

ORIGINAL

STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Horry County
Honorable Benjamin H. Culbertson, Circuit Court Judge
Appellate Case No. 2011-190688

THE STATE,

Appellant,

vs.

ROBERT STEVE JOLLY,

Respondent.

FINAL BRIEF OF APPELLANT

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SC COURT OF APPEALS

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STATEMENT OF ISSUE ON APPEAL

Did the trial judge commit reversible error by dismissing two indictments for obtaining property by false pretenses based on an alleged double jeopardy violation where the elements of the indicted offense of obtaining property by false pretenses were distinctly different from the elements of Jolly's earlier offense of criminal contempt and each of those offenses required proof of a fact the other did not?

STATEMENT OF THE CASE

On March 12, 2009, the Honorable J. Michael Baxley, circuit court judge, issued an order directing Respondent Robert Steve Jolly to appear for a hearing and show cause as to why he should not be sanctioned, held in contempt, and dismissed from further involvement in a number of pending cases. A hearing was conducted on the order on April 16, 2009. On May 4, 2009, Judge Baxley issued an order holding Jolly in criminal contempt of court and sentencing him to a term of incarceration of six months. Later that month, the Horry County grand jury indicted Jolly for one count of unauthorized practice of law. In July of 2009, the Horry County grand jury additionally indicted Jolly for five counts of obtaining property by false pretenses. On April 12, 2011, a jury trial was commenced in the Horry County court of general sessions before the Honorable Benjamin H. Culbertson, circuit court judge. Prior to trial, Jolly moved to dismiss the indictments based on an allegation of a double jeopardy violation. At the conclusion of the hearing, the trial judge granted Jolly's motion to dismiss the indictments in respect to two counts of obtaining property by false pretenses and allowed the trial to proceed on the remaining indictments. Thereafter, the State timely appealed the trial judge's ruling dismissing the indictments, filing a notice of appeal on April 22, 2011. This appeal follows.

STATEMENT OF FACTS

Following a hearing in April of 2009, the Honorable J. Michael Baxley, circuit court judge, issued an order detailing his findings of fact regarding Respondent Robert Steve Jolly's involvement in a fraudulent mortgage scheme in which Jolly induced distressed homeowners to transfer their mortgaged property and homes to him through the filing of quitclaim deeds. (R. pp. 51-52). Judge Baxley determined Jolly represented to the victims he would pay off the mortgages on their behalf once they transferred their property to him and instructed the victims to submit their future mortgage payments to him as opposed to the original mortgage holders. (R. pp. 52-53). He found Jolly's fraudulent scheme resulted in the filing of numerous foreclosure actions against the victims' property, resulting in a risk of the victims being evicted from their homes. (R. pp. 54-55). Judge Baxley further noted Jolly repeatedly filed frivolous documents in an effort to impede the orderly disposition of the pending foreclosure actions and elicited testimony evincing a "remarkable lack of candor" from witnesses appearing on his behalf during the April hearing. (R. pp. 55-57).

Based on his "consideration of the evidence, the testimony of the witnesses, Defendant Jolly's conduct before the Court[,] and his conduct in the Foreclosure Actions," Judge Baxley concluded Jolly's conduct interfered with the orderly adjudication of numerous foreclosure actions, constituted the perpetration of a fraud upon the court, constituted an affront to the integrity of the judicial process, interfered with judicial proceedings, exhibited disrespect for the Court, hampered the parties and witnesses, and evinced an intention on Jolly's part to obstruct, degrade, and undermine the administration of justice. (R. p. 51; pp. 55-56). Accordingly, Judge Baxley held Jolly's orchestration of the fraudulent mortgage scheme, Jolly's submission of frivolous

court filings, and Jolly's conduct during the April hearing constituted direct contempt of court. (R. pp. 56-57). As a result, Judge Baxley sanctioned Jolly for criminal contempt, sentenced him to a term of imprisonment of six months, and issued an injunction against Jolly and his company. (R. pp. 57-58).

