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Summary of Wilson v. State of Nevada, 123 Nev. Adv. Op. No. 54

Tanya Gaylord
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Wilson v. State of Nevada,
123 Nev. Adv. Op. No. 54 (Nov. 21, 2007)¹

CRIMINAL LAW – DOUBLE JEOPARDY

Summary

Appeal from an amended judgment of conviction following a remand post direct appeal.

Disposition/Outcome

Vacated the amended judgment and remanded to the district court with instructions to reinstate the portions of the original sentence affirmed on direct appeal. The double jeopardy protections prohibit increasing a defendant’s sentence after a partially vacated conviction on appeal.

Factual and Procedural History

Wiley Gene Wilson was convicted of four counts of using a minor in the production of pornography and four counts of possession of a visual representation depicting sexual conduct of a person under 16 years of age. He was sentenced to 4 terms of 24 to 72 months on the possession charges to run concurrently with 4 consecutive terms of 10 years to life on the production charges. On direct appeal, the Nevada Supreme Court reversed three of the four production charges and remanded the case for resentencing.² The district court then resentedenced Wilson but modified the sentences in two ways: (1) by increasing the minimum sentence for each possession from 24 months to the statutory maximum of 28 months; and (2) by ruling that Wilson’s possession sentences should run consecutively, instead of concurrently, with his sentence on the one remaining production count. Wilson appealed.

Discussion

On appeal, the Nevada Supreme Court considered whether the district court violated Wilson’s right against double jeopardy by increasing Wilson’s original sentences on the counts affirmed on direct appeal and concluded that his right against double jeopardy was violated.

Double Jeopardy

The Nevada Constitution mandates that “[n]o person shall be subject to be twice put in jeopardy for the same offense.”³ Wilson based his appeal on the Nevada Supreme Court’s interpretation of the federal Double Jeopardy Clause in *Dolby v. State* where the Court held that “[w]hen a court is forced to vacate an unlawful sentence on one count, the court may not increase

¹ By Tanya Gaylord.

² *Wilson v. State*, 121 Nev. 345, 358, 114 P.3d 285, 294 (2005).

³ NEV. CONST. art. 1, § 8(1). *Cf.* U.S. CONST. amend. V (no person “shall ... be subject for the same offense to be twice put in jeopardy of life or limb”).

a lawful sentence on a separate count.”⁴ The State argued that the Nevada Supreme Court should reconsider its core holding in *Dolby* because, as a result of the United States Supreme Court double jeopardy holdings⁵ in the last half century, *Dolby* is no longer a good law. The Nevada Supreme Court refused to accept the State’s argument and affirmed its commitment to strong double jeopardy protections articulated in *Dolby*.

Rejection of *United States v. DiFrancesco* and “sentencing package doctrine”

The United States Supreme Court first considered the application of the double jeopardy protection to sentencing in its 1874 landmark decision in *Ex Parte Lange*.⁶ In *Lange*, the defendant was convicted of stealing mail bags, a crime punishable by either a fine or a prison term. The defendant, however, was both fined and sentenced to prison. The Supreme Court reversed holding that once Lange suffered one of the punishments allowed under the statute, “the power of the court to punish further was gone.”⁷

In *United States v. Benz*, the Supreme Court extended *Lange* to constitutionally prohibit increasing a sentence after the defendant had begun to serve it.⁸ However, between 1947 and 1980, the Supreme Court gradually retreated from this prohibition.⁹ In *United States v. DiFrancesco*, the United States Supreme Court completely abandoned the *Lange-Benz* rationale and held that the Double Jeopardy Clause prohibits resentencing only when defendants have developed a legitimate expectation of finality in their original sentences.¹⁰

Following *DiFrancesco*, the majority of federal courts have held that defendants waive any expectation of finality in their original sentences when they exercise their right to an appeal.¹¹ In effect, when defendants challenge one of several interdependent sentences (or underlying convictions), they have challenged the entire sentence.¹² Accordingly, federal courts now generally recognize that when a defendant has successfully appealed part of a conviction, “the Double Jeopardy Clause does not preclude increasing the sentence on the remaining offense to effectuate the sentencing judge’s original intent, even though the defendant has already begun serving the sentence.”¹³

⁴ *Dolby v. State*, 106 Nev. 63, 65 (1990).

⁵ See *Pennsylvania v. Goldhammer*, 474 U.S. 28, 30 (1985); *United States v. DiFrancesco*, 449 U.S. 117, 138-39 (1980).

⁶ 85 U.S. 163 (1874).

⁷ *Id.* at 176.

⁸ 282 U.S. 304, 307-08 (1931).

⁹ See *DiFrancesco*, 449 U.S. 117; *North Carolina v. Pearce*, 395 U.S. 711, 721 (1969); *Bozza v. United States*, 330 U.S. 160, 166-67 (1947) (no double jeopardy where trial court resentenced defendant to more severe punishment where initial sentence was less than the statutory minimum).

¹⁰ 449 U.S. at 135.

¹¹ *United States v. Bello*, 767 F.2d 1065, 1070 (4th Cir. 1985); see also *U.S. v. Bentley*, 850 F.2d 327, 329 (7th Cir. 1988); *U.S. v. Shue*, 825 F.2d 1111, 1115 (7th Cir. 1987); *United States v. Crawford*, 769 F.2d 253, 257 (5th Cir. 1985); *McClain v. United States*, 676 F.2d 915, 918 (2d Cir. 1982); *United States v. Busic*, 639 F.2d 940, 950 (3d Cir. 1981).

