



IN THE SUPREME COURT OF THE STATE OF DELAWARE

RAYMOND E. BLAKE,	)	
	)	
Defendant-Below,	)	
Appellant,	)	No. 282, 2012
	)	
v.	)	On Appeal from the
	)	Superior Court of the
STATE OF DELAWARE,	)	State of Delaware in and
	)	for New Castle County
Plaintiff-Below,	)	
Appellee.	)	

STATE'S ANSWERING BRIEF

STATE OF DELAWARE
DEPARTMENT OF JUSTICE

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Dated: October 8, 2012

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NATURE AND STAGE OF PROCEEDINGS

Wilmington Police arrested Raymond Blake on January 19, 2011. (D.I. 1). On March 14, 2011, a New Castle County grand jury indicted Blake on charges of: trafficking in heroin (16 Del. C. § 4753A(a)(3)(a)); possession with intent to deliver heroin (16 Del. C. § 4751); trafficking in cocaine (16 Del. C. § 4753A(a)(2)(a)); possession with intent to deliver cocaine (16 Del. C. § 4751); and maintaining a vehicle for keeping controlled substances (16 Del. C. § 4755(a)(5)). (D.I. 9). Beginning on October 4, 2011, Superior Court held a two-day jury trial. (D.I. 41). Prior to the start of trial, the prosecutor voluntarily dismissed the charge of trafficking in heroin. The jury hung on the charge of trafficking in cocaine, found Blake not guilty of maintaining a vehicle, and found him guilty of the lesser-included offenses of possession of cocaine and possession of heroin. (D.I. 41).

On October 24, 2011, a grand jury re-indicted Blake on charges of trafficking in cocaine and trafficking in heroin. (D.I. 48). On December 12, 2011, Blake moved to dismiss the charge of trafficking in heroin from the re-indictment. (D.I. 57). Superior Court denied Blake's motion to dismiss the re-indicted charge on January 3, 2012, and also granted Blake's motion to represent himself.

(D.I. 67 & 68). Beginning on January 4, 2012, Superior Court held a three-day trial, at the conclusion of which the jury convicted Blake of both re-indicted charges. (D.I. 73). On March 9, 2012, Blake moved to vacate his convictions for both possession and trafficking, or alternatively merge those sentences. (D.I. 78). On April 26, 2012, Superior Court denied Blake's motion. (D.I. 93). On April 27, 2012, Superior Court sentenced Blake as follows: trafficking in heroin—5 years at level V; trafficking in cocaine—3 years at level V; possession of cocaine—1 year at level V, suspended for decreasing levels of supervision; possession of heroin—1 year at level V, suspended for 1 year at level III. (D.I. 96).

Blake filed a timely notice of appeal, and has filed an opening brief and appendix in support of his appeal. This is the State's answering brief.

SUMMARY OF ARGUMENT

1. Appellant's first argument is ADMITTED in part, and DENIED, in part. Blake's January 2012 trial for trafficking in cocaine and heroin did not constitute a Double Jeopardy violation. Blake's October 2011 trial did not resolve his trafficking charges, one of which the jury failed to reach a verdict and the other which the prosecutor erroneously dismissed prior to the start of that first trial. Blake's convictions for possession of both cocaine and heroin, as lesser-included offenses of possession with intent to deliver those drugs, did not preclude his subsequent prosecution for trafficking. These possession sentences, however, must merge with his trafficking sentences, and the matter should be remanded for that limited purpose.

2. Appellant's second argument is DENIED. Blake's January 2012 trial did not amount to vindictive prosecution. Re-prosecution of the trafficking in cocaine charge followed the October 2011 jury's failure to reach a verdict on that count. Blake never faced a jury verdict on the trafficking in heroin charge because the prosecutor erroneously dismissed the count prior to the start of the first trial on the mistaken belief that the drugs failed to satisfy the weight threshold. The prosecutor realized his

error during the course of the October 2011 trial, and, immediately after the jury announced its verdict, informed the Superior Court of his intention to re-indict that trafficking charge. The prosecutor did not re-indict Blake to punish him for the exercise of a constitutional right. The re-indictment did not include any charges that did not exist in the original indictment. Superior Court committed no error in holding that vindictive prosecution was not the cause of Blake's re-indictment.

