they are the "same offence" and double jeopardy bars additional punishment and successive prosecution.

United States v. Dixon, ___ U.S. ___, 113 S. Ct. 2849, 2856, 125 L. Ed. 2d 556 (1993) (internal citations omitted); see Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306 (1932).

At the time of the offense, a "first degree murder" was defined as "the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm." La. Rev. Stat. Ann. § 14:30 (West 1986) (historical and statutory notes). The crime of "armed robbery" was "the theft of anything of value from the person of another or which is in the immediate control of another, by use of force or intimidation, while armed with a dangerous weapon." La. Rev. Stat. Ann. § 14:64 (West 1986) (historical and statutory notes). A defendant who, "having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object [was] guilty of an attempt to commit the offense intended." La. Rev. Stat. Ann. § 14:27(A) (West 1986) (historical and statutory notes).

Guiden relies on cases which hold that convictions for felony murder and the underlying felony violate double jeopardy. See generally Illinois v. Vitale, 447 U.S. 410, 420-21, 100 S. Ct. 2260, 65 L. Ed. 2d 228 (1980). In this case, the offense occurred before Louisiana adopted its felony murder statute. See 1979 La. Acts, No. 74, § 1 (effective June 29, 1979). Accordingly, Guiden was not convicted for felony murder. "While the Double Jeopardy Clause prohibits prosecution for both felony murder and an underlying felony, it does not prohibit prosecution for specific intent murder and armed robbery." Taylor v. Whitley, 933 F.2d 325, 328 (5th Cir. 1991), cert. denied, 112 S. Ct. 1678 (1992). The offenses of attempted first degree murder

and attempted armed robbery have distinct elements and are not the same offense under the Blockburger test.

AFFIRMED.