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Case Number 44,2016

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DJAVON P. HOLLAND,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	No. 44, 2016
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

APPELLANT'S REPLY BRIEF

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ARGUMENT

CLAIM I. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO DISMISS NEWLY-INDICTED CHARGES AGAINST MR. HOLLAND AS THEY RAN AFOUL OF THE UNITED STATES AND DELAWARE CONSTITUTIONS, THEREBY DEPRIVING MR. HOLLAND OF DUE PROCESS OF LAW.

A. The Trial Court's Construction of 11 *Del. C.* § 208 Created an Internally Inconsistent Reading of the Statute as a Whole that Requires Reversal.

In its Answering Brief, the State contends that the Commentary to section 208 of Title 11 supports the trial court's reading of the statute.[1] Specifically, the State relies upon the language that "Subsection (1) applies where the former prosecution resulted in a conviction or an acquittal and the subsequent prosecution is either (a) for any offense of which the defendant could have been convicted in the prosecution (*e.g., an included offense*). . . ."[2] The State also points to the Commentary of section 1.09(1)(a) of the Model Penal Code (hereinafter "MPC")—the statutory language of which is identical to section 208—which explains that the test under the subsection is "any offense of which the defendant could have been convicted," not "any offense for which the defendant could have been prosecuted" at the first trial.[3] Both, however, betray the trial court's interpretation of section 208.

[1] Ans. Br. at 12-15.
[2] Ans. Br. at 13 (internal citations omitted) (emphasis added).
[3] Ans. Br. at 14 (internal citations omitted).

The State seems to confuse the phrase "*e.g.*" for "*i.e.*" The term "*i.e.*" is "shorthand for the Latin phrase *id est* meaning 'that is.' It is meant to specify or to add clarity to a statement."[4] The Latin *e.g.*, on the other hand, stands for *exempli gratia* and means "for example."[5] If the Commentary for section 208 read "*i.e.*, an included offense," the meaning would be undeniable—the statute would stand as a bar only to new prosecutions for offenses that were lesser included offenses of those for which a defendant already stood trial. The draftsmen of section 208, however, took care to use the phrase "*e.g.*" Read in conjunction with the entirety of the statute, which is specifically limited to "a prosecution for a violation of a *different* statutory provision or is based on different facts,"[6] use of the phrase "*e.g.*" extinguishes the possibility that subsection (1)(a) *only* refers to included offenses. The only remaining application, therefore, is crimes for which a defendant could have been charged but was not.

Moreover, despite that the language of 208 is a mirror image of MPC section 1.09(1)(a), the legislature opted not to duplicate its Commentary. Had the draftsmen of section 208 intended to exclude from the statute's scope "any offense for which the defendant could have been prosecuted" during the first proceeding,

[4] *Glaxo SmithKline PLC v. Hikma Pharm. Co., Ltd.*, 2012 WL 3561970 at *18 (D.N.J. Aug. 16, 2012).
[5] *Otter Prod., LLC v. Treefrog Dev., Inc.*, 2012 WL 4468211 at *22 n.12 (D. Col. Sep. 27, 2012).
[6] 11 *Del. C.* § 208.

certainly the MPC Commentary language would have been carried forward. Instead, the legislature struck the pertinent language and made explicit, via use of the phrase "*e.g.*", that while included offenses fell within the scope of section 208, its reach extended further.

The State also relies upon *State v. Esham* to save the Reindictment.[7] The facts of *Esham* vary substantially from the present case, insofar as the new charges brought against the *Esham* defendant did not arise out of the same criminal conduct for which he first stood trial.[8] *Esham* stands merely for the proposition that section 208 does not require the State to bring a defendant to trial on all outstanding charges of which it is aware if those charges do not stem from the same criminal incident.[9] Indeed, seven years after its decision in *Esham*, the trial court acknowledged that:

> [T]he objective of [section 208] in providing protection based on former jeopardy is to assure that one who has been exposed to a prosecution which resulted in an acquittal on its merits shall not again be exposed to prosecution for a charge which was asserted *or could have been asserted* in the former prosecution.[10]

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[7] Ans. Br. at 13.

[8] *See State v. Esham*, 321 A.2d 512, 513 (Del. Super. 1974).

[9] *See id*. at 515 ("In the case at bar, the defendant is not charged with the possession which was coincident with the sale [for which he was later brought to trial]. The possession charged is not the unbroken chain of events of possession immediately preceding the sale in which the possession was followed directly by the sale. If it had been, the possession and sale *might be said to arise from the same conduct*. Here, the charged possession occurred 14 days after the sale transaction. Obviously, the marijuana which defendant is charged with possession on September 28 is not the marijuana which he sold on September 14. It is not contended that defendant's conduct on September 28 involved his sale on September 14.").

