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12-6-2012

Summary of Jackson v. State, 128 Nev. Adv. Op. 55

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Nevada Law Journal

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Recommended Citation

Mead, Sarah, "Summary of Jackson v. State, 128 Nev. Adv. Op. 55" (2012). *Nevada Supreme Court Summaries*. 143.

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CRIMINAL LAW AND PROCEDURE – DOUBLE JEOPARDY AND COMMON
LAW REDUNDANCY THEORY

Summary

Appeals from district court judgments of conviction based on similar questions regarding double jeopardy and redundancy. The Court considered whether a criminal defendant who is charged with both attempted murder and battery or aggravated battery through a single act can be so charged, or whether such a charge constitutes double jeopardy, or violates Nevada’s common law redundancy theory.

Disposition/Outcome

The State is allowed to charge a criminal defendant with battery, assault and attempted murder as a result of one single act, because battery, assault, and attempted murder each include elements the others do not. Furthermore, a prosecutor can request cumulative punishment for those crimes.

Facts and Procedural History

The opinion used two distinct criminal cases to answer this question.

The first case was *Jackson v. State*, in which the defendant/appellant Jackson, in the course of attempting to rob a bar, forced the bartender to stay in the restroom, shot the bartender in the leg, and attempted to shoot him in the chest. The bartender struggled and Jackson eventually ran away, failing to rob the bar or kill the bartender as he intended. Jackson was charged with attempted murder, assault and battery, all with a deadly weapon, as well as robbery, kidnapping, burglary and discharge of a firearm in a building.

The police used a video that was recovered from the bar’s surveillance system as evidence of Jackson’s actions. The video was a “composite” video, which omitted recordings from the night of the incident that did not show the defendant or the bartender.

Jackson was convicted for all charges. The district court sentenced Jackson to multiple consecutive sentences of life imprisonment and specific terms of years on the attempted murder, robbery, and kidnapping counts, with consecutive additional terms for the weapon enhancements, and lesser concurrent sentences for his assault, battery, and other convictions. Jackson and appealed his convictions for assault and battery on top of the attempted murder conviction on the basis that a conviction for all three of these things violated his constitutional guarantee against double jeopardy and were impermissibly redundant. Jackson also argued that the State’s failure to preserve the complete surveillance video violated his due process rights.

¹ By Sarah Mead

The second case was *Garcia v. State*, in which the defendant/appellant Garcia and his friends got into a street fight with three other men. Garcia drew a gun in the course of the fight, and shot at the three men. One of the men died and the other two men were injured. Garcia was convicted of murder and two counts of attempted murder with a deadly weapon, as well as battery with use of a deadly weapon causing substantial bodily harm to one of the men and battery with use of a deadly weapon against the third man who was harmed the least. He was given a life sentence with the possibility of parole for the murder conviction, consecutive sentences of 192 months for the two attempted murder convictions, and two lesser concurrent sentences for the aggravated battery convictions.

Garcia appealed his convictions for attempted murder and aggravated battery on the basis that the convictions for both violated double jeopardy and were impermissibly redundant.

Discussion

Justice Pickering wrote the opinion for the Court sitting en banc.

The Court used the two cases as a basis to make the determination of whether in Nevada, and in compliance with the U.S. Constitution, conduct that violated more than one criminal statute can produce multiple convictions in a single trial. The Court determined that this question is one of “statutory construction with a constitutional overlay,” and therefore reviewed this question de novo.²

The right against Double Jeopardy in criminal convictions comes from the Fifth Amendment of the United States Constitution, and is extended to Nevada citizens the Fourteenth Amendment to the United States Constitution,³ and is also guaranteed to Nevada citizens through the Nevada Constitution. The Double Jeopardy Clause in both the United States Constitution and the Nevada Constitution protect against multiple punishments for the same offense.

“Where two statutory provisions proscribe the same offense,” a defendant cannot be charged under both of those statutes and be given two punishments for the same offense.⁴ Given this presumption, the Court then stated that it must determine whether the statute describing battery and attempted murder are the same offense, and therefore whether a defendant cannot be punished under both statutes.

Nevada utilizes the Blockburger test to determine whether two statutory provisions involve the same offense. The Blockburger test “inquires whether each offense contains an element not contained in the other; if not, they are the ‘same offense’

² *Firestone v. State*, 120 Nev. 13, 16, 83 P.3d 279, 281 (2004).

³ *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

⁴ *Rutledge v. United States*, 517 U.S. 292, 297 (1996).

and double jeopardy bars additional punishment and successive prosecution.”⁵The Court clarified that the Blockburger test does not determine, by itself, whether multiple punishments are permissible, but instead determines whether statutes violated “penalize the same or several distinct offenses,” and if they do punish the same offense, whether the presumption restricting cumulative punishment applies.

The Court used this principle in analyzing whether Jackson and Garcia were punished in violation of Double Jeopardy principles. In so analyzing, the Court looked to the actual language of Nevada’s attempt statute Jackson and Garcia were convicted under, which states in relevant part, “an act done with the intent to commit a crime, and tending but failing to accomplish it, is an attempt to commit that crime.”⁷ The statute also states, “nothing in this section protects a person who, in an unsuccessful attempt to commit one crime, does commit another and different one, from the punishment prescribed for the crime actually committed.”⁸ So, reading the statute outside of any constitutional context, the statute itself allows for conviction and punishment of crimes that arise from the same act for which a defendant is charged under the attempt statute.

