FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D16-4769

CHRISTOPHER NEWCOMBE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

On appeal from the Circuit Court for Leon County.
Martin A. Fitzpatrick, Judge.

December 6, 2019

ON REMAND FROM FLORIDA SUPREME COURT

MAKAR, J.

In 2012, Christopher Newcombe was charged with one count of unlawful use of a computer service to solicit a minor and one count of traveling to meet a minor. In 2013, he entered a plea of nolo contendere and was sentenced to five years in prison and 15 years of sex offender probation. In 2015, he filed a rule 3.850 post-conviction motion alleging, in part, that his convictions for unlawful use of a computer service and traveling to meet a minor violate double jeopardy. The trial court denied relief and this Court affirmed on the basis of *Lee v. State*, 223 So. 3d 342 (Fla. 1st DCA 2017), a decision that has since been overturned. *Lee v. State*, 258 So. 3d 1297 (Fla. 2018). In light of its decision, the supreme court

has quashed the panel decision in this case and remanded for reconsideration of *Lee* to Newcombe's situation.

We conclude that Newcombe is not entitled to post-conviction relief because his decision to enter a *plea agreement* differs from the situations in *Lee* and in *State v. Shelley*, 176 So. 3d 914, 919 (Fla. 2015), both of which were based on *jury verdicts* founded upon a charging document limited to one count of solicitation and one count of traveling after solicitation.

The problem in both *Lee* and *Shelley* was that the jury's dual convictions for solicitation and traveling after solicitation were not based on separate and distinct counts of solicitation in the charging document. Absent separate and distinct counts of solicitation in the charging document, the dual convictions for solicitation and traveling after solicitation were necessarily based on the same conduct. Evidence of uncharged solicitations was deemed inadequate to support the verdict; instead, the charging document must include separate and independent solicitation counts to avoid a double jeopardy violation.

In contrast, although Newcombe faced the same type of two count information (one solicitation count and one traveling count) as in *Lee* and *Shelley*, the basis for his plea negotiations was broader than just the charging document. It included not only the charging document but also information about potential solicitations that could have been charged, such as those mentioned in the probable cause affidavit, but were not. Unlike the situation in *Lee* and *Shelley*, where only charged conduct is allowable at trial, plea negotiations are not so limited and can be based on relevant but uncharged information. In the context of plea negotiations, the charging document need not be as strictly constructed as to those counts that might form the basis for a double jeopardy violation. Here, for instance, the charging document could have been drafted more broadly to include two or more solicitation counts, making it likely that Newcombe was willing to enter a plea as to the one count of solicitation and the one count of traveling presented, and that he accepted that a factual basis existed for doing so, as the trial judge noted.

AFFIRMED.

LEWIS, J., concurs; B.L. THOMAS, J., concurs in result with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

B.L. THOMAS, J., concurring in result only.

I agree that relief should be denied, but I concur in result only with the majority opinion, because *Lee v. State*, 223 So. 3d 342 (Fla. 1st DCA 2017), *rev'd*, 258 So. 3d 1297 (2018) is not retroactive under *Witt v. State*, 387 So. 2d 922 (Fla. 1980). I also concur in result only to recommend that the Florida Supreme Court recede from the rationale of that decision.[1] I respectfully recommend that the supreme court adopt the views expressed in Judge Winokur's concurring opinion in this court's decision in *Lee*, which correctly states that a claimed double-jeopardy violation based on multiple punishments can only be raised at sentencing and logically must be based on the facts established at trial, not by a pre-trial motion which cannot assert factual claims that multiple criminal acts were not committed.

I. Retroactivity Analysis

The supreme court's decision in *Lee*[2] should not be applied retroactively. In general, decisions of the Florida Supreme Court in criminal cases establishing a new rule of law are not retroactive,

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[1] A district judge is bound to follow all supreme court precedent, of course, but may respectfully express a view that the supreme court decision is not correct under the law. *See Hoffman v. Jones*, 280 So. 2d 431, 424 (Fla. 1973) (explaining that district courts must follow decisions of Florida Supreme Court but may "state their reasons for advocating change").

