STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT I

Appeal No.2018AP001254 CRLV
Milwaukee County Circuit Court Case No. 18-CF-2013

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANDREAL WASHINGTON,

Defendant-Petitioner.

BRIEF OF DEFENDANT-PETITIONER ON DOUBLE JEOPARDY ISSUE

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INTRODUCTION

This case involves the application of the Double Jeopardy Clause of the U.S. and Wisconsin Constitutions; secs. 939.71, 939.66(2) and 972.07, Wis. Stats.; and the doctrine of Collateral Estoppel as it relates to a subsequent prosecution after a jury trial acquittal for the same "offense".

On May 5, 2016, in Milwaukee County Case No. 16-CF-1939, a complaint was filed in Milwaukee County Circuit Court, charging the defendant in this case, Andreal Washington, with First Degree Reckless Homicide in the death of Travis Deon Williams on April 30, 2016. Before trial an amended information was filed, changing the charge to one of Felony Murder, with the underlying felony being an alleged Armed Robbery.

On September 8, 2017, the jury returned a verdict of Not Guilty on the single charge.

On May 2, 2018, the State filed a new complaint in the present case, 18-CF-2013, charging this same defendant with Second Degree Reckless Homicide, and Felon in Possession of a Firearm, in the same death of Travis Deon Williams on April 30, 2016, under the same circumstances alleged in the previous case, 16-CF-1939, which resulted in the acquittal on the Felony Murder charge.

The Defendant-Petitioner filed a motion to dismiss the new charges on Double Jeopardy and Collateral Estoppel grounds. In an oral decision on June 15, 2018, Judge Jeffrey Conen ruled that new charges do not violate the Double Jeopardy clauses or the doctrine of Collateral Estoppel.

On July 5, 2018, the Defendant-Petitioner filed a Petition for Leave to Appeal the non-final order. By order dated July 6, 2018, the Court of Appeals ordered a transcript of the oral decision be ordered and produced (it was; filed on July 25. 2018) and for the Defendant-Petitioner to file a brief "addressing the merits of the double jeopardy issue".

The Defendant-Petitioner understands the order to require only a brief on the Double Jeopardy issue, and not the Collateral Estoppel issue, which it also considers essential to the Petition for Leave to Appeal.

ISSUE PRESENTED

1. Does the charging of the defendant with Second Degree Reckless Homicide and Felon in Possession of Firearm after an acquittal on a charge of Felony Murder based on the same facts and offense violate the Double Jeopardy clauses of the U.S. and Wisconsin Constitution?

   Judge Conen ruled that the new charges did not violate Double Jeopardy.

STATEMENT OF THE CASE AND FACTS

On May 5, 2016, a complaint was filed in Milwaukee County Circuit Court, charging the defendant in this case, Andreal Washington, with First Degree Reckless Homicide, pursuant to sec. 940.02(1), Wis. Stats., in the death of Travis Deon Williams on April 30, 2016. (Milwaukee County Case No. 16-CF-1939). The original charge carried a maximum penalty of 60 years in prison. The defendant was arraigned on the original Information charging First Degree Reckless Homicide on October 31, 2016.

Subsequently, there was a period of time in which plea negotiations were entered into and information was exchanged between Assistant District Attorney Paul Tiffin and the defendant's first attorney in the case, Danielle Shelton. It was in the course of those negotiations – on March 23, 2017 – that ADA Tiffin filed an amended information, changing the single charged count to one of Felony Murder, pursuant to sec. 940.03, Wis. Stats.

At the hearing on the defendant's motion to dismiss the present case, ADA Tiffin explained the reason for changing the charge in the amended information to Felony Murder:

> "...during the previous prosecution, Mr. Washington's previous attorney, Danielle Shelton, forwarded to the State which she described as his account of what happened. And ultimately on the day of trial, the morning of trial, the Court ruled that the State couldn't put that in. My interpretation of what he was saying as forwarded to the State was that this was a felony murder and that is why the charge ended up being changed." June 15, 2018 transcript at p. 7.

In the course of subsequent negotiations with both Attorney Shelton and subsequent counsel, Michael B. Plaisted, the charge of Felon in Possession of a Firearm was part of offers made by ADA Tiffin and considered by the defendant. It was known and acknowledged by all parties that the defendant has a felony on his record that precluded him from possessing a firearm. However, the charge of Felon in Possession was never filed in any subsequent amended information in the 2016 case.

