No. 23063 – State of West Virginia v. Robert Lee Greene

Cleckley, Justice, concurring:

I concur in all respects with the result reached in the majority opinion. I write separately to add my observations to an issue only lightly raised by the State. The majority opinion is absolutely correct to proceed to the merits of the double jeopardy claim notwithstanding the failure of the defendant to raise it in the circuit court.

The State suggests the defendant has waived/forfeited the opportunity to raise the double jeopardy claim on appeal. Having felt the lash of administrative forfeiture of property, the defendant now asks this Court to reverse his guilty plea conviction and bar

further proceedings in the underlying criminal action on double jeopardy grounds. The difficulty is that the nisi prius court was never presented this issue and we are asked on appeal to review this constitutionally framed issue for the first time. In my mind, the threshold question is whether the defendant has vaulted this waiver/forfeiture hurdle.

Ordinarily, a criminal case is ripe for the ministrations of appeal only after the lower court has made a definitive ruling on the matter. As suggested above, in this instance, the defendant knocked on the appellate doors without ever asking the circuit court for a ruling or, for that matter, making a factual record on this precise issue. The defendant argues forcefully that because this issue comes

under the rubric of double jeopardy, he is permitted to evade the "forfeiture" bar.

To be clear, the State does not argue that the procedural bar in this case be imposed under the "raise or waive" rule but, instead, argues the defendant chose to enter a valid plea on the record without preserving his right to appeal the constitutional issue. Nevertheless, I believe it is appropriate to discuss the flexibility inherent in this Court to address issues not properly preserved below within the context of the "waive or raise" rule. First, to be sure, a defendant who fails to raise any issue in the circuit court proceeds at his or her peril even when the issue is of a constitutional dimension. The requirement that issues be preserved below is even more

pronounced in guilty plea cases. If any principle is well settled in this State, it is that, in the absence of special circumstances, a guilty plea waives all antecedent constitutional and statutory violations save those with jurisdictional consequences. See State v. Sims, 162 W. Va. 212, 248 S.E.2d 834 (1978). Also, a defendant has before him or her the procedural mechanism to protect his or her rights. Rule

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[1] A knowing and voluntary guilty plea waives all antecedent, nonjurisdictional defects. A double jeopardy claim is not a "true" jurisdictional issue (one that renders the court powerless to consider the case) and for that reason can be subject to waiver under appropriate circumstances. Absent exceptional circumstances, such as where the parties execute an agreement reached prior to the plea, this Court will not recognize an attempt to reserve the right of appeal nunc pro tunc. In short, the failure to follow the procedures set forth in Rule 11(a)(2) of the West Virginia Rules of Criminal Procedure will result in a valid guilty plea waiving all nonjurisdictional defects in the proceedings below.

11(a)(2) of the West Virginia Rules of Criminal Procedure provides the protection for a defendant who wants to plead guilty but nevertheless wants to appeal an alleged constitutional infirmity. See State v. Lilly, 194 W. Va. 595, 605-07, 461 S.E.2d 101, 111-13 (1995). (Cleckley, J., concurring). However, foolish consistency is the hobgoblin of little minds, see Ralph Waldo Emerson, "Self Reliance," in Essays First Series (1848), and, in the last analysis, all these

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[2]Rule 11(a)(2) provides:

> "Conditional pleas.--With the approval of the court and the consent of the state, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right, on appeal from the judgment, to review of the adverse determination of any specified pretrial motion. A defendant who prevails on appeal shall be allowed to withdraw the plea."

principles discussed above are procedural rules of discretion. Thus, although the rule requiring all appellate issues be raised first in the circuit court is important, it is not immutable: Our cases have made clear that the failure to raise issues below is not a jurisdictional prerequisite to an appeal but, rather, is a gatekeeper provision rooted in the concept of judicial economy, fairness, expediency, respect, and practical wisdom. Requiring issues to be raised at the trial level is a juridical tool, embodying appellate respect for the circuit court's advantage and capability to adjudicate the rights of our citizens.

This case, however, is not one in which, by neglecting to raise an issue in a timely manner, a litigant has deprived this Court of useful factfinding. The issue raised here, but omitted below, is purely

legal in nature and lends itself to satisfactory resolution on the existing record without further development of the facts. In other words, the defense of double jeopardy raised here is law-based, not fact-based, and our review of the circuit court's ruling is de novo. These attributes ease the way for permitting this appeal to go forward. More importantly, the defendant's belated proffer raises an issue of constitutional magnitude, a factor that favors review notwithstanding a procedural default. The omission below seems more inadvertent than deliberate; although withholding this argument could have had the effect of blindsiding the circuit judge and needlessly prolonging the litigation, it yielded no tactical advantage to the defendant. Finally, the double jeopardy issue implicates matters of great public moment and touches on policies involving effective

means to protect the public from drugs and other types of harm emanating from crime. I believe this sensitivity is appropriately expressed by a frank recognition that, when public, as well as institutional, interests are at stake, the case for the flexible exercise of a circuit court's discretion is strengthened and waiver rules ought not to be applied inflexibly.

