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**May 14, 2001**

RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

**RELEASED**

**May 16, 2001**

RORY L. PERRY II, CLERK  
SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

Davis, J., dissenting:

The decision reached by the majority opinion in this case is disturbing to me for two reasons. First, the majority opinion has utilized constitutional double jeopardy principles to analyze the issues in this case when the defendant did not invoke double jeopardy as a basis for challenging the convictions and sentences. The majority opinion *sua sponte* invoked double jeopardy to reach the result achieved in this case. Second, assuming the defendant had raised double jeopardy principles, there was no double jeopardy violation in this case. For these reasons, I dissent from the majority opinion.

**I.**

***Convictions and Sentences Involving Elkins Distributing Company***

The defendant in this case was convicted and sentenced for committing the crimes of fraudulent schemes and false pretenses against Elkins Distributing Company (hereinafter referred to as “Elkins”). Before this Court, the defendant made a simple sufficiency of the evidence argument as to both crimes against Elkins. The defendant argued: “There was simply no proof at trial that the defendant obtained anything by means of false pretenses or fraudulent conduct from Elkins Distributing Company.”

The defendant’s basic argument of insufficiency of evidence, which the state

had an opportunity to address and did address in its brief, was *sua sponte* transformed by the majority opinion into a claim that double jeopardy barred the defendant from being convicted and sentenced for both offenses against Elkins. There was absolutely no mention in the defendant's brief, nor any reasonable inference therefrom, that double jeopardy applied to the crimes against this victim. Consequently, the majority was wrong in addressing the issue of double jeopardy. This Court has developed a long line of cases where we have consistently held that "errors neither briefed nor argued are . . . considered abandoned." *State v. Goodmon*, 170 W. Va. 123, 125 n.1, 290 S.E.2d 260, 262 n.1 (1981). *See also State v. Lockhart*, \_\_\_ W. Va. \_\_\_, \_\_\_ n.4, \_\_\_ S.E.2d \_\_\_, \_\_\_ n.4 (No. 27053, Dec. 1, 2000) ("Assignments of error that are not argued in the briefs on appeal may be deemed by this Court to be waived."); *State v. Helmick*, 201 W. Va. 163, 172, 495 S.E.2d 262, 271 (1997) (same); *State v. Potter*, 197 W. Va. 734, 741 n.13, 478 S.E.2d 742, 749 n.13 (1996); (same); Syl. pt. 9, *State v. Garrett*, 195 W. Va. 630, 466 S.E.2d 481 (1995) (same); *State v. George W.H.*, 190 W. Va. 558, 563 n.6, 439 S.E.2d 423, 428 n.6 (1993) (same); *State v. Lola Mae C.*, 185 W. Va. 452, 453 n.1, 408 S.E.2d 31, 32 n.1 (1991) (same); Syl. pt. 1, *State v. Schoolcraft*, 183 W. Va. 579, 396 S.E.2d 760 (1990) (same); *State v. Sayre*, 183 W. Va. 376, 379 n.2, 395 S.E.2d 799, 802 n.2 (1990) (same); *State v. Stacy*, 181 W. Va. 736, 739 n.3 384 S.E.2d 347, 350 n.3 (1989) (same); *State v. Moss*, 180 W. Va. 363, 374 n.16, 376 S.E.2d 569, 580 n.16 (1988) (same); *State v. Flint*, 171 W. Va. 676, 679 n.1, 301 S.E.2d 765, 768 n.1 (1983) (same); *State v. Fairchild*, 171 W. Va. 137, 150 n.7, 298 S.E.2d 110, 123 n.7 (1982) (same); *State v. Buck*, 170 W. Va. 428, 430 n.2, 294 S.E.2d 281, 284

n.2 (1982) (same); *State v. Church*, 168 W. Va. 408, 410 n.1, 284 S.E.2d 897, 899 n.1 (1981) (same). Because of this Court’s history of prohibiting appellate consideration of an issue not raised as an assignment of error, the majority opinion was without legal justification to *sua sponte* resolve the Elkins crimes on an issue not raised by the defendant.<sup>1</sup>

Assuming arguendo that the defendant alleged double jeopardy as an assignment of error to the Elkins crimes, there was no double jeopardy violation in his convictions and sentences for the crimes of fraudulent schemes and false pretenses. The statute setting out the fraudulent schemes offense specifically states that “[a] violation of law may be prosecuted under this section notwithstanding any other provision of this code.” W. Va. Code § 61-3-24d(c). Clearly, the legislative intent provides that this crime may be punishable regardless of any other criminal statute. Our cases have held that “[i]n ascertaining legislative intent, a court should look initially at the language of the involved statutes and, if necessary, the legislative history to determine if the legislature has made a clear expression of its intention to aggregate sentences for related crimes.” Syl. pt. 8, in part, *State v. Gill*, 187 W. Va. 136, 416 S.E.2d 253 (1992). Disregarding the clarity of

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<sup>1</sup>The majority opinion attempts to justify its *sua sponte* actions in this case in footnote 15 of the opinion. In that footnote the majority quotes *State v. Salmons*, 203 W. Va. 561, 571 n.13, 509 S.E.2d 842, 852 n.13 (1998), wherein we held that “[a]lleged errors of a constitutional magnitude will generally trigger a review by this Court under the plain error doctrine.” Obviously, the quote from *Salmons* does not support the majority’s actions in this case. *Salmons* specifically states that “alleged errors” may trigger the plain error rule. However, in the instant case the defendant did not “allege” any constitutional error.