On September 5, 2017, a jury trial began before Hon. Jeffrey Conen, Branch 30 for Milwaukee County, on the charge of Felony Murder. On September 8, 2017, the jury returned a verdict of Not Guilty on the single charge.

On May 2, 2018, the State, by ADA Tiffin, filed a new complaint in the present case, 18-CF-2013, charging this same defendant with Second Degree Reckless Homicide, pursuant to sec. 940.06(1), Wis. Stats., and Felon in Possession of a Firearm, pursuant to sec. 941.29(1m)(a), Wis. Stats. in the same death of Travis Deon Williams on April 30, 2016, under that same circumstances

alleged in the previous case 16-CF-1939, which resulted in the acquittal on the Felony Murder charge.

The charge of Second Degree Reckless Homicide carries a maximum sentence of 25 years in prison and a fine of $100,000. By operation of sec. 939.66(2), Wis. Stats., that charge is a lesser-included offense of the Felony Murder of which the defendant was acquitted.

The Trial Court's Decision

In an oral decision on June 15, 2018, Judge Conen ruled that new charges do not violate the Double Jeopardy clauses of the U.S. and Wisconsin Constitutions.

ARGUMENT

I. The present prosecution is barred by the Double Jeopardy clauses of the U.S. and Wisconsin Constitutions.

U.S. Constitution – 5th Amendment:

> *...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb...*

Wis. Constitution – Art. I, Sec. 8:

> *...no person for the same offense may be put twice in jeopardy of punishment...*

***Ashe v. Swenson*, 397 U.S. 436, 445 (1970)**

> *"For whatever else that constitutional guarantee may embrace, it surely protects a man who has been acquitted from having to 'run the gantlet' a second time."*

On its face, both the federal and State constitutional provisions prohibiting a subsequent prosecution of the same "offense" after an acquittal would seem to apply in a case such as this, where the "offense" of causing the death of Travis Williams has already been litigated in the shifting manner chosen by the State of Wisconsin in the course of the original prosecution. Having charged the defendant with First Degree Reckless Homicide but choosing, midstream, to try the issues it perceived in the "offense" as a Felony Murder, the entire logic of the prohibition against Double Jeopardy, by the very words of the State and Federal Constitutions, would appear to have been violated.

However, in this case the State makes the extremely rare attempt (in Milwaukee County, certainly) to "correct" an outright acquittal on Felony Murder with a subsequent prosecution the lesser-included charge of Second Degree Reckless Homicide based on exactly the same facts and for exactly the same "offense" (causing the death of Mr. Williams).

In doing so, the State cites ***State v. Vassos***, 218 Wis. 2d 330, 579 N.W.2d 35 (1998) for the proposition that it can charge an acquitted defendant an

apparently unlimited number of times for the same "offense", as long as there is at least one element in the newly-charged crime that is different from the preceding prosecution.

The Court in ***Vassos*** interpreted the U.S. Supreme Court case of ***Blockburger v. United States***, 284 U.S. 299 (1932), concluding that the prosecution of Vassos in that case for misdemeanor Battery was not precluded by the defendant's acquittal on a charge of Felony Battery for the same offense because of the "same-elements" test in ***Blockburger***. "[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 a fact which the other does not." ***Vassos***, 218 Wis. 2d 330, at ¶8, quoting ***Blockburger***.

Vassos relies on ***Blockburger***, a case that does not involve the subsequent prosecution of an offense after an acquittal. Rather, ***Blockburger*** recognized the fairly uncontroversial proposition that the conviction of a defendant for several different crimes arising out of the same event is not prohibited. Be that as it may, the court in ***Vassos*** expanded the State's ability to pursue a subsequent prosecution after an acquittal for the same offense, thereby vitiating, at least in its common and literal sense, the constitutional prohibition against being prosecuted after an acquittal for the same "offense".

The ***Vassos*** Court therefore dismissed the defendant's challenge to the subsequent prosecution on Double Jeopardy grounds. Judge Conen did the same in the present case, identifying different elements in the Felony Murder charge (i.e.: commission of a specific felony) and the Second Degree Reckless Homicide charge (i.e: recklessness) not present in both charges.

