2016 IL App (5th) 140429-U

NO. 5-14-0429

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 04-CF-1761
	)	
DARRON R. PERKINS,	)	Honorable
	)	Jan V. Fiss,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE WELCH delivered the judgment of the court.
Justices Chapman and Stewart concurred in the judgment.

ORDER

¶ 1 *Held*: Where the constitutional prohibition against double jeopardy does not bar reprosecution of defendant on two counts of attempted first-degree murder, and any argument to the contrary would lack merit, appointed appellate counsel is granted leave to withdraw and the circuit court's order denying defendant's motion to dismiss the attempted-murder counts is affirmed.

¶ 2 The defendant, Darron R. Perkins, appeals from the circuit court's order denying his motion to dismiss counts of an indictment. His appointed attorney on appeal, the Office of the State Appellate Defender (OSAD), has concluded that this appeal lacks merit. On that basis, OSAD has filed a motion to withdraw as counsel, in accordance with the procedures outlined in *Anders v. California*, 386 U.S. 738 (1967), and *People v.*

Jones, 38 Ill. 2d 384 (1967). The defendant has filed a written reply to OSAD's motion. This court has examined the entire record on appeal, as well as this court's decisions in the defendant's two previous appeals in this case, and has determined that OSAD's motion is well-taken. The motion is granted, and the judgment of the circuit court is affirmed.

¶ 3 BACKGROUND

¶ 4 In January 2005, the defendant was charged by indictment with seven felony counts, *viz.*: (I) first-degree murder of Keith Williams, (II) attempted first-degree murder of Halbert Alexander, (III) attempted first-degree murder of Michael Foster, (IV) armed violence for shooting Michael Foster, (V) armed violence for shooting Alexander, (VI) aggravated battery with a firearm for shooting Foster, and (VII) aggravated battery with a firearm for shooting Alexander. Each of the two armed-violence counts was predicated on the felony of aggravated battery (720 ILCS 5/12-4(a) (West 2004)).

¶ 5 In June 2008, the cause proceeded to trial by jury. The jury returned verdicts of guilty on counts IV, VI, and VII, *i.e.*, armed violence for shooting Foster, aggravated battery with a firearm for shooting Foster, and aggravated battery with a firearm for shooting Alexander, respectively. The jury returned a verdict of not guilty on count V, *i.e.*, armed violence for shooting Alexander. On counts I, II, and III, *i.e.*, the lone count of first-degree murder and the two counts of attempted first-degree murder, the jury was deadlocked, and the court declared a mistrial with regard to those three counts.

¶ 6 Subsequently, the circuit court sentenced the defendant to imprisonment as follows: 30 years for armed violence for shooting Foster (count IV) and 10 years for

aggravated battery with a firearm for shooting Alexander (count VII), with the sentences to run consecutively. Applying the one-act-one-crime rule, the court did not impose a sentence for aggravated battery with a firearm for shooting Foster (count VI).

¶ 7 The defendant appealed from the judgment of conviction. He argued to this court that (1) the trial evidence, which included allegedly conflicting testimony by the State's witnesses, did not support the two convictions entered, and (2) the sentences represented an abuse of discretion in light of the defendant's background. This court rejected both arguments and affirmed the judgment of conviction. See *People v. Perkins*, No. 5-08-0574 (Feb. 23, 2011) (unpublished order under Illinois Supreme Court Rule 23).

¶ 8 The State proceeded on the three counts for which a mistrial had been declared, *i.e.*, first-degree murder of Williams (count I), attempted first-degree murder of Alexander (count II), and attempted first-degree murder of Foster (count III).

¶ 9 In February 2011, the defendant filed a motion to dismiss the two counts of attempted first-degree murder (counts II and III). He argued that reprosecution on the attempted-murder counts was barred, on double-jeopardy grounds, by the jury's guilty verdicts on the two counts of aggravated battery with a firearm. (The defendant did not move to dismiss count I.) In May 2011, the court denied the motion to dismiss. The defendant appealed.

¶ 10 In deciding the appeal, this court assumed *arguendo* that the two counts of aggravated battery with a firearm were based on the same two physical acts as the two counts of attempted first-degree murder. Then, this court found that aggravated battery with a firearm is not a lesser-included offense of attempted first-degree murder for

double-jeopardy purposes. On that basis, this court concluded that reprosecution of the defendant on the two attempted-murder counts was not barred, on double-jeopardy grounds, by the jury's verdicts on the two aggravated-battery-with-a-firearm counts. The judgment denying the defendant's motion to dismiss the attempted-murder counts was affirmed. *People v. Perkins*, 2012 IL App (5th) 110403-U.

¶ 11 Back in the circuit court, the defendant on April 16, 2014, filed a motion to dismiss counts of the indictment, on two different grounds. First, he argued that reprosecution on the attempted-murder counts was barred, on double-jeopardy grounds, by the jury's verdicts on the two armed-violence counts (guilty as to complainant Foster, not guilty as to complainant Alexander). Second, he argued that the indictment should be dismissed because it was obtained in violation of due process. Specifically, the defendant alleged that the State's sole witness before the grand jury, police detective Mario Fennoy, gave perjured testimony about the type of bullets found at the crime scene, and without this perjured testimony the evidence was insufficient to support the indictments against the defendant. The defendant added that the indictment included the name of a law enforcement officer other than Detective Fennoy, and did not include Fennoy's name.

