IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

SHERMAN BROWN, Petitioner, -vs- STATE OF OKLAHOMA, Respondent.	)	No. MA-2001-117

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS / ALTERNATIVE WRIT OF PROHIBITION

The Petitioner has filed a petition for extraordinary writ of mandamus / alternative writ of prohibition challenging an order entered by the Honorable John D. Maley, District Judge, denying Petitioner's motion to dismiss the Bill of Particulars in Case Nos. CF-1998-51A and CF-1998-51B in the District Court of Okmulgee County. In Case No. CF-1998-51, Petitioner was charged by Information with two counts of Murder in the First Degree and two counts of Robbery With a Dangerous Weapon. The State filed a Bill of Particulars alleging two aggravating circumstances as to both murders: 1) the murders were committed for the purpose of avoiding or preventing a lawful arrest or prosecution ("avoiding arrest aggravator"); and 2) the existence of a probability that Petitioner would commit criminal acts of violence, constituting a continuing threat to society ("continuing threat aggravator"). The jury found Petitioner guilty on all counts. The jury also found the continuing threat aggravator applicable to both murder counts, but recommended a sentence of life without the possibility of parole on the murder convictions, and a sentence of life imprisonment on the robbery convictions. The trial court sentenced Petitioner in accordance with the jury's verdict. Petitioner appealed to this Court and his Judgment and Sentence was reversed and remanded for separate trials, due to

the failure to sever the two different robbery/homicide charges. *Brown v. State*, No. F-99-607 (Okl.Cr. October 19, 2000) (not for publication).

After remand, the District Court severed the charges into Case Nos. CF-1998-51A and CF-1998-51B. In both cases, a Bill of Particulars was filed again alleging the avoiding arrest and continuing threat aggravators. Petitioner filed a motion to dismiss the Bill of Particulars and death penalty on the grounds of Double Jeopardy. After reviewing briefs and hearing arguments of counsel, Judge Maley denied Petitioner's motion to dismiss the Bill of Particulars.

In this challenge to Judge Maley's decision, Petitioner is seeking a dismissal of the Bill of Particulars filed against him in both Case Nos. CF-1998-51A and CF-1998-51B, and an order prohibiting the State from seeking the death penalty and prohibiting the giving to the jury the death penalty as a sentencing option in both cases. Petitioner acknowledges that his first jury found the existence of the continuing threat aggravator applicable to both murder counts[1], but argues that the jury, by its verdict sentencing him to life without the possibility of parole in each case, acquitted him of the death penalty. Petitioner contends United States Supreme Court case law is clear that it is the fixing of punishment at a sentence less than death which triggers the protection of the Double Jeopardy Clause, not the finding of any particular aggravating circumstance.

Before deciding this matter, this Court directed Judge Maley or a designated representative to respond to Petitioner's petition for extraordinary writ of mandamus / alternative writ of prohibition. *Brown v. State*, No. MA-2001-117 (Okl.Cr. February 27, 2001). The State of Oklahoma, by the District

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[1] The direct appeal opinion states that the jury made this finding. *Brown, supra.* Petitioner has not provided a record of the jury's actual findings made during the first trial.

Attorney for Okmulgee County, has responded contending that the successful appeal of a judgment on any ground save insufficiency of the evidence to support the verdict rendered, does not trigger the provisions of the Double Jeopardy Clause and does not operate as a bar to further prosecution. The State notes that the reversal of Petitioner's Judgment and Sentence on appeal was not based upon any alleged insufficiency of evidence either in the guilt or penalty phase of the prior trial.

