In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-22-00034-CR

KRISTOPHER ALLEN FATE WILSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 102nd District Court
Bowie County, Texas
Trial Court No. 21F0001-102

Before Morriss, C.J., Stevens and van Cleef, JJ.
Memorandum Opinion by Chief Justice Morriss

MEMORANDUM OPINION

Kristopher Allen Fate Wilson appeals his conviction for felony murder.[1] He stood trial for capital murder, and the jury acquitted him of that count but convicted him of the lesser-included offense of felony murder. Wilson argues that the conviction for felony murder was barred by double jeopardy. Because (1) Wilson was not placed in double jeopardy and (2) Wilson's issue with court costs has been resolved, we affirm the trial court's judgment.

(1) Wilson Was Not Placed in Double Jeopardy

After the jury was impaneled and sworn, the prosecutor and defense counsel met at the bench. The prosecutor told the court that the parties had reached an agreement, under which the State would abandon Count II of the indictment, alleging felony murder, and that felony murder would be included in the jury charge as a lesser-included offense to Count I, capital murder.[2]

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[1]*See* TEX. PENAL CODE ANN. § 19.02. Wilson and another man went to the victim's home to buy illegal drugs. During the transaction, the victim was shot and his drugs were taken.

[2]The discussion at the bench was as follows:

> [THE STATE]: Your Honor, . . . as of right now[,] the State has Kristopher Wilson indicted for capital murder and felony murder. At this time, the State is gonna abandon count two, but [defense counsel] has requested that we do a lesser included so there will be a lesser included felony murder in the jury charge, which it's already in our draft right now. So it has been circulated and we're still working on that.
>
> [THE COURT]: Okay. So, as we come back this afternoon[,] we're gonna start with the prosecution presenting the indictment.
>
> [THE STATE]: Yes, sir.
>
> [THE COURT]: And it's not going to include count two?
>
> [THE STATE]: Correct.
>
> [THE COURT]: Any objection?

Wilson argues that, when the State abandoned Count II, alleging felony murder, after the jury had been sworn and jeopardy attached, such abandonment was akin to an acquittal on felony murder. Thus, argues Wilson, double jeopardy barred a conviction for felony murder.

An accused is protected against multiple prosecutions or punishments for the same offense by the Double Jeopardy Clause.

> The Double Jeopardy Clause of the Fifth Amendment, applicable to the states through the Fourteenth Amendment, protects an accused against a second prosecution for the same offense for which he has been previously acquitted or previously convicted. It also protects an accused from being punished more than once for the same offense.

Littrell v. State, 271 S.W.3d 273, 275 (Tex. Crim. App. 2008) (footnotes omitted).

Three separate guarantees are recognized in the Double Jeopardy Clause: (1) protection against reprosecution for the same offense following an acquittal; (2) protection against reprosecution for the same offense following a conviction; and (3) protection against multiple punishments for the same offense. *Stephens v. State*, 806 S.W.2d 812, 816 (Tex. Crim. App. 1990) (citations omitted). None of those situations describe the circumstances of Wilson's conviction.

Wilson's double-jeopardy argument is based on the fact that the State's abandonment of Count II, felony murder, came after the jury was impaneled and jeopardy attached to the indictment. While generally "the state may, with the consent of the court[,] dismiss, waive or abandon a portion of the indictment," "if the dismissal, waiver or abandonment occurs after

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[Defense Attorney]: Since we're gonna have it in the jury charge, no, sir. I was not gonna ask for that alternative.

jeopardy attaches, the State is barred from later litigating those allegations." *Ex parte Preston*, 833 S.W.2d 515, 517 (Tex. Crim. App. 1992).[3]

However, Wilson suffered no subsequent prosecution. He was tried once, in a single trial that had begun with the impaneling of the jury. As *Ex parte Preston* clearly stated, where the prosecution abandons a count or charge after jeopardy attaches, "the State is barred from later litigating those [abandoned] allegations." *Id.*[4] Additionally, "[i]n a prosecution for an offense with lesser included offenses, the jury may find the defendant not guilty of the greater offense, but guilty of any lesser included offense." TEX. CODE CRIM. PROC. ANN. art. 37.08.