¶ 12 The court held a hearing on the defendant's motion to dismiss counts. On July 23, 2014, the court entered an order denying the motion in its entirety. The court found that (1) double-jeopardy principles did not bar reprosecution on the two counts of attempted first-degree murder, the armed-violence verdicts notwithstanding, because armed violence was not a lesser-included offense of attempted first-degree murder, and (2) no material errors were made, and due process was not violated, during the grand jury

proceedings. The defendant filed a timely notice of appeal, thus perfecting the instant appeal.

¶ 13 ANALYSIS

¶ 14 This appeal is from an order denying the defendant's motion to dismiss counts of an indictment. An order denying a criminal defendant's motion to dismiss counts of an indictment is an interlocutory order, not a final order. *People v. Miller*, 35 Ill. 2d 62, 67 (1966). In general, reviewing courts lack jurisdiction to review orders or judgments that are not final. Ill. Const. 1970, art. VI, § 6; *Miller*, 35 Ill. 2d at 67. One exception to the general rule is applicable here: a defendant may appeal "the denial of a motion to dismiss a criminal proceeding on grounds of former jeopardy." Ill. S. Ct. R. 604(f) (eff. Dec. 3, 2015). Accordingly, this court has jurisdiction to consider the issue of whether double-jeopardy principles bar the reprosecution of the defendant on the two counts of attempted first-degree murder. However, there is no rule or statute that gives this court jurisdiction to consider the issue of whether alleged witness misconduct during grand jury proceedings compels dismissal of the pending counts. Therefore, this court's review is limited to the double-jeopardy portion of the order denying the defendant's motion to dismiss.

¶ 15 If the two armed-violence counts, on the one hand, and the two attempted first-degree counts, on the other hand, were based upon different physical acts, there would be no double-jeopardy issue. Where prosecutions are based on different acts, "the prohibition against double jeopardy is not violated." *People v. Sienkiewicz*, 208 Ill. 2d 1, 6 (2003). However, the record on appeal makes clear that the two counts of attempted

first-degree murder–counts II and III of the indictment–and the two counts of armed violence–counts IV and V–are based on the same two physical acts. Specifically, counts II and V are based on the one physical act of shooting Alexander, once, in a shoulder, while counts III and IV are based on the one physical act of shooting Foster, once, in the face. Because the two armed-violence counts are based on the same two physical acts as the two attempted-murder counts, double jeopardy is an issue. This court must decide whether the jury's verdicts on the armed-violence counts (guilty on count IV, not guilty on count V) bar, on double-jeopardy grounds, the reprosecution of the defendant on the attempted-murder counts.

¶ 16 The facts relevant to the double-jeopardy issue are uncontested. For that reason, the question is purely one of law, and appellate review is *de novo*. *People v. Taylor*, 2013 IL App (2d) 110577, ¶ 22.

¶ 17 Both the United States Constitution and the Illinois Constitution provide that no person shall be twice put in jeopardy for the same offense. U.S. Const., amends. V, XIV; Ill. Const. 1970, art. I, § 10. The prohibition against double jeopardy "protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense." *People v. Placek*, 184 Ill. 2d 370, 376-77 (1998). The first and second of these three abuses are implicated here.

¶ 18 To determine whether a constitutional double-jeopardy violation has occurred, courts employ the "same elements" test that originated in *Blockburger v. United States*, 284 U.S. 299 (1932). "This test *** inquires whether each offense contains an element

not contained in the other; if not, they are the same offense and double jeopardy bars additional punishment and successive prosection." *People v. Sienkiewicz*, 208 Ill. 2d 1, 5 (2003).

¶ 19 In his written reply to OSAD's *Anders* motion, the defendant baldly asserted that the instant case "is not subject to" the *Blockburger* same-elements test. This assertion is clearly incorrect in light of *Sienkiewicz* and subsequent double-jeopardy cases; the *Blockburger* test is required here.

¶ 20 The elements of armed violence, as the offense was charged in this case, are as follows: personally discharging a firearm that is a Category I weapon, and thus proximately causing great bodily harm to another person, while committing the felony of aggravated battery. See 720 ILCS 5/33A-2(c) (West 2004). The elements of attempted first-degree murder are: doing any act that constitutes a substantial step toward the commission of first-degree murder, with the intent to kill. 720 ILCS 5/8-4(a) (West 2004); *People v. Romero*, 2015 IL App (1st) 140205, ¶ 41. Plainly, each of these two offenses contains an element (indeed, more than one element) not contained in the other. See *People v. Stanford*, 2011 IL App (2d) 090420, ¶¶ 44-45. The circuit court recognized this plain fact, and so did OSAD. They also recognized the legal consequence of this fact: reprosecution on the attempted-murder counts may proceed; double jeopardy is not a bar.

¶ 21 CONCLUSION

¶ 22 Armed violence contains an element not contained in attempted first-degree murder, and *vice versa*. Therefore, under *Blockburger* and *Sienkiewicz*, the jury's verdicts

on the two armed-violence counts do not bar, on double-jeopardy grounds, reprosecution of the defendant on the two counts of attempted first-degree murder. OSAD correctly concluded that any argument to the contrary would lack merit. Accordingly, this court hereby grants OSAD leave to withdraw as counsel and hereby affirms the circuit court's denial of the defendant's motion to dismiss the attempted-murder counts on the basis of double jeopardy.

¶ 23 Motion granted; judgment affirmed.