RENDERED: September 25, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

No. 1996-CA-003072-MR

FRANK S. RODEFER — APPELLANT

v. APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE RON JOHNSON, JUDGE
ACTION NO. 95-CR-00081

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

* * * * * * * *

BEFORE: BUCKINGHAM, EMBERTON and GUIDUGLI, Judges.

EMBERTON, JUDGE. The appellant, Frank S. Rodefer, was convicted of sexual abuse in the first degree and sentenced to four years' imprisonment. He alleges that he was acquitted of sexual abuse in a prior trial and his retrial and conviction violates double jeopardy principles. We disagree.

Appellant was indicted on September 6, 1995, for two counts of sexual abuse in the first degree and one count of rape in the first degree. On April 10, 1996, a jury returned a

verdict of not guilty of Count I, sexual abuse in the first degree and Count III, rape in the first degree, but reported that it was deadlocked on Count II, sexual abuse in the first degree. The trial court set the remaining count for retrial.

On June 26, 1996, appellant filed a motion for the Commonwealth to specify the nature of the offense to be tried noting that the indictment was not fact specific on either count of sexual abuse. The indictment referred to one count of sexual abuse in the fall of 1994, and another in the fall or winter of 1994. At the first trial S.B. testified to two separate acts of sexual abuse. The first occurred when she and appellant were sitting on a couch and appellant put his hand down her pants. The other act occurred in the fall or winter of that same year when S.B. was sleeping in the bed with appellant who forced S.B. to touch his genitals. S.B. was unable to specify the date of either event.

On June 28, 1996, the trial court held a hearing on appellant's motion. It is clear from what transpired at the hearing that there was an agreement among counsel and the court that appellant was being retried for his act of forcing S.B. to touch his genitals. On July 10, 1996, the trial court entered the following order:

> This matter being before the Court upon the Defendant's motion for the Commonwealth Attorney to specify which charge of Sexual Abuse the Defendant would be tried for on July 9, 1996 and the parties and the Court being in agreement in their understanding that the charge involved is the charge that

> the Defendant forced the complaining witness to touch his "private parts" and that being the charge and fact pattern the Commonwealth would attempt to prove and the Defendant being entitled to such knowledge prior to the trial and the Court being sufficiently advised;
>
> IT IS HEREBY ORDERED that the count for which the Defendant will stand trial on July 9, 1996 is and will be that count involving the allegation that the Defendant forced the child to touch his genitals.

It is elementary that if the charge as set forth in the trial court's order is that on which the first jury was unable to reach a verdict, a retrial on the same charge does not violate double jeopardy principles. Trowel v. Commonwealth, Ky., 550 S.W.2d 530, 531 (1977). If, however, as appellant suggests he was again tried for the same act for which he was acquitted, double jeopardy requires reversal of his conviction. Commonwealth v. Littrell, Ky., 677 S.W.2d 881 (1984).

Appellant concedes that his double jeopardy claim is unpreserved. Our Supreme Court, with reluctance, has accepted the legal proposition that such a claim need not be preserved. In Baker v. Commonwealth, Ky., 922 S.W.2d 371 (1996), the court explained the difficulty faced by an appellate court when reviewing an issue not presented below.

> [W]e have held in Sherley v. Commonwealth, Ky., 558 S.W.2d 615, 618 (1977), and Gunter v. Commonwealth, Ky., 576 S.W.2d 518, 522 (1978), that failure to object on the grounds of double jeopardy does not constitute a waiver of the right to raise the issue for the first time on appeal. This view appears

> to be based on Menna v. New York, 423 U.S. 61, 96 S.Ct. 241, 46 L.Ed.2d 195 (1975), a per curiam opinion which held that a plea of guilty after an unsuccessful plea of double jeopardy would not constitute waiver; that the merits of the double jeopardy claim should be reviewed on appeal. Menna, 423 U.S. at 62, 96 S.Ct. at 242. From Menna to Sherley and Gunter is a significant leap of logic and we now question its soundness. A principal reason for doubting the soundness of the rule, in addition to the general reasons for requiring preservation, is the difficulty of analyzing a double jeopardy claim when there is no context from the trial court. In such a circumstance, an appellate court must decide from the entire record whether double jeopardy principles have been violated on any one of multiple bases. As such, appellant's counsel is at liberty to throw every possible double jeopardy theory at the Court without having had to analyze and present such claims in the trial court. Deciding issues in such a manner is fraught with danger of error or omission and we can think of no compelling reason for such deference to double jeopardy principles. As with other rights, constitutional rights may be waived by failure to timely and properly present the issue. West v. Commonwealth, Ky., 780 S.W.2d 600, 602 (1989). Nevertheless, we will observe the Sherley rule in this case and address the merits of appellant's double jeopardy claim.

Id. at 374.

In this case, whether appellant's double jeopardy claim can survive on the merits is dependent upon a determination as to which charge he was initially acquitted. It is this issue, not the double jeopardy claim, which we find that appellant has waived, and therefore, we affirm his conviction.

The court conducted a hearing to determine this precise issue. A review of that proceeding reveals that the colloquy

between the court and counsel established that all agreed appellant was acquitted of the charge of touching S.B. and was being retried on the charge of forcing S.B. to touch his genitals while in bed with her. Appellant's double jeopardy claim is fraught with the dangers envisioned by the court in Baker, supra. Under the guise of an unpreserved double jeopardy claim, appellant seeks review of the trial court's finding as to which act he was being retried for. After review of the record, we are convinced that appellant agreed that the first jury was unable to reach a verdict on the sexual abuse charge arising from the act of forcing S.B. to touch his genitals.

The judgment of the Harlan Circuit Court is affirmed.

ALL CONCUR.

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