

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

 ORIGINAL

Appeal from Oconee County

Honorable R. Scott Sprouse, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

JACOB DROTNING,

APPELLANT

APPELLATE CASE NO 2016-002288

RECEIVED

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FINAL BRIEF OF APPELLANT

SC Court of Appeals

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge err in allowing the State to prosecute Appellant for both attempted murder and criminal domestic violence of a high and aggravated nature when prosecution for both violates double jeopardy?

STATEMENT OF THE CASE

In July of 2014, the Oconee County Grand Jury indicted Appellant Drotning for attempted murder and arson second degree, indictments #2014-GS-37-742, 743. (R. p. 420, 422). In May of 2015 the Oconee County Grand Jury indicted Appellant for criminal domestic violence of a high and aggravated nature and malicious injury to property, indictments #2015-GS-37-441,442. (R. p. 424, 426). On October 17, 2016, Appellant proceeded to jury trial before the Honorable R. Scott Sprouse. Gregory Lee Cole, Jr. represented Appellant at trial. David R. Wagner, Jr. and Lindsey Satterfield Simmons prosecuted the case. The jury returned verdicts of guilty as charged. Judge Sprouse sentenced Appellant to thirty (30) years for attempted murder, twenty (20) years consecutive for arson, ten (10) years concurrent for criminal domestic violence of a high and aggravated nature and five (5) years concurrent for malicious injury to property. On October 28, 2016, Appellant filed a motion to reconsider sentence. The motion was denied on November 2, 2016. A timely notice of intent to appeal was served on November 11, 2016. This appeal follows.

ARGUMENT

The trial judge erred in allowing the State to prosecute Appellant for both attempted murder and criminal domestic violence of a high and aggravated nature when prosecution for both violates double jeopardy.

The Oconee County Grand Jury indicted Appellant for attempted murder, criminal domestic violence of a high and aggravated nature [CDVHAN], arson second degree and malicious injury to property. Prior to trial Appellant argued that he should not be prosecuted for both attempted murder and CDVHAN. (R. p. 49-51). The trial judge ruled, “These cases are – my understanding of what the law is, the CDV high and aggravated has an element that is not present in the attempted murder charge. And, as Ms. Simmons correctly stated, the test is whether the greater of the two offenses includes all of the elements of the lesser offense. That’s been the long-standing law. And clearly, the attempted murder charge does not have the household member element that’s present in the CDV high and aggravated. So, Mr. Cole, I’m going to deny your motion on that on that [sic] basis.” (R. p. 52, line 16 – p. 53, line 1). The trial judge erred.

In Jivers v. State, 304 S.C. 556, 406 S.E.2d 154 (1991), the South Carolina Supreme Court held that where conduct supporting a criminal domestic violence conviction was the same conduct supporting a later charge of assault and battery with intent to kill, subsequent prosecution for assault and battery with intent to kill violated the double jeopardy clause. In Jivers the Court wrote:

Here, since there is no dispute that the conduct that supported the ABIK charge was the same conduct that supported the criminal domestic violence charge, petitioner's subsequent prosecution for ABIK was clearly a violation of the double

jeopardy clause. See also Grady v. Corbin¹, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990) (double jeopardy clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted).

304 S.C. at 560, 406 S.E.2d at 157 (1991). The “same conduct” test applied in Jivers, however, is no longer the proper test. In State v. Easler, the South Carolina Supreme Court held that the same elements test announced in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), is the only test for determining a double jeopardy violation. Under the Blockburger test, prosecuting Appellant for both CDVHAN and attempted murder violates double jeopardy.

“The Double Jeopardy Clause of the Fifth Amendment, applicable to the States through the Fourteenth, provides that no person shall ‘be subject for the same offence to be twice put in jeopardy of life or limb.’ It has long been understood that separate statutory crimes need not be identical either in constituent elements or in actual proof in order to be the same within the meaning of the constitutional prohibition. 1 J. Bishop, *New Criminal Laws* 1051 (8th ed. 1892); Comment, *Twice in Jeopardy*, 75 *Yale L.J.* 262, 268-269 (1965).” Brown v. Ohio, 432 U.S. 161, 164, 97 S. Ct. 2221, 2225, 53 L. Ed. 2d 187 (1977). No person shall be subject for the same offense to be twice put in jeopardy of life or liberty, nor shall any person be compelled in any criminal case to be a witness against himself. S.C. Const. art. I, § 12.

In Stevenson v. State, 335 S.C. 193, 198, 516 S.E.2d 434, 436–37 (1999) (fn#3, #4 omitted), the South Carolina Supreme Court wrote:

The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal or conviction, and protects against multiple punishments

¹ Grady v. Corbin was overruled by United States v. Dixon, 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993).

for the same offense. Brown v. Ohio, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977); State v. Easler, 327 S.C. 121, 489 S.E.2d 617 (1997). In Blockburger v. United States, the United States Supreme Court held where the same act or transaction constitutes a violation of two distinct statutory provisions, “the test to determine whether these are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.” 284 U.S. at 304, 52 S.Ct. at 182.

