IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

STATE OF FLORIDA,

Appellant,

v. Case No. 5D19-792

TERRANCE DEMOND BROWN,

Appellee.

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Opinion filed October 23, 2020

Appeal from the Circuit Court
for Putnam County,
Howard O. McGillin, Jr., Judge.

Ashley Moody, Attorney General, Tallahassee, and Kellie A. Nielan, Assistant Attorney General, Daytona Beach, for Appellant.

James S. Purdy, Public Defender, and Nancy Ryan, Assistant Public Defender, Daytona Beach, for Appellee.

PER CURIAM.

The State of Florida appeals the trial court's dismissal of two firearms-related charges against Terrance Demond Brown. Even though a jury previously acquitted Brown of possession of a firearm by a convicted felon, Brown's consent to separate trials

obviates any issues relating to double jeopardy or collateral estoppel. We therefore reverse.

The State concedes all the firearms charges arose from the same incident. Brown moved to sever the possession charge from the remaining charges of aggravated assault with a firearm and willful discharge of a firearm from a vehicle. The parties discussed typical measures to resolve all charges in one trial. Nevertheless, with Brown's consent, the State elected to proceed with separate trials.[1] At the first trial, which was solely on the felon-in-possession charge, the parties stipulated Brown was a convicted felon at the time he allegedly possessed a firearm. Accordingly, the only issue for the jury's resolution was whether Brown possessed a firearm. The jury acquitted him.

Brown then moved to dismiss the remaining charges, or alternatively, to preclude the State from raising the issue of his firearm possession in a second trial. In support, Brown advanced similar arguments under both federal and Florida law. He first contended that further prosecution violated double jeopardy principles because the jury's acquittal barred a second trial. Alternatively, he claimed the State should be collaterally estopped in the second trial from arguing that he possessed a firearm.[2]

The Fifth Amendment, applied to Florida through the Fourteenth Amendment, prevents the government from trying any person twice "for the same offence." Amend. V, U.S. Const.; *see Benton v. Maryland*, 395 U.S. 784, 794 (1969). In limited situations, the

[1] Our record is silent on why the State chose to litigate separate trials instead of bifurcating the issue of Brown's felony record, and why Brown consented to the State's approach.

[2] The State conceded below that if Brown prevailed on either argument, it could not proceed, and the trial court relied on this concession in its order.

Fifth Amendment also precludes the government from relitigating ultimate facts determined by a valid and final judgment, a doctrine known as collateral estoppel. *Ashe v. Swenson*, 397 U.S. 436, 443 (1970). The Florida Constitution echoes the protections against double jeopardy, and its scope is identical to the federal constitution. *See* Art. 1, § 9, Fla. Const.; *Burnette v. State*, 45 Fla. L. Weekly D1606 (Fla. 5th DCA July 2, 2020) (citing *Dunbar v. State*, 89 So. 3d 901, 904 n.2 (Fla. 2012)).

Brown's consent to separate trials obviated any double jeopardy or collateral estoppel concerns. *See Burnette*, 45 Fla. L. Weekly D1606 (Fla. 5th DCA July 2, 2020) (citing *Currier v. Virginia*, 138 S. Ct. 2144, 2148–50 (2018); *Morris v. State*, 252 So. 3d 383, 385–86 (Fla. 3d DCA 2018)). When it entered its thorough and reasoned dismissal order, the trial court did not have the benefit of our decision in *Burnette*.[3] Indeed, Brown does not dispute on appeal *Currier*'s applicability to his federal claims.

Brown instead relies on two Florida Supreme Court cases for the proposition that a separate Florida due process right bars the State from referencing his firearm possession during a second trial. *See Burr v. State*, 576 So. 2d 278 (Fla. 1991); *State v.*

[3] In *Currier*, Justice Gorsuch wrote for a four-judge plurality. 138 S. Ct. at 2148. Justice Kennedy joined the plurality opinion in concluding Currier's consent to a second trial eliminated any double jeopardy concerns relating to a second trial. *Id*. at 2156. The plurality and Justice Kennedy could not, however, agree on a rationale relating to collateral estoppel. The plurality advocated for a broader resolution, contending that "'[s]o far as merely evidentiary . . . facts are concerned,' the Double Jeopardy Clause 'is inoperative.'" *Id*. at 2154 (quoting *Yates v. United States*, 354 U.S. 298, 338 (1957)). Justice Kennedy espoused a narrower rationale, finding Currier's consent to separate trials also resolved the collateral estoppel issue. *See id*. at 2156–57 (Kennedy, J., concurring in part). Justice Kennedy's concurrence provides the narrower ground. *See Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976))).

Perkins, 349 So. 2d 161 (Fla. 1977). But neither case mentions due process. In fact, *Perkins* relies on a federal decision that expressly declines to reach a due process argument. 349 So. 2d at 163; *see Wingate v. Wainwright*, 464 F.2d 209, 214 n.6 (5th Cir. 1972). Moreover, *Burr* and *Perkins* dealt with the admissibility of collateral crime evidence, and, as a result, neither case involves a defendant's consent to separate trials. *See Burr*, 576 So. 2d at 280–81; *Perkins*, 349 So. 2d at 163–64. Accordingly, Brown's authority is readily distinguishable.

REVERSED and REMANDED for further proceedings.

EVANDER, C.J., and TRAVER, J., concur.
EISNAUGLE, J., concurs specially with opinion.

EISNAUGLE, J., concurring specially. Case No. 5D19-792

I agree that *Burr v. State*, 576 So. 2d 278 (Fla. 1991) and *State v. Perkins*, 349 So. 2d 161 (Fla. 1977) do not apply, and that the trial court's order must be reversed pursuant to *Currier v. Virginia*, 138 S. Ct. 2144, 2150 (2018) (holding a defendant's consent to two trials "must overcome a double jeopardy complaint under *Ashe* [*v. Swenson*, 397 U.S. 436 (1970)]"), *Morris v. State*, 252 So. 3d 383, 386 (Fla. 3d DCA 2018), and *Burnette v. State*, 45 Fla. L. Weekly D1606 (Fla. 5th DCA July 2, 2020). However, I do not join footnote 3 of the majority opinion.