[2] *Lee v. State*, 258 So. 3d 1297 (Fla. 2018).

unless the decision creates a new fundamental constitutional right that the court holds must apply retroactively. *See Witt v. State*, 387 So. 2d at 925.

The rationale and rule of *State v. Glenn* resolves the issue in this case. 558 So. 2d 4, 6-7 (Fla. 1990) ("only major constitutional changes of law which constitute a development of fundamental significance are cognizable under a motion for postconviction relief."). Most "'jurisprudential upheavals' in the law fall within two broad categories . . . which are of such significant magnitude as to necessitate retroactive application as determined by the three-prong test applied in *Stovall v. Denno*, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967)." *Id.* at 6. By contrast, mere "evolutionary refinements in the criminal law, affording new or different standards for the admissibility of evidence, for procedural fairness, for proportionality review of capital cases, and for other like matters . . . do not compel an abridgment of the finality of judgments." *Id.* (citing *Witt*, 387 So. 2d at 929-30).

As the supreme court emphasized in *Witt*, this limitation of retroactivity in postconviction cases must be scrupulously honored so as to not jeopardize finality and the rule of law:

> The importance of finality in any justice system, including the criminal justice system, cannot be understated. It has long been recognized that, for several reasons, litigation must, at some point, come to an end. In terms of the availability of judicial resources, cases must eventually become final simply to allow effective appellate review of other cases. *There is no evidence that subsequent collateral review is generally better than contemporaneous appellate review for ensuring that a conviction or sentence is just*. Moreover, an absence of finality casts a cloud of tentativeness over the criminal justice system, *benefiting neither the person convicted nor society as a whole.*

Witt, 387 So. 2d at 925 (emphasis added). In *Witt*, a capital case, the supreme court declined to apply several decisions retroactively.

Inappropriate retroactive application of decisions in criminal cases cause delays, which foster disrespect for our courts and the rule of law. Society has a reasonable expectation that the judiciary will not alter the rules previously defined to allow retrials that impose public costs and in cases involving criminal violence, require victims to relive the agony of the experience and the stress involved in a criminal trial.

If *Carawan v. State*, 515 So. 2d 161 (Fla. 1987), *superseded by statute*, ch. 88-131, § 7, Laws of Florida, *as recognized in Valdes v. State*, 3 So. 3d 1067 (Fla. 2009) was held not to be retroactive, neither should *Lee*, which did not announce a fundamental rule of constitutional magnitude. Rather, *Lee* should be regarded as only "evolutionary refinements" of the law of double jeopardy in Florida because it merely applied previously established double-jeopardy law on multiple punishments to specific facts and did not announce a new fundamental constitutional rule:

> We must emphasize that the policy interests of decisional finality weigh heavily in our decision. At some point in time cases must come to an end. Granting collateral relief to Glenn and others similarly situated would have a strong impact upon the administration of justice. Courts would be forced to reexamine previously final and fully adjudicated cases. Moreover, courts would be faced in many cases with the problem of making difficult and time-consuming factual determinations based on stale records. We believe that a court's time and energy would be better spent in handling its current caseload than in reviewing cases which were final and proper under the law as it existed at the time of trial and any direct appeal.

Glenn, 558 So. 2d at 7-8.

In addition, principles of fairness do not require *Lee* to be held retroactively given the nature of the crimes and Appellant's lack of confusion. The facts of the present case are relevant and informative.

Appellant sought to engage in sexual activity with a (presumed) 13-year old minor. In 2012, Appellant (then 31 years

of age) was charged with one count of traveling to meet a minor (for sexual activity) in violation of section 847.0135(4)(a), and one count of unlawful use of a computer service (to solicit such activity) in violation of section 847.0135(3)(a), Florida Statutes (2012).

