IN THE SUPREME COURT OF MISSISSIPPI

NO. 2010-KA-01923-SCT

MICHAEL KELLY

v.

STATE OF MISSISSIPPI

DATE OF JUDGMENT:	11/19/2010
TRIAL JUDGE:	HON. JANNIE M. LEWIS
COURT FROM WHICH APPEALED:	HUMPHREYS COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	ROBERT D. EVANS
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: SCOTT STUART
DISTRICT ATTORNEY:	STEVEN E. WALDRUP
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	AFFIRMED AND REMANDED - 02/23/2012
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE CARLSON, P.J., LAMAR AND CHANDLER, JJ.

CARLSON, PRESIDING JUSTICE, FOR THE COURT:

¶1. On February 1, 2009, Michael Kelly was charged with reckless driving at the location of the ZipTrip Store in Humphreys County. On March 5, 2009, Kelly was found guilty of this charge in justice court, and he paid a fine of $114. Arising out of the same facts, a Humphreys County grand jury handed down a two-count indictment against Kelly on September 10, 2009. Count I charged Kelly with the aggravated assault of Tiffany Walker (by hitting Walker while driving his truck). Count II charged Kelly with felony malicious

mischief for the destruction of a Master-Bilt outdoor ice machine. Count II of the indictment is not an issue in today's case.

¶2. Kelly moved for dismissal of his indictment, asserting his double-jeopardy rights. The trial court denied Kelly's motion. Aggrieved, Kelly filed with us a Petition for Permission to Appeal from an Interlocutory Order, and a three-justice panel of this Court granted Kelly's petition pursuant to ***Beckwith v. State***, 615 So. 2d 1134, 1146 (Miss. 1992), to consider's Kelly's double-jeopardy claim. Having now considered the merits of Kelly's double-jeopardy claim, we affirm the trial court's denial of Kelly's motion to dismiss.

JURISDICTION

¶3. Since this is an appeal simply from the denial of a motion to dismiss, an obvious issue is whether we have jurisdiction to consider it. Generally, an appeal may be taken in a criminal case only from a final judgment. Miss. Code Ann. § 9-3-9 (Rev. 2002). However, in certain limited circumstances, we may entertain interlocutory appeals. ***Beckwith***, 615 So. 2d at 1142-43; Miss. R. App. P. 5.

¶4. In our seminal decision in ***Beckwith***, we held that, "[b]ecause of the unique nature of the denial by a circuit court of a colorable double jeopardy claim, involving as it does the Constitutional right not to be prosecuted for the offense, it is final. This Court is authorized to treat it as a 'final judgment' . . . [under] Miss. Code. Ann. § 9-3-9. . . ." ***Beckwith***, 615 So. 2d at 1146.

¶5. In ***Beckwith***, this Court cited ***Abney v. United States***, 431 U.S. 651, 657, 97 S. Ct. 2034, 52 L. Ed. 2d 651 (1977) for the proposition that "the double jeopardy clause protected an accused beyond that of being twice *convicted* for the same offense, it protected the

accused 'against being *twice put to trial* for the same offense.'" ***Beckwith***, 615 So. 2d at 1138 (emphasis in original). Hence,

> [o]rders denying motions to dismiss an indictment on double jeopardy. . . grounds are likewise immediately appealable . . . Refusals to dismiss an indictment for violation of the Double Jeopardy Clause . . . are truly final and collateral, and the asserted rights . . . would be irretrievably lost if review were postponed until trial is completed.

Id. at 1141.

¶6. The United States Supreme Court is in accord with our position on this jurisdictional issue, as it has held that "pretrial orders rejecting claims of former jeopardy . . . constitute 'final decisions' and thus satisfy the jurisdictional prerequisites of 28 U.S.C. § 1291." ***Abney***, 431 U.S. at 662, 97 S. Ct. at 2042. *See also* ***Flanagan v. United States***, 465 U.S. 259, 270, 104 S. Ct. 1051, 79 L. Ed. 2d 288 (1984); ***United States v. MacDonald***, 435 U.S. 850, 98 S. Ct. 1547, 56 L. Ed. 2d 18 (1978).

¶7. Consistent with today's discussion, we find that prejudgment double-jeopardy appeals are reviewed on an interlocutory basis; therefore Kelly's double-jeopardy claim is properly before this Court.