STATEMENT OF FACTS

On November 8, 2011, a confidential informant, in the presence of Wilmington Police Detective Joshua Wilkers, placed a phone call to Raymond Blake to purchase an "eight ball" of crack cocaine for \$225. [B-5]. Detectives Heather Pierson and Vincent Jordan were conducting surveillance of Blake's residence at the time of this phone call. [B-8]. The location of the purported drug purchase was the intersection of Fifth and Lincoln Streets. [B-5]. Approximately half-an-hour after this phone call, police saw Blake leave 1821 West Fourth Street, and soon arrive at the intersection of Fifth and Lincoln. [A-77; B-8].

Wilmington Police removed Blake from his car once he arrived. *Id.* A search of Blake's coat revealed 31 plastic baggies containing crack cocaine, four vials containing cocaine, and 52 baggies with blue wax paper containing heroin stamped "Taliban." After taking Blake into custody, Blake signed a form consenting to the search of his residence, 1821 West Fourth Street. [B-6]. Blake agreed to cooperate with police to investigate other criminal activity, in exchange for which, police would not formally arrest Blake. [B-7]. Next, Blake accompanied police to his residence and indicated where they could find additional drugs. [B-9]. In Blake's bedroom, police

located a small refrigerator, inside of which they collected 65 plastic baggies. [A-78]. Nine of these baggies were stamped "A+," four stamped "Who wants this," and 52 stamped "Taliban." *Id.* A glass jar in a cardboard box contained cocaine. *Id.* These drugs combined to weigh 12.27 grams of cocaine and 2.66 grams of heroin. [A-79-80].

After providing police with information that led to the arrest of two persons related to guns, and participating in two or three controlled drug purchases, Blake broke all contact with police. [B-10].

**1. BLAKE'S TRIAL FOR TRAFFICKING IN COCAINE AND
HEROIN DID NOT VIOLATE THE CONSTITUTIONAL
PROHIBITION AGAINST DOUBLE JEOPARDY.**

Question Presented

Whether the Double Jeopardy Clause precludes the prosecution of a defendant for trafficking when he has previously been convicted of simple possession as a lesser-included offense of possession with intent to deliver?

Standard and Scope of Review

This Court reviews an alleged Double Jeopardy Clause violation for plain error when the defendant has failed to raise that claim in the trial court. *Johnson v. State*, 5 A.3d 617, 620 (Del. 2010); *Nance v. State*, 903 A.2d 283, 285 (Del. 2006). See also DEL. SUPR. CT. R. 8 ("Only questions fairly presented to the trial court may be presented for review; provided, however, that when the interests of justice so require, the Court may consider and determine any question not so presented."). Plain error must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial. *Johnson*, 5 A.3d at 620.

Argument

Blake contends that his trial for trafficking in cocaine and heroin violated the constitutional prohibition against Double Jeopardy because a jury had previously found

him guilty of possession of both cocaine and heroin in a previous trial. If those simple possession convictions had been lesser-included offenses of trafficking, Blake would have a valid argument. But those possession convictions came about from charges of possession with the intent to deliver. Therefore, Blake's trial for trafficking in cocaine and heroin did not subject him to Double Jeopardy.

Both the United States and Delaware Constitutions contain Double Jeopardy clauses: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb" U.S. Const. amend. V; "no person shall be for the same offense twice put in jeopardy of life or limb" DEL. CONST. art. I, § 8. These constitutional provisions are designed to protect defendants from successive prosecutions for the same crime, from multiple charges under separate statutes requiring proof of the same factual events, and from multiple charges under the same statute. *E.g.*, *Zugehoer v. State*, 980 A.2d 1007, 1013 (Del. 2009); *Spencer v. State*, 868 A.2d 821, 822-23 (Del. 2005); *Poteat v. State*, 840 A.2d 599, 603 (Del. 2003); *Washington v. State*, 836 A.2d 485, 487 (Del. 2003).

Blake's argument appears to fall under both the first and second theories underlying the proscription against Double Jeopardy. Blake, however, does not dispute that

possession with intent to deliver and trafficking are different crimes, both of which contain an element the other does not. Op. Brf. at 12. He argues that because the jury in his first trial acquitted him of possession with intent to deliver (regarding both heroin and cocaine), and possession is lesser-included offense of both PWITD and trafficking, that he has now been tried twice for the same crime.

In his October 2011 trial, the jury never returned a verdict related to any charge of trafficking. "The Double Jeopardy Clause protects against being tried twice for the same offense. The Clause does not, however, bar a second trial if the first ended in a mistrial." *Blueford v. Arkansas*, 132 S.Ct. 2044, 2048 (2012). A mistrial based on a jury's inability to reach a verdict amounts to the classic basis to establish a manifest necessity to permit a retrial. *Blueford*, 132 S.Ct. at 2052, citing *Wade v. Hunter*, 336 U.S. 684, 690 (1949); *Arizona v. Washington*, 434 U.S. 497, 509 (1978). Regarding trafficking in heroin, no jury considered Blake's guilt as to that charge. As to trafficking in cocaine, the first jury to consider that claim did not return a verdict. Blake simply has not been put in jeopardy twice for either trafficking in heroin or trafficking in cocaine.