Despite the apparent "bright-line" of the ***Blockburger*** "same elements" test, the application of the Double Jeopardy clause to subsequent prosecutions appeared to be in flux, at least in the U.S. Supreme Court, as early as several years before the ***Vassos*** decision, which relied on U.S. Supreme Court precedent.

In ***U.S. v. Dixon***, 509 U.S. 688 (1993), a 5-4 decision with an opinion by Justice Scalia, the Supreme Court summarily overturned a case interpreting the ***Blockburger*** "same elements" test from just three terms previous – ***Grady v. Corbin***, 495 U. S. 508 (1990) (decided by a different 5-4 majority, with J. Scalia dissenting). The ***Grady*** holding, if not apparently overturned in ***Dixon***, may well have barred the present prosecution:

> "In ***Illinois v. Vitale***, 447 U. S. 410 (1980), we suggested that, even if two successive prosecutions were not barred by the Blockburger test, the second prosecution would be barred if the prosecution sought to establish an essential element of the second crime by proving the conduct for which the defendant was convicted in the first prosecution. Today we adopt the suggestion set forth in Vitale. We hold that 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." ***Grady*** at 510

Applying that rationale to the present case, the State certainly intends to attempt to prove the very same conduct in its "new" prosecution for Second Degree Reckless Homicide as it did in its failed prosecution for Felony Murder. ***Blockburger*** or no, this prosecution may well have been barred by the Double Jeopardy clauses of the U.S. and State Constitutions because of the "same conduct" addendum to the ***Blockburger*** "same elements" incorporated in ***Grady***.

Alas, the Court in ***Dixon*** expressly overruled the "same conduct" test in Grady, a case decided a mere three years before. In so doing, however, the ***Dixon*** Court preserves some of the elements of Double Jeopardy case law incorporated in ***Grady*** relevant to the present case.

For one thing, the Court assumes that the prohibition against a subsequent prosecution for a lesser-included offense is still in place:

> "The fountainhead of the "same-conduct" rule, [Justice Souter] asserts, is ***In re Nielsen***, 131 U. S. 176 (1889). That is demonstrably wrong. Nielsen simply applies *the common proposition, entirely in accord with Blockburger, that prosecution for a greater offense* (cohabitation, defined to require proof of adultery) *bars prosecution for a lesser included offense* (adultery). ***Dixon*** at 705, *emphasis added*.

By operation of sec. 939.66(2), Wis. Stats., the Second Degree Reckless Homicide charge is a lesser-included offense of the Felony Murder of which the defendant was acquitted.

The Court in ***Dixon*** also includes some interesting language relative to cases that can and cannot be brought together in the same prosecution and an interesting comment on the collateral estoppel issue:

> "The collateral-estoppel effect attributed to the Double Jeopardy Clause, see ***Ashe v. Swenson***, 397 U. S. 436 (1970), *may bar a later prosecution for a separate offense where the Government has lost an earlier prosecution involving the same facts*. But this does not establish that the Government "must ... bring its prosecutions ... together." It is entirely free to bring them separately, and *can win convictions in both*." ***Dixon*** at 705, *emphasis added*.

Collateral estoppel was not raised in the courts below in ***Dixon*** and was thus not considered (and, as I understand it, is not a subject of this brief). However, the ***Dixon*** Court does allow for the possibility that a subsequent prosecution after "the Government has lost an earlier prosecution involving the same facts" – as is the case here – may not be allowed. Also, the ***Dixon*** Court presumes that the State "can win convictions in both" of the two crimes charges sequentially. That is not the case in Felony Murder and Second Degree Reckless Homicide – a conviction can only be had in one or the other by operation of sec. 939.66, Wis. Stats.: "Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included crime, but not both."

CONCLUSION

For the reasons stated above, Defendant-Petitioner respectfully requests that the court of appeals grant this petition for leave to appeal the Milwaukee County Circuit Court's order denying the defendant's motion to dismiss due to violation the Double Jeopardy Clause of the U.S. and Wisconsin Constitutions and the doctrine of Collateral Estoppel .

Dated this 4th day of September, 2018.

Respectfully submitted,

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rules 809.50(1) and 809.81 in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 2,523 words.

Dated this 4th day of September, 2018.

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