

NO. 78788-3
(consol. with NO. 78465-5)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DENNIS BRYANT,

Appellant.

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BY RONALD R. CARPENTER
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Ronald Kessler, Judge

SUPPLEMENTAL BRIEF OF PETITIONER BRYANT

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A. ISSUE PRESENTED FOR REVIEW

When the State charges one crime under two alternative theories and the first trial ends without a verdict on one theory for reasons of the prosecution's making, does double jeopardy bar retrial on the abandoned theory?

B. STATEMENT OF THE CASE

The King County Prosecutor's Office charged Dennis Bryant and co-defendant Cinque Garrett with murder in the second degree in connection with the August 6, 1994 shooting death of Jacque Burns. Both men were also charged with first degree assault and unlawful possession of a firearm based on the same incident. CP 11-13.

The second-degree murder charge, as set forth in the Second Amended Information, was predicated on alternative theories of (1) felony murder -- that Burns was killed during the course of an attempted or completed assault in the first or second degree -- and (2) intentional murder. CP 11.¹ For reasons the record fails to reveal, the State abandoned

¹ Garrett's trial counsel mistakenly argued at the conclusion of the State's case-in-chief that only felony murder was alleged and the trial judge agreed. RP (2/23/95) 17. This is clearly incorrect in light of the information and Bryant's attorney did not join in this mistaken assertion. CP 11. There is nothing to indicate, nor does the State contend, that this confusion impacted the prosecution's later decision to abandon intentional murder. See Supplemental Brief of Respondent at 5 n.5.

the intentional murder alternative at trial and the jury was only instructed on the felony murder alternative. CP 213. The jury convicted Bryant of felony murder. CP 84.

Bryant unsuccessfully appealed on several grounds. See State v. Garrett, 87 Wn. App. 1067 (1997), review denied, 136 Wn.2d 1004 (1998). Bryant's murder conviction was subsequently vacated, however, based on this Court's decision in In re the Personal Restraint of Address, 147 Wn.2d 602, 56 P.3d 981 (2002) (holding felony assault may not serve as the predicate offense for felony murder) and In re The Personal Restraint of Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004) (holding Address applies retroactively). CP 131-32.

On remand, the State's attempt to revive the previously abandoned second degree intentional murder alternative failed when Bryant successfully moved for dismissal. CP 133-64, 170-86. The trial court held that allowing the State to pursue an intentional murder conviction violated double jeopardy principles. CP 168-69.

The State sought discretionary review in the Court of Appeals, arguing double jeopardy does not apply because Bryant's felony murder conviction was vacated and the jury never decided whether Bryant was guilty of second degree intentional murder. State's Motion for Discretionary Review at 3-11. Citing State v. Wright, 131 Wn. App. 474,

127 P.3d 742 (2006), the Court of Appeals agreed and reversed the trial court. State v. Garrett, No. 57086-2-I/consolidated with 57087-1-I (unpublished opinion filed on May 8, 2006). This Court consolidated Bryant's petition with a petition in Wright and granted review in both cases.

C. ARGUMENT

DOUBLE JEOPARDY PROHIBITS RE-FILING SECOND DEGREE MURDER CHARGES.

1. When the State charges an offense under alternative theories of guilt, but only seeks and obtains a verdict as to one, double jeopardy prohibits retrial on the other alternative.

The Fifth Amendment provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. Amend. 5. Article 1, § 9 of the Washington Constitution similarly provides, “No person shall be compelled in any criminal case to give evidence against himself or be twice put in jeopardy for the same offense.” Consistent with these principles, RCW 10.43.050 provides, “Whenever a defendant shall be acquitted or convicted upon an indictment or information charging a crime consisting of different degrees, he cannot be proceeded against or tried for the same crime in another degree, nor for an attempt to commit such a crime, or any degree thereof.” A conviction or

acquittal is a bar to another prosecution for that offense or any lesser or included offense. RCW 10.43.020.