[10] *State v. Sheeran*, 441 A.2d 235, 242 (Del. Super. 1981) (emphasis added).

The State's contention that Mr. Holland ignores subsection (1)(b), "which specifically permits a subsequent prosecution based on the same conduct in certain circumstances," is based on a reading of section 208 that strips it of its protective purpose.[11] The language of the statute makes clear that it is intended to protect criminal defendants from twice being exposed to jeopardy for the same conduct—it states that prosecutions are "barred" under an enumerated list of circumstances.[12] Subsection (1) prohibits a second prosecution where the first proceeding resulted in acquittal and the subsequent prosecution is for any offense of which the defendant could have been convicted previously *or* the same conduct (with specific exceptions).[13] The State's contention that (1)(b) "specifically permits" a subsequent prosecution ignores that if subsection (1)(a) is satisfied, the subsequent prosecution is barred regardless of whether the (1)(b) exceptions would apply. Section 208 is designed to be a mechanism for a defendant to seek shelter from double jeopardy, not a tool for the State to utilize to save a prosecution.

B. The Reindictment Was the Product of Vindictive Prosecution.

The State contends that Mr. Holland waived the argument that the Reindictment was a product of vindictive prosecution because he did not fairly

[11] Ans. Br. at 14.
[12] *See generally* 11 *Del. C.* § 208.
[13] 11 *Del. C.* § 208(1)(a)-(b).

present it to the Superior Court.[14] Not so. Prior to commencement of the second trial, Mr. Holland repeatedly brought the issue to the trial court's attention. While discussing the defendant's desire to proceed *pro se* at trial, Mr. Holland said to the trial court:

> Well, your Honor, right there, when you say that, I think it was -- it was a little misunderstanding between me and Mr. Figliola as to my point of view and his point of view. I think it should be noted for the record that the prosecutor lied in their motion, and I wanted that addressed to the courts. It was proof on this fact and it wasn't brought up, and I think that was substantiated -—

The trial court interrupted Mr. Holland, stating it was not "the time and place" to reargue the motion.[15] Later, the trial court reached the motion for reargument previously filed by Mr. Holland's counsel, stating "it's Mr. Holland's motion to argue since he's representing himself. . . . Mr. Holland, representing yourself, you may make any argument you wish over and beyond what was set forth in Mr. Figliola's motion for reargument filed September 4."[16] Mr. Holland began his argument, first contending that the State should not be permitted to prosecute him a second time for charges of which he had already been acquitted.[17] The court interjected and asked for the State's response.[18] After the State presented its argument, the trial court did not allow Mr. Holland to speak again prior to ruling,

[14] Ans. Br. at 15.
[15] A420.
[16] A425.
[17] A425-26.
[18] A426.

indicating that it had "heard enough."[19] As the trial court explained its rationale for denying the motion for reargument, Mr. Holland interrupted:

> MR. HOLLAND: Your Honor --
>
> THE COURT: I've just ruled. One moment.
>
> MR. HOLLAND: I really had something --
>
> THE COURT: One moment.
>
> MR. HOLLAND: With the motion.
>
> THE COURT: I have written on the front of the motion: "Motion to reargue denied for the reasons stated on the record." I'll ask the Prothonotary to docket this. This now takes us to the motion in limine filed on September 3 by Mr. Figliola when he was your attorney. The gist of the motion in limine is that defense moves that any evidence of injuries, either Mr. DeShields or Mr. Moore, be excluded, since you have been acquitted of inflicting any injury on those individuals and that evidence of this nature will only confuse the jury, unquote. Argument on that motion, Mr. Holland, if anything further to add?
>
> MR. HOLLAND: I didn't hear what you were saying right there.
>
> THE COURT: If you have anything further to add to what was already set forth in the motion.
>
> MR. HOLLAND: Well, I wanted to bring up the fact that the prosecution lied in the last motion. I wasn't done rearguing that fact, that they lied. And I wanted my lawyer to bring that up and he didn't bring that up. That basically was my issue.
>
> THE COURT: Well, the only argument I'm going to hear is what's in the motion in limine. I'm not going to get into your allegations about the State's conduct. Anything further to add in support of the motion in limine?

[19] A426.

