18-P-1310 Appeals Court

COMMONWEALTH vs. KEYSHAUN TAYLOR.

No. 18-P-1310.

Norfolk. April 12, 2019. - September 26, 2019.

Present: Vuono, Wolohojian, & Hand, JJ.

Firearms. Judicial Estoppel. Practice, Criminal, Double jeopardy, Required finding. Constitutional Law, Double jeopardy.

Complaint received and sworn to in the Quincy Division of the District Court Department on December 26, 2017.

Motions to dismiss and for reconsideration were heard by Diane E. Moriarty, J., and the case was reported by her.

Seena A. Pidani for the defendant.
Susanne M. O'Neil, Assistant District Attorney, for the Commonwealth.

HAND, J. This case was reported to us by a judge of the District Court (motion judge) pursuant to Mass. R. Crim. P. 34, as amended, 442 Mass. 1501 (2004). As we explain in greater detail below, a different District Court judge (trial judge) entered a required finding of not guilty on a complaint charging

the defendant with carrying a loaded firearm in violation of G. L. c. 269, § 10 (n); the defendant was later charged in a second complaint alleging a violation of G. L. c. 269, § 10 (a), carrying a firearm without a license. The second complaint was dismissed on double jeopardy grounds,[1] and the Commonwealth moved for reconsideration. After a hearing, the motion judge took the matter under advisement. She subsequently issued the rule 34 report, which included the procedural history of the two complaints and rulings of law outlining the judge's revised legal conclusion that the Commonwealth could proceed with its prosecution on the second complaint.[2]

[1] The dismissal has not entered on the docket, and the defendant remains subject to conditions of release on this case.

[2] Notwithstanding the fact that the report includes this conclusion, the docket does not reflect that the judge has ruled on the motion for reconsideration, and it is our understanding that the motion remains under advisement.

Background. On April 4, 2017, the defendant was arraigned on a single count of carrying a loaded firearm in violation of G. L. c. 269, § 10 (n) (first complaint).[3,4]

A jury trial on the first complaint was held on December 14, 2017. At the close of the Commonwealth's evidence, the defendant moved for a required finding of not guilty, arguing that without an accompanying charge of one of the predicate offenses to § 10 (n), either G. L. c. 269, § 10 (a) (carrying a firearm without a license), or G. L. c. 269, § 10 (c) (possession of a machine gun or sawed-off shotgun), "it would be impossible" for the Commonwealth to prove a violation of § 10 (n). In response, the Commonwealth asked the trial judge to "conform to the evidence" by instructing the jury on a charge of violation of G. L. c. 269, § 10 (a).[5] After that request was

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[3] General Laws c. 269, § 10 (n), provides:

> "Whoever violates paragraph (a) or paragraph (c) [of G. L. c. 269, § 10], by means of a loaded firearm, loaded sawed off shotgun or loaded machine gun shall be further punished by imprisonment in the house of correction for not more than 2½ years, which sentence shall begin from and after the expiration of the sentence for the violation of paragraph (a) or paragraph (c)."

[4] A cash bail of $10,000 was imposed on the defendant's arraignment date, and was not posted until after a bail review approximately seven months later, at which time bail was reduced to $1,000. The defendant remained in custody in the interim.

[5] "General Laws c. 269, § 10 (a), defines the offense of possession of a firearm, not in an individual's home or business, without a license. The statute is violated, inter

denied, the Commonwealth moved to amend the complaint. Defense counsel objected to any amendment on the ground that § 10 (a) is not a lesser included offense of § 10 (n), and argued that the "only proper avenue" was for the trial judge to enter a required finding of not guilty.[6] Defense counsel noted that if the Commonwealth later wished to bring a new complaint including a § 10 (a) charge, it was "certainly free to do so, but [the defendant's] argument would be that there are double jeopardy implications because we have now tried the matter." The trial judge allowed the defendant's motion for a required finding of not guilty on the charge of violating G. L. c. 269, § 10 (n).[7]

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alia, when an individual 'knowingly has in his possession[,] or knowingly has under his control in a vehicle[,] a firearm, loaded or unloaded, . . . without either . . . being present in or on his residence or place of business . . . or having in effect a license to carry firearms . . . .'" Commonwealth v. Brown, 479 Mass. 600, 604 (2018), quoting Commonwealth v. Sann Than, 442 Mass. 748, 752 (2004).

