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1992-93 U.S. SUPREME COURT: CASES AFFECTING CRIMINAL LAW & PROCEDURE

Double Jeopardy

Court Overrules *Grady v. Corbin* And Relies Solely On Blockburger Test For Double Jeopardy Analysis

United States v. Dixon, 113 S.Ct. 2849, 125 L.Ed.2d 556, 53 Crim. L. Rep. 2291 (28 June 1993). This case involved double jeopardy issues in unrelated trials with two different defendants.

Defendant Dixon. Defendant Dixon was arrested for second-degree murder and released on bond, which specified that he was not to commit "any criminal offense" and warned him that a violation of any condition of pretrial release would subject him, among other things, to prosecution for criminal contempt. Defendant Dixon was later arrested and charged with possession of cocaine with intent to distribute. Based on the violation of his pretrial release condition, he was convicted of criminal contempt based on proof beyond a reasonable doubt that he had committed the drug offense. He later moved to dismiss the cocaine charge on double jeopardy grounds.

Defendant Foster. After defendant Foster had committed physical attacks on his estranged wife, she obtained from a court a civil protection order (CPO), which required that he not "molest, assault, or in any manner threaten or physically abuse" her. She later filed motions to hold Foster in contempt for three separate threats (on November 12, 1987, and March 26 and May 17, 1988) and two assaults (on November 6, 1987 and May 21, 1988). Her counsel prosecuted the action for contempt (although the Court notes that the United States Attorney's Office—the crimes were committed in the District of Columbia—was apparently aware of the action). The trial judge noted that for the assault charges, she must prove as an element, first there was a civil protection order (CPO), and second, that Foster committed a criminal assault. Foster was acquitted of criminal contempt for the three threats violations (described above) but was convicted of criminal contempt for the two assaults (described above). The United States Attorney's Office later obtained an indictment charging Foster with simple assault on November 6, 1987 (Count I); threatening to injure her on November 12, 1987 and March 26 and May 17, 1988 (Counts II-IV); and assault with intent to kill on May 21, 1988) (Count V). Defendant Foster moved to dismiss all counts based on double jeopardy and also on collateral estoppel grounds for Counts II-IV (since he had been acquitted of those charges in the criminal contempt proceeding).

Court's Rulings

<u>*Plenary Criminal Contempt Is Included Within Double Jeopardy*</u>. The Court ruled that the double jeopardy clause applies to a prosecution of a criminal charge after a defendant has been tried in plenary proceedings for criminal contempt for violating a pretrial release order that prohibited the defendant from committing "any criminal offense." (The Court specifically does not decide if the double jeopardy clause applies to summary criminal contempt.)

The Court applies to each defendant the *Blockburger* test [Blockburger v. United States, 284 U.S. 299 (1932)], also known as the same-elements test, which determines whether each offense contains an element not contained in the other; if not, they are the "same offence" and double

jeopardy bars additional punishment and successive prosecution. [But remember there is a different rule for multiple punishments at a *single trial*; see Missouri v. Hunter, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983).]

Defendant Dixon. The Court ruled under the *Blockburger* test that defendant Dixon's drug offense did not include any element not contained in his previous criminal contempt offense, and therefore his subsequent prosecution for the drug offense was barred under the double jeopardy clause.

Defendant Foster. The Court ruled that the subsequent prosecution for Count I (simple assault) was barred because it was based on the prior criminal contempt conviction for violating the CPO provision forbidding him from committing simple assault. The Court ruled that the subsequent prosecution for Counts II-IV was not barred, because the criminal contempt prosecution required proof of an element (knowledge of CPO) that Count II-IV did not, and Counts II-IV required proof of element (threat to kidnap, threat to inflict bodily injury, or threat to damage property) that the conviction for criminal contempt based on the CPO (Foster must not "in any manner threaten") did not. The Court ruled that Count V was not barred, because the criminal contempt prosecution required proof of an element (knowledge of CPO) that Count V did not, and Count V required proof of an element (specific intent to kill) that the conviction for criminal contempt did not (it only required proof of simple assault). [Note that collateral estoppel principles, not decided in this case, may effectively bar the subsequent prosecution of Counts II-IV, because defendant Foster was acquitted of criminal contempt for elements included within those offenses; see, e.g., *State v. McKenzie*, 292 N.C. 170, 232 S.E.2d 424 (1977).]

