

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of TWAYNE BILLINGSLEY, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TWAYNE BILLINGSLEY,

Defendant-Appellee.

UNPUBLISHED

October 27, 1998

No. 211186

Wayne Juvenile Court

LC No. 90-283763

Before: Kelly, P.J., and Holbrook, Jr., and Murphy, JJ.

PER CURIAM.

The prosecution appeals as of right from the juvenile court's order denying the prosecution's motion to reinstate its petition and its motion to waive jurisdiction. We reverse.

In October 1994, defendant pleaded guilty in Detroit Recorder's Court to a charge of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and was sentenced to probation. At the time defendant committed this offense, he was sixteen years of age. The court was unaware of his juvenile status, however, because defendant misrepresented his date of birth. Then, in October 1995, defendant pleaded guilty to a charge of carjacking, MCL 750.529a; MSA 28.797(a). Defendant was subsequently sentenced to consecutive prison terms of three to five years on the carjacking conviction and one to twenty years' imprisonment for the probation violation on the drug case.

After defendant's appellate counsel ascertained that defendant's actual birth date rendered him a juvenile at the time of the drug offense, defendant succeeded in having his conviction and sentence on the drug charge vacated, because at the time of the offense the Recorder's Court was without jurisdiction to adjudicate his case. The prosecution sought to reinstate the charge of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), against defendant and have the juvenile court waive jurisdiction to the adult criminal court, MCL

712A.4; MSA 27.3178(598.4).¹ Defendant contested, arguing that double jeopardy precluded retrial on the drug charge. The juvenile court agreed and denied the prosecution's motion to reinstate.

The prosecution argues that the lower court erred when it denied the prosecution's motion to reinstate on the ground that a subsequent retrial would violate defendant's protections against double jeopardy, guaranteed by both the United States and Michigan Constitutions.² We agree. "A double jeopardy issue constitutes a question of law that is reviewed de novo on appeal." *People v Artman*, 218 Mich App 236, 244; 553 NW2d 673 (1996).

"The double jeopardy provision of the United States Constitution, U.S. Const, Am V, and its counterpart in the Michigan Constitution, Const 1963, art 1, § 15,[³] protect citizens from suffering multiple punishments and successive prosecution for the same offense." *People v Peña*, 224 Mich App 650, 657; 569 NW2d 871 (1997), mod on other grounds 457 Mich 883; ___ NW2d ___ (1998). "For double jeopardy protections to apply, defendant must first have been put in jeopardy by a criminal prosecution in a court of justice." *People v Burks*, 220 Mich App 253, 256; 559 NW2d 357 (1996). Accord *Serfass v United States*, 420 US 377, 390-391; 95 S Ct 1055; 43 L Ed 2d 265 (1975) (observing that "the premise that the 'constitutional policies underpinning the Fifth Amendment's guarantee' are not implicated before that point in the proceedings at which 'jeopardy attaches'" (quoting *United States v Jorn*, 400 US 470, 480; 91 S Ct 547; 27 L Ed 2d 543 [1971])).

It has long been recognized that the right to be free from double jeopardy "is not violated where a defendant is retried after his conviction is set aside because of an error in the first trial, unless the error was that there was insufficient evidence of guilt to convict the defendant." *People v Torres*, 452 Mich 43, 74; 549 NW2d 540 (1996). Accord *People v Langley*, 187 Mich App 147, 150; 466 NW2d 724 (1991). Furthermore, it is also well established that conviction and sentencing of a defendant by a court that was without jurisdiction does not bar the subsequent retrial of the defendant on the same charge in a court vested with competent jurisdiction to hear the case. See *Serfass*, *supra* at 391 (observing that the federal guarantee "does not come into play until a proceeding begins before a trier 'having jurisdiction to try the question of the guilt or innocence of the accused'" (quoting *Kepner v United States*, 195 US 100, 133; 24 S Ct 797; 49 L Ed 2d 114 [1904])); *Ball v United States*, 163 US 662, 669; 16 S Ct 1192; 41 L Ed 300 (1896) ("An acquittal before a court having no jurisdiction is . . . absolutely void, and therefore no bar to subsequent indictment and trial in a court which has jurisdiction of the offense."); *People v Rose*, 117 Mich App 530, 535; 324 NW2d 25 (1982) ("Jeopardy only attaches when the court is vested with competent jurisdiction."). Therefore, because at the time defendant pleaded guilty to, and was sentenced on the drug charge, the juvenile court, and not the Recorder's Court, had exclusive jurisdiction over defendant, MCL 712A.2; MSA 27.3178(598.1), double jeopardy does not bar retrial of defendant on the same charge.⁴

Defendant also argues that his right to be free from multiple punishments is also at issue. This argument is premature. In the event of a guilty verdict upon retrial, the trial court will have to address the effect defendant's previous imprisonment on the drug charge has on his new conviction. *Johnson*, *supra* at 499-500; *North Carolina v Pearce*, 395 US 711, 718-719; 89 S Ct 2089; 23 L Ed 2d 656 (1969).

Accordingly, we reverse the decision of the lower court and remand this case for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly

/s/ Donald E. Holbrook, Jr.

/s/ William B. Murphy

¹ The prosecution had previously filed a petition and a motion to waive jurisdiction. Arguing that double jeopardy precluded any subsequent retrial and punishment on the drug charge, defendant filed a motion to dismiss the prosecution's petition and motion to waive. Without addressing the merits of the double jeopardy question, the juvenile court granted defendant's motion on the grounds that as of the hearing, the cocaine could not be located by police.

² US Const, Am V; Const 1963, art 1, § 15.

³ US Const, Am V, reads in pertinent part: "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." Const 1963, art 1, § 15 reads in pertinent part: "No person shall be subject for the same offense to be twice put in jeopardy." The federal double jeopardy prohibition was made applicable to the states through the Fourteenth Amendment in *Benton v Maryland*, 395 US 784, 793-796; 89 S Ct 2056; 23 L Ed 2d 707 (1969).

⁴ Under the circumstances of this case, allowing a court of proper jurisdiction to try defendant on the drug charge does not offend the principles underlying the constitutional protections afforded by the federal and state double jeopardy provisions. See *Lockhart v Nelson*, 488 US 33, 42; 109 S Ct 285; 102 L Ed 2d 265 (1988). "There simply has been none of the governmental overreaching that double jeopardy is supposed to prevent." *Ohio v Johnson*, 467 US 493, 502; 104 S Ct 2536; 81 L Ed 2d 425 (1984).