[6] Since, as we discuss below, the Commonwealth's charging error in the first complaint resulted in a void prosecution, the correct course under these circumstances would have been for the defendant to request, and for the judge to grant, a mistrial. See Commonwealth v. Perry P., 418 Mass. 808, 814 (1994) (where juvenile was charged with delinquency by reason of murder without an indictment, juvenile's failure to waive indictment rendered prosecution of murder charge a "nullity," resulting in manifest necessity for mistrial on murder charge).

[7] The trial judge did not rule on the motion to amend the complaint, thus implicitly denying it. See Commonwealth v. Dubois, 451 Mass. 20, 29 (2008) ("The failure of a judge to rule on a motion is treated as an implicit denial").

There is no dispute that the judge allowed the motion for a required finding of not guilty based on the Commonwealth's charging error, and not because the evidence was insufficient to prove a violation of either § 10 (n) or § 10 (a).

Within a few weeks of the conclusion of the defendant's trial, the Commonwealth obtained a second complaint, which charged the defendant with one count of violating G. L. c. 269, § 10 (a), carrying a firearm without a license, based on the same conduct underlying the first complaint. In lieu of bail, the defendant was released subject to pretrial electronic monitoring and a curfew. Initially, the motion judge allowed the defendant's motion to dismiss the second complaint on the basis that double jeopardy precluded the Commonwealth from charging the defendant with violating § 10 (a) in light of the not guilty finding that had entered on the violation of § 10 (n) charged in the first complaint. The Commonwealth moved for reconsideration. Taking the motion under advisement, the judge prepared a revised legal analysis concluding that in the circumstances of this case, the doctrine of judicial estoppel applied, defeating the defendant's protection against double jeopardy.[8] The judge thereupon reported the following four questions to us:

[8] As we note above, the judge did not rule on the motion for reconsideration.

> "1. Is G. L. c. 269, § 10 (n)[,] a freestanding crime?
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> "2. Is G. L. c. 269, § 10 (a)[,] a lesser included offense of G. L. c. 269, § 10 (n) under Morey v. Commonwealth, 108 Mass. 433 (1871)?
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> "3. In the context of double jeopardy, is the doctrine of judicial estoppel applicable as against a defendant?
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> "4. If the answers to questions 1-3 are 'Yes,' did the court, in the circumstances of this case, properly conclude that the commonwealth may proceed upon the complaint charging the defendant with a violation of G. L. c. 269, § 10 (a)[,] without violating the defendant's protections afforded under principles of double jeopardy?"[9]

We answer the questions "insofar as it is necessary to resolve the issues raised by the record." Commonwealth v. Markvart, 437 Mass. 331, 333 (2002).

Discussion. We turn now to the reported questions.

1. Is G. L. c. 269, § 10 (n), a freestanding crime? No. General Laws c. 269, § 10 (n), provides a sentencing enhancement provision applicable to § 10 (a) and § 10 (c), not an independent crime. See Commonwealth v. Brown, 479 Mass. 600, 604 (2018), citing Commonwealth v. Loadholt, 456 Mass. 411, 423-424 (2010), S.C., 460 Mass. 723 (2011) (section 10 [n] provides a "sentencing enhancement"); Commonwealth v. Dancy, 90 Mass.

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[9] We understand the "conclusion" to which the judge refers in this question to be the ruling of law, included in the judge's report to us, that judicial estoppel applied to preclude the defendant from arguing that double jeopardy considerations barred his prosecution on the second complaint. As we discuss below, we disagree with this conclusion.

App. Ct. 703, 705 (2016) (same). A defendant cannot be convicted of a violation of § 10 (n) without first being convicted of violating § 10 (a) or § 10 (c). Brown, supra.

2. Is G. L. c. 269, § 10 (a), a lesser included offense of G. L. c. 269, § 10 (n), under Morey v. Commonwealth, 108 Mass. 433 (1871)? No. Section 10 (n) is a sentencing enhancement of § 10 (a) and § 10 (c), not an independent crime. See Brown, 479 Mass. at 604. Accordingly, while § 10 (a) is one of the predicate offenses of § 10 (n), § 10 (a) is not and cannot be its lesser included offense.

3. In the context of this case, does judicial estoppel preclude the defendant from arguing that double jeopardy protects him from being prosecuted on the second complaint?[10] No.[11] Judicial estoppel is an equitable doctrine that

[10] In answering the reported question, we exercise our discretion to rephrase the question as we determine necessary in order to assist the judge and the litigants. See Commonwealth v. Martinez, 480 Mass. 777, 783 (2018) (exercising authority to reformulate reported questions "[f]or the sake of providing clear and simple guidance to trial courts and litigants"); Gasior v. Massachusetts Gen. Hosp., 446 Mass. 645, 646 (2006) (answering "the narrow question presented by the circumstances of this case [rather than] the broader question reported").