The Double Jeopardy Clause protects accused individuals from three distinct types of government abuse: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. State v. Hescoek, 98 Wn.App. 600, 603-04, 989 P.2d 1251 (1999); North Carolina v. Pearce, 295 U.S. 711, 717, 89 S.Ct. 2072, 23 L. Ed.2d 656 (1969).

The United States Supreme Court has explained one primary rationale behind the Double Jeopardy Clause — the prevention of repeated prosecutions by the State until a conviction is obtained:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense...

Green v. United States, 355 U.S. 184, 187-88, 78 S.Ct. 221, 2 L. Ed. 2d 199 (1957).² Jeopardy attaches once a jury is empanelled and sworn and is

² Former Justice Philip A. Talmadge has stated,

Fear and abhorrence of governmental power to try people twice for the same conduct is one of the oldest ideas found in western civilization. While some writers have explained

“put to trial;” the defendant need not show that the jury actually reached a verdict. Crist v. Bretz, 437 U.S. 28, 98 S.Ct. 2156, 57 L. Ed. 2d 24 (1978); Serfass v. United States, 420 U.S. 377, 388, 95 S.Ct. 1055, 43 L. Ed. 2d 265 (1975).

“The Double Jeopardy Clause bars the reprosecution of a criminal defendant on the same charges after a judgment of conviction or acquittal.” Venson v. Georgia, 74 F.3d 1140, 1145 (11th Cir., 1996), citing United States v. Wilson, 420 U.S. 332, 342-43, 95 S.Ct. 1013, 1021, 43 L. Ed. 2d 232 (1975) (quoting North Carolina v. Pearce, 395 U.S. at 717). The jury’s failure to make a finding has the same effect as an acquittal. Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L. Ed. 2d 199 (1957).

the opposition to double prosecutions by emphasizing the injustice inherent in two punishments for the same act, and others have stressed the dangers to the innocent from allowing the full power of the state to be brought against them in two trials, the basic and recurring theme has always simply been that it is wrong for a man to "be brought into danger for the same offense more than once." Few principles have been more deeply "rooted in the traditions and conscience of our people."

Phillip Talmadge, Double Jeopardy: The Civil Forfeiture Debate, 19 Seattle Univ. L. R. 209, 209-210 (1996).

In Green, the jury found the defendant guilty of arson and second degree murder but failed to find him guilty or not guilty on the first degree murder charge – the verdict was simply silent on that charge. Id. at 186. The trial judge accepted the verdict, entered judgments, dismissed the jury, and did not declare a mistrial. Id. Green appealed and his conviction was overturned. On remand he was retried for first-degree murder and convicted. Id. The Supreme Court held that double jeopardy prohibited retrial on the first-degree murder charge even though the jury made no finding on that charge:

[I]t is not even essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge. This Court, as well as most others, has taken the position that *a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be charged again.*

Id. at 188 (emphasis added).

The Green Court did not rely on the assumption that the jury implicitly acquitted Green of murder in the first degree:

Green was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gauntlet once on that charge and the jury refused to convict him. When given the choice between finding him guilty of either first or second degree murder it chose the latter. In this situation the great majority of cases in this country have regarded the jury's verdict as an implied acquittal on the charge of first degree murder. But the result in this case need not rest alone on the assumption,

which we believe legitimate, that the jury for one reason or another acquitted Green of murder in the first degree. For here, the jury was dismissed without returning any express verdict on that charge and without Green's consent.

Green, 355 U.S. at 190-91 (internal citations omitted).

As early as 1937, this Court concluded that when a jury rendered a verdict on one count but was silent as to the other two, and the record did not show why the jury was discharged before rendering a verdict on those counts, such action was "equivalent to acquittal." State v. Davis, 190 Wash. 164, 166-67, 67 P.2d 894 (1937). Accordingly, when a jury has found a defendant guilty of an offense on only one of two charged alternative theories of culpability, but, due to the State's election, the jury is discharged without rendering a verdict on the other alternative theory -- and a reviewing court subsequently reverses the conviction on sufficiency grounds -- the defendant is deemed acquitted of the charges and the State may not re-prosecute the offense under the other alternative theory.