¹² See *Busic*, 639 F.2d at 947 n. 10.

¹³ *Bello*, 767 F.2d at 1070; see also *Bentley*, 850 F.2d at 329; *Crawford*, 769 F.2d at 257; *McClain*, 676 F.2d at 918; *Busic*, 639 F.2d at 950.

In addition, federal courts have developed the “concept of a sentencing package.”¹⁴ Under the sentencing “package” doctrine, courts treat the penalties imposed on multiple counts as individual components of a single, comprehensive sentencing plan.¹⁵ Accordingly, federal courts can let composite sentences in multicount convictions stand or fall in the aggregate and have the authority to revise even unchallenged portions of a sentencing “package” without violating the double jeopardy protection.¹⁶

Nevada double jeopardy jurisprudence

While recognizing the contradicting developments in the federal double jeopardy jurisprudence and the sentencing law, the Nevada Supreme Court reaffirmed its commitment to the traditional rule articulated in *Dolby*: “When a court is forced to vacate an unlawful sentence on one count, the court may not increase a lawful sentence on a separate count.”¹⁷ The defendant in *Dolby* was convicted of the attempted murder of an elderly man and sentence to ten years in prison. Additionally, the district court imposed a ten-year enhancement based on the age of the victim, leading to a total sentence of 20 years. After the sentencing hearing, *Dolby* brought a motion to vacate the enhanced penalty. The district court vacated the enhanced penalty, but resented *Dolby* to 20 years on the primary offense of attempted murder. On appeal, *Dolby* argued that the district court violated his double jeopardy protection by increasing his original sentence. The Nevada Supreme Court agreed.

Application of *Dolby* to Wilson’s resentencing

The Nevada Supreme Court disagreed with the State’s argument that *Dolby* is no longer good law for three reasons. First, the Court noted that *Dolby* was an implicit rejection of the United States Supreme Court holding in *DiFrancesco* because *Dolby* was decided a decade after *DiFrancesco* and by citing cases purportedly overruled by *DiFrancesco*, *Dolby* deliberately sought to reserve the double jeopardy protections. Second, the Nevada Supreme Court stated that states are free to provide additional constitutional protections beyond the ones provided by the United States Constitution and that its decision to adhere to *Dolby* is consistent with Nevada’s past practice of affording more citizen protections under the Nevada Constitution than those under the federal Constitution.¹⁸ Third, the Nevada Supreme Court noted that the State failed to offer sound reasons for depleting the increased constitutional protections in Nevada by failing to argue, for example, that the “practical realities” of the sentencing in Nevada have reached the complexity of the federal sentencing law or by failing to invoke the sentencing “package” doctrine.

¹⁴ U.S. v. Handa, 122 F.3d 690, 692 (9th Cir. 1997).

¹⁵ See State v. Saxon, 846 N.E.2d 824, 827 (Ohio 2006).

¹⁶ The courts have acknowledged two limitations on their power to resentence. First, the increased sentences must fall within the statutory limitations. *Shue*, 825 F.2d at 1115. Second, because a defendant has a legitimate expectation that, after appeal, he will not be subject to “a greater sentence than that previously imposed as punishment for appealing his conviction,” a district court may not resentence a defendant to a greater aggregate sentence after a successful appeal. *Id.*

¹⁷ 106 Nev. at 65; 787 P.2d at 389.

¹⁸ California v. Ramos, 463 U.S. 992, 1014 (1983) (“States are free to provide greater protections in their criminal justice system than the Federal Constitution requires.”). See *Miranda v. State*, 114 Nev. 385, 387, 956 P.2d 1377, 1378 (1998); *Ennis v. State*, 122 Nev. 694, 704, 137 P.3d 1095, 1102 (2006).

Applying *Dolby* to Wilson's case, the Nevada Supreme Court concluded that by modifying Wilson's sentence, the district court unconstitutionally increased the lawful sentences on the counts affirmed on appeal. Under the original sentence, Wilson faced an aggregate minimum sentence of 40 years to life. After the district court vacated the three production counts, four possession counts and one production count remained and therefore, Wilson should have been sentenced to an aggregate minimum sentence of ten years on all remaining counts.¹⁹ However, the district court increased the minimum sentence on the remaining possession counts which resulted in Wilson facing an aggregate minimum sentence of 19 years and 4 months. Although the resentencing did not lead to a harsher penalty than Wilson's original sentence, the district court's sentencing procedure to individually increase the minimum terms on the remaining possession counts and restructure the relationship between the possession counts and the one production count, was forbidden by *Dolby*.

Conclusion

The Court held that the district court's resentencing on the lawful portions of Wilson's conviction violated Wilson's double jeopardy rights, vacated the amended sentence, and remanded the case for resentencing consistent with the opinion. The core holding of *Dolby* continues to embody the double jeopardy protections followed in Nevada. Additionally, the Court extended *Dolby* to apply to resentencing mandated on appeal.

¹⁹ This minimum aggregate sentence results from running Wilson's one term of ten years on the production count concurrently with four two-year terms on the possession counts (which run concurrently with one another).