WHETHER DOUBLE JEOPARDY APPLIES IN THIS CASE

¶8. "We apply a *de novo* standard of review to claims of double jeopardy." ***Boyd v. State,*** 977 So. 2d 329, 334 (Miss. 2008) (citing ***Brown v. State,*** 731 So. 2d 595, 598 (Miss. 1999)). "The constitutional protection at issue, commonly known as the double-jeopardy clause, is enforceable against the states through the Fourteenth Amendment. Its protection prohibits, *inter alia,* multiple punishments for the same offense." ***Boyd***, 977 So. 2d at 334 (citing ***Brown***, 731 So. 2d at 599)). "[A] conviction can withstand [a] double-jeopardy analysis only

if each offense contains an element not contained in the other." ***Boyd***, 977 So. 2d at 334 (citing ***Powell v. State,*** 806 So. 2d 1069, 1074 (Miss. 2001)). "If they do not, the two offenses are, for double-jeopardy purposes, considered the same offense, barring prosecution and punishment for both." ***Id***.

¶9. Kelly argues that reckless driving is a lesser-included offense of aggravated assault in this case.[1] Since Kelly entered a plea of guilty to reckless driving, he argues that to try him for aggravated assault would violate the prohibition against double jeopardy. Both the United States and Mississippi Constitutions provide protections against double jeopardy, providing in the case of the U.S. Constitution that no "person [shall] be subject for the same offense to be twice put in jeopardy of life or limb. . . ." U.S. Const. amend. V. *See also* Miss. Const. art. III § 22 (1890). There is no argument but that the two charges arose out of the same set of facts.

¶10. This guarantee, enforceable against the states through the Fourteenth Amendment, assures three separate protections: (1) protection from a second prosecution for the same offense after acquittal, (2) protection from a second prosecution for the same offense after conviction, and (3) protection from multiple punishments for the same offense. ***U.S. v. Dixon***, 509 U.S. 688, 695-96, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993). This case deals with the protection against a second prosecution for the same offense after conviction.

[1]Count I of the indictment, charging Kelly with aggravated assault, stated, *inter alia*, that Kelly had caused "serious bodily injury to Tiffany Walker . . . by driving his truck at a high rate of speed . . . hitting her with [his] truck."

¶11. The trial court applied the double-jeopardy test established by the United States Supreme Court in ***Blockburger v. United States***, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932). The ***Blockburger*** test instructs courts to determine whether each offense contains an element not present in the other; if not, they are labeled the same offense, for double-jeopardy purposes. The rule plainly states 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." ***Blockburger*** 284 U.S. at 304. This Court has held that "[t]o determine whether double-jeopardy protections apply, we look to the 'same-elements' test prescribed by the United States Supreme Court in ***Blockburger*** . . . ." ***Graves v. State,*** 969 So. 2d 845, 847 (Miss. 2007) (internal citation omitted).

¶12. In today's case, Kelly was found guilty of misdemeanor reckless driving. Mississippi Code Section 63-3-1201 (Rev. 2004) states:

> Any person who drives any vehicle in such a manner as to indicate either a wilful or wanton disregard for the safety of persons or property is guilty of reckless driving. Reckless driving shall be considered a greater offense than careless driving.

The present indictment against Kelly cites Mississippi Code Section 97-3-7(2)(a) (Rev. 2006), which states:

> A person is guilty of aggravated assault if he (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life.

Applying this test, the trial court held that, to prove aggravated assault, no element requires proof of a willful or wanton disregard for the safety of person or property. The trial court

also held that to prove reckless driving, no element requires proof of injury nor attempt to injure. Therefore, the trial court found that each offense had elements not contained in the other and denied Kelly's motion to dismiss.

¶13. Kelly argues that it was error for the trial court to make its decision solely based on ***Blockburger***, and in particular urges the application of a different test from ***Grady v. Corbin***, 495 U.S. 508, 509, 109 L. Ed. 2d 548, 110 S. Ct. 2084 (1990). Kelly further argues that this Court has recognized that reckless driving, under certain conditions, is a lesser offense of aggravated assault, which would invoke his double-jeopardy rights. *See* ***Brooks v. State***, 18 So. 3d 833, 841 (Miss. 2009). Kelly cites the case of ***Brown v. Ohio***, 432 U.S. 161, 168, 97 S. Ct. 2221, 2227-28, 53 L. Ed. 2d 187 (1977), which held that a "greater offense is . . . by definition the 'same' for purposes of double jeopardy as any lesser offense included in it." Kelly also attempts an analogy to ***Illinois v. Vitale***, 447 U.S. 410, 419-20, 100 S. Ct. 2260, 65 L. Ed. 2d 228 (1980). The United States Supreme Court, in ***Vitale***, stated that if "a careless failure to slow is always a necessary element of manslaughter by automobile, then the two offenses [of manslaughter and failing to reduce speed] are the same. . . .trial on the latter charge would constitute double jeopardy. . . ." ***Id.*** at 419-20.

¶14. In response, the State argues that ***Grady*** was explicitly overruled by ***Dixon v. U.S.***, 509 U.S. at 704. The State contends that, according to ***Dixon***, both ***Brown*** and ***Vitale*** merely stand for the proposition that it is double jeopardy to prosecute for a lesser-included offense after a defendant already has been prosecuted for the greater offense. The State further argues that ***Brooks*** established only that reckless driving could be a lesser offense for the

purposes of jury instructions, not that it was a lesser-included offense in the double-jeopardy setting.

