REL: December 17, 2021

Alabama Court of Criminal Appeals

OCTOBER TERM, 2021-2022

CR-18-0790

William Howard Wesson

v.

State of Alabama

Appeal from Lauderdale Circuit Court
(CC-17-312)

On Application for Rehearing on Return to Second Remand

MINOR, Judge.

William Howard Wesson appeals his convictions for 55 counts of possession of obscene material, see § 13A-12-192(b), Ala. Code 1975, and his conviction for one count of possession of obscene material with intent to disseminate, see § 13A-12-192(a), Ala. Code 1975. For each possession-

of-obscene-material conviction, the circuit court sentenced Wesson to four years in prison; the circuit court split each sentence and ordered Wesson to serve two years, followed by three years of probation.[1] For the possession-of-obscene-material-with-intent-to-disseminate conviction, the circuit court sentenced Wesson to 10 years in prison. The circuit court ordered that the sentences imposed for counts 1-8 run consecutively with each other and with the sentences for counts 9-55 and with the sentences for the count for possession with intent to disseminate. It ordered that the sentences for counts 9-55 run concurrently with each other and consecutively with the count for possession with intent to disseminate.[2]

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[1]The circuit court originally sentenced Wesson to four years in prison for each possession-of-obscene-material conviction without suspending or splitting those sentences. We remanded the case for the circuit court to resentence Wesson in compliance with §§ 13A-5-6(a)(3) and 15-18-8(b), Ala. Code 1975. Wesson v. State, [Ms. CR-18-0790, Dec. 16, 2020] ___ So. 3d ___ (Ala. Crim. App. 2020).

[2]The record on return to remand shows a discrepancy between the circuit court's oral pronouncement at Wesson's resentencing hearing and the circuit court's written order. By order, issued on June 2, 2021, we remanded the case for the circuit court to clarify which sentences were to be served consecutively with each other and with the other counts, and which sentences were to be served concurrently with each other and with the other counts.

On original submission, this Court issued an opinion affirming Wesson's convictions and remanding the case for the circuit court to resentence Wesson under §§ 13A-5-6(a)(3) and 15-18-8(b), Ala. Code 1975. On return to second remand, we affirmed the judgment of the circuit court by an unpublished memorandum.

On application for rehearing, Wesson raises two issues that this Court must address: (1) whether his sentence for possession of obscene material with intent to disseminate is erroneous because, he says, in sentencing him on that conviction the circuit court cited a Code section that was not in effect when he committed that offense, and (2) whether he received simultaneous convictions for both a greater and lesser-included offense in violation of double-jeopardy principles when he was convicted of possession of obscene material and possession of obscene material with intent to disseminate, both involving the same image. For the reasons stated below, Wesson's first argument lacks merit, but we agree with his double-jeopardy claim and remand this case to the circuit court for it to vacate one of Wesson's possession-of-obscene-material convictions.

I.

Wesson argues that his sentence for his possession-of-obscene-material-with-intent-to-disseminate conviction is erroneous because, he says, the circuit court cited a Code section–§ 13A-5-6(6), Ala. Code 1975–that was not in effect in 2016 when he was charged for that offense. Although it is true that § 13A-5-6(6) was not a section of the Code of Alabama that was in effect when Wesson committed the offense, we can reasonably conclude that the circuit court made a clerical error and that it actually sentenced Wesson under §13A-5-6(a)(6), Ala. Code 1975, which was in effect when Wesson committed the offense.

Following Wesson's resentencing hearing, the circuit court issued a written sentencing order on remand that stated, in pertinent part:

> "It is the judgment of the Court and the sentence of the law that the defendant be sentenced to the Alabama Department of Corrections for a term of 10 years on Count 78.[3] ... The defendant's sentence to Count 78 shall be served in accordance with 13A-5-6(6) of the Code of Alabama."

[3]Count 78 of the indictment against Wesson encompasses the charge of possession of obscene material with intent to disseminate.

(Record on Return to Remand, C. 60.) In this Court's order following the circuit court's return to remand, we recognized the circuit court's omission of the applicable subsection of § 13A-5-6 and, in quoting the circuit court's order, we added the correct subsection: "The defendant's sentence to Count 78 shall be served in accordance with 13A-5-6[(a)](6) of the Code of Alabama." (Record on Return to Second Remand, C. 4.)