[11] For the purposes of this discussion, we assume, without deciding, that judicial estoppel may be invoked against a defendant in a criminal action, and that the doctrine prohibits parties from asserting "mutually exclusive" factual or legal positions. Cf. Otis v. Arbella Mut. Ins. Co., 443 Mass. 634, 640-641 (2005) (judicial estoppel in context of law suits concerning injuries resulting from automobile accident).

"prevent[s] the manipulation of the judicial process by litigants." Commonwealth v. Rodriguez, 476 Mass. 367, 375 (2017), quoting Commonwealth v. DiBenedetto, 458 Mass. 657, 671 (2011), S.C., 475 Mass. 429 (2016). It applies where "a party has adopted one position, secured a favorable decision, and then taken a contradictory position in search of legal advantage." Rodriguez, supra, quoting Otis v. Arbella Mut. Ins. Co., 443 Mass. 634, 641 (2005). The doctrine has been interpreted to mean that "[a] party who has successfully maintained a certain position at a trial cannot in a subsequent trial between the same parties be permitted to assume a position relative to the same subject that is directly contrary to that taken at the first trial." Commonwealth v. Prophete, 443 Mass. 548, 555 n.10 (2005), quoting East Cambridge Sav. Bank v. Wheeler, 422 Mass. 621, 623 (1996). Here, having argued for a required finding of not guilty on the § 10 (n) charge at the trial of the first complaint, and faced with an oral motion to amend that charge to one of violating § 10 (a), defense counsel initially argued that § 10 (a) is not a lesser included offense of § 10 (n). Later in the sidebar discussion, counsel signaled that, should the Commonwealth bring a subsequent complaint charging violation of § 10 (a), the defendant would move to dismiss on double jeopardy grounds. Counsel did just that, arguing for dismissal of the § 10 (a) charge in the second complaint on the basis that

§ 10 (a) is a lesser included offense of § 10 (n). Because in addressing the § 10 (n) charge in the first complaint, the defendant neither staked out a firm legal position nor obtained a favorable ruling, judicial estoppel does not apply here.

First, the defendant did not ultimately "secure[] a favorable decision" when he argued for a required finding of not guilty in the first trial. Rodriguez, 476 Mass. at 375. Despite the judge's entry of a not guilty finding, any beneficial effect of that ruling was, as we conclude below, fleeting: while the ruling terminated the first complaint, it was not an "acquittal upon the facts and merits" of the case, G. L. c. 263, § 7, and so could not terminate any jeopardy that had attached to the prosecution of the first complaint. See Commonwealth v. Brown, 470 Mass. 595, 603-604 (2015); Commonwealth v. Gonzalez, 437 Mass. 276, 282 (2002), cert. denied, 538 U.S. 962 (2003). Additionally, to the extent that the entry of a required finding of not guilty was "favorable" in the short term, the defendant's lesser-included argument did not "secure" that ruling. The defendant's argument whether § 10 (a) is a lesser included offense of § 10 (n) arose in the context of the Commonwealth's last-ditch effort to salvage the complaint with a motion to amend, a motion on which the judge did not explicitly rule. See note 7, supra.

Second, given the evolution of the defendant's argument during the course of the hearing on the motion for a required finding, we conclude that the defendant's final position at trial on the first complaint was not inconsistent with the position he took in arguing for dismissal of the second complaint. We acknowledge that when the Commonwealth first made its oral motion to amend the complaint, the defendant opposed it on the grounds that § 10 (a) is not a lesser included offense of § 10 (n). As the argument continued, however, the defendant's position changed, as evidenced by counsel's later statement that "the only proper avenue here is for a motion for a required finding to be allowed and then if the Commonwealth wishes to bring a [§] 10 [(a)], . . . and a [§] 10 [(n)] [complaint], then it's certainly free to do so, but our argument would be that there are double jeopardy implications because we have now tried the matter" (emphasis supplied). In taking this latter position, the defendant necessarily argued, as he did in moving to dismiss the second complaint, that § 10 (a) is a lesser included offense of § 10 (n); otherwise, double jeopardy would not be implicated.