¶15. Kelly cites ***Grady*** for the proposition that "the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element to an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." ***Grady***, 495 U.S. at 508. Unfortunately for Kelly, that holding in ***Grady*** was explicitly overruled in ***Dixon***. The ***Dixon*** Court found that the "same-conduct" rule of ***Grady*** was wholly inconsistent with other Supreme Court precedent and the "clear common-law understanding of double jeopardy," instead reinstating the "same-elements" test of ***Blockburger***. ***Dixon***, 509 U.S. at 711. Kelly's attempt to invoke the dead letter of the ***Grady*** rule cannot prevail. The standard for double-jeopardy analysis is the ***Blockburger*** "same-elements" test, not the ***Grady*** "same-conduct" test.

¶16. ***Dixon*** similarly clarified and put into context two other cases on which Kelly relies – ***Brown v. Ohio*** and ***Illinois v. Vitale***, both of which stand for the proposition that prosecution of a lesser-included offense is barred by prior prosecution of a greater-included offense. *See* ***Brown v. Ohio***, 432 U.S. 161 at168, and ***Illinois v. Vitale***, 447 U.S. at 419-20. ***Dixon*** found that the holding in ***Brown*** "rests squarely upon the existence of a lesser included offense." ***Dixon***, 509 U.S. at 706. Similarly, ***Vitale*** is "merely an application of the double jeopardy bar to lesser and greater included offenses." ***Dixon***, 509 U.S. at 707.

¶17. Kelly argues that Mississippi has recognized that, under certain conditions, reckless driving is a lesser offense of aggravated assault. Kelly bases this argument on his reading of our decision in ***Brooks***. In that case, a defendant was charged with aggravated assault, and

this Court held that the defendant was entitled to a jury instruction on the lesser-nonincluded offense of reckless driving "the same as if it were a lesser-included charge." ***Brooks***, 18 So. 3d at 839-40 (citing ***Moore v. State***, 799 So. 2d 89, 91 (Miss. 2001)). The argument that this analogy to a lesser-included charge, in the context of jury instructions, transforms reckless driving into an actual lesser-included charge of aggravated assault for double-jeopardy purposes has no merit. The Court specifically held in ***Brooks*** that "reckless driving is a separate and distinct offense from aggravated assault" and is a nonincluded offense of that crime. ***Brooks*** at 839. Furthermore, in ***Brooks***, we specifically held that aggravated assault does not have the same elements as reckless driving:

> There is no intent requirement in the reckless-driving statute, which simply criminalizes driving a vehicle in a manner that indicates a wilful or wanton disregard for the safety of persons or property. Miss. Code Ann. § 63-3-1201 (Rev. 2004). Therefore, the evidence to support a verdict of guilt of reckless driving does not necessarily prove guilt of aggravated assault, under ***Rowland***, because a conviction for aggravated assault requires proof of intent. ***Rowland***, 531 So. 2d at 631-32.[2]

Brooks, 18 So. 3d at 841. Kelly's argument that this Court has recognized reckless driving as a lesser-included offense of aggravated assault for double-jeopardy purposes is meritless.

CONCLUSION

¶18. The United States Supreme Court made clear in ***Dixon*** that the standard for a double-jeopardy analysis of two charges arising out of the same facts remains the ***Blockburger*** "same-elements test," which likewise remains the rule in Mississippi as set out in ***Graves v. State,*** 969 So. 2d 845, 847 (Miss. 2007). The law is that prosecution of a greater offense, for

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[2] ***Rowland v. State***, 531 So. 2d 627 (Miss. 1988).

double-jeopardy purposes, bars the prosecution of any lesser offense included therein. However, this Court has never held that reckless driving may be a lesser-included offense of aggravated assault for double-jeopardy purposes. Indeed, each charge contains elements that the other does not. To prove aggravated assault, it is not necessary to prove the element of willful or wanton disregard for the safety of person or property, nor of driving a vehicle. To prove reckless driving, it is not necessary to prove the elements of injury or attempt to injure. Since each of these charges contains separate elements, the prosecution of Kelly for aggravated assault does not violate his double-jeopardy rights, and that contention is without merit.

¶19. For the reasons discussed, the Humphreys County Circuit Court order denying Michael Kelly's motion to dismiss his aggravated-assault indictment is affirmed, and the case is remanded to the circuit court for further proceedings consistent with this opinion.

¶20. **AFFIRMED AND REMANDED.**

WALLER, C.J., DICKINSON, P.J., RANDOLPH, LAMAR, KITCHENS, CHANDLER, PIERCE AND KING, JJ., CONCUR.