Subsequently, based on his involvement in the fraudulent mortgage scheme, Jolly was indicted for five counts of obtaining property by false pretenses and one count of unauthorized practice of law, and he proceeded to trial. (R. p. 2; pp. 72-83). Prior to trial, Jolly moved to dismiss the indictments based on an alleged double jeopardy violation. (R. p. 7). In support of the motion, Jolly contended he had previously been held in contempt in May of 2009 in an order outlining the same facts relied upon in the current prosecution. (R. p. 7). Jolly claimed the contempt order already punished him for the same actions he was now indicted for, and he asserted he could not be punished for the same conduct twice pursuant to the Double Jeopardy Clause. (R. p. 7). For those reasons, Jolly argued the case could not properly go forward. (R. pp. 8-9).

In rebuttal, the State argued Judge Baxley's order determined Jolly engaged in a fraud upon the court, evinced an intention to obstruct the administration of justice, and interfered with judicial proceedings. (R. p. 10). The State further pointed out Jolly was found in contempt for his actions both prior to and during the hearing before Judge Baxley. (R. p. 13). Additionally, the State argued the elements of the offense of criminal contempt were distinctly different from the elements of the offenses of unauthorized practice of law and obtaining property by false pretenses. (R. pp. 13-14). Relying on the Blockburger test announced by the United States Supreme Court, the State argued no double jeopardy violation occurred as the elements of the offenses were different. (R. p. 14).

After hearing the arguments from counsel, the trial judge indicated he needed to review Judge Baxley's contempt order. (R. p. 19). The trial judge noted Judge Baxley's order referenced the testimony of two of the victims, Ernest Mauck and Esther Reinhardt, and indicated he did not believe they could testify to the same thing they previously testified to without violating the Double Jeopardy Clause. (R. pp. 19-20). In response, the State argued the factual findings of Judge Baxley did not constitute the elements of the offenses. (R. p. 20). In reply, Jolly argued Judge Baxley's order found him in contempt for multiple reasons, including his orchestration of the fraudulent mortgage scheme, which he contended covered the indicted offenses and required the dismissal of the entire case. (R. pp. 22-23). The State again noted the elements of contempt and the other offenses were different and specifically identified the element of monetary value required for a conviction for obtaining property by false pretenses as an element not required for the imposition of contempt sanctions. (R. pp. 24-25).

The trial judge then denied Jolly's double jeopardy motion with respect to all of the indictments not involving the victims specifically referenced in Judge Baxley's order. (R. p. 26). However, the trial judge took the matter under advisement regarding the two indictments for Jolly's fraudulent conduct towards Mauck and Reinhardt.¹ (R. pp. 26-27). Subsequently, after considering Judge Baxley's order, the trial judge granted Jolly's double jeopardy motion regarding those two indictments. (R. p. 43). The trial judge ruled:

So I'm going to rule that Indictments 2009-GS-26-2948 and 2009-GS-26-2947 that deal with the Reinhardts and Ernest and Patricia Mauck and Esther and Larry Reinhardt, those are barred by double jeopardy because I think it's pretty clear that Judge Baxley sentenced Mr. Jolly to six months

¹ In the "Factual and Procedural Background" section of his order, Judge Baxley indicated Mauck and Reinhardt, two of the victims affected by the foreclosure actions, testified during the April hearing about their dealings with Jolly in relation to Jolly's fraudulent mortgage scheme. (R. pp. 50-51).

in prison for criminal contempt for several actions, part of the actions being the exact information that's contained in these indictments with regard to the Maucks and the Reinhardts that he obtained signatures on quit claim deeds, filed quit claim deeds, made promises to them that he was going to pay off mortgages and things of that nature. So since he's already served the six month sentence by Judge Baxley for that I'm going to rule that those two indictments are barred, prosecution of those two indictments are barred by double jeopardy.

(R. p. 43).

Thereafter, the State moved for reconsideration of the ruling, arguing Judge Baxley defined the elements of criminal contempt in his order and held Jolly in contempt for committing those elements. (R. p. 44). The trial judge denied the motion, noting he was going with the facts referenced in Judge Baxley's order and believed Judge Baxley already dealt with the actions covered by the dismissed indictments. (R. pp. 44-45). The State then timely appealed the trial judge's ruling dismissing the two indictments for obtaining property by false pretenses.

