

IN THE COURT OF APPEALS 11/28/95
OF THE
STATE OF MISSISSIPPI
NO. 94-KA-00684 COA

STATE OF MISSISSIPPI

APPELLANT

v.

DAVID RONALD RUSSOM, GEORGE W.

BOWLIN, JR., AND GEORGE W. BOWLIN, III

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. GEORGE C. CARLSON, JR.

COURT FROM WHICH APPEALED: CIRCUIT COURT OF PANOLA COUNTY

ATTORNEYS FOR APPELLANT:

OFFICE OF THE ATTORNEY GENERAL

BY: EDWIN A. SNYDER AND SCOTT F. LEARY

ATTORNEYS FOR APPELLEES:

STEVEN F. FARESE (RUSSOM)

H.R. GARNER (BOWLIN, JR.)

DAVID CLAY VANDERBURG (BOWLIN, III)

DISTRICT ATTORNEY: EDWIN A. SNYDER

NATURE OF THE CASE: CRIMINAL - MANUFACTURE OF A CONTROLLED SUBSTANCE

TRIAL COURT DISPOSITION: INDICTMENT DISMISSED ON DOUBLE JEOPARDY GROUNDS

BEFORE THOMAS, P.J., BARBER, AND DIAZ, JJ.

BARBER, J., FOR THE COURT:

The State of Mississippi appeals from an order of the Circuit Court of Panola County dismissing, on the ground of double jeopardy, the indictment against Appellees David Donald Russom, George W. Bowlin, Jr. ("Bowlin, Jr.") and George W. Bowlin, III ("Bowlin, III") on the charge of manufacturing a controlled substance. Finding that the trial court applied the wrong standard in its double jeopardy analysis, we reinstate the indictment against the Appellees and remand this case for trial.

I. BACKGROUND

On October 29, 1992, Russom, Bowlin, Jr. and Bowlin, III were arrested in Panola County in connection with the cultivation and harvesting of a crop of approximately seventy marijuana plants located on a parcel of land of undetermined ownership. Upon their arrests, each of these Appellees was formally charged with both manufacturing and transferring marijuana as well as with the misdemeanor charge of criminal trespass. The trespass charges were based upon the affidavit of Mike Samuels, a member of the Blue Room Rod & Gun Club, who swore that the land upon which the marijuana plants had been located was part of a leasehold interest belonging to the Club.

On December 8, 1992, a single hearing was held in the Justice Court of the First Judicial District of Panola County. The hearing served two purposes. First, it functioned as a preliminary hearing on the drug charges. Second, it functioned as a bench trial on the trespass charges. At the conclusion of the hearing, the justice court judge dismissed the trespass charges. The record discloses that he did so because he found that there was insufficient evidence before the court as to who owned the land. The justice court judge, however, found that probable cause existed on the drug charges and ordered the Appellees bound over to await the action of the Panola County grand jury. On September 3, 1992, the grand jury returned a single indictment against all the Appellees charging them with "knowingly and intentionally manufactur[ing] a controlled substance by harvesting more than one (1) Kilogram of Marijuana" in violation of section 41-29-139 of the Mississippi Code."

Trial was set for April 20, 1994 in the Circuit Court of Panola County. At trial, the Appellees brought a motion to quash or dismiss the indictment. In doing so, they argued that in view of the previous dismissal of the trespass charges by the justice court judge, prosecution of the drug charges comprised a double jeopardy violation. Finding that the double jeopardy clause of the Mississippi Constitution barred prosecution of the Appellees on the drug charge, the circuit judge granted their motion and quashed the indictment against them. The State now appeals the circuit judge's decision.

II. DISCUSSION

a) Did the Circuit Court Err in Determining That the Marijuana Prosecutions Were Barred By the Double Jeopardy Clause of the Mississippi Constitution?

In finding that prosecution of the defendants was barred by Article 3, Section 22 of the Mississippi Constitution, the circuit judge relied upon *Harrelson v. State*, 569 So. 2d 295 (Miss. 1990). In that case, the Mississippi Supreme Court adopted the double jeopardy standard set forth by the United States Supreme Court in *Grady v. Corbin*, 495 U.S. 508 (1990):

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, 109 L. Ed 2d at 557. Applying the *Grady* standard adopted in *Harrelson*, the circuit judge, reasoned that "in order to prove harvesting of marijuana [in a subsequent prosecution], the State must prove presence on the property where the marijuana was located, the same conduct which is necessary to prove trespass, a charge for which all defendants have been acquitted," and dismissed the marijuana charges.