"[T]he law in effect at the time of the commission of the offense controls the prosecution." Minnifield v. State, 941 So. 2d 1000, 1001 (Ala. Crim. App. 2005). When Wesson committed the offense, § 13A-5-6, Ala. Code 1975, provided:

> "(a) Sentences for felonies shall be for a definite term of imprisonment, which imprisonment includes hard labor, within the following limitations:
>
> > "(1) For a Class A felony, for life or not more than 99 years or less than 10 years.
> >
> > "(2) For a Class B felony, not more than 20 years or less than 2 years.
> >
> > "(3) For a Class C felony, not more than 10 years or less than 1 year and 1 day and must be in accordance with subsection (b) of Section 15-18-8 unless sentencing is pursuant to Section 13A-5-9.

> "(4) For a Class D felony, not more than 5 years or less than 1 year and 1 day and must be in accordance with subsection (b) of Section 15-18-8.
>
> "(5) For a Class A felony in which a firearm or deadly weapon was used or attempted to be used in the commission of the felony, or a Class A felony sex offense involving a child as defined in Section 15-20A-4(26), not less than 20 years.
>
> "(6) For a Class B or C felony in which a firearm or deadly weapon was used or attempted to be used in the commission of the felony, or a Class B felony sex offense involving a child as defined in Section 15-20A-4(26), not less than 10 years.

"(b) The actual time of release within the limitations established by subsection (a) of this section shall be determined under procedures established elsewhere by law.

"(c) In addition to any penalties heretofore or hereafter provided by law, in all cases where an offender is designated as a sexually violent predator pursuant to Section 15-20A-19, or where an offender is convicted of a Class A felony sex offense involving a child as defined in Section 15-20A-4(26), and is sentenced to a county jail or the Alabama Department of Corrections, the sentencing judge shall impose an additional penalty of not less than 10 years of post-release supervision to be served upon the defendant's release from incarceration.

"(d) In addition to any penalties heretofore or hereafter provided by law, in all cases where an offender is convicted of a sex offense pursuant to Section 13A-6-61, 13A-6-63, or 13A-6-65.1, when the defendant was 21 years of age or older and the victim was six years of age or less at the time the offense was

> committed, the defendant shall be sentenced to life imprisonment without the possibility of parole."

In 2016, § 15-20A-4(26) defined "sex offense involving a child" as "[a] conviction for any sex offense in which the victim was a child or any offense involving child pornography." The version of § 13A-12-192(a) in effect in 2016 classified possession of obscene material involving a person under 17 years of age with intent to disseminate as a Class B felony.

Thus, the only subsection of § 13A-5-6 that could apply to Wesson's sentence for that offense was subsection (a)(6). Wesson's sentence of 10 years' imprisonment for his possession-of-obscene-material-with-intent-to-disseminate conviction complies with § 13A-5-6(a)(6), Ala. Code 1975, and we do not see a need for this Court to remand this matter for the circuit court to correct its written sentencing order in this case.[4] Wesson's argument lacks merit, and he is due no relief on this claim.

[4]The circuit court may correct the clerical error at any time. Rule 29, Ala. R. Crim. P.

II.

Wesson argues that he received simultaneous convictions for both a greater and lesser-included offense in violation of double-jeopardy principles when the jury convicted him of possession of obscene material and possession of obscene material with intent to disseminate, both offenses involving the same image. We agree as to Wesson's convictions for possession of obscene material under Count 10 of the indictment and possession of the same obscene material under Count 78.

Although Wesson raises this claim for the first time on application for rehearing, because his claim raises a jurisdictional issue, it can be raised at any time.

> " ' "Since the decision in Rolling[v. State, 673 So. 2d 812 (Ala. Crim. App. 1995)], this Court has continued to hold that certain double jeopardy claims implicate the jurisdiction of the trial court and, therefore, are not subject to waiver. [Citations omitted.] Like Rolling, most of those decisions involved simultaneous convictions for both a greater and lesser-included offense." ' "

Heard v. State, 999 So. 2d 992, 1006 (Ala. 2007) (quoting Ex parte Benefield, 932 So. 2d 92, 95 (Ala. 2005) (Stuart, J., concurring specially),

quoting, in turn, Straughn v. State, 876 So. 2d 492, 508 (Ala. Crim. App. 2003)).

> "The test for determining whether two offenses are the same for double-jeopardy purposes was established in Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). 'The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.' Blockburger, 284 U.S. at 304, 52 S. Ct. 180."

Heard, 999 So. 2d at 1007.