2. Because the evidence was legally insufficient to convict Bryant of murder under the alternative presented to the jury in the first trial, double jeopardy bars re-filing the same charge under an alternative theory upon remand.

Reversal of a criminal conviction on appeal based on the State's failure to present sufficient evidence acts as an acquittal and bars the State from re-filing charges:

Since we hold today that the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient, the only "just" remedy available for that court is the direction of a judgment of acquittal. To the extent that our prior decisions suggest that by moving for a new trial, a defendant waives his right to a judgment of acquittal on the basis of evidentiary insufficiency, those cases are overruled.

Burks v. United States, 437 U.S. 1, 17-18, 98 S.Ct. 2141, 57 L. Ed. 2d 1 (1978). Accordingly, once a conviction is reversed because the reviewing court found the State's evidence legally insufficient to affirm a conviction, re prosecution is barred and a judgment of acquittal is required.

For purposes of double jeopardy, legal insufficiency is no different than factual insufficiency – and when a reviewing court reverses a conviction based on insufficiency of the evidence, it is deemed to be an acquittal because it “means that the government’s case was so lacking that it should not have even been submitted to the jury.” Burks, 437 U.S. at 16.³ As recently as February 2005, the United States Supreme Court held

³ See also United States v. Martin Linen Supply Co., 430 U.S. 564, 573-74, 97 S.Ct. 1349, 51 L. Ed. 2d 642 (1977) (holding acquittal on insufficiency of the evidence grounds for double jeopardy purposes includes legal and factual insufficiency, including a directed verdict); Smalis v. Pennsylvania, 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L. Ed. 2d 116 (1986) (holding insufficiency of the evidence for double jeopardy purposes includes insufficiency of the evidence based on facts as well as insufficiency as a matter of law); United States v. Scott, 437 U.S. 829, 98 S.Ct. 2187, 57 L. Ed. 2d 65 (1978) (holding acquittal includes judgments by the court that the evidence is insufficient to convict).

evidence insufficient to convict as a matter of law is an acquittal because it “actually represents a resolution . . . of some or all of the factual elements of the offense charged.” Smith v. Massachusetts, 543 U.S. 462, 468, 125 S.Ct. 1129, 160 L. Ed. 2d 914 (2005). Accordingly, when a reviewing court finds the evidence factually or legally insufficient to satisfy the elements of the offense charged, double jeopardy bars reprosecution of the offense.

In Andress, this Court found the State’s evidence of an assault legally insufficient to prove the predicate crime necessary to convict for felony murder. Andress, 147 Wn.2d at 604. In so ruling, this Court vacated Andress’s conviction because the State could not prove second degree felony murder with a predicate offense of assault – a nonexistent crime. Andress, 147 Wn.2d at 610, 614.

In light of Andress, reversal of Bryant’s second degree murder conviction constitutes an acquittal because the State presented insufficient evidence of an appropriate predicate offense for second degree felony murder. Burks, 437 U.S. at 16. Following such a reversal, the State is barred from re-filing the same second degree murder charge. Id.

In Wright, the Court of Appeals misinterpreted this Court’s holding in Andress by assuming it ruled solely on a statutory construction argument and not a sufficiency argument. On this basis, the Court of

Appeals concluded Wright's felony murder conviction was not reversed because it was legally insufficient under Andress, but instead because he was convicted of a nonexistent crime under a statutory construction analysis. 131 Wn. App. at 479-80, citing Montana v. Hall, 481 U.S. 400, 107 S.Ct. 1825, 95 L. Ed. 2d 354 (1987)(defendant erroneously convicted of incest under statute that did not go into effect until after date of crime; reversal did not bar retrial on charge of sexual assault under more general statute). This Court should reject the reasoning in Wright for several reasons.

