IN THE SUPREME COURT OF THE STATE OF NEVADA

THE STATE OF NEVADA,
Appellant,
vs.
ANDRE TERRELL MCGEE,
Respondent.

No. 34694

FILED

MAR 05 2001

ORDER VACATING AND REMANDING

This is an appeal from a district court order granting respondent's motion to dismiss an amended information. Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

The State first argues that the district court lacked jurisdiction to entertain respondent's post-conviction motion to withdraw his guilty plea because respondent had completed his sentence before he filed the motion. The State primarily relies on Jackson v. State.[1]

The State's reliance on Jackson is misplaced. In Jackson, this court held that the district courts do not have jurisdiction to entertain a post-conviction petition for a writ of habeas corpus where the petitioner completed his sentence before filing the petition.[2] That decision is based on a constitutional provision that specifically limits the district courts' power to issue a writ of habeas corpus and a statutory provision that specifically limits the availability of the post-conviction petition for a writ of habeas corpus.[3] There are no similar constitutional or statutory limitations on the post-conviction motion to withdraw a guilty plea. While we have

[1]115 Nev. 21, 973 P.2d 241 (1999).

[2]Id. at 23, 973 P.2d at 242.

[3]See id. (citing Nev. Const. art. 6, § 6, cl. 1 and NRS 34.724(1)).

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recently adopted the equitable doctrine of laches as a limitation on such motions,[4] that doctrine is not jurisdictional and therefore cannot be raised by the State at any time. Accordingly, because the State failed to file a notice of appeal from the district court's order granting the post-conviction motion to withdraw the guilty plea, we decline to address any issues related to that decision.

The State also argues that the district court erred in dismissing the amended information based on the Double Jeopardy Clause and the statute of limitations. We agree and, therefore, we vacate the district court's order and remand this matter to the district court for further proceedings.

Double jeopardy

The Double Jeopardy Clause of the United States and Nevada constitutions bars multiple prosecutions or punishment of a defendant for the same offense.[5] As a general rule, however, the Double Jeopardy Clause does not apply to the original counts in a charging document when a defendant has withdrawn or successfully challenged his guilty plea.[6] This is the situation presented in this case.

The district court, however, apparently accepted respondent's analogy of his situation to cases in which the defendant moves for a mistrial and then seeks to bar a retrial on the ground of double jeopardy because of prosecutorial intent to cause the defendant to ask for a mistrial. As a general rule, when a defendant moves for a mistrial, he "has elected to terminate the proceedings against him" and double jeopardy does

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[4]See Hart v. State, 116 Nev. ___, ___, 1 P.3d 969, 972 (2000).

[5]North Carolina v. Pearce, 395 U.S. 711, 717 (1969); State v. Lomas, 114 Nev. 313, 315, 955 P.2d 678, 679 (1998).

[6]Fransaw v. Lynaugh, 810 F.2d 518, 524-25 (5th Cir. 1987); accord Santobello v. New York, 404 U.S. 257, 263 n.2 (1971); NRS 173.035(4).

not bar a retrial.[7] There is one narrow exception to the general rule: The Double Jeopardy Clause bars retrial when the prosecution has intentionally "goaded" the defendant into moving for a mistrial.[8]

We are not entirely convinced that the narrow exception recognized in Kennedy should be extended to this case. But even assuming that Kennedy should be extended in this manner, the rule would be that double jeopardy bars retrial when the State has goaded the defendant into entering a guilty plea with the intent that the defendant later withdraw it so that a new trial results. Because it is clear in this case that the State did not intentionally goad respondent into entering and later withdrawing his guilty plea in order to cause the equivalent of a mistrial, we need not adopt this rule in this case.

In particular, we note that the prosecutor did not have actual knowledge of the evidence withheld by the police and, therefore, it cannot be said that he failed to disclose the evidence to respondent with the intent to goad respondent into entering a guilty plea. Respondent suggests that because the prosecutor may be "'charged with constructive knowledge and possession of evidence withheld by other state agents'"[9] for purposes of Brady v. Maryland,[10] the Double Jeopardy Clause should bar a retrial in this case. We disagree.

Assuming that this case is analogous to the mistrial cases, the issue is the prosecutor's intent. We conclude that respondent cannot demonstrate that the prosecutor intended to

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[7]Oregon v. Kennedy, 456 U.S. 667, 672-73 (1982); see also Melchor-Gloria v. State, 99 Nev. 174, 178, 660 P.2d 109, 111 (1983).

[8]Kennedy, 456 U.S. at 676.

[9]Jimenez v. State, 112 Nev. 610, 620, 918 P.2d 687, 693 (1996) (quoting Gorham v. State, 597 So. 2d 782, 784 (Fla. 1992)).

[10]373 U.S. 83 (1963).

