STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal From Laurens County
The Honorable Eugene C. Griffith, Jr., Circuit Court Judge
Appellate Case Tracking Number 2011-196627

The State, Respondent,

v.

Teresa Blakely, Appellant.

Op. No. 5114 (S.C. Ct. App. Refiled April 11, 2013)

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SC Court of Appeals

RETURN TO PETITION FOR REHEARING

On April 13, 2013, this Court properly affirmed Appellant's conviction and sentence. This Court correctly held the trial of Appellant on accessory charges was not the result of prosecutorial vindictiveness. Further, this Court correctly found the ABA Standards do not create a due process right and do not prohibit prosecution.

Prosecutorial Vindictiveness

This Court correctly found the exact issue in this case has not been addressed by the Courts of this State. As such, this Court looked to similar cases in which prosecutorial vindictiveness was found in order to gleam the general rules and applicable law to which it should apply the facts of this case.

State v. Fletcher, 322 S.C. 256, 471 S.E.2d 702 (Ct. App. 1996), is one such case. This Court relies on Fletcher for the general rule that the presumption of vindictiveness arises when the prosecutor's actions "pose a realistic likelihood of vindictiveness." The

Court then properly concluded, while relying on Fletcher: "Only 'certain limited circumstances pose a realistic likelihood of vindictiveness by a prosecutor' and, therefore, warrant the application of a presumption of vindictiveness." Id. This Court explained: "The inquiry . . . is not focused solely on the presence or absence of actual vindictive motive, but includes whether the action taken, which exposes the accused to an increased punishment, poses such a reasonable likelihood of vindictiveness as to require a presumption of vindictiveness." Id. at 260-61, 471 S.E.2d at 704. The Court then provided a summary of the analysis in Fletcher, ultimately stating that it was not directly applicable to the facts of this case.

It was not error for the Court to rely on Fletcher in order to obtain some basic and general law regarding prosecutorial vindictiveness, especially in light of this Court recognition the case was not directly on point. Further, the same law could be gleamed from a multitude of cases, including *inter alia* Blackledge v. Perry, 417 U.S. 21, 27, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974) (finding to establish genuine animus, the defendant may prove actual vindictiveness through direct evidence or raise a presumption of vindictiveness when the prosecutor's actions "pose a realistic likelihood of 'vindictiveness.'").

This Court correctly looked to decisions of the federal courts where nearly the precise issue in this case was addressed. See Biales v. Young, 315 S.C. 166, 169, 432 S.E.2d 482, 484 (1993) (while not binding, federal precedent may provide guidance to the court); State v. Al-Amin, 353 S.C. 405, 415, 578 S.E.2d 32, 37 (Ct. App. 2003) (looking to federal decisions for "guidance and edification").

This Court correctly relied on United States v. Kendrick, 682 F.3d 974 (11th Cir. 2012). In Kendrick, the primary holding of the Court enounced: "There is no presumption of vindictiveness for still another reason: we agree with our sister circuits that bringing a second indictment, supported by evidence, against a defendant after an acquittal does not result in a presumption of vindictiveness." Id. at 983. This is the primary holding in Kendrick and the holding properly relied on by this Court. The Kendrick Court went on to state: "But even if a presumption of vindictiveness somehow arose as a matter of law, the government rebutted the presumption by explaining that it did not bring the alien smuggling charge to punish Kendrick because it did not have sufficient evidence at the time of the original indictment to charge Kendrick with knowingly smuggling an alien for profit." Id. This holding, relied on by Appellant to cast doubt on this Court's reliance is mere dicta and not the primary holding of the case.

Similarly, this Court properly looked to other federal cases, all of which reach the same conclusion that a presumption of vindictiveness does not arise from a subsequent prosecution after an acquittal, and, as a result, there is no need for the State to rebut a presumption. See U.S. v. Johnson, 171 F.3d 139, 141 (2nd Cir. 1999) ("[W]e join the other courts of appeals that have held that a new federal prosecution following an acquittal on separate federal charges does not, without more, give rise to a presumption of vindictiveness.") (citing United States v. Wall, 37 F.3d 1443, 1449 (10th Cir. 1994); United States v. Rodgers, 18 F.3d 1425, 1430–31 (8th Cir. 1994); United States v. Esposito, 968 F.2d 300, 306 (3d Cir. 1992)).

The Johnson Court held no presumption applies even when "[t]he mere fact that a new crime is being charged [that differs from the original charges] . . . even after

acquittal " on the initial charges. Johnson, 171 F.3d at 141. Further, Johnson applied this rule even where the government appeared to have had the evidence of this new crime before the defendant's jury demand on the initial charges.