ARGUMENT

Did the trial judge commit reversible error by dismissing two indictments for obtaining property by false pretenses based on an alleged double jeopardy violation where the elements of the indicted offense of obtaining property by false pretenses were distinctly different from the elements of Jolly's earlier offense of criminal contempt and each of those offenses required proof of a fact the other did not?

Prior to trial, the trial judge erred in dismissing two indictments for obtaining property by false pretenses on the basis of an alleged double jeopardy violation. The trial judge concluded Jolly's subsequent prosecution for the indicted offenses could not go forward because Jolly was previously held in criminal contempt for the same conduct giving rise to the indicted offense. This ruling was erroneous, particularly in light of the Supreme Court's recent decision in State v. Brandt, 393 S.C. 526, 713 S.E.2d 591 (2011). The only appropriate test for determining whether a double jeopardy violation has occurred involves strictly comparing the essential elements of the offenses and not comparing the conduct underlying those offenses. As the essential elements of obtaining property by false pretenses are markedly different from the essential elements of criminal contempt, no double jeopardy violation occurred in this case. Accordingly, the trial judge's ruling dismissing the indictments should be reversed and the previously-dismissed indictments should be reinstated.

Through their Double Jeopardy Clauses, the United States Constitution and the South Carolina Constitution offer protection to citizens from being subjected to double jeopardy for the same offense. See U.S. Const. amend. V ("No person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb . . ."); S.C. Const. art. I, § 12 ("No person shall be subject for the same offense to be twice put in jeopardy of life or liberty . . ."). The guarantee against double jeopardy offers three separate constitutional protections: (1) protection against a second prosecution for the same

offense after acquittal; (2) protection against prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense. State v. Cuccia, 353 S.C. 430, 434, 578 S.E.2d 45, 48 (Ct. App. 2003).

However, a single act can constitute multiple distinct offenses without subsequent indictment or punishment running afoul of the Double Jeopardy Clause. See State v. Moyd, 321 S.C. 256, 258, 468 S.E.2d 7, 9 (1996) (“A defendant may be severally indicted and punished for separate offenses without being placed in double jeopardy where a single act consists of two ‘distinct’ offenses.”). Multiple punishments and successive prosecutions are **not** prohibited where a different offense calls for proof of a fact another offense does not. Cuccia, 353 S.C. at 438, 578 S.E.2d at 49.

The traditional test for determining whether successive prosecutions are barred by the Double Jeopardy Clause was explained in Blockburger v. United States, 284 U.S. 299 (1932). In Blockburger, the United States Supreme Court instructed: “The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” Id. at 304. Accordingly, the Blockburger test “requires a technical comparison of the elements of the offense for which the defendant was first tried with the elements of the offense in the subsequent prosecution.” Moyd, 321 S.C. at 258, 468 S.E.2d at 9.

Notably, following the decision in Blockburger, the United States Supreme Court temporarily expanded the test for determining whether a double jeopardy violation has occurred with its opinion in Grady v. Corbin, 495 U.S. 508 (1990). Under that expanded approach, the Grady Court instructed the test from Blockburger must still be applied in a double jeopardy analysis. Id. at 520. However, in addition to applying the traditional

Blockburger test, the Grady Court held: “[T]he 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.” Id. at 521. Critically though, the United States Supreme Court overruled Grady shortly thereafter in United States v. Dixon, 509 U.S. 688, 704 (1993), and abandoned its “same-conduct” test.

Therefore, in light of the United States Supreme Court’s ruling in Dixon, “Blockburger remains as the *only* test of double jeopardy for successive prosecutions as well as for multiple punishments in a single prosecution” in South Carolina. Moyd, 321 S.C. at 259, 468 S.E.2d at 9 (italics in original); see also State v. Easler, 327 S.C. 121, 131, 489 S.E.2d 617, 623 (1997) (“We hereby affirm the Court of Appeals’ abandonment of the Grady v. Corbin same conduct test.”). Thus, if a defendant’s conduct constitutes the elements of two distinct offenses, the defendant can be prosecuted for and convicted of two separate crimes arising from the same conduct without running afoul of the constitutional prohibitions against double jeopardy. State v. Elders, 386 S.C. 474, 482, 688 S.E.2d 857, 861 (Ct. App. 2010).

