

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE  
September 19, 2006 Session

**STATE OF TENNESSEE v. CLEMENTINE MYERS**

**Direct Appeal from the Circuit Court for White County  
No. CR-1583 John Turnbull, Judge**

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**No. M2005-01853-CCA-R3-CD - Filed January 19, 2007**

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Both the State of Tennessee and the defendant, Clementine Myers, appeal decisions made by the trial court. The defendant contends that the trial court erred in sentencing the defendant as it relates to the length and manner of service. The State of Tennessee contends the trial court erred in barring the defendant's retrial on the charge of conspiracy to commit first degree murder. After careful review, we affirm the sentence imposed and reverse the trial court's order barring the retrial of this defendant on the charge of conspiracy to commit first degree murder.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part,  
Reversed in Part, and Remanded**

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which THOMAS T. WOODALL and JAMES CURWOOD WITT, JR., JJ., joined.

Robert S. Peters, Winchester, Tennessee, for the appellant, Clementine Myers.

Paul G. Summers, Attorney General and Reporter; Preston Shipp, Assistant Attorney General; William Edward Gibson, District Attorney General; Dale Potter and Larry Bryant, Assistant District Attorneys General, for the appellee, State of Tennessee.

**OPINION**

This case involves the murder of Delores Diane Watts; her ten-year-old daughter, Jessica Watts; and her daughter's overnight guest, thirteen-year-old Chelsie Smith, in Ms. Watts' residence. The three victims were beaten with a baseball bat and/or a torque wrench. The house was then intentionally set ablaze with the use of gasoline. Diane Watts died from the blunt force trauma, but the cause of death of the two children was smoke inhalation. The defendant was indicted along with co-defendant Gary Myers for the offense of first degree murder of Delores Diane Watts by way of criminal responsibility for the conduct of another. The defendant was later indicted, along with three other co-defendants, for conspiracy to commit the first degree murder of Delores Diane Watts. After a change of venue, the defendant was tried before a jury in White County. After deliberations, the

White County jury announced it could not reach a verdict on the second indictment and a mistrial was declared on the charge of conspiracy to commit first degree murder. As to the first indictment charging first degree murder by way of criminal responsibility for the conduct of another, the jury returned a verdict to the lesser included offense of criminal responsibility for criminally negligent homicide. After a sentencing hearing, the trial court sentenced the defendant to one year and eight months and denied any form of alternative sentencing. Later, the trial court sustained the defendant's motion to bar retrial of the indictment for conspiracy to commit first degree murder on the grounds that double jeopardy precluded a retrial.

First, we will address the defendant's claim that the trial court's imposed sentence was too lengthy and should have included full probation or some other form of alternative sentence. The defendant was found guilty of criminal responsibility of criminally negligent homicide, a Class E felony. The defendant is a Range I, standard offender, and the sentencing range is from one to two years.

The defendant, in essence, is asking this court to sentence her de novo. The record before us contains the presentence report, the victim impact statements, and the transcript of the sentencing hearing in which the State called two witnesses to introduce their victim impact statements. The defense did not cross-examine and offered no proof.

We are unable to conduct appellate review because the record on appeal does not contain a full transcript of the defendant's trial. We are unable to review the facts and circumstances of the defendant's crime which led the trial court to impose the sentence. The defendant, as the appellant, has the burden to provide an adequate record for appellate review. Tenn. R. App. P. 24(b); State v. Taylor, 992 S.W.2d 941, 944 (Tenn. 1999). When the record is incomplete with respect to a challenged issue, this court cannot determine whether the trial court correctly rejected the defendant's claims and must conclusively presume that the trial court's determination was supported by the record. See State v. Draper, 800 S.W.2d 489, 492 (Tenn. Crim. App. 1990). As such, we are bound to presume that the record supports the trial court's sentence.

## II. Double Jeopardy

Next, the State argues that the trial court erred in finding that double jeopardy principles barred a retrial of the defendant for conspiracy to commit first degree murder. Here, the jury was unable to reach a unanimous verdict on that charge, but the trial court barred retrial because it determined that the elements of conspiracy included the elements of criminal responsibility for criminally negligent homicide. After careful review, we conclude that double jeopardy principles do not preclude a retrial of the defendant on the conspiracy indictment and remand this matter to the trial court for further proceedings.