In *United States v. Dixon*, 113 S. Ct. 2849, 2864 (1993), the United States Supreme Court overruled the *Grady* "same conduct" double jeopardy standard and re-established the standard first announced in *Blockburger v. United States*, 284 U.S. 299 (1932), and previously applied before *Grady*, as the sole test by which a determination should be made as to whether a second prosecution violates the double jeopardy clause of the federal constitution. The *Blockburger* test "inquires whether each offense contains an element not contained in the other; if not, they are the 'same offense' and double jeopardy bars additional punishment and successive prosecution." *Dixon*, 113 S. Ct. at 2856.

We are mindful of the Mississippi Supreme Court's pronouncement that it "construe[s] the double jeopardy clause of . . . [the Mississippi] Constitution consistent with authoritative constructions of the Constitution of the United States." *Lee v. State*, 469 So. 2d 1225, 1228 (Miss. 1985). Moreover, subsequent to the United States Supreme Court's decision in *Dixon*, the Mississippi Supreme Court announced its decision in *State v. Thomas*, 645 So. 2d 931 (Miss. 1994). In that case, the Mississippi Supreme Court was called upon to determine whether a prosecution for the criminal offense of conspiracy to commit burglary after a previous conviction for the same burglary violated the double jeopardy clause of the Mississippi Constitution. The Mississippi Supreme Court decided that it did not. In doing so, however, the Mississippi Supreme Court relied solely on the *Blockburger* test and made no mention of the *Grady* test previously adopted by it in *Harrelson*. *Thomas*, 645 So. 2d at 933-34. Thus, it appears that in relying solely on *Blockburger*, the Mississippi Supreme Court was implicitly overruling *Harrelson* and re-establishing the *Blockburger* standard as the appropriate double jeopardy standard under the Mississippi Constitution. In view of these two considerations, we hold that the circuit court erred in applying the *Grady* standard.

It is obvious that under the *Blockburger* test, the crime of illegal manufacture of a controlled substance under section 41-29-139 of the Mississippi Code is not barred by a previous prosecution and acquittal on the charge of criminal trespass since each offense contains an element not contained in the other. Accordingly, we hold that prosecution of the Appellees for manufacture of marijuana is not barred by the Mississippi Constitution.

b) Does the Doctrine of Collateral Estoppel Bar Prosecution of the Defendants?

The Appellees argue that prosecution on the marijuana charges is foreclosed by the doctrine of

collateral estoppel. In *Griffin v. State*, 545 So. 2d 729 (Miss. 1989), the Mississippi Supreme Court discussed how the concept of double jeopardy encompasses the doctrine of collateral estoppel. Referring to the United States Supreme Court decision *Ashe v. Swenson*, 397 U.S. 436 (1970), the *Griffin* opinion stated:

Ashe held that the State cannot put on proof *that conflicts with or questions the findings of fact implicit in a prior acquittal* because the Fifth Amendment's guaranty against double jeopardy protects a man who has been acquitted from having to "run the gauntlet" a second time. The State is forbidden to treat a first trial, at which the defendant is acquitted as a 'dry run' for a second prosecution.

Griffin, 545 So. 2d at 34-45 (emphasis added). In view of *Ashe*, the Appellees argue that to allow a prosecution for the manufacture of marijuana would conflict with or question a finding of fact implicit in the justice court judge's dismissal of the trespass charges. Specifically, the Appellees argue that in dismissing the trespass charges, the justice court judge found that the Appellees were never on the land on which the marijuana plants were harvested and that a subsequent prosecution for harvesting the plants would conflict with such a finding since the State would have to prove that the Appellees were at some point present on the land.

