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Multiple Punishments for Similar Crimes: Is the Double Jeopardy Clause Violated?

by Jimmy Gurule

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The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST., amend V. As the Supreme Court observed in *North Carolina v. Pearce*, 395 U.S. 711 (1969), the Double Jeopardy Clause embodies three constitutional protections. In *Pearce*, the Court declared that the Clause "protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense." 395 U.S. at 717.

When two statutes punish the same conduct and the defendant is convicted of each offense in a single prosecution, does imposing cumulative punishment violate the protections afforded by the Double Jeopardy Clause? The critical inquiry is whether or not the legislature intended cumulative punishment for the offenses. If the legislature clearly expressed its intent that cumulative punishment should be imposed, principles of double jeopardy are not offended. See *Garrett v. United States*, 471 U.S. 773 (1985).

ISSUE

Does the Double Jeopardy Clause bar entry of judgments of conviction and the imposition of concurrent sentences on a defendant convicted in a single proceeding of conspiracy to distribute a controlled substance and conducting a continuing criminal enterprise, when the two offenses are based on the same criminal agreement?

FACTS

Tommy Lee Rutledge was the leader of a large drug organization that distributed multikilogram quantities of cocaine from 1988 to 1990. He allegedly bought cocaine from the Latin Kings street gang in Chicago, Illinois, for distribution in Warren County, in northern Illinois. In 1991, Rutledge was indicted for various federal drug and firearms offenses, including operating a continuing criminal enterprise ("CCE") in violation 21 U.S.C. § 848 (1988); conspiring to distribute cocaine in violation of 21 U.S.C. § 846; distributing

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TOMMY L. RUTLEDGE V.
UNITED STATES
DOCKET NO. 94-8769

ARGUMENT DATE:
NOVEMBER 27, 1995
FROM: THE SEVENTH CIRCUIT

Case at a Glance

Criminal defendants often are charged and convicted of multiple offenses. And often one offense is a lesser included offense of another, which means that proving one offense proves the other. If the offender is sentenced for both crimes, is the prohibition against double jeopardy violated? That is the question the Supreme Court addresses in this drug trafficking case, a case in which two concurrent life imprisonment sentences were imposed for virtually the same conduct.





cocaine in violation of 21 U.S.C. § 841(a)(1); possessing a firearm after being convicted of a felony in violation of 18 U.S.C. § 922(g); and using or carrying a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c).

After a jury trial in the federal district court, Rutledge was convicted on all counts. At sentencing, the district court imposed separate terms of life imprisonment on the CCE, drug conspiracy, and drug distribution convictions. The court imposed other terms of imprisonment on the firearms convictions, but these convictions are not at issue. The judgment of the district court specified that the life sentences imposed on the CCE and the drug conspiracy violations would run concurrently.

On appeal to the Seventh Circuit, Rutledge maintained that the entry of separate judgments of conviction on the CCE and conspiracy charges and the imposition of separate, concurrent sentences for those offenses violated the Double Jeopardy Clause's prohibition against multiple punishments for the same offense. While the Seventh Circuit agreed that "the conspiracy charge is a lesser included offense of the CCE charge," it nonetheless explicitly rejected Rutledge's double jeopardy argument. 40 F.3d 879, 886 (7th Cir. 1994).

The Seventh Circuit opined that "concurrent sentences may be imposed for conspiracy and CCE provided the cumulative punishment does not exceed the maximum under the CCE act." The court held that "by imposing concurrent sentences, the district court did not impose a cumulative penalty, and Rutledge's sentence is proper." 40 F.3d at 886.

Finding no violation of the Double Jeopardy Clause, the Seventh

Circuit affirmed Rutledge's convictions and sentences for CCE and conspiracy. It is this decision that the Supreme Court reviews, having granted Rutledge's petition for a writ of certiorari. 115 S. Ct. 2608 (1995).