<u>*Court Overrules Grady v. Corbin*</u>. The Court overruled *Grady v. Corbin*, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990). [The *Grady* ruling had prohibited a subsequent prosecution if, to establish an element of an offense charged in that prosecution, the prosecutor had to prove conduct that constituted an offense for which the defendant had already been prosecuted.]

The Court's overruling of *Grady v. Corbin* affects prior North Carolina case law as follows. The court's result in State v. Hamrick, 110 N.C. App. 60, 428 S.E.2d 830 (1993) remains correct. In *Hamrick*, the defendant on May 1, 1990 was involved in an automobile accident with another vehicle, and the operator of that vehicle died. The defendant was charged the same day with the infraction of driving left of center and in a separate criminal summons with misdemeanor death by vehicle, based on the left-of-center violation. On May 18, 1990, the defendant pled responsible before a magistrate to the left-of-center infraction. On May 30, 1990 in district court, the defendant moved to dismiss the misdemeanor death by vehicle charge on double jeopardy grounds. Without discussing *Grady*, the court of appeals ruled that the plea to the left-of-center infraction did not bar prosecution of remaining pending charge of misdemeanor death by vehicle, based on the ruling in Ohio v. Johnson, 467 U.S. 493 (1984) (defendant's plea of guilty over prosecutor's objection to one count of multi-count indictment did not bar state's prosecution of greater offense in indictment). The ruling in *Hamrick* also is correct under the *Blockburger* test, because the driving left of center violation contains an element (driving left of center) that is not required to be proven in misdemeanor death by vehicle (any motor vehicle violation is sufficient) and misdemeanor death by vehicle contains an element (the death of the person resulting from the violation) that is not an element of driving left of center.

The Court's ruling (overruling *Grady v. Corbin*) effectively overrules State v. Griffin, 51 N.C. App. 564, 277 S.E.2d 77 (1981) (defendant was involved in accident with another vehicle and was charged with failing to yield right-of-way, and pled guilty that same day; later, the driver of the

other vehicle died from injuries received in the accident; the defendant was then charged with death by vehicle; court upheld dismissal of that charge on double jeopardy grounds). *Griffin* had relied on dicta in Illinois v. Vitale, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980) that clearly was disavowed in this case, *United States v. Dixon*. In any event, the *Griffin* ruling appeared to be incorrect when it was decided, because double jeopardy principles do not apply when a defendant pleads guilty to a lesser offense when the greater offense could not be charged (e.g., because the victim had not died yet); see Diaz v. United States, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500 (1912) and Garrett v. United States, 471 U.S. 773, 105 S.Ct. 2407, 85 L.Ed.2d 764 (1985).

Fourth Amendment

Court Recognizes "Plain Feel" To Be Within "Plain View" Doctrine, But Facts In This Case Did Not Support Officer's Actions

Minnesota v. Dickerson, 113 S.Ct. 2130, 124 L.Ed.2d 334, 53 Crim. L. Rep. 2186 (7 June 1993). An officer had reasonable suspicion to stop the defendant and to frisk him for weapons. Based on the record before the Court, the officer during the frisk felt a lump (a small, hard object wrapped in plastic) in the defendant's jacket pocket that he knew was not a weapon. However, after concluding that the lump was not a weapon, the officer determined that the lump was cocaine *only after* "squeezing, sliding and otherwise manipulating the contents of the defendant's pocket." The Court ruled that the "plain view" doctrine [which provides that if officers are lawfully in a position in which they view an object, if its incriminating character is immediately apparent (i.e. they have probable cause to seize it), and if the officers have a lawful right of access to the object, they may seize it without a warrant] applies by analogy to cases in which an officer discovers contraband through the sense of touch during an otherwise lawful search. However, the Court also rules that the officer in this case was not justified in seizing the cocaine, because the officer exceeded the search for weapons permitted by Terry v. Ohio, 392 U.S. 1 (1968). Once the officer determined the lump was not a weapon, his continued exploration of the lump until he developed probable cause to believe it was cocaine was an additional search that was not justified by *Terry v. Ohio*. [Thus, the officer's action would have been permissible in this case only if he had developed probable cause to believe the lump was cocaine at the time he determined the lump was not a weapon.]

