STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Certiorari to the Court of Appeals
Appeal From York County
Hon. John C. Hayes, III, Circuit Court Judge
Appellate Case Tracking No. 2018-000029

The State, Respondent,

v.

Sean Robert Kelly, Petitioner.

Opinion No. 2017-UP-391 (S.C. Ct. App. filed October 18, 2017)

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Procedural History

On September 11, 2013, Petitioner was arrested for driving under the influence (DUI) pursuant to Section 56-5-2930 of the South Carolina Code. A bench trial was held in magistrate's court before the Honorable Clayborn Barnette, Jr., on September 12, 2015. After the State rested, Petitioner moved for a "directed verdict" on the basis of the State's failure to properly present a video recording under section 56-5-2953(A) of the South Carolina Code. Several days later, the magistrate granted the motion to dismiss the case. The State filed a notice of appeal in circuit court on December 1, 2015.

The Honorable John C. Hayes, III, heard the appeal from the magistrate's decision. Petitioner never raised the issue of Double Jeopardy to the circuit court. By Order dated March 25, 2016, Judge Hayes affirmed the decision of the magistrate, and the court did not address the issue of Double Jeopardy in its Order.

The State served and filed a timely Notice of Appeal on April 22, 2016. Petitioner raised the issue of Double Jeopardy for the first time in his Brief to the Court of Appeals. The Court of Appeals considered the appeal and reversed the decisions of the magistrate and circuit court and remanded for trial. The Court of Appeals did not address the issue of Double Jeopardy. Petitioner filed a Petition for Rehearing raising the issue of Double Jeopardy, which was denied on December 11, 2017.

Petitioner timely served his Petition for Writ of Certiorari on January 10, 2018. After the State filed a Return, this Court granted the Petition for Writ of Certiorari on March 28, 2018. Petitioner served his Brief of Appellant on April 27, 2018. This Brief of Respondent follows.

STANDARD OF REVIEW

A determination of whether retrial is barred by the Double Jeopardy Clause is "a mixed one of law and fact." State v. Jenkins, 20 S.C. 351, 352 (1884). In criminal cases, an appellate court sits to review errors of law only and is bound by the trial court's factual findings unless they are clearly erroneous. State v. Wilson, 345 S.C. 1, 5–6, 545 S.E.2d 827, 829 (2001) (citations omitted). "[Appellate courts] are free to decide a question of law with no particular deference to the circuit court." Catawba Indian Tribe of South Carolina v. State, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007).

ARGUMENT

I. The Double Jeopardy Clause does not prohibit a retrial of Petitioner in this case because the judge's procedural dismissal is not the equivalent of an acquittal and makes no determination related to factual guilt or innocence.

The circuit court and Court of Appeals correctly considered the State's appeal in this case because retrial is not barred by the Double Jeopardy Clause.[1] The dismissal of Petitioner's charges was based on procedural grounds and did not involve any determination of guilt or innocence. This Court should affirm the Court of Appeals and remand this case to the magistrate for trial.[2]

"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.'" Brown v. Ohio, 432 U.S. 161, 164 (1977); see also, S.C. Const. Art. I,

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[1] As noted in the procedural history of this case, Petitioner never raised the issue of Double Jeopardy to the circuit court on appeal. Petitioner instead raised the issue for the first time as an additional sustaining ground to the Court of Appeals. In I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 526 S.E.2d 716 (2000), this Court acknowledged an appellate court **may** consider additional sustaining grounds which were not argued below, it is a consideration entirely within the discretion of the appellate court. This Court explained it "likely would perceive it as being unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal," and thus would decline the invitation to entertain an issue that should properly have been raised to the previous tribunal. Id. at 421, 526 S.E.2d at 724. This Court's warning was clear: "Stated another way, the respondent may raise an additional sustaining ground that was not even presented to the lower court, but the appellate court is likely to ignore it." Id. This appears to be what the Court of Appeals did in this case by not addressing the Double Jeopardy claim and it is certainly within this Court's discretion to refuse to consider the issue as well.

[2] It is important to note Petitioner has not raised any challenge to the substantive findings of the Court of Appeals' Opinion that the magistrate court erred in dismissing the case. He has not challenged the findings that the State complied with section 56-5-2953 of the South Carolina Code by having the arresting officer produce a video in full compliance with subsection A. Therefore, these findings are the law of the case. See Shirley's Iron Works, Inc. v. City of Union, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance."); State v. Sampson, 317 S.C. 423, 427, 454 S.E.2d 721, 723 (Ct. App. 1995) (holding that an unchallenged ruling, right or wrong, is the law of the case).

§ 12 ("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."). "In a nonjury trial, jeopardy attaches when the court begins to hear evidence." Serfass v. United States, 420 U.S. 377, 388 (1975). However, the United States Supreme Court has made it abundantly clear, "[t]he conclusion that jeopardy has attached . . . **begins**, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial." Martinez v. Illinois, 134 S. Ct. 2070, 2075 (2014) (internal citations and quotations marks omitted) (emphasis added). "The remaining question is whether the jeopardy ended in such a manner that the defendant may not be retried." Id.

