[J-11-2007]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 44 WAP 2006
	:	
Appellant	:	Appeal from the Order of the Superior
	:	Court entered December 30, 2005, at No.
	:	169 WDA 2004, reversing the Order of the
v.	:	Court of Common Pleas of Allegheny
	:	County entered January 5, 2004, at Nos.
	:	CP-02-CR-0016578-2000 and CP-02-CR-
LAWRENCE STATES,	:	0017056-2000.
	:	
Appellee	:	2005 PA Super 434, 891 A.2d 737 (2005)
	:	
	:	ARGUED: March 6, 2007
	:	RESUBMITTED: April 2, 2007

DISSENTING OPINION

MR. JUSTICE CASTILLE **DECIDED: DECEMBER 27, 2007**

The essence of the Majority's decision in this case is that inconsistent verdicts implicate federal constitutional double jeopardy in a situation where a defendant is acquitted by a judicial factfinder in one part of an agreed-upon bifurcated trial, but a jury deadlocks in the other part, with the result that the defendant cannot be retried on the charges on which the jury merely deadlocked. Clearly, there was no governmental overreaching in this case and no attempt by the Commonwealth to wear the defendant down with multiple trials, which would support a finding of double jeopardy. In fact, the separate trials in this case were a product of appellee's own request and trial strategy. The Majority nevertheless awards the ultimate constitutional windfall. I disagree with the Majority's far-reaching conclusion, and therefore, I respectfully dissent.

The facts pertinent to the issue in this appeal are unique, but of course odd cases can make bad law. Appellee, who was the sole survivor of a single vehicle accident in which two other men perished, was charged with involuntary manslaughter, homicide by vehicle, homicide by vehicle while driving under the influence of alcohol, accidents involving death or personal injury while not properly licensed and driving under the influence of alcohol. Appellee moved to sever the charge of accidents involving death or personal injury while not properly licensed from the other charges so that the jury would not learn that he did not have a valid driver's license. The trial court granted the motion.[1] Thus, it was appellee who demanded that he face not one, but two prosecutions. After invoking its right to a trial by jury, the Commonwealth agreed to a bifurcated trial with the accidents involving death or personal injury charge to be tried in a simultaneous bench trial along with the jury trial on the remaining charges. Appellee agreed to this bifurcated approach, which accommodated his severance request. Ultimately, the jury deadlocked on the charges of homicide by vehicle, homicide by vehicle as a result of driving under the influence of alcohol, and driving under the influence of alcohol. The trial court declared a mistrial and dismissed the jury, thus opening the way to retrial on those charges. On the less serious charge of accidents involving death or personal injury while not properly licensed, the trial court found appellee not guilty. Although it was not necessary to explain the basis for its decision to acquit, the trial court gratuitously offered that it felt that the Commonwealth had failed to prove beyond a reasonable doubt that appellee was the driver of the vehicle at the time of the accident.

Seeking to bootstrap on the resulting verdict from the severed proceedings he had demanded, appellee moved to dismiss the remaining charges, invoking double jeopardy. Appellee argued that the bench trial acquittal on the minor charge precluded retrial on the

[1] The trial court also dismissed the involuntary manslaughter charges.

remaining charges because the trial court -- which was not the factfinder on those charges -- had expressly found that he was not driving the vehicle. Appellee contended that, because each of the other charges required him to be the driver, the trial court's statement and acquittal precluded a jury from returning a guilty verdict on any of the remaining charges. The trial court disagreed and denied the motion, concluding that, as a general principle, a retrial following a mistrial does not violate double jeopardy and that, when a case is bifurcated with separate trials by different factfinders, inconsistent verdicts based upon the same facts are permissible.[2] In my view, the trial court's analysis and conclusion are correct, and therefore, I would reverse the Superior Court's decision upsetting that judgment.