Conspirator Status Does Not Automatically Confer Standing To Contest Search Or Seizure

United States v. Padilla, 113 S. Ct. 1936, 123 L.Ed.2d. 635, 53 Crim. L. Rep. 2109 (4 May 1993). An Arizona law enforcement officer stopped a vehicle driven by Arciniega, the sole occupant. He consented to a search of the vehicle, and the officer found cocaine. The Ninth Circuit Court of Appeals ruled that various drug co-defendants had standing to contest the search of the vehicle, because a co-conspirator has a legitimate expectation of privacy under Fourth Amendment if a co-conspirator's participation in an operation or arrangement indicates joint control and supervision of the place searched. The Court rejects the Ninth Circuit's ruling, and remands the case for consideration of standing under principles set out in Alderman v. United States, 394 U.S. 165 (1969); Rakas v. Illinois, 439 U.S. 128 (1978); Rawlings v. Kentucky, 448 U.S. 98 (1980); Soldal v. Cook County, 506 U.S. 56 (1992).

Officers' Involvement With Moving Mobile Home During Eviction Was A Seizure

Soldal v. Cook County, 113 S. Ct. 538, 121 L.Ed.2d 450, 52 Crim. L. Rep. 2032 (8 December 1992). Officers' involvement in moving a mobile home from a mobile home park during the eviction of a tenant was a seizure under the Fourth Amendment.

Sixth Amendment

No Federal Constitutional Right To Jury Trial For Six-Months' Imprisonment Offense

United States v. Nachtigal, 113 S. Ct. 1072, 122 L.Ed.2d 374, 52 Crim. L. Rep. 3159 (22 February 1993). Following Blanton v. North Las Vegas, 489 U.S. 538 (1989), the Court ruled that defendant did not have a federal constitutional right to a jury trial for a federal DUI offense that was punishable by maximum six months' imprisonment and $5,000 fine.

Counsel's Failure To Object Did Not Constitute Prejudice Under *Strickland v. Washington*

Lockhart v. Fretwell, 113 S. Ct. 838, 122 L.Ed.2d 180, 52 Crim. L. Rep. 2107 (25 January 1993). Defense counsel's failure to object in a state capital sentencing hearing—an objection that would have been supported by an appellate decision that later was overruled—did not constitute "prejudice" under Strickland v. Washington, 466 U.S. 668 (1984). The analysis of prejudice does not simply focus on whether the outcome would have been different, but also includes whether the result of the proceeding was fundamentally unfair or unreliable.

First Amendment

Penalty Enhancement For Racially-Motivated Assault Is Constitutional

Wisconsin v. Mitchell, 113 S.Ct. 2194, 124 L.Ed.2d 436, 53 Crim. L. Rep. 2210 (11 June 1993). Distinguishing R.A.V. v. St. Paul, 505 U.S. 377, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992) (ordinance that prohibited display of symbol that one knows or has reason to know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender" was facially unconstitutional under First Amendment), the Court ruled that defendant's First Amendment rights were not violated when the sentence for his assault conviction was enhanced because the assault was racially motivated. This ruling likely removes constitutional questions about two North Carolina statutory aggravating factors based on racial, religious, etc. motive [G.S. 15A-1340.4(1)q. and r.] and the crime of ethnic intimidation (G.S. 14-401.14).

Ordinance Prohibiting Ritual Animal Sacrifice Violates First Amendment

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S.Ct. 2217, 124 L.Ed.2d 472, 53 Crim. L. Rep. 2210 (11 June 1993). Ordinance prohibiting ritual animal sacrifice unconstitutionally burdened religious practice under First Amendment.