CASE ANALYSIS

The facts in this case implicate the double jeopardy bar against multiple punishments for the same offense. In determining if the imposition of concurrent sentences for drug-related conspiracy and for conducting a CCE offends the Double Jeopardy Clause, the dispositive question is whether or not Congress intended that an offender be punished separately for each offense. If Congress has not authorized cumulative penalties, double jeopardy prohibits such punishment. *See Garrett*, 471 U.S. at 778.

Rutledge maintains that the Supreme Court answered this threshold question against the Government in *Jeffers v. United States*, 432 U.S. 137 (1977) (plurality opinion). (Refer to Glossary for the definition of plurality opinion.)

In *Jeffers*, the defendant was indicted for conspiring to distribute illicit drugs; in a separate indictment, the defendant was charged with operating a CCE. Jeffers opposed the Government's pretrial motion to consolidate the two trials, arguing that he would be prejudiced. The district court agreed, and the conspiracy and CCE charges were prosecuted in separate trials.

Jeffers was convicted in both criminal proceedings. In the first trial on the drug conspiracy charge, Jeffers was sentenced to a 15-year term of imprisonment and fined \$25,000. In the second trial on the CCE charge, he was sentenced to life imprisonment and fined \$100,000, the sentence to run consecutively to the prior sentence for conspiracy.

Jeffers appealed, claiming that under the Double Jeopardy Clause, his CCE conviction and sentence imposed after a conviction and sentence for drug conspiracy constituted multiple prosecution and the imposition of multiple punishments for the same offense. The Supreme Court rejected Jeffers' argument, holding that the second prosecution did not offend double jeopardy principles because Jeffers had opposed having the CCE and conspiracy charges prosecuted in a single proceeding. In effect, the Court reasoned that Jeffers had waived any double jeopardy claim he may have had.

The Court, however, did take exception to the cumulative fines imposed at the second sentencing, fines that, taken together, exceeded the maximum \$100,000 fine permitted under the CCE statute. Four Justices concluded that Congress did not intend "to allow cumulative punishment for violations of Sections 846 and 848." 432 U.S. at 157. Accordingly, the Court remanded the case with an instruction to the district court that the cumulative fines imposed against Jeffers could not exceed the maximum permitted under the CCE statute. Interestingly, the Court left intact the cumulative, consecutive prison sentences imposed in the two proceedings for violations of Sections 846 and 848.

Rutledge interprets *Jeffers* to preclude cumulative punishment for drug conspiracy and CCE convictions and construes cumulative punishment to encompass the imposition of concurrent sentences. The United States, on the other hand, argues that *Jeffers* only prohibits imposition of cumulative punishment that exceeds the maximum sentence prescribed for a CCE conviction.



The Government stresses that the *Jeffers* Court only remanded the case on the issue of the imposition of cumulative fines that exceeded the statutory maximum. The Court did not disturb *Jeffers*' dual convictions and cumulative prison sentences on the drug conspiracy and CCE convictions because, even served consecutively, they did not exceed the maximum prison sentence under the CCE statute, which is life. Similarly, since Rutledge's separate terms of life imprisonment for conspiracy and CCE were imposed to run concurrently, the Government asserts that the sentences do not exceed the maximum sentence permitted for a CCE.

In this case, the Supreme Court is called on to clarify its earlier result in *Jeffers*. Did Congress intend to prohibit the imposition of a sentence in addition to a sentence imposed for operating a CCE, or did Congress merely intend to prohibit cumulative sentences that exceed the maximum sentence permitted for conducting a CCE?

Rutledge advances a second major argument. Relying on the Supreme Court's decision in *Ball v. United States*, 470 U.S. 856 (1985), Rutledge maintains that the double jeopardy bar against multiple punishments not only prohibits the imposition of separate sentences but also precludes the entry of separate judgments of convictions for both offenses.

In *Ball*, the Supreme Court held that Congress did not intend to permit cumulative punishment for the same conduct that resulted in violations of two separate statutes, one statute that prohibited receiving a firearm by a convicted felon, 18 U.S.C. § 922(h)(1), and one that prohibited possessing the same firearm by a convicted felon, 18 U.S.C. § 1202(a)(1). Of significance from

Rutledge's point of view, the Court in *Ball* stressed that punishment prohibited by the Double Jeopardy Clause includes "a criminal conviction and not simply the imposition of sentence." 470 U.S. at 861.