Double Jeopardy

Using the principles of *Rutledge*, the Court looked to the statutory text to determine the legislative intent, and through the above-mentioned statute, determined that the legislature authorized cumulative punishment. The Court noted the language of the attempt statute which says, “nothing in this section protects a person who, in an unsuccessful attempt to commit one crime, does commit another and different one, from the punishment prescribed for the crime actually committed.”⁹ Using this analysis, the Court determined the legislature authorized cumulative punishment because in the statute, the legislature expressly authorized punishment for both attempted murder (the “unsuccessful attempt to commit one crime”) and assault and/or battery (“the crime[s] actually committed”).

The Court’s analysis does not end there, however, because the appellants specifically argued that the case be analyzed under *Blockburger*. The Court rejected this challenge, stating that convictions of both attempted murder and battery with a deadly weapon did not violate Double Jeopardy because “each offense contain[ed] an element not contained in the other.” Attempted murder requires intent to kill, malice aforethought, and failure to complete the crime of murder, and none of those are requirements of battery or assault.¹⁰ Therefore, the Court stated that the two statutes do not proscribe the same offense, according to the Blockburger test.

⁵ *Blockburger v. United States*, 284 U.S. 299 (1932).

⁷ NEV. REV. STAT. § 193.330 (2007).

⁸ *Id.*

⁹ NEV. REV. STAT. § 193.330(2).

¹⁰ NEV. REV. STAT. § 193.330 (2007); NEV. REV. STAT. § 200.010 (2007),

Nevada's Redundancy Doctrine

Jackson and Garcia also challenged their convictions based upon Nevada's redundancy doctrine. Jackson and Garcia argued that because their multiple convictions are factually based on the same act or course of conduct, the convictions cannot stand, even if each crime contains an element the other does not. In other words, appellants asserted that Nevada's redundancy doctrine uses a "same conduct" standard, which was overruled through *Barton*.¹¹ In *Barton*, the Court rejected the "same conduct" approach and instead adopted the "same elements" approach that was endorsed in *Dixon v. United States*.¹² Based on *Barton*, the Court rejected this argument.

The Court then discussed two cases Jackson and Garcia relied heavily on in their redundancy arguments: *Salazar v. State*¹³ and *Skiba v. State*.¹⁴ Both *Salazar* and *Skiba* were decided with the "same conduct" approach for determining the permissibility of cumulative punishment, which is inconsistent with *Barton*. The Court stated that, consistent with *Barton*, it disapproved of *Salazar*, *Skiba*, and their redundancy progeny to the extent that they endorse a fact-based "same conduct" test for determining the permissibility of cumulative punishment. The Court stated that the proper focus is on legislative authorization, beginning with an analysis of the statutory text. If the legislature has authorized cumulative punishment, that legislative directive controls. If there has been no express legislative authorization, then the Blockburger test is employed.

The Court found that Jackson's and Garcia's cumulative punishment challenges failed under *Blockburger* and *Barton*. Further, the Court stated that in disapproving of *Salazar* and *Skiba*, the holding is limited to the fact-based "same conduct" approach of determining redundancy. The Court also stated that Nevada's redundancy case law has captured "unit of persecution" and alternative-offense challenges, which this opinion does not question.

Jackson's Due Process Argument

Finally, Jackson argues that the district court erroneously admitted video surveillance evidence despite the State's violation of *Leonard v. State*, which stated that a defendant's due process rights may be violated if the State fails to preserve evidence and the defendant can show that the State acted in bad faith or that the defendant suffered undue prejudice.¹⁵ The Court found that the defendant's reliance on *Leonard* was misplaced because the state could not have failed to preserve or destroy evidence that it did not have in the first place.

¹¹ 117 Nev. 686, 693 (2001), 30 P.3d 1103, 1107 (2001).

¹² *Barton*, 117 Nev. at 694-95, 30 P.3d at 1103.

¹³ 119 Nev. 224, (2003).

¹⁴ 114 Nev. 612 (1998).

¹⁵ 117 Nev. 53, 68, 17 P.3d 397, 407 (2001).

In investigating Jackson's crime, the police collected the complied security footage and did not collect the omitted portions of the video. Because *Daniels v. State*¹⁶ stated that "police officers generally have no duty to collect all potential evidence from a crime scene," failing to collect the omitted portions of the video, alone, did not constitute a due process violation. However, because the Court states this rule is not absolute, it used the Leonard two-part test to determine whether the State's failure to gather evidence in this case caused injustice to Jackson. This two-part test requires that the Court consider whether the uncollected evidence is material, and if it is material, whether the failure to gather evidence was the result of negligence or bad faith.

The Court determined that the omitted video evidence was not material because had the omitted video footage been available to the defense, the result of the proceedings would not have been different. Even if the Court could find a way to determine the evidence was material, Jackson failed to prove that the State acted with bad faith, and therefore the State's action in omitting some of the video surveillance as evidence does not violate the holding in *Leonard v. State*.

Conclusion

The Court affirmed the convictions of Jackson and Garcia.

¹⁶ 114 Nev. 261, 956 P.2d 111 (1998).