Miscellaneous

Prosecutors Were Not Entitled To Absolute Immunity For Investigative Acts And Press Conference

Buckley v. Fitzsimmons, 113 S.Ct. 2606, 125 L.Ed.2d 209, 53 Crim. L. Rep. 2248 (24 June 1993). Plaintiff brought § 1983 action against state prosecutors for (1) allegedly fabricating evidence during the preliminary investigation of crimes (murder and rape) with which the plaintiff was later charged, and (2) making false statements at a press conference announcing the return of an indictment against the plaintiff. Plaintiff alleged that prosecutors, dissatisfied with state experts' failure to match plaintiff's boot with footprint on door of murder victim's home, obtained a positive identification from another expert when they knew that this expert was well known for her willingness to fabricate unreliable testimony. This expert's opinion was obtained during early stages of the investigation, which was being conducted jointly by the prosecutors and sheriff. Plaintiff was thereafter charged with murder and other offenses. Applying the functional test of Imbler v. Pachtman, 424 U.S. 409 (1976) and Burns v. Reed, 500 U.S. 478 (1991) (prosecutors are entitled to absolute immunity only if the function they are performing is intimately associated with the judicial phase of the criminal process), the Court ruled that prosecutors were not entitled to absolute immunity because their mission in seeking expert testimony was entirely investigative (it occurred well before arrest and well before preparation for grand jury proceedings or trial). Court also rules that prosecutors are not entitled to absolute immunity for allegedly defamatory statements made at press conference announcing the indictment of the defendant. The conduct of a press conference does not involve the initiation of a prosecution, presentation of the state's case in court, or actions preparing for these functions.

Defendant's Burden Of Producing Evidence Of *Boykin* Error Is Constitutional

Parke v. Raley, 113 S. Ct. 517, 121 L.Ed.2d 391, 52 Crim. L. Rep. 2011 (1 December 1992). Defendant was being sentenced as a persistent felony offender, and the state offered judgments of prior convictions for which the defendant had pled guilty, for which a presumption of legality attaches. Under Kentucky law, a defendant who moves to suppress evidence of guilty pleas under Boykin v. Alabama, 395 U.S. 238 (1969) (evidence must show that defendant's guilty plea was knowing and voluntary) has the burden of producing evidence of *Boykin* error. If the defendant does so, then the state has the burden of proving that the judgments were entered without violating the defendant's rights. The Court ruled that Kentucky's procedures are constitutional, and it also determines--based on the facts of this case--that defendant failed to produce evidence of *Boykin* error (there was no guilty plea transcript for the one contested conviction).

[Although the Court did not rule on the constitutionality of assigning the burden of proof as well as the burden of production to the defendant to show *Boykin* error, it is highly likely that the Court would uphold such a procedure. Federal and North Carolina case law assigns the burden of proof to the defendant; see, e.g., State v. Pickard, 107 N.C. App. 94, 418 S.E.2d 690 (1992) and United States v. Stewart, 977 F.2d 81 (3d Cir. 1992).]

Due Process Standard For Competence To Plead Guilty And To Waive Right To Counsel Is The Same Standard As Competence To Stand Trial

Godinez v. Moran, 113 S.Ct. 2680, 125 L.Ed.2d. 321, 53 Crim. L. Rep. 2240 (24 June 1993). The Court ruled that the due process standard for competence to plead guilty and to waive the right to counsel is the same standard as competence to stand trial. Court rejects lower federal court ruling that established higher standard for competence to plead guilty and to waive right to counsel.

Interstate Detainer Agreement: 180-Day Period Starts With Receipt By Prosecutor

Fex v. Michigan, 113 S. Ct. 1085, 122 L.Ed.2d 406, 52 Crim. L. Rep. 2222 (23 February 1993). The Court ruled that time period when state must try prisoner (for whom detainer has been filed under Interstate Agreement on Detainers; see G.S. 15A-761) is 180 days from *receipt by prosecutor* of prisoner's request for trial.

Constitutionally-Deficient Reasonable Doubt Instruction Not Subject To Harmless Error Analysis

Sullivan v. Louisiana, 113 S.Ct. 2078, 124 L.Ed.2d 182, 53 Crim. L. Rep. 2171 (1 June 1993). A constitutionally-deficient reasonable doubt instruction cannot be harmless error. Defendant is always entitled to a new trial.