In *Ball*, the Supreme Court had two grounds for concluding that the Double Jeopardy Clause forbids even the entry of a second judgment of conviction in cases where the legislature did not intend cumulative punishment. First, the entry of multiple judgments of conviction might result in an increased sentence under some recidivist statute implicated at some later time, and "the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction." 470 U.S. at 865. Rutledge maintains that both of those concerns are present when a defendant is convicted of conspiracy and operating a CCE. Thus, under *Ball*, Rutledge maintains that the separate judgment of conviction for conspiracy must be vacated.

In opposition, the United States argues that the threat of adverse consequences in this case is much less than in *Ball*. First, the Government maintains that with respect to sentencing under recidivist provisions, the Federal Sentencing Guidelines would not produce an enhanced sentence in subsequent sentencing merely because of the entry of dual convictions for conspiracy and CCE. Second, with respect to the societal stigma or use of the second conviction for impeachment, the Government argues that the CCE offense is one of the most serious federal criminal offenses, and it is doubtful that a defendant, once convicted of CCE, would suffer any incremental stigma as the result of being convicted of a Section 846 drug conspiracy.

Finally, the United States asserts a practical consideration militating against vacating a conspiracy conviction and sentence. If the Supreme Court were to hold that the Double Jeopardy Clause mandates vacating both the entry of a Section 846 judgment of conviction and sentence and the defendant were successful in having the CCE conviction overturned on appeal, the defendant would reap a windfall by avoiding punishment altogether for the conspiracy conviction. Certainly, the Government maintains, Congress did not intend this result.

To avoid this legal dilemma in the event Rutledge were to prevail on his double jeopardy argument, the Government urges the Court to adopt the approach taken by the Second Circuit of merging the two convictions into a single conviction so that only one remains. See *United States v. Aiello*, 771 F.2d 621 (2d cir. 1985). Under that approach, "the conviction for the lesser offense would cease to exist unless the conviction for the greater offense should be reversed, in which event the defendant could be punished for the lesser offense." 771 F.2d at 632. Thus, if the CCE conviction were reversed on appeal, a court could reinstate the conspiracy conviction so that the offender would not avoid punishment. Any time already served would be counted against the sentence imposed on the conspiracy conviction.

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SIGNIFICANCE

The issue of whether or not entry of separate judgments of conviction and concurrent sentences for drug conspiracy and CCE convictions violates the Double Jeopardy Clause has divided the federal circuits. While a majority of circuits have interpreted the Double Jeopardy Clause to require that a Section 846 conspiracy conviction and sentence be vacated, four circuits have departed from this position.

In addition to the Second Circuit in *Aiello*, the Third, Seventh, and Ninth Circuits have adopted other approaches. In *United States v. Fernandez*, 916 F.2d 125 (3d Cir. 1990), the Third Circuit allowed retention of both the conspiracy and the CCE convictions but required

that any sentence imposed for a conviction on the lesser included conspiracy charge be vacated. And, in *United States v. Medina*, 940 F.2d 1247, 1253 (9th Cir. 1991), the Ninth Circuit directed the district court to impose a sentence on the CCE count and an alternative sentence on the conspiracy conviction. The conspiracy conviction and sentence would then be vacated subject to the condition that the CCE conviction is not reversed on appeal. The Seventh Circuit, as reflected in *Rutledge v. United States*, would permit both conspiracy and CCE convictions and sentences to stand as long as the cumulative sentences for both offenses do not exceed the maximum sentence for operating a CCE.

These conflicting views of the Double Jeopardy Clause have yielded inconsistent and seemingly unfair results depending on where a defendant is tried and convicted on drug conspiracy and CCE charges. It is anticipated that the Supreme Court's decision in this case will address these concerns and resolve the conflict by announcing a uniform rule.

ATTORNEYS OF THE PARTIES

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