Finally, and perhaps most importantly, we do not view the defendant's differing arguments on the question whether § 10 (a) is a lesser included offense of § 10 (n) to be a "manipulation of the judicial process" (citation omitted), Rodriguez, 476

Mass. at 375, much less a tactic with the flavor of impropriety "that courts should not tolerate," Otis, 443 Mass. at 640, quoting East Cambridge Sav. Bank, 422 Mass. at 623. The issue whether § 10 (a) is a lesser included offense arose in the first case without notice and as a collateral issue to the defendant's argument on his motion for a required finding of not guilty. The fact that the defendant's position at that point was still developing was made clear by his later statement that if, after termination of the prosecution of the first complaint, the Commonwealth took out a new complaint, he would argue that double jeopardy precluded his prosecution on the later-issued charge. The defendant was in the position of trying to correct the Commonwealth's charging error, not arguing a strategic position of his own. Any change in the defendant's legal position was the result of the unusual procedural circumstances of this case, and not any improper attempt to manipulate the judicial system; judicial estoppel is inapplicable here.

4. Did the motion judge properly conclude, as her rule 34 report reflects, that the Commonwealth may proceed on the second complaint?[12] Yes, but for reasons other than those articulated by the motion judge. As we discuss, we conclude that the

[12] Here, again, we rephrase the reported question to address what we perceive to be the issues central to the judge's report. See note 10, supra, and cases cited.

prosecution of the defendant on the second complaint does not violate the prohibition against double jeopardy. Thus, upon the Commonwealth's motion for reconsideration, the motion judge properly concluded in her rule 34 report that the Commonwealth may proceed on the second complaint.

To give our conclusion context, we first briefly review the double jeopardy doctrine as it has developed in Massachusetts. The prohibition against double jeopardy in the Fifth Amendment to the United States Constitution applies to the States through the due process clause of the Fourteenth Amendment to the United States Constitution. See Commonwealth v. Medina, 64 Mass. App. Ct. 708, 713 (2005). Although the Massachusetts Declaration of Rights does not include an explicit guarantee of freedom from multiple prosecutions or punishments for the same crime, "protection against double jeopardy in this Commonwealth has long been part of the common law," Commonwealth v. Hrycenko, 417 Mass. 309, 316 (1994), quoting Lydon v. Commonwealth, 381 Mass. 356, 366 (1980), and has become part of our statutory canon, see G. L. c. 263, § 7. Our rule, like its Federal constitutional corollary, protects criminal defendants against being subjected to consecutive prosecutions for the same offense after acquittal or conviction, and against multiple punishments for the same offense absent an explicit legislative intent to permit multiple punishments. See Commonwealth v. Vick, 454 Mass. 418, 435

(2009); Hrycenko, supra at 316-317 (reprosecution after acquittal). It "serves principally as a restraint on courts and prosecutors." Commonwealth v. Arriaga, 44 Mass. App. Ct. 382, 384 n.2 (1998), quoting Brown v. Ohio, 432 U.S. 161, 165 (1977).

With respect to the prohibitions on multiple prosecutions, these "deeply ingrained" protections are animated by the principle that the government, "with all its resources and power[,] should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." Green v. United States, 355 U.S. 184, 187-188 (1957). "The [double jeopardy] clause is essentially a rule of finality. It is intended to prevent vexatious piecemeal prosecution whether the result of an intent to harass, a desire to have more than one shot at obtaining a conviction or severe sentence, or mere prosecutorial caprice or carelessness." United States v. Engle, 458 F.2d 1021, 1025 (6th Cir. 1972).

The double jeopardy doctrine does not, however, prohibit consecutive prosecutions in every instance: its application is limited to instances in which jeopardy has actually attached and has then actually been terminated. See Commonwealth v. Hebb, 477 Mass. 409, 412 (2017), quoting Commonwealth v. Johnson, 426

Mass. 617, 625 (1998) ("the protection of the [d]ouble [j]eopardy [c]lause by its terms applies only if there had been some event, such as an acquittal, which terminates the original jeopardy"); Commonwealth v. Love, 452 Mass. 498, 503 (2008), quoting Serfass v. United States, 420 U.S. 377, 390-391 (1975) ("The 'constitutional policies underpinning the Fifth Amendment's guarantee' [against double jeopardy] are not implicated before that point in the proceedings at which 'jeopardy attaches'"). As, ordinarily, jeopardy attaches when a jury is sworn, Love, supra, and terminates with an acquittal, Hebb, supra, the prerequisite conditions to the double jeopardy protections at first appear to have been met in this case. In fact, however, as we explain below, because the Commonwealth's charging error resulted in the defendant's being prosecuted for a sentencing enhancement alone, and not an independent crime, the prosecution was void, and jeopardy did not attach to it. Likewise, because the required finding of not guilty on the first complaint was based solely on the charging error, and not on the evidence, even had jeopardy attached to the first complaint, it was not terminated by the entry of the required finding of not guilty. Consequently, the bar against double jeopardy does not apply.