We have examined the record of the justice court proceedings and think that it is clear that in ruling that there was "no evidence beyond any reasonable doubt or hardly any evidence at all" that the defendants were trespassing, the justice court judge based his conclusion not on the factual finding that the Appellees were never present on the land on which the marijuana plants were growing but on the fact that there was insufficient evidence that the land was owned by someone other than the Appellees. Thus, a prosecution for harvesting an amount of marijuana in excess of one kilogram does not conflict with or place in question the factual findings of the justice court judge and it is therefore not barred by the doctrine of collateral estoppel.

c) Does the Fact that the Circuit Court Impanelled and Ultimately Dismissed a Jury After Granting the Motion to Quash/Dismiss Bar Prosecution of the Defendants on the Grounds of Double Jeopardy?

In the circuit court proceedings, a jury was impanelled for the trial. While the circuit judge considered the motion to quash/dismiss the indictment, the jury was put in recess. After he announced his decision dismissing the indictment, the circuit judge dismissed the jury. Thus, the Appellees argue that since a jury was impaneled, the circuit court's dismissal of their indictments constituted an acquittal on the drug charges and that further prosecution of them is barred by section 99-35-103(b) of the Mississippi Code.

It is well established in both federal and state double jeopardy jurisprudence that the prosecution is allowed to take an appeal in a criminal case *only* to the extent that a statute confers such a right. *See State v. Insley*, 606 So. 2d 600, 602 (Miss. 1992). The Mississippi statute controlling the right of the State to appeal in this case is section 99-35-103 of the Mississippi Code. This statute states in pertinent part:

The state or any municipal corporation may prosecute an appeal from a judgment of the circuit court in a criminal cause in the following cases:

(a) From a judgment sustaining a demurrer to, or a motion to quash an indictment, or an affidavit charging crime; but such appeals shall not bar or preclude another prosecution of the defendant for the same offense.

(b) From a judgment actually acquitting the defendant where a question of law has been decided adversely to the state or municipality; but in such case the appeal shall not subject the defendant to further prosecution, nor shall the judgment of acquittal be reversed, but the Supreme Court shall nevertheless decide the questions of law presented

Miss. Code Ann. § 99-35-103 (1972).

This case is controlled by subsection (a) of section 99-35-103 since the present appeal is an appeal from an order granting a motion to quash or dismiss the indictment. Therefore, further prosecution of the Appellees is expressly authorized by that subsection. Nevertheless, the defendants argue that the circuit judge's grant of their motion represented a judgment actually acquitting them and should therefore place this case under the province of subsection (b) and preclude any further prosecution. We find this argument completely without merit.

In *United States v. Scott*, 437 U.S. 82 (1978), the United States Supreme Court stated that a defendant is "acquitted only when the ruling of the judge, whatever its label, actually represents a resolution in defendant's favor, correct or not, of some or all of the factual elements of the offense charged." *Id.* at 97. In the present case, the ruling of the judge did not present a resolution in the Appellees' favor of any of the elements involved in the offense of manufacturing marijuana. Instead, the circuit judge dismissed the indictment due to a misapprehension of the pertinent double jeopardy standard and its application to the procedural facts of the case. In addition, we think that the fact that the drafters of section 99-35-103 included subsection (a) in that statute, which expressly provides for further prosecution of a criminal defendant after an appeal from a motion to quash an indictment, unquestionably shuts the door to any possibility that subsection (b)'s concept of "a judgment actually acquitting the defendant" could be logically construed to encompass the situation in the present case. Thus, Appellees' final double jeopardy argument fails.

III. CONCLUSION

In view of the preceding discussion, we find that none of the Appellees' double jeopardy arguments possess any merit and that the circuit judge erred in granting the Appellees' motion to quash or dismiss the indictment against them. Accordingly, we reinstate the indictment on the charge of harvesting an amount in excess of one kilogram of marijuana and remand this case for trial.

THE JUDGMENT OF THE CIRCUIT COURT OF PANOLA COUNTY DISMISSING THE INDICTMENT AGAINST APPELLEES ON THE CHARGE OF MANUFACTURING AN AMOUNT OF MARIJUANA IN EXCESS OF ONE (1) KILOGRAM IS REVERSED; THE INDICTMENT IS REINSTATED AND THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS. COSTS ARE ASSESSED TO APPELLEES.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., COLEMAN, DIAZ, KING, McMILLIN,

PAYNE, AND SOUTHWICK, JJ., CONCUR.