the legislature's intent as embodied in W. Va. Code § 61-3-24d(c), the majority opinion makes the unconscionable conclusion "that the language at issue fails to constitute a clear and definite statement of such an intent." The majority's conclusion is wrong. What more could the legislature have done to express its clear intent to permit prosecution under W. Va. Code § 61-3-24d, regardless of any other offense charged?<sup>2</sup>

## II.

### ***Convictions and Sentences Involving Micro Vane, Inc.***

The defendant in this case was convicted and sentenced for committing the crimes of fraudulent schemes and embezzlement against Micro Vane Inc. (hereinafter referred to as "Micro"). The defendant contended in his brief that: "Appellant Rogers

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<sup>2</sup>The false pretense offense dates back to 1849, when West Virginia was part of Virginia. The fraudulent scheme offense was created in 1995. Clearly, if nothing else, the dates of the creation of the offenses should inform the majority that the legislature intended to create separate punishable offenses.

If the legislature had not made its intent clear with respect to the fraudulent scheme statute, I would readily concede that double jeopardy principles prevent a prosecution for both fraudulent scheme and false pretenses under the facts of the crimes against Elkins. However, I make this concession for reasons slightly different than those stated by the majority opinion. The majority states that the elements of false pretenses and fraudulent scheme are exactly the same. I disagree. As I discuss in Part II of this dissent, the fraudulent scheme statute requires the prosecutor to prove the element of a "common scheme or plan," which element is not part of the false pretense offense. See *infra* note 4.

cannot be convicted of both embezzlement and fraudulent schemes with regard to the same transaction. Appellant can either be the lawful possessor of the items or not. It cannot be both ways.” The defendant did not raise double jeopardy as a basis for challenging his crimes against Micro. The majority opinion *sua sponte* decided to raise this issue.

The majority opinion tersely reaffirmed its earlier conclusion that there was no clear legislative intent to prosecute for fraudulent schemes, in addition to other similar offenses.<sup>3</sup> After concluding that there was no clear legislative intent on the issue, the majority opinion turned to the *Blockburger/Zaccagnini* test, which holds: “Wher

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<sup>3</sup>I have previously stated my position that the legislature in fact expressly intended for the fraudulent schemes offense to be prosecuted in addition to other like offenses. See *supra* note 2 and accompanying text.

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After applying the *Blockburger/Zaccagnini* test, the majority opinion concluded that while the embezzlement offense contained an element different from the fraudulent schemes offense, the fraudulent schemes offense did not contain an element different from the embezzlement offense. This conclusion is incorrect. The majority opinion reached this wrong conclusion because it actually omitted the additional elements found in W. Va. Code § 61-3-24d that are not contained in the embezzlement statute. Specifically, the majority opinion failed to examine additional elements of the fraudulent schemes offense that are

contained in W. Va. Code § 61-3-24d(b).<sup>4</sup> Under W. Va. Code § 61-3-24d(b), the state may “cumulate” monies illegally obtained when there is proof of a “common scheme or plan.” The state does not have to prove a “common scheme or plan” to prosecute for the offense of embezzlement.<sup>5</sup> Had the majority opinion examined W. Va. Code § 61-3-24d in its entirety, it would have concluded that the crimes of fraudulent schemes and embezzlement each contain elements that are different.<sup>6</sup>

### **III.**

#### ***Disposition of Case***

The final dissenting issue involves the disposition of the case on remand. The majority opinion states that:

By requiring the entry of new conviction and sentencing

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<sup>4</sup>This provision of the statute is the basis for the legislature creating the crime of fraudulent schemes. Without the common scheme or plan provision, the crime of fraudulent schemes would indeed be identical to the crime of false pretenses. *See supra* note 2.

<sup>5</sup>One of the elements in the embezzlement offense that is not found in the fraudulent schemes offense is proof that a person came lawfully into possession of the property taken.

<sup>6</sup>The majority opinion failed to demonstrate an understanding of what the prosecution had to prove as to both offenses. The indictment in the case accused the defendant of embezzling “software and hardware pertaining to computer systems, which had come into his possession and had been placed under his care and management by virtue of his position and employment as sales representative of Micro Vane Inc.” On the other hand, the indictment accused the defendant of fraudulent schemes in his retention of the “money” he received from the embezzled computer equipment. Part of the “money” received by the defendant for the sale of the embezzled computer equipment belonged to Micro. In the final analysis, the prosecutor had to prove that the defendant embezzled computer equipment and engaged in fraudulent schemes to retain money that legally belonged to Micro.

orders, we do not mean to imply that a further pre-sentence report is required or that the trial court's discretion in permitting probation or imposing consecutive sentences should be disturbed. We leave those matters to the sound discretion of the trial court.

This disposition is flawed. In the language quoted above, the majority has implied that the trial court has discretion to resentence the defendant in any manner that it chooses. To the contrary, on remand the trial court may not impose a greater penalty than that which was originally imposed. That is, initially the trial court suspended the sentences and placed the defendant on probation. On remand, the trial court does not have discretion to deny the suspension and probation. “[A] defendant should not face increased punishment for having successfully appealed the initial conviction.” *People v. Harvest*, 84 Cal. App. 4th 641, 646, 101 Cal. Rptr. 2d 135, 137 (2000). *See also Reyes v. State*, 978 P.2d 635, 637 (Alaska 1999) (“One principle of double jeopardy law is that ‘once a sentence has been meaningfully imposed, it may not, at a later time, be increased.’” (quoting *Sonnier v. State*, 483 P.2d 1003, 1005 (Alaska 1971))).

For the reasons stated, I respectfully dissent from the majority opinion in this case.