Recognizing the flaw in his reasoning, Blake also asserts that the jury's acquittal of him for PWITD and conviction for possession of both heroin and cocaine collaterally estopped the State from trying him for trafficking in either heroin or cocaine. Op. Brf. at 14. The United States Supreme Court's decision in *Bobby v. Bies*, 556 U.S. 825 (2009), resolves that argument against Blake. "[I]ssue preclusion is a plea available to *prevailing* parties. The doctrine bars relitigation of determinations necessary to the ultimate outcome of a prior proceeding. ... Issue preclusion, in short, does not transform final judgment losers, in civil or criminal proceedings, into partially prevailing parties." *Id.* at 829 (emphasis added). "Issue preclusion bars successive litigation of 'an issue of fact or law' that 'is actually litigated and determined by a valid and final judgment, and ... is essential to the judgment.' ... If a judgment does not depend on a given determination, relitigation of that determination is not precluded." *Id.* at 834, quoting Restatement (Second) of Judgments § 27 (1980). Here, Blake contends, as a non-prevailing party in his first trial, that "when [the jury in the first trial] rejected the State's argument that Blake intended to sell the drugs, it rejected a finding that he possessed the drugs and

paraphernalia in the house.” Op. Brf. at 17. The first jury’s decision to acquit Blake of PWITD contained no findings of fact such as the one Blake now seeks to read into it. The jury in the first trial could not reach a verdict on trafficking in cocaine, and was never presented with the charge of trafficking in heroin. Blake’s effort to read-in other factual findings to the first jury verdict is inconsistent with *Bies*. The critical element of trafficking is the weight of the drugs, in this case cocaine and heroin. Nothing in the jury’s October 2011 verdict rendered a finding of fact as to the amount of either cocaine or heroin that Blake possessed. As such, Blake does not have a valid Double Jeopardy/collateral estoppel defense to his trafficking convictions.

Blake has also, at a minimum, requested that this Court merge his respective convictions for possession of heroin and cocaine with his convictions for trafficking in heroin and cocaine. Op. Brf. at 14 n. 8; 18 n.13. On this point, the State agrees with Blake. Given the unusual procedural history under which the verdicts were rendered, the State suggests that merger of the sentences is appropriate. The State has previously conceded, and this Court has held, that because possession is a lesser-included offense of trafficking, that Double Jeopardy

prohibits sentences for both crimes. *Hickman v. State*, 2002 WL 1272154, at *1 (Del. June 7, 2002); *McRae v. State*, 2001 WL 1175349, at * 4 (Del. Oct. 1, 2001), citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932). *Cf. Winston v. State*, 1993 WL 22014, at *4 (Del. Jan. 11, 1993) (no double jeopardy violation for convictions under both PWITD and trafficking because each crime contains an element not contained in the other). Thus, although Blake's convictions for possession of cocaine and possession of heroin did not bar his prosecutions for trafficking, once Blake was found guilty of trafficking, the mere possession convictions that arose from the original PWITD counts had to merge with trafficking for purposes of sentencing. Therefore, this Court should remand this matter with instructions to vacate Blake's sentences for possession of heroin and possession of cocaine.

**2. SUPERIOR COURT PROPERLY DETERMINED
THAT THE RE-INDICTMENT DID NOT
CONSTITUTE VINDICTIVE PROSECUTION.**

Question Presented

Whether a prosecutor's decision to re-indict a charge that he voluntarily dismissed based on his error in calculating the weight of drugs may accurately be described as "vindictive" for purposes of Due Process?

Standard and Scope of Review

This Court reviews the Superior Court's denial of a motion to dismiss for abuse of discretion. *Smith v. State*, 2001 WL 1006207, at *1 (Del. Aug. 7, 2001). This Court reviews constitutional claims *de novo*. *E.g.*, *Powell v. State*, 49 A.3d 1090, 1103 (Del. 2012).