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goad him into pleading guilty by withholding evidence of which the prosecutor had no actual knowledge. There is no evidence to suggest that the prosecutor acted intentionally. Because the prosecutor did not know about the evidence, we conclude that he could not have intended to subvert the protections of the Double Jeopardy Clause by withholding the evidence. Moreover, we are aware of no cases holding that reversal of a conviction based on a Brady violation precludes a second trial;[11] the typical remedy for a Brady violation is a new trial.[12]

The district court also may have accepted respondent's argument that he cannot be reprosecuted because he has already been punished and completed his sentence and reprosecution on the original charges would subject him to a harsher sentence and multiple punishments. To the extent that the district court accepted this argument, we conclude that it erred. The withdrawal of respondent's guilty plea essentially wipes the slate clean and returns the parties to their respective positions before entry of the guilty plea.[13] While respondent may receive a lengthier sentence if he is convicted of the original charges, that does not bar reprosecution.[14]

In sum, we conclude that the Double Jeopardy Clause does not bar the State from prosecuting respondent on the original charges. Accordingly, we conclude that the district court erred in granting the motion to dismiss based on the Double Jeopardy Clause.

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[11]See State v. Mincey, 636 P.2d 637, 646-47 (Ariz. 1981) (discussing argument that Double Jeopardy Clause precludes a second trial after conviction is reversed due to a Brady violation).

[12]See, e.g., Mazzan v. Warden, 116 Nev. 48, 993 P.2d 25 (2000) (reversing judgment of conviction and remanding for further proceedings); Jimenez, 112 Nev. at 613, 918 P.2d at 688 (same).

[13]People v. Aragon, 14 Cal. Rptr. 2d 561, 656 (Ct. App. 1992).

[14]Pearce, 395 U.S. at 719-26.

Statute of limitations

The State originally charged respondent with two counts of trafficking in a controlled substance. Pursuant to NRS 171.085(2), the statute of limitations for the charged offenses is three years. To comply with the statute, the State must file "an information or complaint . . . within 3 years after the commission of the offense."[15]

Here, the State filed the criminal complaint within the three-year statute of limitations. The filing of the complaint commenced the criminal prosecution and arrested the statute of limitations.[16] Respondent's guilty plea and subsequent withdrawal of that plea do not change the fact that the State commenced the criminal prosecution within the statute of limitations.[17] Moreover, NRS 173.035(4) specifically contemplates the filing of an amended information following the withdrawal of a guilty plea:

> If, for any reason, the agreement is rejected by the district court or withdrawn by the defendant, the prosecuting attorney may file an amended information charging all of the offenses which were in the criminal complaint upon which the preliminary examination was waived. The defendant must then be arraigned in accordance with the amended information.

The State is allowed to file an "amended" information because the information that is filed after a defendant waives his right to a preliminary examination based on a plea bargain may contain only those charges to which the defendant has agreed to plead

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[15]NRS 171.085(2).

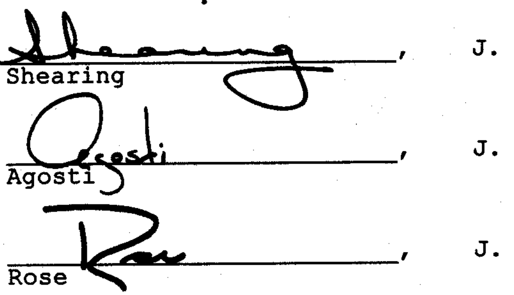
[16]See id.; Higgins v. People, 868 P.2d 371, 374 (Colo. 1994); State v. Strand, 674 P.2d 109, 110 (Utah 1983); 22 C.J.S. Criminal Law § 206, 251 (1989) (generally, date on which charging document is filed marks beginning of criminal prosecution and arrests statute of limitations); Id. § 207 (under some authority, when charging document is quashed, dismissed or set aside, time during which it was pending is not computed as part of limitations period for offense).

[17]See Aragon, 14 Cal. Rptr. 2d at 565 (noting that withdrawal of guilty plea returns parties to their respective positions prior to entry of guilty plea).

guilty.[18] For these reasons, we conclude that the district court also erred in dismissing the amended information based on the statute of limitations.

Having considered the briefs and record on appeal, we conclude that the district court erred in dismissing the amended information based on the Double Jeopardy Clause and the statute of limitations. Accordingly, we

ORDER the judgment of the district court VACATED AND REMAND this matter to the district court for proceedings consistent with this order.



_______________, J.
Shearing

_______________, J.
Agosti

_______________, J.
Rose

cc: Hon. Ronald D. Parraguirre, District Judge
Attorney General
Clark County District Attorney
Goodman, Chesnoff & Keach
Clark County Clerk

[18] See NRS 173.035(4).