The second probable-cause affidavit established that beginning on August 7, 2012, Appellant began communicating by computer with a person who identified themselves as a 13-year old girl. Appellant communicated repeatedly and in graphic detail with the minor, an undercover police officer, describing the sexual acts he wanted the minor to perform. He repeatedly solicited sex with the minor and eventually proposed meeting the minor to engage in the sexual acts. Upon arrest, Appellant confessed to the conversations, stated he thought the minor was 14-years old, and admitted that the emails were sent by him to the undercover police officer.

The State offered Appellant a plea to 3.5 years in state prison, but Appellant declined the plea offer, pleaded to both charges with no agreement, and sought a downward departure from the recommended sentence under the Criminal Punishment Code. He received a sentence of 5 years in state prison, followed by 15 years of sex-offender probation. Appellant did not appeal his convictions or sentence.

Appellant then sought post-conviction relief in 2016 based on two grounds. Appellant's first ground (later abandoned) asserted that original defense counsel was ineffective for advising Appellant to reject the State's plea offer because "[e]ven a fleeting review of the State's evidence in this case unquestionably establishes the (Appellant's) guilt, and there were no readily available defenses (entrapment, etc.)." Appellant also argued that his two sentences and convictions were a violation of double jeopardy.

In his second ground asserted, Appellant argued he was entitled to have the trial court vacate the count for solicitation of a minor, a second-degree felony, and be resentenced to the third-degree felony of traveling to meet a minor for sexual activity.

Critical here, Appellant made no argument that his solicitation and travel were a single act, because he could not, in light of the facts of the repeated communications beginning on

August 7th, 2012, and the travel and arrest occurring on September 4th, 2012. Rather, Appellant asserted in his second ground for postconviction relief that the two convictions somehow violated the prohibition against multiple-punishments under the Double Jeopardy Clause of the United States Constitution.

Rejecting Appellant's post-conviction claim, the trial court correctly determined that the "[i]nformation does not contend that there was a single event which constituted solicitation and traveling; rather, it alleges that there were multiple events which constituted such crimes." Both the information and the probable-cause affidavit, as the trial court found, identified *three* acts of solicitation of sexual activity with a (presumed) minor, and travel to meet the minor, *in separate months*. Thus, the trial court correctly decided in 2016 that it need not even reach the issue of whether the rule announced in *Shelley v. State*, 176 So. 3d 914 (Fla. 2015), that multiple sentences could not be imposed for a single criminal act, would apply, because Appellant clearly committed multiple acts of solicitation and travel.

Here, Appellant was not confused as to whether he was being punished twice for the same act for crimes subsumed within each other. Rather, Appellant pleaded "straight-up" to the charges in 2013, and asserted in his second ground for postconviction relief only that the two convictions somehow violated the prohibition against multiple-punishments under the Double Jeopardy Clause of the United States Constitution. Therefore, fairness does not require *Lee* to be applied retroactively.

Ironically, another reason to decline to apply *Lee* retroactively, is that under the rule of *Lee*, prosecutors will be incentivized to charge *every count of solicitation*, rather than only charging one or two out of a reasonable notion of leniency. This will likely occur because if every count is not charged in the information, then the defendant can assert a right to a pretrial dismissal of the charges without ever demanding a statement of particulars under Florida Rule of Criminal Procedure 3.140(n). *See Lee*, 258 So. 3d at 1302-05. If forced to specify by an adversarial motion exactly how many criminal acts a defendant did allegedly commit, a prosecutor is highly likely, and not unreasonably so, to specify *exactly* how many criminal acts were allegedly committed.

This will result in criminal defendants facing far more severe penalties rather than under this court's decision in *Lee*.

For the above reasons, the supreme court's decision reversing this court's decision in *Lee* should not be applied retroactively in postconviction cases.