The constitutional right against double jeopardy protects against (1) a second prosecution after an acquittal, (2) a second prosecution after a conviction, and (3) multiple punishments for the same offense. State v. Beauregard, 32 S.W.3d 681, 682 (Tenn. 2000). The rule in Tennessee is well

settled that constitutional provisions against double jeopardy protect an accused from the peril of a second punishment and a second trial for the same offense. Whitwell v. State, 520 S.W.2d 338, 341 (Tenn. 1975); State v. Taylor, 912 S.W.2d 183, 185 (Tenn. Crim. App. 1995). “This does not mean, however, that every time a defendant is subjected to a trial before a competent tribunal he [or she] is entitled to go free if the trial fails to end in final judgment.” State v. Carter, 890 S.W.2d 449, 452 (Tenn. Crim. App. 1994)(citations omitted).

One of the recognized exceptions to the prohibition against double jeopardy is when the defendant has actively sought or consented to the mistrial, unless he was “goaded” into requesting a mistrial. Taylor, 912 S.W.2d at 185; State v. Nixon, 669 S.W.2d 679, 681 (Tenn. Crim. App. 1983). Another exception exists when there is a “manifest necessity” for a mistrial. Nixon, 669 S.W.2d at 681. If it appears that some matter has occurred which would prevent an impartial verdict from being reached, a mistrial may be declared and a claim of double jeopardy would not prevail to bar a subsequent trial. State v. Mounce, 859 S.W.2d 319, 321 (Tenn. 1993); State v. Williams, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996).

The issue of whether a retrial shall be allowed must be decided on the circumstances of each case and is within the discretion of the trial judge. The trial judge must weigh the public’s right to a fair and complete adjudication against the accused’s constitutional right not to be harassed, oppressed by successive trials, or otherwise denied the protection of constitutional rights. Gori v. United States, 367 U.S. 364, 81 S. Ct. 1523 (1961). The trial court’s discretion in weighing these factors is open to review by appellate courts, and any doubts shall be resolved “in favor of liberty of the citizen.” Arnold v. State, 563 S.W.2d 792, 795 (Tenn. Crim. App. 1977)(quoting Downum v. United States, 372 U.S. 734, 83 S. Ct. 1033 (1963)).

In State v. Denton, 938 S.W.2d 373, 381 (Tenn. 1996), our supreme court held that the resolution of a double jeopardy question under our state constitution requires the following: (1) a Blockburger<sup>1</sup> analysis of the statutory offenses; (2) an analysis, guided by the principles of Duhac,<sup>2</sup> of the evidence used to prove the offenses; (3) a consideration of whether there were multiple victims or discrete acts; and (4) a comparison of the purposes of the respective statutes. Furthermore, “[n]one of these steps is determinative; rather the results of each must be weighed and considered in relation to each other. Id.

Our supreme court adopted the Blockburger test for determining when to sustain multiple convictions based upon the same acts or transactions in State v. Black, 524 S.W.2d 913, 919 (Tenn. 1975). The question is whether the indicted offenses constitute the same offense under the double jeopardy provision of the constitution. The court in Black held that multiple convictions do not violate double jeopardy if the statutory elements of the indicted offenses are different and neither offense is included in the other. Id.

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<sup>1</sup>Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 182 (1932).

<sup>2</sup>Duhac v. State, 505 S.W.2d 237 (Tenn.1973)

The State argues, and we agree, that it is well settled that conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy and cites to several cases to support their argument, including a recent decision by a panel of this court. See State v. Jonathan Wesley Stephenson, No. E2003-01091-CA-R3-DD, 2005 Tenn. Crim. App. LEXIS 208, at \*38 (Tenn. Crim. App. Mar. 9, 2005). This court in Stephenson also correctly pointed out that our legislature has expressly codified at Tennessee Code Annotated section 39-12-106(c), its intent that a person may be convicted of conspiracy and the offense which was the object of the conspiracy. Id.

The offenses in the instant case are not the same when compared under the test in Blockburger. They have different statutory elements. Criminally negligent homicide requires proof that a death occurred and that it resulted from criminally negligent conduct. Conspiracy to commit first degree murder requires evidence of an agreement, but it is not necessary that the killing actually occur. Neither offense is included in the other as one could commit the offense of criminally negligent homicide by means of criminal responsibility without being involved in a conspiracy. Alternately, one could engage in a conspiracy without committing criminally negligent homicide.

We conclude that double jeopardy does not prevent retrying this defendant for conspiracy to commit first degree murder. We remand to the trial court for further proceedings.

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JOHN EVERETT WILLIAMS, JUDGE