Defendant's Perjury During Trial May Constitutionally Be Used At Sentencing

United States v. Dunnigan, 113 S. Ct. 1111, 122 L.Ed.2d 445, 52 Crim. L. Rep. 2219 (23 February 1993). The Court ruled that the constitution permits trial judge to enhance sentence if sentencing judge finds that defendant committed perjury during trial. [Note that North Carolina trial judges may not make such a finding as a non-statutory aggravating factor; see State v. Vandiver, 321 N.C. 570, 364 S.E.2d 373 (1988).]

Plaintiff Who Wins Nominal Damages Under § 1983 Is Prevailing Party For Attorney's Fees, But Court Determines That No Fee Is Appropriate In This Case

Farrar v. Hobby, 113 S. Ct. 566, 121 L.Ed.2d 494, 52 Crim. L. Rep. 2045 (14 December 1992). Plaintiff who wins nominal damages under § 1983 is a prevailing party for attorney's fees under § 1988. However, Court also determines that no fee should be awarded in this case; it states that when a plaintiff recovers only nominal damages because he or she fails to prove an essential element of a claim for monetary relief, then the reasonable fee is usually no fee at all.

Prisoner's Involuntary Exposure To Second-Hand Tobacco Smoke May Constitute Eighth Amendment Claim

Helling v. McKinney, 113 S. Ct. 2475, 125 L.Ed.2d 22, 53 Crim. L. Rep. 2230 (18 June 1993). Prisoner's § 1983 action against prison officials that alleged that they, with deliberate indifference, exposed him to environmental tobacco smoke levels that pose an unreasonable risk to his future

health stated an Eighth Amendment claim on which relief could be granted—based on standard set out in Court's ruling.

Capital Case Issues

Mitigating Factor (No Significant History Of Prior Criminal Activity) Was Properly Not Submitted In Capital Sentencing Hearing

Delo v. Lashley, 113 S. Ct. 1222, 122 L.Ed.2d 620, 52 Crim. L. Rep. 3179 (8 March 1993). In Missouri capital sentencing hearing, neither state nor defense offered any evidence of defendant's past criminal history. The Court ruled that trial judge properly refused to submit the mitigating factor that defendant had no significant history of prior criminal history. The Court cited and discussed with approval a similar ruling in State v. Fullwood, 323 N.C. 371, 373 S.E.2d 518 (1988).

Idaho Capital Aggravating Circumstance Is Constitutional

Arave v. Creech, 113 S. Ct. 1534, 123 L.Ed.2d 188, 52 Crim. L. Rep. 2373 (30 March 1993). Idaho's statutory aggravating circumstance (defendant's murder of victim exhibited utter disregard for human life) is constitutional, considering narrowing definition of "utter disregard" by Idaho Supreme Court.

Appellate Court Did Not Reweigh Factors Properly In Affirming Death Sentence

Richmond v. Lewis, 113 S. Ct. 528, 121 L.Ed.2d 411, 52 Crim. L. Rep. 2016 (1 December 1992). The Court set aside death sentence because it determines that appellate court majority did not properly reweigh aggravating and mitigating factors under Clemons v. Mississippi, 494 U.S. 738 (1990) after one aggravating factor was found to be impermissibly used by the sentencing trial judge.

Texas Capital Sentencing Law Is Constitutional

Johnson v. Texas, 113 S.Ct. 2658, 125 L.Ed.2d 290, 53 Crim. L. Rep. 2257 (24 June 1993). The Court ruled that Texas capital sentencing law allowed adequate consideration of defendant's youth as a mitigating factor and therefore was constitutional.

Federal Habeas Corpus Cases

Miranda Violations Must Be Considered In Federal Habeas Review

Withrow v. Williams, 113 S. Ct. 1745, 123 L.Ed.2d 407, 53 Crim. L. Rep. 2035 (21 April 1993). The Court ruled that *Miranda* violations must be considered in federal habeas corpus review of state convictions. The Court rejected extension of ruling in Stone v. Powell, 428 U.S. (1976) (if state provided full and fair review of Fourth Amendment claim, federal habeas review of that claim is unavailable) to *Miranda* violations.