> MR. HOLLAND: I think that constitutes a fair trial, though -- if they lying, I can't get a fair trial if they're lying.
>
> THE COURT: All right. I think I understand your position.[20]

Prior to adjourning for the day, the following exchange occurred:

> MR. HOLLAND: I don't think lying constitutes a fair trial. For the record, lying doesn't constitute a fair trial. And that's a violation of a fair trial, to be lied about –
>
> THE COURT: I'm not going to hear any allegations of unfair trial. There have been motions briefed and argued and, at some later time, if you should be convicted, that's the time to make the arguments.
>
> MR. HOLLAND: Lying, what is -- I did.
>
> THE COURT: I'm directing you now to sit down, Mr. Holland, since there's nothing further that's appropriate to discuss today. We're in recess until tomorrow at 9:30.[21]

The following morning, Mr. Holland again attempted to argue his motion to the trial court:

> THE COURT: . . . I was told that Mr. Holland had something he wished to take up with me. So, Mr. Holland is there something you wanted to raise with me? Please stand.
>
> MR. HOLLAND: Yes, your Honor, it's a few issues that I have. I would like to object to a couple things. Like, first, I would like to object to the fairness of this trial, first and foremost. I don't believe that I can receive a fair trial due to the fact of the reindictment was based on lies. So, I don't believe that lying in the reindictment would constitute a fair trial. That's the first thing.

[20] A426.
[21] A427.

> THE COURT: All right. Well, as to that first application, the motion for acquittal, if that's what it is, because you can't get a fair trial because there were lies that form the basis of the indictment, is denied. That will just have to come out at trial with the credibility of the witnesses tested in the usual way. So, there's no basis on what you said for any relief.
>
> MR. HOLLAND: Well --
>
> THE COURT: Is there anything else you wanted to bring up?
>
> MR. HOLLAND: It wasn't really based on witnesses as much as it was based on the prosecution lying in their reindictment for their reasons for reindicting me. They said that they didn't know about these people being drug dealers, when there's proof that they knew that these people were, in fact, drug dealers. And the information was given to me, in fact, by prosecution theirself [*sic*]. They had a warrant, they executed warrants on the house for suspected drug dealing. The man said he took canvas, Detective Breslin, and said that they knew this guy to be the weed man which would -- a weed man is a known drug dealer. They confiscated Baggies.
>
> THE COURT: I heard the gist of what you are complaining about.[22]

In response, the State claimed that it "may have had an indication" that a robbery had occurred, but that the information had not come from the alleged victims.[23]

The trial court ruled, stating:

> Well, first, the application is too late to file any motion based on that because the time for bringing such kinds of motions is far before the beginning of the second trial. But secondly, the motion's not, on its merits, on the -- as a practical matter, I can't adjudicate and won't adjudicate that kind of allegation. It's going to have to be tested by the evidence that comes in at trial.[24]

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[22] A430.
[23] A430.
[24] A430.

It is unclear what more Mr. Holland—a *pro se* defendant—could have done to properly present the issue to the trial court. As the State noted in its Answering Brief, Mr. Holland filed two *pro se* letters with the trial court raising the claim of vindictive prosecution days before discharging his attorney.[25] Prior to the commencement of trial, the trial court explained to Mr. Holland that he could "make any argument . . . over and beyond" what was alleged by his then-attorney in the motion for reargument.[26] When Mr. Holland tried to do so, however, the trial court would not hear the argument. Moreover, the trial court indicated that it believed it was not a claim it was capable of hearing, as it would have to be "tested by the evidence" at trial. Such a finding was erroneous.

Mr. Holland's vindictive prosecution claim is not a trial defense and was incapable of being "tested by the evidence." The defendant alleged that the State relied upon factual inaccuracies in responding to his motion to dismiss; specifically, that it learned information during the first trial of which it was previously unaware, thereby making it impossible to have previously charged Mr. Holland with the newly-indicted offenses.[27] Were such a claim accurate, the Reindictment would be protected by *State v. Moran*, where the trial court held that

[25] Ans. Br. at 15-16; A407-16.
[26] A425.
[27] A382-83. *See also* A399 (whereupon the trial court notes that "[t]he State maintains, however, that the evidence supporting the new charges was only discovered during the first trial.").

newly-indicted charges could proceed forward because the State did not know about them before the first proceeding.[28] Short of calling the prosecutors assigned to his case to testify and admitting into evidence the State's Response to the defense motion to dismiss, as well as the pretrial discovery provided to Mr. Holland in advance of the first trial—all of which would have been improper—Mr. Holland was wholly unable to advance such an argument at trial.

In the event this Court finds that Mr. Holland failed to properly present his claim of vindictive prosecution to the trial court, the interests of justice demand review. "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings."[29] Here, Mr. Holland had filed *pro se* letters with the trial court mere days prior to discharging his attorney at trial that raised a claim of vindictive prosecution. The trial court informed Mr. Holland that he could advance arguments above and beyond what his prior attorney had already made. Yet, when confronted with Mr. Holland's claim of vindictive prosecution, the trial court initially refused to hear argument, then reasoned it was not a pretrial issue at all and, consequently, had to

[28] 820 A.2d 381, 389 (Del. Super. 2002).
[29] *Silber v. United States*, 370 U.S. 717, 718 (1962) (citing *United States v. Atkinson*, 297 U.S. 157, 160 (1936)).

be left to the province of the jury. Such a confluence of events affected the fairness and integrity of Mr. Holland's trial.