The Majority's general survey of the law pertaining to double jeopardy and collateral estoppel is thorough and well-presented, and therefore, it need not be repeated. I respectfully disagree, however, with the Majority's easy dismissal of this Court's decision in Commonwealth v. McCane, 539 A.2d 340 (Pa. 1988). In my view, the reasoning employed in McCane is directly on point, as both cases involve the application of principles of double jeopardy to second prosecutions following a hung jury. In McCane, this Court succinctly stated when double jeopardy applies: "The prohibition against double jeopardy protects against a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." Id. at 345-46 (citation omitted). The Majority correctly notes that the defendant in McCane had not been acquitted on any charges; instead, the jury was simply unable to reach a verdict

[2] Although the court acquitted, it obviously did not find that the Commonwealth's evidence concerning who was driving was insufficient to present a jury question. In short, there is no claim here that appellee was entitled to acquittal on grounds of insufficient evidence. Instead, the question is the preclusive effect of one factfinder's decision upon a second factfinder hearing distinct criminal charges.

as to the charges which the Commonwealth was seeking to retry. Likewise, in the case *sub judice*, the Commonwealth did not seek to retry appellee on the charge of accidents involving death or personal injury while not properly licensed, for which he was acquitted by a judicial factfinder, but rather only on the separate charges that resulted in a **jury** deadlock and a declaration of mistrial. Because this case does not involve a second prosecution for the same offense after acquittal, or a multiple conviction or punishment for the same offense, pursuant to McCane, double jeopardy is not implicated.

The Majority invokes collateral estoppel principles as affording a basis for its decision, concluding that the trial court's unnecessary, record explanation of the reason for its verdict of acquittal precludes the Commonwealth from exercising its right to have a jury determine whether appellee was the driver in any retrial on the deadlocked charges. Application of the doctrine of collateral estoppel requires the adjudication of a specific issue with a resolution, in this instance, in favor of appellee. In its opinion addressing appellee's motion to dismiss, the trial court correctly noted that two separate factfinders may make inconsistent findings of fact and, as a result, reach inconsistent verdicts; if that were not so, the court noted, there would be little reason to sever charges or bifurcate trials. Trial Ct. Op. at 4. This settled point is even broader: the **same** factfinder constitutionally may render inconsistent verdicts.

I believe that the trial court's analysis is correct. "It has long been the rule in Pennsylvania and in the federal courts that consistency in a verdict in a criminal case is not necessary." Commonwealth v. Strand, 347 A.2d 675, 676 (Pa. 1975) (citing Commonwealth v. Parrotto, 150 A.2d 396 (Pa. Super. 1959); United States v. Carbone, 378 F.2d 420 (2nd Cir. 1967); United States v. Cindrich, 241 F.2d 54 (3rd Cir. 1957); Mills v. Commonwealth, 13 Pa. 633 (1850); Commonwealth v. Kline, 164 A. 124 (Pa. Super. 1933)). Here, appellee sought severance of the charge of accidents involving death or personal injury while not properly licensed, a request that led to the bifurcation of the

charges, and the existence of two separate factfinders. Appellee agreed to the bifurcation, a potential byproduct of which was inconsistent verdicts.

If the trial court and the jury had rendered verdicts simultaneously, it was entirely possible and permissible that the trial judge could acquit and that the jury could convict, or vice versa. In terms of constitutional principle, the trial level result here, as approved by the trial court, is materially indistinguishable from the simultaneous, inconsistent verdict scenario. The trial judge rendered a verdict, but the jury was unable to do so; that jury deadlock was inconsistent with the trial judge's statement that he found unconvincing the Commonwealth's proof that appellee was the driver of the vehicle.

Another difficulty with the Majority's double jeopardy analysis is that it attaches constitutional consequences to a case-specific oddity -- that the trial court stated the grounds for its acquittal -- which is not a necessary part of a bench trial or a verdict in a bifurcation setting. A trial judge is not required to state the basis for an acquittal in a bench trial and, if the trial judge had not announced the basis for his decision here, appellee's claim would lack any legal predicate. Acquittals are returned, by bench trial judges and by juries, for a variety of reasons, some legally justifiable, and some less so. Among the latter are acquittals reflecting factfinder nullification of charges, misunderstanding of the law, mercy verdicts, or decisions resulting from bias or prejudice. Thus, the fact of an acquittal does not necessarily mean that either the defense proffered or the argument forwarded was credited. In most instances, the basis for and legitimacy of the acquittal cannot be second-guessed; the verdict is conclusive. In terms of its inherent legal effect, then, an acquittal does not act as a finding concerning any particular fact: indeed, a factfinder may believe that all elements of a crime were proven beyond a reasonable doubt, and yet acquit anyway. This reality is a factor which both the defendant and the Commonwealth weigh in determining whether to demand a jury or a judicial factfinder. Given this reality, a factfinder's gratuitous statement of the reasons for a verdict of acquittal should not operate

as a substitute for what is the only ineluctable effect of the verdict. In my judgment, a federal double jeopardy bar should not depend upon such an arbitrary factor.