Stevenson v. State, 335 S.C. 193, 198, 516 S.E.2d 434, 436–37 (1999)

The indictment for attempted murder alleges, “That Jacob Daniel Drotning did in Oconee County, South Carolina, on or about May 16, 2014, did unlawfully with malice aforethought and with the intent to kill, attempted to kill Catherine Cook, to wit: defendant did light the victim on fire using gasoline causing burns over 60% of her body. This is in violation of 16-3-29 of the South Carolina Code of Laws (1976) as amended.” (Supp. R. p. 6). The indictment for CDVHAN alleges:

That defendant, Jacob Daniel Drotning did in Oconee County, South Carolina on or about May 16, 2014, cause, offer, or attempt to cause physical harm or injury to Catherine Cook, a household member of the Defendant, with the present ability under the circumstances reasonable creating fear or imminent peril and Jacob Daniel Drotning intentionally committed an assault and battery which involved the use of a deadly weapon, or resulted in serious bodily injury, and/or an assault, with or without an accompanying battery, which would reasonably cause fear of imminent serious bodily injury or death, to wit: defendant did light the victim on fire using gasoline causing burns over 60% of her body. All in violation of 16-25-0065, Code of Laws of South Carolina (1976), as amended. Against the peace and dignity of the State, and contrary to the statute in such case made and provided.

(Supp. R. p. 2). The indictments for attempted murder and CDVHAN appear very similar with the exception that CDVHAN alleges a household member.

S.C. Code Ann. § 16-25-65, the CDVHAN statute provides:

A) A person who violates Section 16-25-20(A) is guilty of the offense of domestic violence of a high and aggravated nature when one of the following occurs. The person:

- (1) commits the offense under circumstances manifesting extreme indifference to the value of human life and great bodily injury to the victim results;
- (2) commits the offense, with or without an accompanying battery and under circumstances manifesting extreme indifference to the value of human life, and would reasonably cause a person to fear imminent great bodily injury or death; or
- (3) violates a protection order and, in the process of violating the order, commits domestic violence in the first degree.

S.C. Code Ann. § 16-25-20 provides:

A) It is unlawful to:

- (1) cause physical harm or injury to a person's own household member; or
- (2) offer or attempt to cause physical harm or injury to a person's own household member with apparent present ability under circumstances reasonably creating fear of imminent peril.

S.C. Code Ann. § 16-3-29, the attempted murder statute, provides:

A person who, with intent to kill, attempts to kill another person with malice aforethought, either expressed or implied, commits the offense of attempted murder. A person who violates this section is guilty of a felony, and, upon conviction, must be imprisoned for not more than thirty years. A sentence imposed pursuant to this section may not be suspended nor may probation be granted.

The trial judge found there was no double jeopardy violation because attempted murder does not include the element of a household member. CDVHAN, however, includes all of the elements of attempted murder. CDVHAN requires that one commit the offense, against a household member, under circumstances manifesting extreme indifference to the value of human life and great bodily injury to the victim results or commits the offense, against a household member, with or without an accompanying battery and under circumstances manifesting extreme indifference to the value of human life, and would reasonably cause a person to fear imminent great bodily injury or death. The extreme indifference requirement of CDVHAN is the

equivalent of the malice requirement of attempted murder. Attempted murder does not require an element not found in CDVHAN.

If the State had proceeded only on the CDVHAN charge, after acquittal or conviction, the State could not have then proceeded to trial on attempted murder. “The Double Jeopardy Clause ‘protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.’ North Carolina v. Pearce, 395 U.S. 711, 717; 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969) (footnotes omitted). Brown v. Ohio, 432 U.S. 161, 165, 97 S. Ct. 2221, 2225, 53 L. Ed. 2d 187 (1977). The fact that Appellant received concurrent sentences for CDVHAN and attempted murder is not dispositive of the double jeopardy issue. Ball v. United States, 470 U.S. 856, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985).

CONCLUSION

Based on the above argument this Court should reverse the convictions for attempted murder and CDVHAN and remand for a new trial on one of the offenses.



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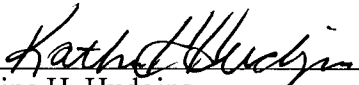
ATTORNEY FOR APPELLANT

This 8th day of February, 2018.

CERTIFICATE OF COUNSEL FOR APPELLANT

The undersigned certifies that to the best of my ability this Final Brief of Appellant complies with Rule 211(b), SCACR, and the April 15, 2014 order from the South Carolina Supreme Court entitled "Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings."

February 8, 2018



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