Accordingly, the State is barred from prosecuting a defendant for the same offense after acquittal or conviction. State v. Easler, 327 S.C. 121, 129, 489 S.E.2d 617, 622 (1997). The United States Supreme Court held: "Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '(a) verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting (a defendant) twice in jeopardy, and thereby violating the Constitution.' " U.S. v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977) (citing U.S. v. Ball, 163 U.S. 662, 671 (1896)). The Supreme Court explained:

> An **acquittal** is accorded special weight. The constitutional protection against double jeopardy unequivocally prohibits a second trial following **an acquittal**, for the public interest in the finality of criminal judgments is so strong that an **acquitted** defendant may not be retried even though the **acquittal** was based upon an egregiously erroneous foundation. If the **innocence** of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair.

United States v. DiFrancesco, 449 U.S. 117, 129 (1980) (internal citations and quotation marks omitted)(emphasis added).

It is without question the State may not appeal a jury's verdict of not guilty, even when wrongly decided. "[W]e necessarily afford absolute finality to a jury's verdict of acquittal-no matter how erroneous its decision". There is no doubt the State may not appeal from a directed verdict of not guilty. State v. McKnight, 353 S.C. 238, 239, 577 S.E.2d 456, 457 (2003) ("[W]e have long recognized that the State has no right of appeal from a judgment of acquittal in a criminal case . . . ." (emphasis removed) (internal citation omitted)). This is true even where a magistrate committed a legal error in granting the acquittal. See State v. Tillinghast, 375 S.C. 201, 203, 652 S.E.2d 400, 401 (2007) ("Whether or not the magistrate erred in his ruling of law, appellant was acquitted and is now out of court. The circuit court erred by finding the State may appeal the magistrate's ruling.").

Nonetheless, the United States Supreme Court has stated: "The result is definitely otherwise in cases where the trial has not ended in an acquittal." DiFrancesco, 449 U.S. at 130. The Court articulated: "where the trial has been terminated prior to a jury verdict at the defendant's request **on grounds unrelated to guilt or innocence**, the Government may seek appellate review of that decision even though a second trial would be necessitated by a reversal." Id.

Where Petitioner fails in his argument is in his assumption he was acquitted by the magistrate court. As the United States Supreme Court explained: "a defendant is acquitted only when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.'" United States v. Scott, 437 U.S. 82, 97 (1978). The United States Supreme Court has clarified an acquittal "encompass[es] any ruling that the prosecution's proof is insufficient to establish criminal liability for an offense." Evans v. Michigan, 133 S. Ct. 1069, 1074–75 (2013). This

definition would include "a ruling by the court that the evidence is insufficient to convict, a factual finding [that] necessarily establish[es] the criminal defendant's lack of criminal culpability, and any other rulin[g] which relate[s] to the ultimate question of guilt or innocence." Id. at 1075 (alterations in original) (internal quotation marks omitted). However, these factual rulings are differentiated from mere **procedural** endings to a case, such as "rulings on questions that are **unrelated to factual guilt or innocence**, but which serve other purposes, including a legal judgment that a defendant, although criminally culpable, may not be punished because of some problem like an error with the indictment." Id. (internal quotation marks omitted) (citation omitted) (emphasis added).

The discussion and rationale presented in Scott is enlightening:

> We think that in a case such as this the defendant, by deliberately choosing to seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the Double Jeopardy Clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant. . . . Rather, we conclude that the Double Jeopardy Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice. In [Green v. United States, 355 U.S. 184 (1957)] the question of the defendant's factual guilt or innocence of murder in the first degree was actually submitted to the jury as a trier of fact; in the present case, respondent successfully avoided such a submission of the first count of the indictment by persuading the trial court to dismiss it on a basis which did not depend on guilt or innocence. He was thus neither acquitted nor convicted, because he himself successfully undertook to persuade the trial court not to submit the issue of guilt or innocence to the jury which had been empaneled to try him.

Scott, 437 U.S. 82, 98–99.

In this instance, the magistrate dismissed the case under a purely procedural rationale. As the magistrate's order makes plain, he found "the state failed to produce a video in compliance

with Section 56-5-2953(A), and none of the exceptions of Section 56-5-2953(B) apply." (App p.11.) He thus concluded that based on that deficiency, "the court must dismiss this prosecution." (App. p.11.) Petitioner acknowledges: "the magistrate dismissed the case based upon the State's failure to produce a video in compliance with S.C. Code Ann. § 56-5-2953 (Supp. 2013)" and not based on either an acquittal by the magistrate or a determination by the magistrate the facts presented were insufficient to support a finding of guilt of DUI. (Br. of Pet. p.7). Petitioner even admits, as he must, that "the magistrate did not specifically rule on the evidence presented by the State and whether the State proved the *corpus delicti* of driving under the influence." (Br. of Pet. p.9.).