First, the Wright Court's reliance on Hall is suspect. Hall specifically provides that the State could file a new charge only because the defendant had requested the improper incest charge:

Montana originally sought to try respondent for sexual assault. At respondent's behest, Montana tried him instead for incest. In these circumstances, trial of respondent for sexual assault, after reversal of respondent's incest conviction on grounds unrelated to guilt or innocence, does not offend the Double Jeopardy Clause.

Hall, 481 U.S. at 403 (emphasis added). Such a unique factual scenario was not presented in Wright. Wright never insisted that the State charge him with a non-existent crime. The same is true for Bryant.

Secondly, reversal for conviction of a nonexistent crime is reversal based on insufficient proof the defendant committed a crime. In State v.

Hembd, the Supreme Court of Montana held double jeopardy prohibits the State from re-filing charges after reversal of a conviction for a nonexistent crime. 197 Mont. 438, 643 P.2d 567 (1982). The defendant was charged with negligent arson, and the jury found the defendant guilty of “attempted misdemeanor negligent arson.” Id. at 439. The Montana Supreme Court first found that “attempted misdemeanor negligent arson” and “attempted felony negligent arson” (like felony murder based on assault in Washington) were nonexistent crimes. Id. The Hembd Court found the jury’s verdict on the nonexistent crime constituted an implied acquittal of the charged crimes of misdemeanor negligent arson and felony negligent arson. Id. Importantly, the Court held double jeopardy barred the State from retrying Hembd of the charged crimes. 197 Mont. at 439-40.

In Andress and Hinton, this Court found the defendants could not be guilty of second degree felony murder because assault is not listed as a predicate crime for second degree felony murder. Thus, insufficient evidence was presented to prove the defendants guilty of the crime charged. This Court followed Fiore v. White, wherein the United States Supreme Court held it is a fundamental due process violation to convict and incarcerate a defendant for a crime without proof of all the elements of the crime. Hinton, 152 Wn.2d at 859, citing Fiore v. White, 531 U.S. 225, 228-29, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001). The Fiore Court held due

process was violated by “the [State’s] failure to prove all the elements of the crime [of operating a hazardous waste facility without a permit], i.e., the failure to prove that the defendant lacked a permit.” Fiore, 531 U.S. at 228-29. Hinton concluded, “the same analysis applies here,” ruling the Andress decision determined what RCW 9A.32.050 had meant since 1976, and the petitioners in Hinton were all convicted for crimes that did not criminalize their conduct as second degree felony murder. 152 Wn.2d at 859-60.

Just as there was insufficient evidence to convict the petitioners in Hinton of second degree murder predicated on an assault, the same is true for Bryant and double jeopardy bars another trial for that offense. Moreover, double jeopardy precludes the State from re-filing the same charge upon remand under an alternative theory.

When a defendant is charged with two alternative methods for committing a single crime, double jeopardy bars retrying the defendant after reversal on one alternative theory. In State v. Hescok, the defendant was charged with forgery under two alternative means of committing the crime, RCW 9A.60.020(1)(a) and (b). 98 Wn. App. at 602. At a bench trial the defendant was found guilty of violating only section (1)(a). Id. Hescok argued on appeal that the evidence was insufficient to support a conviction under (1)(a). The State agreed, but requested remand for a

determination of whether Hescoock violated (1)(b). Id. at 603. Hescoock argued double jeopardy prevented remand for consideration of his culpability under the alternative section, (1)(b). Id. at 602.

The Hescoock Court ruled that an acquittal implied by conviction on a different theory of culpability precludes a second trial. 98 Wn. App. at 604-05. The trial court's written findings and conclusions of law were unambiguous as to the source of Hescoock's culpability. 98 Wn. App. at 602. While the Court noted that remand is appropriate where a defect is found in the written findings and is not based on the State's failure to prove its case, a lack of written findings or conclusions of law on an alternative theory of culpability cannot justify remand for prosecution under that theory. Hescoock, 98 Wn. App. at 607.

