

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HOWARD HUGHES, III,

Defendant-Appellant.

UNPUBLISHED
December 1, 2000

No. 203069
Washtenaw Circuit Court
LC No. 75-009781-FY

Before: Saad, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant Howard Hughes, III, appeals by leave granted from the denial of his motion for relief from judgment. We vacate defendant's convictions and sentences for armed robbery and bank robbery. He remains convicted, however, of felony murder.

Defendant was charged in 1975 with felony murder, MCL 750.316; MSA 28.548, arising from a bank robbery in which an Ypsilanti police officer was killed. Defendant was tried three times. The first trial, in 1976, ended in a mistrial after the jury was unable to reach a verdict. The second trial, in 1977, resulted in a guilty verdict. However, defendant's conviction was reversed by our Supreme Court. See *People v Hughes*, 411 Mich 517; 309 NW2d 525 (1981). Shortly before the third trial in 1982, the prosecution moved to amend the information to include the charges of armed robbery, MCL 750.529; MSA 28.797, and bank robbery, MCL 750.531; MSA 28.799. The trial court granted the motion to amend. Defendant was convicted of all three offenses. He was sentenced to life without parole on the felony murder conviction and forty to sixty years' imprisonment on both the armed robbery and bank robbery convictions. This Court affirmed his convictions. *People v Hughes*, unpublished opinion per curiam of the Court of Appeals, issued October 6, 1988 (Docket No. 98379).

Defendant moved for relief from judgment under MCR 6.500 *et seq.*, raising eight claims. Included among his claims was an argument that his conviction and sentence for armed robbery and bank robbery, which were in addition to his conviction and sentence for felony murder, violated his right not to be twice placed in jeopardy because the armed robbery and bank robbery were the underlying offenses for the felony murder conviction. The court denied defendant's

motion for relief, holding that defendant had failed to show good cause for not raising any of the issues in his direct appeal.¹ MCR 6.508(D)(3). Defendant moved for leave to appeal from the trial court's denial of relief, raising several theories. This Court granted leave only on defendant's double jeopardy claim.

This Court has discussed the protections afforded by the Double Jeopardy Clause as follows:

[T]he Double Jeopardy Clause of the United States Constitution actually protects against two separate transgressions. *North Carolina v Pearce*, 395 US 711, 717; 89 S Ct 2072; 23 L Ed 2d 656 (1969). The first is a protection against "multiple punishment," i.e., being punished more than once for the same offense. See *Brown v Ohio*, 432 US 161, 165; 97 S Ct 2221; 53 L Ed 2d 187 (1977). The second is a protection against "successive prosecution," i.e., being prosecuted a second time for the same offense after acquittal. *Id.*, citing *United States v Jorn*, 400 US 470, 479; 91 S Ct 547; 27 L Ed 2d 543 (1971) (plurality opinion). The courts in Michigan have observed a similar categorization. See *People v Robideau*, 419 Mich 458, 484; 355 NW2d 592 (1984). [*People v Walker*, 234 Mich App 299, 305; 593 NW2d 673 (1999).]

In the present case, we are faced with the "multiple punishment" prong of the Double Jeopardy clause. The protection against multiple punishments for the same offense is to ensure that the defendant does not endure more punishment than was intended by the Legislature. *People v Whiteside*, 437 Mich 188, 200; 468 NW2d 504 (1991). Because of the purpose of the protection against multiple punishments, application of this aspect of the double jeopardy clause involves an examination of legislative intent. *People v Denio*, 454 Mich 691, 706; 564 NW2d 13 (1997). To determine whether the Legislature intended that a person be punished twice for a single act, this Court must consider whether each statute prohibits conduct violative of a social norm distinct from the norm protected by the other, the amount of punishment authorized by each statute, whether the statutes are hierarchical or cumulative, the elements of each offense, and any other factors indicative of legislative intent. *Id.* at 708, quoting *Robideau, supra* at 487-488. "If no conclusive evidence of legislative intent can be discerned, the rule of lenity requires the conclusion that separate punishments were not intended." *Robideau, supra* at 488.

¹ We note that the trial court improperly concluded that defendant's double jeopardy claim should not be reviewed because the "good cause" requirement of MCR 6.508(D)(3) had not been satisfied. The "good cause" requirement applies to grounds for relief that are not "jurisdictional defects." A double jeopardy claim is not subject to the "good cause" requirement because it is considered the equivalent of a jurisdictional issue, which a defendant may always challenge. See *People v Carpentier*, 446 Mich 19, 47 (Riley, J., concurring); 521 NW2d 195 (1994); *People v Johnson*, 396 Mich 424, 442-445; 240 NW2d 729 (1976).

In the present case, defendant was accused of felony murder, with armed robbery as the underlying offense. Our Supreme Court has held that conviction of and punishment for felony murder and its underlying felony violates the prohibition against multiple punishments. *People v Wilder*, 411 Mich 328, 342; 308 NW2d 112 (1981). Accordingly, we vacate defendant's conviction and sentence for armed robbery. *People v Harding*, 443 Mich 693, 714 (Brickley, J.), 735 (Cavanagh, C.J., concurring in part and dissenting in part); 506 NW2d 482 (1993); *People v Gimotty*, 216 Mich App 254, 259-260; 549 NW2d 39 (1996).

In addition, defendant's conviction and sentence for bank robbery must also be vacated. This Court has held that for purposes of double jeopardy analysis, armed robbery and bank robbery are the same offense. See *People v Campbell*, 165 Mich App 1, 5-6; 418 NW2d 404 (1987). There is no evidence in the record to show that two separate crimes were committed. Accordingly, defendant's conviction for bank robbery also violated his right against being twice placed in jeopardy. His conviction and sentence must be vacated. Given our disposition of this point, we do not address defendant's contention that the trial court erred in granting the prosecutor's motion to amend the information.²

We vacate defendant's convictions and sentences for armed robbery and bank robbery. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Joel P. Hoekstra

/s/ Jane E. Markey

² However, we note that this Court did not grant leave to appeal on the issue of whether the information could be amended. This issue is not properly before the Court. See MCR 7.205(D)(4); *Pemberton v Dharmani*, 188 Mich App 317, 323; 469 NW2d 74 (1991).