DA 1-6.88

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JAN 27 1988
CLERK, SUPREME COURT
By _____ Deputy Clerk

STATE OF FLORIDA,

Petitioner,

vs.

JAMES HENDERSON,

Respondent.

CASE NO. 70,789

PETITIONER'S SUPPLEMENTAL BRIEF

ROBERT A. BUTTERWORTH
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POINT ONE

DOUBLE JEOPARDY DOES NOT APPLY TO THE INSTANT CASE AS THE STATE IS SEEKING TO REINSTATE THE JURY VERDICT AND SENTENCE IMPOSED PURSUANT THERETO, SO THERE IS NO THREAT OF MULTIPLE PUNISHMENT OR SUCCESSIVE PROSECUTION.

Respondent has argued that the principle of double jeopardy would bar reinstatement of the jury verdict should this court quash the decision of the district court, as he has already been discharged by the trial court. Petitioner submits that double jeopardy does not apply to the instant case. The Supreme Court has recognized that the Double Jeopardy Clause is not offended where there is no threat or either multiple punishment or successive prosecution. United States v. Wilson, 420 U.S. 332, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975).

Wilson involved the issue of the government's right to appeal. Prior to trial, Wilson had moved to dismiss the indictment based on prejudicial preindictment delay. The motion was denied, and Wilson was eventually found guilty by a jury. He then filed a motion for arrest of judgment, a motion for judgment of acquittal, and a motion for new trial. The district court reversed its earlier ruling and dismissed the indictment. The government sought appeal, and the court of appeals held that double jeopardy barred review. The court reasoned that since the district court had relied on facts brought out at trial in finding prejudice in the preindictment delay, its ruling was in effect an acquittal. United States v. Wilson, 492 F.2d 1345 (3d Cir. 1973). The court held that the government could not

constitutionally appeal the acquittal under the double jeopardy clause, even though it was rendered by the judge after the jury had returned a guilty verdict. Id. at 1348.

On review, the Supreme Court thoroughly discussed the application of double jeopardy principles. The Court began by recognizing that the Double Jeopardy Clause guarantees that the state shall not be permitted to make repeated attempts to convict a defendant once he has been acquitted, but where there is no threat of either multiple punishment or successive prosecution, the Double Jeopardy Clause is not offended. The Court further recognized that an appellate court's order reversing a conviction is subject to further review even when the appellate court has dismissed the indictment and discharged the defendant, because if reversal by a court of appeals deprived the government of further review, dispositon in the court of appeals would be tantamount to a verdict of acquittal at the hands of the jury. 420 U.S. at 345; 95 S.Ct. at 1022-23. The Court then stated:

> Although review of any ruling of law discharging a defendant obviously enhances the likelihood of conviction and subjects him to continuing expense and anxiety, a defendant has no legitimate claim to benefit from an error of law when that error could be corrected without subjecting him to a second trial before a second trier of fact.

Id. The Court held that the Double Jeopardy Clause protects against government appeals only where there is a danger that the defendant will be subjected to a second trial for the same offense, and does not attach to a trial judge's post-verdict correction of an error of law which would not grant the

prosecution a new trial or subject the defendant to multiple prosecution. 420 U.S. at 352; 95 S.Ct. at 1026.

United States v. Jenkins, 420 U.S. 358, 95 S.Ct. 1006, 43 L.Ed.2d 250 (1975) is another case involving the issue of double jeopardy, and was decided the same day as Wilson, supra. In that case, the Court determined that the Double Jeopardy Clause would be violated, because if remanded, there would be further proceedings of some sort devoted to resolution of factual issues going to elements of the offense charged. However, in its analysis, the Court pointed out:

> When this principle [double jeopardy] is applied to the situation where the jury returns a verdict of guilt but the trial court there-after enters a judgment of acquittal, an appeal is permitted. In that situation a conclusion by an appellate court that the judgment of acquittal was improper does not require a criminal defendant to submit to a second trial; the error can be corrected on remand by the entry of a judgment on the verdict. To be sure, the defendant would prefer that the Government not be permitted to appeal or that the judgment of conviction not be entered, but this interest of the defendant is not one that the Double Jeopardy Clause was designed to protect.

420 U.S. at 365; 95 S.Ct. at 1011.

The trial court's order (A 1) discharging respondent is not tantamount to an acquittal. Should this court quash the decision of the district court, respondent will not be forced to twice run the gauntlet of trial. Pursuant to the foregoing principles, there is but one verdict in this case, and that is a

determination of guilt by the jury. Any error can be corrected by entry of judgment on that verdict and imposition of sentence rendered on that verdict.

CONCLUSION

Based on the arguments and authorities presented herein, petitioner respectfully prays this honorable court reinstate the verdict and sentence of the trial court should it reverse the decision of the District Court of Appeal of the State of Florida, Fifth District.

Respectfully submitted,

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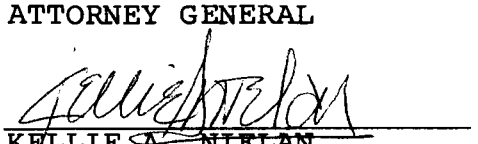

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy has been furnished by mail to: Marc L. Lubet, Esquire, Lubet & Woodard, P.A., 209 East Ridgewood Street, Orlando, FL 32801 on this 25 January, 1988.

KELLIE A. NIELAN
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