Recently, in State v. Brandt, the South Carolina Supreme Court addressed the issue of whether the imposition of criminal contempt sanctions precluded a subsequent prosecution of the same defendant for criminal offenses arising from the same conduct upon which the contempt sanctions were based. Id., 393 S.C. at 536-537, 713 S.E.2d at 596. In Brandt’s case, Brandt presented a forged letter to his attorney during the discovery phase of a legal malpractice action, and the forged letter was introduced during a legal expert’s deposition. Id. at 530, 713 S.E.2d at 593. Subsequently, the letter was exposed as fraudulent. Id. at 531, 713 S.E.2d at 593. As a result, Brandt was found to be

in criminal contempt for perpetrating a fraud upon the Court and was sentenced to a term of imprisonment of six months. Id. Thereafter, Brandt was indicted for forgery and proceeded to trial. Id. at 532, 713 S.E.2d at 594. During trial, Brandt moved for the dismissal of his forgery indictment based on an alleged double jeopardy violation. Id. at 535, 713 S.E.2d at 596. The motion was denied, and Brandt was convicted of the offense of forgery. Id. at 535-536, 713 S.E.2d at 596.

On appeal, Brandt sought to have his forgery conviction overturned because he alleged the successive prosecution was barred by the Double Jeopardy Clause due to the fact he had earlier been subjected to contempt sanctions for the same conduct that gave rise to the forgery indictment. Id. at 536-537, 713 S.E.2d at 596. However, the Supreme Court rejected Brandt's argument, instructing that: "In order to apply the Blockburger analysis, it is necessary to examine the individual elements of the criminal contempt conviction and the forgery offense." Id. at 540, 713 S.E.2d at 598. After strictly applying the Blockburger test and comparing the general elements of forgery and criminal contempt, the Supreme Court determined each offense required proof of an element the other did not. Id. at 540-541, 713 S.E.2d at 598. For that reason, the Supreme Court ruled Brandt's forgery prosecution was not barred by the Double Jeopardy Clause even though he had been found in criminal contempt based on the same conduct. Id. at 540, 713 S.E.2d at 598-599.

In the case sub judice, the trial judge erred in dismissing the two indictments for obtaining property by false pretenses. Critically, the trial judge failed to apply the Blockburger test, the only appropriate test for evaluating a claim of a double jeopardy violation, and neglected to strictly compare the elements of criminal contempt with the elements of obtaining property by false pretenses. If the trial judge had done so, a

comparison of the elements of the offenses establishes that each offense requires proof of an element the other does not. Therefore, since the elements of the offenses were markedly different from each other, Jolly's subsequent prosecution for obtaining property by false pretenses did not constitute a double jeopardy violation even though he was previously held in criminal contempt for related conduct. See id. at 541, 713 S.E.2d at 599 ("Accordingly, Brandt's subsequent prosecution for forgery did not violate the Double Jeopardy Clause as the prior criminal contempt conviction involved decidedly different elements."). Accordingly, the trial judge's ruling dismissing the indictments must be reversed and the indictments must be reinstated.

Looking to the elements of the offenses involved in Jolly's case, criminal contempt in an ordinary sense involves the commission of "offenses that are calculated to obstruct, degrade, and undermine the administration of justice."² Brandt v. Gooding, 368 S.C. 618, 628, 630 S.E.2d 259, 264 (2006). "A person may be found guilty of direct contempt if the conduct interferes with judicial proceedings, exhibits disrespect for the court, or hampers the parties or witnesses." Id.