Additionally, in United States v. Esposito, 968 F.2d 300 (3d Cir.1992), the defendant was acquitted of Racketeer Influenced and Corrupt Organizations Act ("RICO") charges, and later indicted for offenses based on the same drug transactions that formed a basis for the RICO charges. The Third Circuit held that it would "not apply a presumption of vindictiveness to a subsequent criminal case where the basis for that case [was] justified by the evidence and [did] not put the defendant twice in jeopardy." Id. at 306. The court noted that creating a presumption in these circumstances would be "tantamount to making an acquittal a waiver of criminal liability for conduct that arose from the operative facts of the first prosecution." Id. The Court concluded: "It fashions a new constitutional rule that requires prosecutors to bring all possible charges in an indictment or forever hold their peace. We reject such a proposition for it undermines lawful exercise of discretion as well as plain practicality." Id.; see also, People v. Valli, 187 Cal.App.4th 786, 805 (Cal. App. 3 Dist. 2010).

As a result, this Court properly concluded no presumption of vindictiveness arises from the prosecution of Appellant after her successful acquittal on other separate charges.

ABA Standards

Appellant contends this Court erred in finding prosecution was not barred by application of the ABA Standards or any theory it supports. The ABA Standards do not provide any due process rights, nor should they be relied on by the Court to construct

new rights. This Court correctly found the Standards are not controlling or dispositive, even if they may be informative.

Indubitably, the ABA Standards do not create a due process right; due process rights must emanate from the United States Constitution or the South Carolina Constitution. The United States Supreme Court has noted "while we have referred to the ABA Standards for Criminal Justice as a useful point of reference, we have been careful to say these standards 'are only guides' and do not establish the constitutional baseline." Rompilla v. Beard, 545 U.S. 374, 400 (2005). Additionally, the Court has stated: "the Constitution does not codify the ABA's Model Rules." Montejo v. Louisiana, 556 U.S. 778, 790 (2009) (finding the Sixth Amendment is the appropriate standard and not the ABA's Model Rules). In Padilla v. Kentucky, 130 S.Ct. 1473 (2010) the United States Supreme Court specifically noted the Standards were "only guides" and "not 'inexorable commands.'" Id. at 1482.[1] Certainly the Standards were not the basis for the holding of the case, nor should they be a basis to impose a due process of law standard as requested by Appellant.

In South Carolina, the Supreme Court "has never adopted the ABA guidelines as the standard for prevailing professional norms in South Carolina." Ard v. Catoe, 372 S.C. 318, 338 n.19, 642 S.E.2d 590, 600 n.19 (2007) (Toal dissenting). Additionally, Justices of the South Carolina Supreme Court have explained: "The fact that these [ABA

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[1] As Justice Alito noted in his concurrence in Bobby v. Van Hook, 130 S.Ct. 13, 20 (2009) (Alito, J., concurring): "The ABA is a venerable organization with a history of service to the bar, but it is, after all, a private group with limited membership. The views of the association's members, not to mention the views of the members of the advisory committee that formulated the 2003 Guidelines, do not necessarily reflect the views of the American bar as a whole. . . . I see no reason why the ABA Guidelines should be given a privileged position."

Criminal Justice Standards] have been sanctioned by the ABA is of no real consequence. They are in effect the thinking of the Criminal Justice Section of the ABA, whose members are basically engaged in the practice of criminal law and who understandably seek a rule favorable to those people indicted for crime." Medlin v. State, 276 S.C. 540, 544, 280 S.E.2d 648, 650 (1981) (Littlejohn and Gregory, concurring in part and dissenting in part) (discussing the Court's specific adoption of an ABA Standard related to judicial participation in plea bargaining).

Accordingly, the ABA Standards may act as guidelines for the Court to consider, but certainly do not provide a due process right as articulated by Appellant in her brief. As a result, this Court properly declined Appellant's invitation to raise the Standards to the level of due process protections.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Petition for Rehearing be denied, and the judgment and conviction of the lower court be affirmed.

Respectfully submitted,

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May 8, 2013

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PROOF OF SERVICE

I, Ellen R. DuBois, certify that I have served the Return to Petition for Rehearing on Appellant by depositing a copy of same in the United States mail, postage prepaid, addressed to:

C. Rauch Wise Esquire
305 Main Street
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I further certify that all parties required by Rule to be served have been served.

This 8th day of May, 2013.

Ellen R. DuBois

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