The Wright Court's analysis of Hescoock is misguided. In an attempt to distinguish Wright's case from Hescoock, the Court opined Wright's jury did not have a full opportunity to find him guilty of intentional murder because that charge did not appear in the instructions. 131 Wn. App. at 481. But Hescoock involved a bench trial, wherein a judge adjudicated the juvenile guilty of committing forgery, and the Court of Appeals still ruled the State was barred from re-filing charges even when there was a lack of written findings or conclusions of law on the alternative theory of culpability. Hescoock, 98 Wn. App. at 607.

When during trial the State elects to abandon an alternative means of committing a crime, the State must be precluded from pursuing a second trial on the abandoned theory. In Sizemore v. Fletcher, 921 F.2d 667, 673 (6th Cir. 1990), the court ruled that a second trial may be "barred by double jeopardy" if "the first trial ended without a verdict for reasons of the prosecution's making." Similarly, in Saylor v. Cornelius, 845 F.2d 1401, 1403, 1408 (6th Cir. 1988), the Court held,

where the first trial ended without a verdict on the relevant charge for reasons of the prosecution's making, a retrial on that charge would violate the protection the Double Jeopardy Clause affords against harassing re prosecution.... We believe that the Double Jeopardy Clause forbids a second trial on [an alternative] theory because such a trial would be vexatious, regardless of the outcome of the jury's deliberation on the theory charged to it. It would be vexatious because the defendant underwent the jeopardy of a full trial, which is even more vexatious than the aborted or partial trials usually involved in double jeopardy cases, and the trial failed to terminate in a verdict for reasons that cannot fairly be charged to the defendant.

Accordingly, when a prosecutor charges a defendant with two theories and a defendant must defend against each theory, a prosecutor must either submit the proper to-convict instructions for both alternatives, or elect not to instruct on one alternative and realize double jeopardy would bar a second prosecution.

Here, the prosecution inexplicably abandoned the intentional murder theory at trial. The choice was not Bryant's. Bryant had to stand

trial and defend against second degree intentional murder. The prosecution's abandonment of the intentional murder theory must be viewed as the State's admission that insufficient evidence existed to support the alternative of intentional murder.

Because Bryant was brought to trial on the charge of second degree intentional murder, protection from double jeopardy bars retrial on that charge. Burks, 437 U.S. at 10-11. Accordingly, the State is now precluded on double jeopardy grounds from retrying Bryant on a theory it abandoned during trial. Sizemore v. Fletcher, 921 F.2d at 673; Saylor v. Cornelius, 845 F.2d at 1403, 1408.

The Wright Court suggests the Saylor decision "is not solidly tethered to the precedents it cites." 131 Wn. App. at 483. This is incorrect. The Saylor decision is a logical extension of Green, Scott, Burks, and Arizona v. Washington. This line of cases holds that where the State places the accused in jeopardy of conviction by trying him on an offense, it should not have repeated opportunities to re prosecute the defendant until the State finds a crime for which the defendant can be found guilty. "Because jeopardy attaches before the judgment becomes final, the constitutional protection also embraces the valued right to have his trial completed by a particular tribunal." Arizona v. Washington, 434 U.S. 497, 503, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978) (citations and

internal quotations omitted). In view of the defendant's important right to have the trial concluded by a particular tribunal,

the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate "manifest necessity" for any mistrial declared over the objection of the defendant.

434 U.S. at 505.

Lastly, in Burks, the Supreme Court overruled the holding in Forman v. United States, 361 U.S. 415, 80 S.Ct. 481, 4 L.Ed.2d 412 (1960). which had held that following an appellate reversal on one theory, the State may re prosecute on a alternative theory indicated by the indictment but never properly submitted to a jury. Burks, 437 U.S. at 9, 17-18. The Burks Court overruled the Forman holding, ruling once the reviewing Court finds the evidence legally insufficient to support the verdict, "the only 'just' remedy available for that court is the direction of a judgment of acquittal." Burks, 437 U.S. at 18.