Conversely, the offense of obtaining property by false pretenses occurs when a person by false pretense or representation either obtains the signature of a person to a written instrument or obtains from another person any chattel, money, valuable security, or other real or personal property with the intent to defraud a person of that property. See S.C. Code Ann. § 16-13-240 ("A person who by false pretense or representation obtains the signature of a person to a written instrument or obtains from another person any chattel, money, valuable security, or other property, real or personal, with intent to cheat

² Judge Baxley applied our Supreme Court's definition of contempt from Brandt v. Gooding in the contempt order. (R. pp. 56-57).

and defraud a person of that property is guilty [of the offense of obtaining signature or property by false pretenses.]”). Thus, the statutory elements necessary for commission of the offense are: (1) obtaining a person’s signature or property; (2) by false pretense or representation; (3) with the intent to defraud. Id.

Comparing the elements of each of the offenses in Jolly’s case, criminal contempt does not require proof a defendant obtained a signature or any property in order to sustain a contempt conviction. Likewise, criminal contempt does not require proof of an intent to defraud and does not require proof the person used false pretense or a representation. Conversely, obtaining property by false pretenses does not require proof of actions calculated to obstruct, degrade, and undermine the administration of justice. Similarly, the offense does not require proof of conduct interfering with judicial proceedings, exhibiting disrespect for the court, or hampering parties or witnesses. Therefore, the essential elements necessary to sustain a conviction for each offense are separate and distinct from the essential elements required to prove the other. For this reason, Jolly’s subsequent prosecution for obtaining property by false pretenses was not precluded by the earlier imposition of criminal contempt sanctions. Cf. Brandt, 393 S.C. at 541, 713 S.E.2d at 598-599 (“We find each offense requires proof of a fact that the other does not. Specifically, the offense of forgery does not require any interference with judicial proceedings that is ‘calculated to obstruct, degrade, and undermine the administration of justice.’ In comparison, the commission of criminal contempt does not require the ‘uttering or publishing of a fraudulent document.’ Accordingly, Brandt’s subsequent prosecution for forgery did not violate the Double Jeopardy Clause as the prior criminal contempt conviction involved decidedly different elements.” (citations omitted)).

The trial judge improperly compared the specific facts of Jolly's conduct referenced in the contempt order and concluded Jolly's subsequent prosecution for obtaining property by false pretenses was based on the same conduct. However, the proper test for determining whether a double jeopardy violation has occurred involves a comparison of the elements of the offenses as opposed to a comparison of the underlying conduct involved in the offenses. See Dixon, 509 U.S. at 704 ("We have concluded, however, that Grady must be overruled. . . . The 'same-conduct' rule it announced is wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy."). An application of the proper test of comparing the elements of the offenses of criminal contempt and obtaining property by false pretenses establishes each offense has distinctly different essential elements and requires proof of a fact the other does not. Therefore, Jolly could properly be tried for obtaining property by false pretenses even though he had earlier been sanctioned for criminal contempt at least partially for conduct arising out of the same general chain of events. See State v. Pace, 337 S.C. 407, 417, 523 S.E.2d 466, 471 (Ct. App. 1999) ("Because each offense contains at least one element which must be proven by an additional fact that the other does not require, the trial court correctly held that Pace's conviction on both counts does not violate double jeopardy." (citations omitted)). Accordingly, the trial judge committed reversible error in dismissing the two obtaining property by false pretenses indictments. The trial judge's ruling should be reversed and the previously-dismissed indictments should be reinstated.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the judgment and ruling of the lower court be reversed and the previously-dismissed indictments be reinstated.

Respectfully submitted,

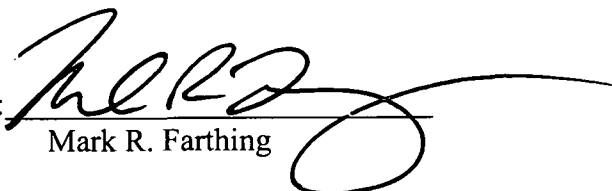
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September 4, 2012

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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b), SCACR, and the August 13, 2007, order from the South Carolina Supreme Court entitled "Interim Guidance Regarding Personal Data Identifiers and Other Sensitive Information in Appellate Court Filings."

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PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the within Final Brief of Appellant on 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.
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