The State makes much of the fact that it was unaware prior—or shortly prior—to the first trial that Moore was actively dealing marijuana at the time of the incident.[30] The State attributes significant import to this fact, noting that "it was not until Mr. Moore admitted that he was dealing marijuana at the time of the incident that the motive for robbery was provided sufficiently for indictment and trial."[31] The State contends that this "change in factual circumstance is sufficient to rebut any presumption of vindictiveness and there is no evidence of actual vindictiveness."[32] The State is incorrect.

Motive is not an element of any of the crimes for which Mr. Holland was indicted after the first prosecution[33] and the "inability [of the State] to [prove motive] is not fatal" to its case.[34] While it is true that "lack of proof of motive may be of importance in a trial of a crime involving an element of willfulness and malice when the State is relying upon circumstantial evidence," such was not the case here.[35] Mr. Holland was identified by all of the residents of the apartment in

[30] Ans. Br. at 18-20.
[31] Ans. Br. at 19.
[32] Ans. Br. at 19-20.
[33] *See generally* A282-88.
[34] *See Littlejohn v. State*, 219 A.2d 155, 157 (Del. 1966) ("[T]here is no requirement of law that the State must prove a motive.").
[35] *Id*.

which he was alleged to have kicked in the door. The doorframe was admitted into evidence. When police arrived at the apartment, Mr. Holland was bleeding on the floor. The State introduced forensic evidence tending to suggest Mr. Holland handled the firearm. This was not a circumstantial case. The State need not have known what Mr. Holland's purported motive was in order to charge him with the newly-indicted offenses during its first presentation to the Grand Jury.[36]

The State also ascribes too much importance to Moore's status as a drug dealer at the time of the incident as it relates to Mr. Holland's supposed motive. Motive is "[s]omething, [especially] willful desire, that leads one to act."[37] Surely, Mr. Holland was not motivated to act merely because Moore was dealing marijuana at the time of the incident. Instead, as the State argued at trial, Mr. Holland "was having money trouble."[38] The State did not contend that the defendant committed these acts *because* Moore was a drug dealer, but rather to steal money:

> And you heard, you saw from the screen a series of texts, texts that show that the defendant was having money problems, and texts that show that the defendant was laying out some sort of plan, and that plan was to commit a robbery. So, you have texts to his mother saying that he had, he has a negativity in his [bank] account, and then there is also a test to his girlfriend saying he is going to get the $1,600, and Detective

[36] It is interesting to note that absent pecuniary gain, it is unclear what the State's theory was as to Mr. Holland's motive for randomly attacking three individuals who, according to the victims, he did not know.
[37] Black's Law Dictionary 1110 (9th ed. 2009).
[38] A578.

> Shahan also told you at the time that the defendant was unemployed. So where is that $1,600 going to come from?[39]

Moreover, evidence of Mr. Holland's purported motive was even adduced and argued by the State at the first trial.[40] During its closing argument at the initial proceeding, the State repeatedly reiterated its theme that the defendant "came in with a purpose"[41] and reminded the jury that "you also saw the texts from the defendant's phone, you saw his name in that phone, you saw him talking back and forth with someone named Bae, saying he needed 1,500."[42]

Presuming that Mr. Holland's motive for purportedly committing these offenses was that Moore was a drug dealer, the State had an abundance of evidence that tended to demonstrate that motive shortly after the incident occurred and well in advance of its initial presentation to the Grand Jury. Within a day of the incident, Grier told police that the assailant "enter[ed] the residence [and] demanded that they hand over their money."[43] Authorities were aware that one of the residents of the apartment "sells marijuana and is known as the 'weed man.'"[44] Finally, despite the State's claim that it was only the admission of Moore shortly before trial that he dealt drugs at the time of the incident that provided sufficient

[39] A581.
[40] *See* A221, 243.
[41] A241, 245.
[42] A243.
[43] A030.
[44] A031.

motive to indict, Moore told the police the night of the incident that "he had never seen [Mr. Holland] before, however he believed the home invasion was due to the fact that he *used to sell marijuana*."[45] Surely, the State's case would not have been affected if the assailant believed Moore to presently be a drug dealer, regardless of whether or not the victim had retired from the trade. Even if the State was required to prove motive beyond a reasonable doubt, it possessed sufficient information within forty-eight hours of the incident to do so.

[45] AR001 (the April 9, 2014 supplemental report of Officer Smack was provided to Mr. Holland by the State in its initial discovery response on October 2, 2014 (*See* A023)) (emphasis added).

CONCLUSION

For the reasons stated in his opening Brief and herein, Mr. Holland respectfully requests that this Honorable Court reverse his convictions and remand the case for a new trial.

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