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STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to Colleton County

D. Craig Brown, Circuit Court Judge

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S.C. Supreme Court

JIMMY LEE DUNCAN,

PETITIONER,

V.

STATE OF SOUTH CAROLINA,

RESPONDENT

APPELLATE CASE NO. 2011-203246

BRIEF OF PETITIONER

ROBERT M. PACHAK
Appellate Defender

South Carolina Commission on Indigent Defense
Division of Appellate Defense
PO Box 11589
Columbia, S. C. 29211-1589
(803) 734-1343

ATTORNEY FOR PETITIONER.

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Constitutional Provisions

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ISSUE PRESENTED

Whether petitioner's conviction for possession of contraband constituted a double jeopardy violation when petitioner was punished by the detention center for the same offense?

STATEMENT

Petitioner was convicted of furnishing or possessing contraband in a county or municipal prison after a jury trial held before the Honorable Perry M. Buckner, III in Colleton County on January 13-14, 2010. A three year sentence was imposed. Everett W. Bennett, Jr., Esquire was trial counsel. On January 14, 2010, petitioner also pled guilty to possession of cocaine base and was sentenced to time served. Petitioner's probation was revoked on a separate charge for eighteen months.

Petitioner filed an application for post-conviction relief on June 7, 2010. An evidentiary hearing was held on September 1, 2011, before the Honorable D. Craig Brown. Petitioner was present and was represented by J. D. Bryan, Esquire. Respondent was represented by Matthew J. Friedman, Assistant Attorney General. Both petitioner and trial counsel testified at the hearing.

On October 6, 2011, Judge Brown issued an order denying and dismissing the application for post-conviction relief.

A Johnson petition was filed on petitioner's behalf on May 14, 2012, presenting the issue of whether trial counsel was ineffective in failing to file a direct appeal. On April 4, 2014, this Court issued an order denying the motion to be relieved as counsel and directing the parties to address the following question:

Did the post-conviction relief judge err in finding petitioner was not entitled to a belated direct appeal of his conviction for furnishing or possessing contraband in a county or municipal prison?

A petition for writ of certiorari was submitted on April 17, 2014. On October 23, 2014, the Court issued the following order directing the parties to brief the following issue:

Whether petitioner's conviction for possession of contraband constituted a double jeopardy violation when petitioner was punished by the detention center for the offense?

This brief of petitioner follows.

ARGUMENT

Petitioner's conviction for possession of contraband constituted a double jeopardy violation because petitioner was punished by the detention center for the same offense.

During pretrial on the charge of possession of contraband, a shank, defense counsel explained to the court that after the incident occurred on September 8, 2009, petitioner was punished within the prison system for the offense. He was put on lockdown and isolation and no visitation along with limited use of the facilities. Because he was already punished, it would violate double jeopardy to try him now so the incident charging him for possession of contraband should be dismissed on double jeopardy grounds. The trial court ruled that the punishment in the prison system was administrative and not judicial punishment. Therefore, there would be no double jeopardy violation. (App. p. 34, line 8 – p. 35, line 8).

The trial court's ruling on this matter was in error. The double jeopardy clause of the Fifth Amendment to the United States Constitution protects against a second prosecution for the same offense or multiple punishments for the same offense. State v. Magazine, 302 S.C. 55, 393 S.E.2d 385 (1990).¹ Being punished for the same conduct violates double jeopardy. Grady v. Corbin, 495 U.S. 508, 110 S.Ct. 2084 (1990).² However, it has been held that prison disciplinary proceedings do not constitute a double jeopardy bar to a subsequent criminal prosecution based on the same acts. State v. Blick, 325 S.C. 636, 481 S.E.2d 452 (Ct.App. 1997); State v. Jolly, 405 S.C. 622, 749

¹ State v. Magazine was abrogated by State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997).

² Grady v. Corbin was overruled by United States v. Dixon, 509 U.S. 688, 113 S.Ct. 2849 (1993).

S.E.2d 114 (Ct.App. 2013). Federal courts appear to be in agreement. State ex rel Franklin v. McBride, 226 W.Va. 375, 701 S.E.2d 97 (2009)(citing

State v. Kell, 61 P.3d 1019, 1037 (Utah 2002) (citing United States v. Mayes, 158 F.3d 1215, 1220 (11th Cir. 1998); United States v. Brown, 59 F.3d 102, 105 (9th Cir. 1995); United States v. Hernandez-Fundora, 58 F.3d 802, 806-08 (2d Cir.1995); Garrity v. Fiedler, 41 F.3d 1150, 1152 (7th Cir.1994); United States v. Newby, 11 F.3d 1143, 1144-45 (3d Cir.1993); *384**106United States v. Rising, 867 F.2d 1255, 1259 (10th Cir.1989); Kerns v. Parratt, 672 F.2d 690, 691-92 (8th Cir.1982); Fano v. Meachum, 520 F.2d 374, 376 n. 1 (1st Cir.1975); United States v. Lepiscopo, 429 F.2d 258, 261 (5th Cir. 1970); Hamrick v. Peyton, 349 F.2d 370, 372 (4th Cir.1965); Gibson v. United States, 161 F.2d 973, 974 (6th Cir. 1947)).

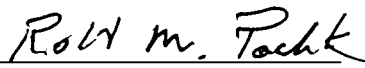
226 W.Va. at 383-384, 701 S.E.2d at 105-106.

The trial court in this case failed to take into consideration Article 1, § 12 of the South Carolina Constitution which provides in its double jeopardy prohibition that, “No person shall be subject for the same offense to be twice put in jeopardy of life or liberty....” This section of the South Carolina Constitution appears broader than protections provided in the federal constitution. Just being twice put in jeopardy of liberty would run afoul of the South Carolina Constitution. When petitioner was put in lockdown and isolation, he was put in jeopardy of his liberty. His subsequent prosecution for possession of contraband would therefore have been a double jeopardy violation.

CONCLUSION

Petitioner's conviction for possession of contraband should be vacated as it violated double jeopardy under the South Carolina Constitution.

Respectfully submitted,


Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER.

This 20th day of November, 2014

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IN THE SUPREME COURT

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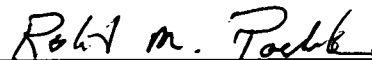
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CERTIFICATE OF SERVICE

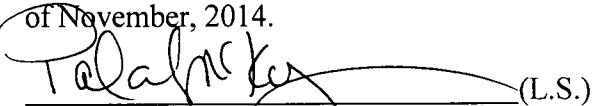
I certify that a true copy of the brief of petitioner, in this case has been served on Ashleigh R Wilson, Esquire, at Rembert Dennis Building, 1000 Assembly Street, Room 519, Columbia, SC 29201, this 20th day of November, 2014.



Robert M. Pachak
Appellate Defender

ATTORNEY FOR PETITIONER

SWORN TO BEFORE ME this 20th day
of November, 2014.

 (L.S.)

Notary Public for South Carolina
My Commission Expires: July 24, 2022