The Majority's analysis also affords insufficient consideration to the fact that appellee himself demanded the separate trials here. In Ohio v. Johnson, 467 U.S. 493, 104 S.Ct. 2536 (1984), the United States Supreme Court held that a defendant who is himself responsible for the severance of charges cannot then avail himself of the protections of double jeopardy based on collateral estoppel. There, the defendant, who was charged with murder, aggravated robbery, involuntary manslaughter and theft, pleaded guilty to involuntary manslaughter and theft. He then argued that prosecution of the remaining murder and aggravated robbery charges was barred by double jeopardy, as subsequent prosecutions following a conviction, because the charges to which he pleaded guilty were lesser included offenses of the remaining charges.

The Supreme Court rejected that argument, finding that the principles behind the double jeopardy protection were not implicated:

> We do not believe, however, that the principles of finality and prevention of prosecutorial overreaching applied in Brown [v. Ohio, 432 U.S. 161, 97 S.Ct. 2221 (1977)] reach this case. No interest of respondent protected by the Double Jeopardy Clause is implicated by continuing prosecution on the remaining charges brought in the indictment. Here respondent offered only to resolve part of the charges against him, while the State objected to disposing of any of the counts against respondent without a trial. Respondent has not been exposed to conviction on the charges to which he pleaded not guilty, nor has the State had the opportunity to marshal its evidence and resources more than once or to hone its presentation of its case through a trial. The acceptance of a guilty plea to lesser included offenses while charges on the greater offenses remain pending, moreover, has none of the implications of an "implied acquittal" which results from a verdict convicting a defendant on lesser included offenses rendered by a jury charged to consider both greater and lesser included offenses. There simply has been none of the governmental overreaching that double jeopardy is supposed to prevent. On the other hand, ending prosecution now would deny the State its right to one full and fair opportunity to convict those who have violated its laws.

> We think this is an even clearer case than Jeffers v. United States, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977), where we rejected a defendant's claim of double jeopardy based upon a guilty verdict in the first of two successive prosecutions, when the defendant had been responsible for insisting that there be separate rather than consolidated trials. Here respondent's efforts were directed to separate disposition of counts in the same indictment where no more than one trial of the offenses charged was ever contemplated. Notwithstanding the trial court's acceptance of respondent's guilty pleas, respondent should not be entitled to use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution on the remaining charges.

Id. at 501-02, 104 S.Ct. at 2542 (citations omitted). The fact that this case does not involve a guilty plea or a guilty verdict is a distinction without a difference for purposes of the constitutional values at stake. A defendant should not be permitted to insist upon separate trials and then seek to avoid the fullness of those separate prosecutions, in an instance, like this one, where there simply is no prosecutorial overreaching.

Of similar effect is the Third Circuit's decision in United States v. Blyden, 964 F.2d 1375 (3rd Cir. 1992). In Blyden, the defendants were charged with firearms violations under both federal and Virgin Islands law. On the first day of trial, the defendants sought and were granted severance of the federal and local charges, and trial proceeded only on the Virgin Island charges. After the jury returned not guilty verdicts, the defendants moved for dismissal of the federal charges, pleading double jeopardy and collateral estoppel. Citing the fact that the defendants themselves had sought the severance of the charges, the Third Circuit declined to dismiss the remaining charges:

> A similar situation was presented in United States v. Ashley Transfer & Storage Co., 858 F.2d 221 (4th Cir. 1988), where the defendants had persuaded the trial court to withdraw one of two counts from the jury's consideration. After the defendants were acquitted on the one count, the government sought a retrial, as to the count the judge had withdrawn from the jury. The Court of Appeals remanded for retrial holding that where "the defendants' choice and not government oppression caused the successive

> prosecutions, the defendants may not assert collateral estoppel as a bar against the government any more than they may plead double jeopardy." Id. at 227. We find the reasoning of the Ashley Transfer opinion persuasive . . ..

