

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL MARKEL MAGBY,

Defendant-Appellant.

UNPUBLISHED
February 15, 2002

No. 224254
Oakland Circuit Court
LC No. 99-166100-FH

ON REMAND

Before: Zahra, P.J., and Hood and Cavanagh, JJ.

PER CURIAM.

This case is before us on remand from the Supreme Court. On original submission, we concluded that the prosecutor's decision to charge defendant with the Group II offenses did not violate double jeopardy where additional facts to support the more serious charges were not present at the outset, citing *People v Harding*, 443 Mich 693, 701-702; 506 NW2d 482 (1993). On remand, the Supreme Court has directed us to specifically address three issues: (1) whether jeopardy attached with respect to the Group I offenses when defendant was sentenced therefor; (2) whether the "later facts" exception to double jeopardy includes facts that occur before jeopardy attaches; and (3) determine the date jeopardy attaches in the case of a plea pursuant to *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993), or pursuant to a sentence agreement.¹

In response to issues one and three, we conclude that when a defendant offers a plea of guilty, jeopardy attaches at the time the defendant is sentenced.² *People v Grier*, 152 Mich App

¹ The Supreme Court observed that defendant claims his counsel cautioned the prosecution about the double jeopardy issue prior to defendant's sentencing on the Group I offenses. We note that the trial court made no factual determination regarding any caution given by defense counsel prior to sentencing. In any event, we conclude that the question whether the prosecution was put on notice of defendant's claim to double jeopardy protection on the Group II offenses before defendant was sentenced on the Group I offenses is not relevant to our analysis of this case.

² We also conclude, in the context of a sentence agreement or guilty plea pursuant to *Cobbs*, that jeopardy attaches when the defendant is sentenced. See *People v Siebert*, 201 Mich App 402, 420 n 11; 507 NW2d 211 (1993), modified 450 Mich 500 (1995), citing *People v Burt*, 29 Mich App 275, 277; 185 NW2d 207 (1970). However, as more fully developed in this opinion, this case is not governed by the nature of any plea agreement. Rather, it is governed by the exception to the bar against double jeopardy based on *facts that occurred after the original charges were*

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129, 132; 393 NW2d 551 (1986), citing *People v Burt*, 29 Mich App 275, 277; 185 NW2d 207 (1970). In response to issue two, we conclude that the “later facts” exception to double jeopardy applies to all facts that arise after a prosecution has commenced, even when those facts arise after a plea of guilty is offered and accepted but before the date the defendant is sentenced on the original charges (the date jeopardy attaches.) We continue to affirm.

In *Harding*, *supra*, the defendants were convicted of armed robbery, assault with intent to commit murder, and two counts of possession of a firearm during the commission of a felony in December 1983. The victim of these crimes was shot twice and thrown headfirst into a sewer, but survived. More than four years later, the victim died after playing basketball against his doctor’s advice. An autopsy revealed that the cause of death was a result of the permanent damage to the victim’s heart from one of the two gunshot wounds. The defendants were then charged with felony-murder and another count of felony-firearm. On appeal, the defendants argued that the prosecution and conviction for felony-murder was precluded by double jeopardy. Our Supreme Court rejected the double jeopardy challenge by holding that there existed an exception to the general rule where additional facts necessary to support a more serious charge had not occurred at the time the prosecution for the lesser crime had begun. *Harding*, *supra* at 701-702.

Additionally, in *People v Smith*, 69 Mich App 537, 538-539; 245 NW2d 125 (1976), the defendant was involved in a personal injury automobile accident and pleaded guilty to a traffic violation. The victim involved in the accident subsequently died, and the defendant was charged with negligent homicide. The defendant moved to withdraw his guilty plea to the traffic violation, pleaded nolo contendere to the traffic violation, and was sentenced. The defendant successfully moved to dismiss the negligent homicide charges on double jeopardy grounds. This Court rejected the double jeopardy challenge, holding that where a crime with which the defendant was charged was not complete at the time of his earlier *plea*, his conviction was not barred by double jeopardy. *Id.* at 539. The above-cited case law does not address the “attachment” of double jeopardy. Rather, the language utilized by Michigan courts indicates that there exists an exception to the *bar* against double jeopardy. Defendant, in the present case, was arraigned on the Group II offenses on the same date that he was sentenced for the Group I offenses. Defendant argues that, because his victim died prior to sentencing, the “later facts” exception does not apply before “jeopardy attaches.” Again, the application of the exception is not contingent upon any analysis of attachment. Rather, the exception examines the development of the facts of the higher offense. The facts are not examined at the time of sentencing, but rather, examined at the time of the filing of charges by the prosecution. *Harding*, *supra* at 702, quoting *Jeffers v United States*, 432 US 137, 151; 97 S Ct 2207; 53 L Ed 2d 168 (1977). Defendant’s attempt to distinguish the law based on the facts available at the time of sentencing, while interesting, is without authority and is inconsistent with the clear holding of

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filed. Harding, supra.

Harding.³ Because there was no death at the time of the filing of the original charges, there was no bar against the Group II offenses based on double jeopardy. *Id.*

Affirmed.

/s/ Brian K. Zahra

/s/ Harold Hood

/s/ Mark J. Cavanaugh

³ In effect, defendant is asking this Court to create an exception to the very clear holding of *Harding*, that the state and federal prohibitions against double jeopardy are not violated where the additional facts to support more serious charges were not present at the commencement of defendant's prosecution. It is the duty of an intermediate appellate court to follow the clear rule of law established by a higher court and to refrain from speculating as to the possible exceptions that can be carved out of such rules. It is the province of the Supreme Court, not the privilege of this Court, to create exceptions to established Supreme Court precedent.