II. The Supreme Court Should Recede from Its Decision in Lee

The supreme court should recede from its decision in *Lee* and adopt Judge Winokur's concurrence in this court's 13-2 en banc decision because it is correct under the United States Constitution and Florida law, which codifies the "same elements test" of *Blockburger v. United States*, 284 U.S. 299, 304 (1932) in section 775.021(4), Florida Statutes (2019). *Shelley*, 176 So. 3d at 917-18 ("[A]bsent an explicit statement of legislative intent to authorize separate punishments for two crimes, application of the *Blockburger* 'same-elements' test pursuant to section 775.021(4), Florida Statutes[,] is the sole method of determining whether multiple punishments are double-jeopardy violations.") (internal citation omitted). And, section 775.021(4), Florida Statutes, "speaks in terms of 'conviction', 'adjudication of guilty,' and 'sentence.' Accordingly, like the constitutional protection against multiple punishments for the same crime, section 775.021(4), does not provide for pretrial dismissal of counts as a remedy." *Lee*, 223 So. 3d at 362 n.12.

The supreme court in *Lee* did not cite to any constitutional precedent establishing that an imprecise *information* violates a criminal defendant's constitutional right to avoid multiple punishments for the same conduct under the Double Jeopardy Clause. Rather, the supreme court's decision in *Lee* conflates the remedy for a criminal defendant to oppose a *successive prosecution*, when a defendant has been previously acquitted or previously prosecuted, which is a pre-trial motion to dismiss under Florida Rule of Appellate Procedure 3.190(b), (defenses of "former acquittal" and "former jeopardy" may be made by motion to dismiss the indictment or information), with the remedy to prevent *multiple punishments*, which can only be sought "*at the end of the trial, not at the beginning*." *See Lee*, 223 So. 3d at 361-63 (Winokur, J., concurring) (citing *State v. Sholl*, 18 So. 3d 1158, 1162 (Fla. 1st

DCA 2009) applying rule of *Johnson*, 467 U.S. at 494-96) (emphasis added).

As Judge Winokur stated in his concurring opinion in *Lee*:

> I see no way that the trial court can "presume" a double-jeopardy violation pretrial, shifting the burden to the State to disprove it, unless the remedy for the State's failure to disprove it is dismissal of the charges. And because pretrial dismissal of charges is not an appropriate remedy for multiple *punishment* violation, this proposal cannot work . . . [A] defendant claiming a multiple-punishment violation under either the Double Jeopardy Clause or section 775.021(4) is not entitled to pretrial dismissal of any counts under the information or indictment.

Lee, 223 So. 3d at 363 (emphasis added).

A court must consider the facts to determine whether the defendant's constitutional right to avoid multiple *punishments* for the same offense was violated. There is no constitutional infirmity to require a trial court and a reviewing court to consider the evidentiary record to determine whether the defendant's constitutional right to avoid multiple *punishments* for the same offense was violated. Quite the contrary, a court *must* consider the facts to make such a determination. The United State Supreme Court has held that the "multiple punishment for the same conduct" type of double-jeopardy violation *cannot* be raised in a pretrial motion. *Ohio v. Johnson*, 467 U.S. 493, 499-500 (1984) ("While the Double Jeopardy Clause may protect a defendant against cumulative punishments for convictions on the same offense, the Clause does not prohibit the State from prosecuting respondent for such offenses in a single prosecution.").

In other words, if a criminal defendant alleges that the State is attempting to prosecute him for multiple crimes based on the same conduct, he should move for a statement of particulars, establish that fact, and *only after multiple convictions* can he assert that he cannot be punished twice for the same criminal conduct.

Conclusion

For the above reasons, I concur in result only, because the supreme court's decision in *Lee v. State* should not be held to be retroactive. In addition, I urge the supreme court to reconsider its holding in *Lee* and adopt the views expressed in Judge Winokur's concurring opinion in this court's en banc decision, later reversed by the supreme court.

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