Id. at 1379.

In my view, the controlling fact in the case *sub judice* is that appellee himself was responsible for the severance of the charges that resulted in two different factfinders hearing the evidence at trial. With the exception of the non-binding decision in Commonwealth v. Wallace, 602 A.2d 345 (Pa. Super. 1992), none of the cases the Majority cites involve the severance of charges at the defendant's request or separate but simultaneous trials. See Commonwealth v. Buffington, 828 A.2d 1024 (Pa. 2003) (single jury trial in which jury acquitted defendant of rape and involuntary deviate sexual intercourse but could not reach verdict on sexual assault; retrial permissible); Commonwealth v. Zimmerman, 445 A.2d 92 (Pa. 1981) (jury acquittal in single proceeding on first-degree murder and simple assault deemed to preclude retrial of deadlocked charges of other grades of murder and aggravated assault); Commonwealth v. Harris, 582 A.2d 1319 (Pa. Super. 1990) (in single trial where jury found defendant not guilty of robbery and simple assault but deadlocked on aggravated assault, retrial of aggravated assault charge not barred). Wallace involved severed charges but not simultaneous trials with separate factfinders and no retrial. Once a jury acquitted Wallace of attempted homicide and assault, the Commonwealth conceded that the jury found that Wallace did not possess a gun; and based solely upon that concession, the Superior Court found that Wallace could not be tried on the severed firearms charges. Thus, none of the cases the Majority relies upon control the issue presented here, much less do they command that we lose sight of the double jeopardy values that must guide our inquiry.

Because they are powered by the values which undergird the protection against double jeopardy, the decisions in Johnson and Blyden are relevant here. As a matter of

constitutional principle, neither double jeopardy nor collateral estoppel precludes a full prosecution of a matter, based upon an acquittal in a separate prosecution, where the defendant is responsible for the severance of the charges that led to separate prosecutions before separate factfinders. In such an instance, there is no governmental overreaching. By contrast, in Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189 (1969), the defendant was charged in separate criminal complaints with robbing six poker players. After a jury acquitted him of robbing one of the victims based on insufficient identification evidence, the prosecutor sought to try him for the robbery of a second poker player. Clearly, concerns of governmental overreaching are implicated in that scenario. In this case, the Commonwealth intended to try all charges against appellee in a single trial, but appellee demanded and received a separation of the proceedings. This is governmental accommodation, not governmental oppression. The windfall the Majority accords appellee furthers no constitutional value; it does, however, operate to deprive the Commonwealth of its constitutional right to a trial by jury. See Pa. Const. Art. I, Sec. 6; Commonwealth v. White, 910 A.2d 648 (Pa. 2006). In this regard, the result here is perverse.[3]

Finally, it is worth noting that the windfall awarded appellee will not likely be shared by many others. In light of today's decision, the Commonwealth should vigorously resist

[3] Respectfully, I am not persuaded by the Maryland case, Wright v. State, 515 A.2d 1157 (Md. 1986), preferred by Mr. Justice Saylor in concurrence. Again, there is no governmental overreaching here; it is governmental accommodation, in a circumstance arising from appellee's own split-trial demand. If the implicit complaint is that the logically resulting waiver should not be chargeable to appellee because he was unaware of that possible effect, his quarrel is a collateral one with his lawyer. I know of no authority that requires an explicit waiver of all contingent effects in such circumstances. Frankly, it is unlikely in the extreme that a defendant in appellee's circumstances at the time he made the motion, even if explicitly informed, would have insisted upon the single trial where the jury would have heard the harmful truth he was trying to keep from it. And so, I repeat, the windfall here serves no legitimate constitutional value; it lets a criminal defendant's pretend complaint turn a constitutional shield into a perverse sword.

severance requests in similar cases, and let the jury hear the whole truth about the defendant and the full array of the crimes charged. If that fails, the Commonwealth should insist that the bench trial verdict be rendered after the jury verdict or, failing that, should insist upon an explicit waiver of what will come to be known as the defendant's "Commonwealth v. States right," *i.e.*, the right to double jeopardy relief where no double jeopardy value is implicated.

I respectfully dissent.

Mr. Justice Baer joins this dissenting opinion.