Standard Adopted For Federal Habeas Review Of Constitutional "Trial Error"

Brecht v. Abrahamson, 113 S. Ct. 1710, 123 L.Ed.2d 353, 53 Crim. L. Rep. 2024 (21 April 1993). Prosecutor violated ruling in Doyle v. Ohio, 426 U.S. 610 (1976) by improperly referring to defendant's post-*Miranda* silence during cross-examination and jury argument. The Court ruled that, in federal habeas review of constitutional "trial error" as occurred in this case, the standard is whether error "had substantial and injurious effect or influence in determining the jury's verdict" [Kotteakos v. United States, 328 U.S. 750 (1946)]. The Court rejected a standard that is used on direct review of conviction—state must prove that error was harmless beyond a reasonable doubt [Chapman v. United States, 386 U.S. 18 (1967)].

Claim of Actual Innocence Does Not Entitle Petitioner To Federal Habeas Relief

Herrera v. Collins, 113 S.Ct. 853, 122 L.Ed.2d. 203, 52 Crim. L. Rep. 2090 (25 January 1993). Petitioner's claim for federal habeas relief was based on newly-discovered evidence presented ten years after trial. The Court ruled that federal habeas relief is not available for a claim of actual innocence, absent an independent constitutional violation that occurred in the underlying state criminal proceeding.

Federal Habeas Relief Barred Under *Teague v. Lane*

Graham v. Collins, 113 S.Ct. 892, 122 L.Ed.2d. 260, 52 Crim. L. Rep. 2114 (25 January 1993). Defendant was not entitled to federal habeas corpus relief on issue of limiting mitigating evidence in Texas capital sentencing hearing, because relief would require announcement of new rule of constitutional law under *Teague v. Lane*, 489 U.S. 288 (1989).

Gilmore v. Taylor, 113 S.Ct. 2112, 124 L.Ed.2d 306, 53 Crim. L. Rep. 2191 (7 June 1993). The Court ruled that lower court's ruling that certain homicide instructions were constitutionally deficient was a new rule under *Teague v. Lane*, and therefore defendant was not entitled to federal habeas corpus relief.

Federal Forfeiture Laws

Innocent Owner Defense Applicable To Civil Forfeiture; Relation Back Theory Is No Bar To Defense

United States v. A Parcel of Land, 113 S.Ct. 1126, 122 L.Ed.2d 469, 52 Crim. L. Rep. 2231 (24 February 1993). The federal government filed *in rem* action against parcel of land on which a person's home was located, alleging she had purchased the property with funds given to her by Joseph Brennas that were proceeds from illegal drug trafficking. The Court ruled (three-Justice plurality opinion and two-Justice concurring opinion) that female owner was entitled to assert innocent owner defense under 21 U.S.C. § 881(a)(6). The Court rejected government's argument under 21 U.S.C. § 881(h) that relation back theory embodied in that statute vested title to land to government at time proceeds from illegal drug trafficking were used to purchase the land.

Eighth Amendment Applicable To Federal Drug Forfeiture Laws

Austin v. United States, 113 S.Ct. 2801, 125 L.Ed.2d 488, 53 Crim. L. Rep. 2274 (28 June 1993). The Court ruled that excessive fines clause of Eighth Amendment applies to federal drug civil forfeiture laws [21 U.S.C. §§ 881(a)(4) and (a)(7)]. However, the Court declined in this case to establish test to determine when forfeiture is excessive.

RICO Forfeiture Did Not Violate Convicted Defendant's First Amendment Rights

Alexander v. United States, 113 S.Ct. 2766, 125 L.Ed.2d. 441, 53 Crim. L. Rep. 2281 (28 June 1993). Defendant's obscenity convictions, based on four magazines and three videotapes sold at his stores, served as predicates for three RICO convictions, which then led to RICO forfeiture of his businesses and almost $9 million acquired through racketeering activity. The Court ruled that forfeiture did not violate defendant's First Amendment rights, but it remands case to determine if forfeiture violated defendant's Eighth Amendment rights, based on Austin v. United States, discussed above.