The record shows that Count 10 of the indictment charged Wesson with possession of obscene material under § 13A-12-192(b), Ala. Code 1975, and that Count 78 of the indictment charged Wesson with possession of obscene material with intent to disseminate under § 13A-12-192(a), Ala. Code 1975, based on his possession of the same child-pornography video referenced in Count 10 of the indictment. At trial, the State introduced as Exhibit 77A a DVD copy of the child-pornography video referenced in Counts 10 and 78. On direct examination by the State, Detective Drew Harless of the Florence Police Department testified as follows:

> "Q. Okay. So [Exhibit 77A] references on the video Count 10, and then it's got the synopsis of whatever is occurring in this video; is that correct?
>
> "A. Yes, ma'am.
>
> "Q. And then on the picture images that go with it, it also has Count 10 and then it has on this image Count 78 and Count 88; is that correct?
>
> "A. Yes, ma'am."

(R. 715.) Thus, the record shows that Wesson's conviction for possession of obscene material as charged in Count 10 and his conviction for possession of obscene material with intent to disseminate as charged in Count 78 arose from the same act—i.e., possession of the same image. We must now determine whether each offense required proof of an additional fact that other did not.

At the time of the offense, § 13A-12-192, Ala. Code 1975, provided:

> "(a) Any person who knowingly possesses with intent to disseminate any obscene matter that contains a visual depiction of a person under the age of 17 years engaged in any act of sado-masochistic abuse, sexual intercourse, sexual excitement, masturbation, breast nudity, genital nudity, or other sexual conduct shall be guilty of a Class B felony. Possession of three or more copies of the same visual depiction

> contained in obscene matter is prima facie evidence of possession with intent to disseminate the same.
>
> "(b) Any person who knowingly possesses any obscene matter that contains a visual depiction of a person under the age of 17 years engaged in any act of sado-masochistic abuse, sexual intercourse, sexual excitement, masturbation, genital nudity, or other sexual conduct shall be guilty of a Class C felony."[5]

Section 13A-12-192(a) requires proof of a fact that § 13A-12-192(b) does not—the intent to disseminate. But § 13A-12-192(b) does not require proof of an additional fact that § 13A-12-192(a) does not. Section 13A-12-192(a) substantially tracks the language of § 13A-12-192(b), adds the element of "intent to disseminate," and provides a possible method of proving intent to disseminate by showing the defendant possessed "three or more copies of the same visual depiction contained in obscene matter." "If each offense does not require proof of an additional fact that the other does not, then double jeopardy applies." Birdsong v. State, 267 So. 3d 343,

[5]The Alabama Legislature amended § 13A-12-192 in 2019. See Act No. 2019-465, Ala. Acts 2019. We review Wesson's claim under the version of § 13A-12-192 in effect in 2016. See Minnifield, 941 So. 2d at 1001.

348 (Ala. Crim. App. 2017) (citing Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932)).

Section 13A-1-8(b), Ala. Code 1975, provides, in pertinent part:

> "When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:
>
> > "(1) One offense is included in the other, as defined in Section 13A-1-9 ...."

Section 13A-1-9(a)(1) states:

> "A defendant may be convicted of an offense included in an offense charged. An offense is an included one if:
>
> > "(1) It is established by proof of the same or fewer than all the facts required to establish the commission of the offense charged ...."

Because possession of obscene material, defined in § 13A-12-192(b), is an element that must be proven of possession of obscene material with intent to disseminate, defined in § 13A-12-192(a), possession of obscene material is a lesser-included offense of possession of obscene material with intent to disseminate. See Heard, 999 So. 2d at 1008-09.

Wesson received simultaneous convictions for both a greater and lesser-included offense in violation of double-jeopardy principles when he was convicted for both possession of obscene material under Count 10 and possession of the same obscene material with intent to disseminate under Count 78.[6] Thus, we remand this case to the circuit court for that court to vacate Wesson's conviction and sentence for the lesser-included offense of possession of obscene material under Count 10. Due return shall be made to this Court within 42 days of the date of this opinion.

APPLICATION GRANTED; REMANDED WITH INSTRUCTIONS.

Windom, P.J., and Kellum, McCool, and Cole, JJ., concur.

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[6]Wesson possessed four copies of the child-pornography video referenced in Count 10, and he was convicted of possession of obscene material for each copy under Counts 16, 17, and 53 of the indictment. We know of no authority—and Wesson cites none—showing that the separate convictions for possession of the other three copies violate double-jeopardy principles. In fact, this Court has stated that under § 13A-12-190(16), Ala. Code 1975, " '[t]he depiction of an individual less than 17 years of age that violates this division [which includes § 13A-12-192] shall constitute a separate offense for each single visual depiction.' " C.B.D. v. State, 90 So. 3d 227, 248 (Ala. Crim. App. 2011).