Here, an important issue of public concern confronts us. It is presented belatedly, but it is in a posture that permits proper resolution on the existing record and works no unfair prejudice to either party. Failure to address and provide proper guidelines for future prosecutions when this issue of double jeopardy appears may well result in an unwarranted denial of justice. "Rules of practice

and procedure are devised to promote the ends of justice, not to defeat them." Hormel v. Helvering, 312 U.S. 552, 557, 61 S. Ct. 719, 721, 85 L.Ed. 1037, 1041 (1941).

Unquestionably, a colorable claim of former jeopardy need not invariably be presented in a circuit court before it is entitled to receive appellate consideration. Such claims are unique and distinctive because the Constitution insists that "'courts may not impose more than one punishment for the same offense and prosecutors ordinarily may not attempt to secure that punishment in more than one trial.'" Witte v. United States, __ U.S. __, __, 115

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[3]Indeed, a petition for extraordinary relief that raises a colorable claim of double jeopardy need not invariably await trial and conviction in the circuit court.

S. Ct. 2199, 2205, 132 L.Ed.2d 351, 362 (1995), quoting Brown v. Ohio, 432 U.S. 161, 165, 97 S. Ct. 2221, 2225, 53 L.Ed.2d 187, 194 (1977). (Emphasis added). See also State v. Sears, __ W. Va. __, 468 S.E.2d 324 (1996). Realization of the solemn promise of this constitutional guaranty makes it appropriate sometimes for appellate courts to entertain a claim that has not been raised or resolved below because otherwise a violation of the Double Jeopardy Clause would occur. Under a double jeopardy claim, a court must decide whether the State had the power to bring a defendant again into court. This issue surely has the sound of a jurisdictional-related question. I agree wholeheartedly with this argument, and I believe this is a classic case for invoking the exemption.

Second, there is an impressive body of authority suggesting a guilty plea does not necessarily waive a double jeopardy claim. See Menna v. New York, 423 U.S. 61, 96 S. Ct. 241, 46 L.Ed.2d 195 (1975); Blackledge v. Perry, 417 U.S. 21, 94 S. Ct. 2098, 40 L.Ed.2d 628 (1974). Concededly, however, the United States Supreme Court carved out an important exception to this general rule in United States v. Broce, 488 U.S. 563, 109 S. Ct. 757, 102 L.Ed.2d 927 (1989). Broce carved out a "face of the indictment" exception. Under Broce, if deciding a double jeopardy claim requires going beyond the existing record and holding a separate evidentiary hearing, a defendant's guilty plea bars any antecedent constitutional violations--including a double jeopardy claim. The justification for the Broce rule is that such a double jeopardy claim cannot be proven

without contradicting the existing record "and that opportunity is foreclosed by the admissions inherent in [the] guilty plea[]." 488 U.S. at 576, 109 S. Ct. at 766, 102 L.Ed.2d at 940. In explaining its departure from Blackledge and Menna, the Supreme Court made the following distinguishing analysis:

> "Both Blackledge and Menna could be (and ultimately were) resolved without any need to venture beyond [the record as it existed at the plea proceeding]. In Blackledge, the concessions implicit in the defendant's guilty plea were simply irrelevant, because the constitutional infirmity in the proceedings lay in the State's power to bring any indictment at all. In

> Menna, the indictment was facially duplicative of the earlier offense of which the defendant had been convicted and sentenced so that the admissions made by Menna's guilty plea could not conceivably be construed to extend beyond a redundant confession to the earlier offense." 488 U.S. at 575-76, 109 S. Ct. at 765-66, 102 L.Ed.2d at 940.

The Broce opinion has been explained as follows:

> "The Court explained that a guilty plea is more than a confession to specific acts described in an indictment; rather it constitutes an admission by the defendant that he or she committed the crime charged against him. Thus, the guilty pleas in Broce constituted admissions that the defendants were guilty of two separate crimes. Regardless of the defendants' subjective state of

> understanding or intent, by pleading guilty they gave up their right to prove, factually, that they were not." 1 Franklin D. Cleckley, Handbook on West Virginia Criminal Procedure 793 (1993).

Of course, the issue here is not whether the defendant is guilty of the crime charged in the indictment but whether he already has been punished for it. I believe Broce is inapposite and its holding in no way limits the opportunity for a criminal defendant to challenge the imposition of double punishment. If Broce means anything, it means that claims litigated below that are inconsistent with an admission of guilt are waived by a guilty plea. Clearly, the admission of guilt in no way impacted the issue of double punishment. Furthermore, whether the defendant's plea barred his claim of double jeopardy can

be determined merely by a study of the indictment and the existing record; no more is required.

In conclusion, it is my belief that the double jeopardy issue is properly before this Court and proceeding to resolve the issue on the merits is most consistent with our mission. See State v. LaRock, __ W. Va. __, __, 470 S.E.2d 613, 633 (1996) ("[t]he obligation of the courts to deliver justice is paramount, and it may not be scrapped for the benefit of cheaper and more rapid dispositions").