Wilson would distinguish *Ex parte Preston* from his own case by pointing out that the prosecution, in *Preston*, failed to "take some affirmative action, on the record, to dismiss, waive or abandon that portion of the charging instrument." *Ex parte Preston*, 833 S.W.2d at 518.[5] That is correct. And contrary to the events in that case, the State in Wilson's case did make such an affirmative declaration of abandonment. But Wilson neglects the rest of *Ex parte Preston*'s holding:

> [T]o preserve a portion of a charging instrument for a subsequent trial, the State must, before jeopardy attaches (i.e., before the jury being impaneled and sworn or for bench trials, when both sides have announced ready and the defendant has

[3]In one indictment Preston was charged with three counts of aggravated robbery. *Preston*, 833 S.W.2d at 516. "After the jury was impaneled and sworn, the State proceeded to trial on the second count only and [Preston] was convicted of that alleged offense." *Id.* Subsequent prosecution on the remaining two counts was held to be jeopardy barred. *Id.* at 518.

[4]As authority, Wilson cites *Ex parte Hunter*, 256 S.W.3d 900 (Tex. App.—Texarkana 2008), *pet. dism'd*, 297 S.W.3d 292 (Tex. Crim. App. 2009). After a mistrial, the State sought to re-try Hunter. *Id.* at 903. Because manifest necessity had not compelled the mistrial, subsequent prosecution was jeopardy barred. *Id.* at 909. That situation is distinguishable from the one at bar.

[5]Further, the State "must obtain permission from the trial judge to dismiss, waive or abandon that portion of the charging instrument." *Ex parte Preston*, 833 S.W.2d at 518.

> pled to the charging instrument. *Ex parte Torres*, 805 S.W.2d 418, 421 [Tex. Crim. App. 1991]), take some affirmative action, on the record, to dismiss, waive or abandon that portion of the charging instrument *and* the State must obtain permission from the trial judge to dismiss, waive or abandon that portion of the charging instrument. Because this was not done, jeopardy attached to the offenses alleged in the first and third counts in the original indictment when the jury was impaneled and sworn at appellant's trial.

Id. At the first prosecution of Preston, the State—after the jury was impaneled and sworn—"proceeded to trial on the second count only" and secured Preston's conviction. *Id.* at 516. Subsequent prosecution of Counts I and III was jeopardy barred because the State failed to get the trial court's "permission . . . to dismiss, waive or abandon" those counts. *Id.* at 518.

The issue is not whether the State formally abandoned a particular count. Rather the issue here, as it was in *Ex parte Preston*, is whether the State in a subsequent proceeding, after abandonment of the charge, attempted to try the defendant again for the previously abandoned charge. As in *Ex parte Preston*, the State here could not try Wilson for the abandoned, jeopardy-barred allegation of felony murder. But that did not happen. The State abandoned its felony murder count (with an agreement with Wilson to include that charge as a lesser-included offense of capital murder). Wilson stood trial, at that time and in that proceeding, for the indictment's remaining allegation, capital murder. Then, per agreement of the parties and Texas law,[6] the court's charge included the lesser offense of felony murder. Wilson has directed us to no authority precluding the State from seeking conviction of a lesser offense in these circumstances, where the accused has only once been put to trial.

We overrule this point of error.

[6] *See* TEX. CODE CRIM. PROC. ANN. art. 37.08.

(2) Wilson's Issue with Court Costs Has Been Resolved

In his initial appellate brief, Wilson complained about a discrepancy between the trial clerk's bill of costs and the amount of court costs in the trial court's judgment.[7] After Wilson filed that brief, the clerk supplemented the record with a new statement of costs reflecting costs of $290.00, which matches the court costs recited in the judgment. After the supplementation of the clerk's record, Wilson filed a reply brief, re-urging only his double-jeopardy argument and not mentioning his complaint about the court costs.

Because the record supports the court costs in the judgment, we overrule this point of error.

We affirm the trial court's judgment.

Josh R. Morriss, III
Chief Justice

Date Submitted: July 28, 2022
Date Decided: September 1, 2022

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[7]The statement of costs in the clerk's record listed $234.00 as court costs, but the judgment had court costs of $290.00.