Pursuant to section 56-5-2930:

> It is unlawful for a person to drive a motor vehicle within this State while under the influence of alcohol to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired, under the influence of any other drug or a combination of other drugs or substances which cause impairment to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired, or under the combined influence of alcohol and any other drug or drugs or substances which cause impairment to the extent that the person's faculties to drive a motor vehicle are materially and appreciably impaired.

S.C. Code Ann. § 56-5-2930 (Supp. 2013). The video recording requirements of section 56-5-2953 are not elements of the offense of DUI as established by section 56-5-2930, but instead, are merely procedural requirements. Unlike an element of an offense, the procedural requirements of 56-5-2953 can be waived by the trial court based on a consideration of the totality of the circumstances. See S.C. Code Ann. § 56-5-2953(B) (Supp. 2013). Clearly, the requirements of the video recording statute are separate and distinct from the elements of the offense of DUI which may not be waived. See State v. Odom, 412 S.C. 253, 267, 772 S.E.2d 149, 156 (2015) ("In all criminal prosecutions, '[t]he government must prove beyond a reasonable doubt every

element of a charged offense.'") (quoting and citing Victor v. Nebraska, 511 U.S. 1, 5, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); Dervin v. State, 386 S.C. 164, 168, 687 S.E.2d 712, 713 (2009) ("Due process requires the State to prove every element of a criminal offense beyond a reasonable doubt.")).

A determination of whether the State properly video recorded the initial stop and incident site of the DUI does not address any issue related to a factual determination of guilt or innocence. The failure to properly video record the incident site does not constitute a finding the State failed to prove the defendant was 1) driving the vehicle; 2) within the State; 3) under the influence of alcohol, drugs, or a combination thereof; and 4) the person's faculties to drive a motor vehicle are materially and appreciably impaired.

It is unclear how a decision that indisputably fails to comment on the sufficiency of the evidence can be characterized as an acquittal. Accordingly, his case is distinguishable from Tillinghast and Horry Cnty. v. Parbel, 378 S.C. 253, 662 S.E.2d 466 (Ct. App. 2008) *overruled on other grounds by* State v. Oxner, 391 S.C. 132, 705 S.E.2d 51 (2011), as both address situations expressly involving an acquittal, not dismissals on purely procedural grounds. In both cases, the magistrate's rulings involved substantive holdings that reflected the court's consideration of the quantum of evidence presented. See Tillinghast, 375 S.C. at 202, 652 S.E.2d at 401 (holding Double Jeopardy Clause barred an appeal where "the magistrate granted appellant's motion for a directed verdict on the ground [that the statute under which he was indicted] was unconstitutional as applied . . . ."); Parbel, 378 S.C. at 258, 662 S.E.2d at 469 (finding the Double Jeopardy Clause prohibited appellate review where "[t]he magistrate granted Appellant's motion for dismissal" based on its finding that "the County has not met the allegations of this zoning ordinance in proving 1303").

As the United States Supreme Court explained:

> The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed.

Wade v. Hunter, 336 U.S. 684, 688–89 (1949). When a trial court "acted on its view that the prosecution had failed to prove its case" it constitutes an acquittal. Evans, 568 U.S. at 325. However:

> These sorts of substantive rulings stand apart from procedural rulings that may also terminate a case midtrial, which we generally refer to as dismissals or mistrials. Procedural dismissals include rulings on questions that "are unrelated to factual guilt or innocence," but "which serve other purposes," including "a legal judgment that a defendant, although criminally culpable, may not be punished" because of some problem . . . .

Evans, 568 U.S. at 319. The Court continued:

> Both procedural dismissals and substantive rulings result in an early end to trial, but we explained in Scott that the double jeopardy consequences of each differ. "[T]he law attaches particular significance to an acquittal," so a merits-related ruling concludes proceedings absolutely. . . . In contrast, a "termination of the proceedings against [a defendant] on a basis unrelated to factual guilt or innocence of the offense of which he is accused," i.e., some procedural ground, does not pose the same concerns, because no expectation of finality attaches to a properly granted mistrial.

Id. at 319–20. Nothing in the trial court's ruling addressed Petitioner's culpability for DUI. The instant case is a clear example of a "procedural dismissal" for which Double Jeopardy does not apply. Accordingly, this Court should affirm the Court of Appeals and remand to the magistrate for trial.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the Court of Appeals opinion should be affirmed and the case remanded to the magistrate for trial.

Respectfully submitted,

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June 1, 2018

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PROOF OF SERVICE

I, ANNE A. MUELLER, certify that I have served the within Brief of Respondent by depositing two copies of the same in the United States mail, postage prepaid, addressed to:

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I further certify that all parties required by Rule to be served have been served.
This 1st day of June, 2018.

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