In this case, the first complaint charged only a sentencing enhancement, not an independent crime. See Brown, 479 Mass. at

604; Dancy, 90 Mass. App. Ct. at 705. Accordingly, it was a nullity, "misbegotten in the inception." Commonwealth v. Norman, 27 Mass. App. Ct. 82, 90 (1989). No court had jurisdiction to act on it. See Commonwealth v. Cantres, 405 Mass. 238, 239-240 (1989) ("if an indictment fails to state a crime, no court has jurisdiction to entertain it"). "Where a court is without jurisdiction to try an offense, a defendant tried on such an offense is not placed in jeopardy because no valid and binding judgment could have been rendered by such court. Therefore, even if a defendant were found not guilty in a court without jurisdiction, double jeopardy would not protect the defendant from being retried by a court with jurisdiction" (quotations and citations omitted). Commonwealth v. Labadie, 467 Mass. 81, 89 (2014). Jeopardy attaches the moment a defendant is put in danger of "the hazards of trial and possible conviction." Green, 355 U.S. at 187. Here, the defendant was not, in the prosecution of the first complaint, at risk of a valid conviction on the offense charged; consequently, jeopardy never attached to that prosecution. See Love, 452 Mass. at 504 (trial conducted in court lacking jurisdiction is a nullity to which jeopardy could not have attached).

Even had jeopardy attached to the charge in the first complaint, it did not terminate on the entry of the required finding of not guilty, as the finding did not enter on the

merits of the case. In order for an acquittal to terminate jeopardy, it must be based on a determination of the facts and merits of the case. See Gonzalez, 437 Mass. at 282, quoting G. L. c. 263, § 7 ("Not every 'acquittal' constitutes an acquittal for double jeopardy purposes. . . . A true acquittal requires a verdict on 'the facts and merits'"). "[W]hat constitutes an 'acquittal' is not to be controlled by the form of the judge's action. . . . Rather, we must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." Gonzalez, supra, quoting United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977). Here, in allowing the defendant's motion for a required finding of not guilty on the first complaint, the trial judge did not address the facts of the case; he simply determined that, as a matter of law, the Commonwealth could not prove a violation of § 10 (n) in the absence of a companion charge of one of the predicate offenses. That ruling was not an acquittal for the purpose of double jeopardy; jeopardy did not terminate. See Brown, 470 Mass. at 603-604 (no acquittal where verdict fails to resolve all factual elements of the offense); Gonzalez, supra at 282-283. Accordingly, double jeopardy principles do not preclude the Commonwealth from prosecuting the defendant on the second complaint.

We acknowledge that our conclusions here have the effect of allowing the Commonwealth "two bites at the apple," despite the fact that the second prosecution is the result of a charging error that the Commonwealth should have avoided and had the unilateral power to correct, once made. While we do not suggest that the error was anything other than that -- a mistake -- it was a mistake with significant consequences for the defendant, including repeated losses of liberty while unable to post bail and, later, when released subject to conditions of electronic monitoring. It is troubling that despite the eight-month-long prosecution of the first complaint, the Commonwealth did not recognize its charging error until the issue was raised at trial by the defendant. It seems unnecessary to observe that the emotional and financial toll of enduring a void prosecution is as real as that associated with a valid prosecution. See Norman, 27 Mass. App. Ct. at 89 (noting that courts outside the Commonwealth "retreat[ed] from the jurisdictional exception to double jeopardy" because, "[f]or the defendant obliged to run the gauntlet more than once, the ordeal [is] not . . . less painful" because the first court lacked jurisdiction). This is particularly although not exclusively true where, as here, the Commonwealth's error causes a significant loss of the defendant's liberty. See id. at 90 n.4 (questioning "the force of the 'altogether void' jurisdictional exception if the

defendant is incarcerated on the basis of the void proceeding"). While we take no position on this point, we observe that if a motion to dismiss were brought on grounds other than double jeopardy, a judge could consider whether "(1) the conduct of the prosecuting attorney in bringing the defendant to trial has been unreasonably lacking in diligence and (2) this conduct on the part of the prosecuting attorney has resulted in prejudice to the defendant." Commonwealth v. Dirico, 480 Mass. 491, 505 n.10 (2018), quoting Mass. R. Crim. P. 36 (c), 378 Mass. 909 (1979).

Conclusion. The reported questions, as rephrased, are answered: (1) no; (2) no; (3) no; and (4) yes, but on grounds other than those relied upon by the motion judge. The case is remanded to the District Court for further proceedings consistent with this opinion.

So ordered.