Accordingly, Saylor is properly grounded in United States Supreme Court precedent that the prosecution should not be able to re prosecute on charges for which the defendant stood trial but the jury was discharged without rendering a verdict due to the State's election. Saylor merely extends this rationale, holding that when the State elects to charge

and place the defendant in jeopardy of conviction by trying him on the offense but then abandons a theory before the jury can render a verdict -- and that jury is discharged without a verdict due to the State's own making -- double jeopardy bars reprosecution on the abandoned theory.

Moreover, the Court of Appeals citation to an Illinois case, People v. Daniels, 187 Ill.2d 301, 718 N.E.2d 149, 240 Ill. Dec. 668 (1999), is misplaced. 131 Wn. App. at 482. In Daniels, the underlying trial error was an erroneous restriction on the right to 14 peremptory challenges, which is not tantamount to an acquittal, and remand for a new trial would be permissible. See Daniels, 187 Ill. at 313, citing People v. Daniels, 172 Ill.2d 154, 168, 665 N.E.2d 1221, 216 Ill. Dec. 664 (1996).

Similarly, in Lewis v. State, the Texas Court of Appeals ruled, “[t]he dismissal or abandonment of an accusation after jeopardy attaches is tantamount to an acquittal.” 889 S.W.2d 403, 406 (Tex. Crim. App. 1994). The Court found whenever a defendant is placed in jeopardy for offenses alleged in the complaint (at the time he enters a plea of not guilty), the State is barred from retrying the defendant on those counts on which it proceeded to trial but abandoned before the jury verdict was entered. 889 S.W.2d at 407. The Lewis Court ruled “*If a charge is still pending at the moment jeopardy attaches, a defendant is entitled to expect the State to proceed to trial on that charge or lose the opportunity*

forever.” 889 S.W.2d at 407, (emphasis in original), quoting Proctor v. State, 841 S.W.2d 1, 3-4 (Tex. Crim. App. 1992). When the State abandons the prosecution of an offense after the defendant is placed in jeopardy, retrial of that accusation is barred, whether the State expressly or implicitly abandons the charge. Id. at 407.

Lewis specifically rejected the argument that the slate was wiped clean because the defendant had prevailed on appeal. 889 S.W.2d at 407. The Court recognized that when the defendant was placed in jeopardy on the later abandoned charges, the jury was discharged without having an opportunity to convict on those charges due to the State’s failure to provide to-convict instructions to the jury. Id. at 408. Thus, the appellant’s successful appeal on charges found by the jury “could not authorize appellant’s re prosecution for the offenses alleged in the other [abandoned] indictments because those causes were not before [the reviewing court].” 889 S.W.2d at 408. Like Saylor, the Texas Court held State-abandoned charges cannot later be recharged following the successful appeal of offenses actually brought before the jury. This would violate the prohibition against multiple prosecutions for the same offense.

Here, the State brought intentional murder and felony murder charges against Bryant. For whatever reason, it decided not to have the jury instructed as to intentional murder. Because of the State’s election to

abandon its theory of the harder-to-prove intentional murder, the jury was discharged without having an opportunity to reach a verdict on that alternative. The State is therefore barred from retrying Bryant on this alternative.

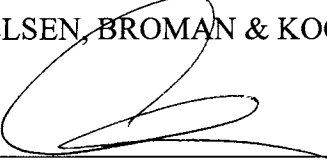
D. CONCLUSION

Because the trial court properly precluded the State from re-filing second degree intentional murder charges, this Court should reverse the Court of Appeals decision and remand for further lawful proceedings.

DATED this 9th day of April, 2007.

Respectfully submitted,

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