Argument

Blake contends that the prosecutor's decision to seek a re-indictment on charges of trafficking in heroin and trafficking in cocaine was vindictive and rose to the level of a Due Process violation. The record reflects that the jury in Blake's first trial failed to reach a verdict on the charge of trafficking in cocaine. Blake has not alleged that his re-trial on the trafficking in cocaine charge was inappropriate. Instead he focuses on the "new" charge of trafficking in heroin. Op. Brf. at 19. Citing the Superior Court's decision in *State v. Moran*, 820 A.2d

831 (Del. Super. Ct. 2002), Blake asserts that a “rebuttable presumption” of vindictiveness exists, and that he need not make any showing of actual bad faith or vindictiveness on the part of the prosecutor. Op. Brf. at 20.

In rejecting Blake’s argument, the Superior Court began with the proposition that Criminal Rule 48(a)¹ permits the State to dismiss a charge without leave of court or consent of the defendant prior to trial, and that section 207 of title 11 permits the State to re-indict and prosecute a defendant for an offense following the entry of a voluntarily dismissed charge. Op. Brf. Ex. B at 4, citing *State v. Wilmer*, 2003 WL 751181, at *4 (Del. Super. Ct. Mar. 12, 2003), *aff’d* 2003 WL 21519871 (Del. July 3, 2003). Superior Court made a finding of fact that the prosecutor’s reason for voluntarily dismissing the charge of trafficking in heroin prior to the commencement of the first trial was his error in calculating the weight of drugs necessary to sustain a charge of trafficking. Op.

¹ “The attorney general may without leave of the court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without the consent of the defendant or after conviction without leave of the court.” DEL. SUPER. CT. CRIM. R. 48(a).

Brf. Ex. B at 6-7. The record supports the Superior Court's factual finding.

Prior to the start of Blake's first trial on October 4, 2011, the prosecutor informed the Court that it would enter a *nolle prosequi* on count 1 of the indictment—trafficking in heroin. [B-3]. The prosecutor made this decision based on his review of only page one of a two-page controlled substances laboratory report. The Medical Examiner tested different packages of drugs. Only one of the sets of materials related to heroin appeared on the first page of the report. The heroin listed on the first page of the report weighed only .03 grams. [B-1]. The second page of the report contained additional quantities of heroin which surpassed the trafficking threshold. [B-2]. Immediately after the jury returned its verdict on October 5, 2011, the Superior Court asked the prosecutor what he planned to do regarding the trafficking charges. [B-4]. The prosecutor stated: "I'll tell you right now, I'm going to try it. I'm going to reindict him on the heroin trafficking, because it was null prossed [sic] in error. It weighs actually more than 2.5, and I made an error in math when I null prossed [sic] it, so you can expect a Rule 9 on that." *Id.* Blake expressed his opposition to the State's plan. *Id.* In its January 3,

2012 order prior to the commencement of Blake's second trial, the Superior Court found: "there is nothing in the record to suggest that the State reindicted Trafficking in Heroin either because Blake was acquitted on the Possession with Intent to Deliver charges or the jury was hung on Trafficking in Cocaine." Op. Brf. Ex. B. at 7.

The United States Supreme Court has found that when a prosecutor seeks increased punishment against a defendant for exercising an appellate right, that such conduct is presumably vindictive and violates the Due Process Clause of the Fourteenth Amendment. *Blackledge v. Perry*, 417 U.S. 21, 28-29 (1974). This Court extended *Perry's* rationale to circumstances when a defendant moves for a mistrial, and after that motion has been granted, the prosecution obtains an enlarged indictment. *Johnson v. State*, 396 A.2d 163, 165 (Del. 1978).

But when not in response to a defendant's exercise of a constitutional right, prosecutors have broad discretion in selecting what charges to file. *Wayte v. United States*, 470 U.S. 598, 607 (1985). Judicial supervision over a prosecutor's charging decision "threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's

enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute." *Id.* at 607-08.

Here, in between his two trials, Blake neither successfully appealed, nor obtained a mistrial. The original indictment contained the charge of trafficking in heroin, just as did the re-indictment. The prosecutor dismissed that charge prior to the start of the first trial as the result of a math error in calculating the weight of the drug necessary to sustain the charge. Thus, because the prosecutor did not increase the severity of the charges between the original indictment and the re-indictment, *Perry's* "presumption" of vindictiveness does not come into play. Superior Court committed no error in denying Blake's motion to dismiss the re-indictment.

CONCLUSION

The judgment of the Superior Court should be affirmed, in part, and reversed and remanded with instructions to vacate Blake's sentences for possession of cocaine (11-01-1706) and possession of heroin (11-01-1705).

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Dated: October 8, 2012

CERTIFICATION OF SERVICE/MAILING

The undersigned certifies that on October 8, 2012, he caused the attached *Answering Brief* to be delivered to the following persons in the form and manner indicated:

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