We begin by noting that jurisdiction of this matter can be assumed, and that a decision on Petitioner's double jeopardy claim can be made in this extraordinary writ proceeding. Petitioner's claim is one that can be addressed on direct appeal in the event he is convicted in the retrial of his criminal cases. *See Bennett v. Shumate*, 1978 OK CR 113, ¶2, 586 P.2d 333, 335, citing *Barnhart v. State*, 1977 OK CR 18, 559 P.2d 451. Moreover, appellate courts will generally not allow piecemeal appeals from, and will not interfere with, decisions made during the course of trial proceedings, and for which the remedy of appeal is available. *See* Rule 10.6(A)(3) and (B)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2001). However, one of the very purposes of the Double Jeopardy Clause is to protect a criminal defendant from enduring the personal strain, public embarrassment, and expense of a criminal retrial. *Abbey v. United States*, 431 U.S. 651, 661-62, 97 S.Ct. 2034, 2041, 52 L.Ed.2d 651 (1977). This Court has recognized the propriety of assuming jurisdiction and granting prohibition to bar retrial of an accused on the grounds of jeopardy. *Bennett, supra*, citing *Sussman v. District Court of Oklahoma County*, 1969 OK CR 185, 455 P.2d 724. We find it appropriate to do so here.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that "[n]o person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. The Double Jeopardy Clause of the Oklahoma Constitution provides that "[n]o person shall . . ., after having been once acquitted by a jury, be again put in jeopardy of life or liberty for that of which he has been acquitted . . ., [n]or shall any person be twice put in jeopardy of life or liberty for the same offense." Okla. Const. Art. II, § 21. Historically, neither the Double Jeopardy provision nor the Equal Protection Clause of the Constitution imposes an absolute bar to a more severe sentence assessed by a jury upon reconviction at a second trial. *E.g. Jerry v. State*, 1972 OK CR 77, ¶15, 496 P.2d 422, 427. This is true even when the death penalty is imposed by a jury on retrial, after a previous jury's decision not to impose the death penalty is overturned on appeal. *Stroud v. United States*, 251 U.S. 15, 18, 40 S.Ct. 50, 51, 64 L.Ed. 103 (1919).

The United States Supreme Court has established a "narrow exception" to the general rule that double jeopardy principles apply only "for the same offence", by applying such principles to capital sentencing proceedings that bear the hallmarks of a jury trial on the issue of guilt or innocence, including standards that guide the jury's decision and require the prosecution to establish facts that prove its case beyond a reasonable doubt. *Bullington v. Missouri*, 451 U.S.430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). The Supreme Court also noted an important exception to another rule, that "the slate is wiped clean" when a defendant succeeds in overturning his conviction and death sentence on appeal, if the conviction and sentence is reversed on the ground that the evidence was insufficient or the prosecution has not proved its case that the death sentence should be imposed. *Bullington*, 451 U.S. at 442, 101 S.Ct. at 1860. The

Supreme Court has also expanded the definition of acquittal to include not only the legal and formal certification of the innocence of a person who has been charged with crime, as it is commonly and legally defined, but also to include either a sentencing jury's determination that the prosecution has not proved whatever is necessary to impose the death sentence, *Bullington*, 451 U.S. at 445, 101 S.Ct. at 1861; or a sentencing judge's rejection of the death penalty as an appropriate sentencing option. *Arizona v. Rumsey*, 467 U.S. 203, 211, 104 S.Ct. 2305, 2310, 81 L.Ed.2d 164 (1984).

The question presented in this proceeding is whether the Double Jeopardy Clause prohibits the State from seeking the death penalty on retrial, when the first jury found the State had proven its case and had proven whatever was necessary to impose the death penalty, but the first jury made the decision not to sentence the defendant to death in a capital sentencing proceeding that resembled a jury trial. We find the Double Jeopardy Clause does prohibit the State from seeking the death penalty on retrial in this case.

Oklahoma's sentencing procedure for imposing the death penalty involves a separate proceeding that bears the hallmarks of a trial on guilt or innocence, and includes standards that guide the jury's decision and require the prosecution to establish facts that prove its case beyond a reasonable doubt. 21 O.S.1991 & Supp.2000, §§ 701.10 - 701.13. The procedure can thus be distinguished from traditional sentencing, like that in *Stroud, supra*, in which it is impossible to conclude that a sentence less than the statutory maximum constitutes a decision to the effect that the government has failed to prove its case. *Monge v. California*, 524 U.S. 721, 730-31, 118 S.Ct. 2246, 2251, 141 L.Ed.2d 615 (1998); *cf. Jerry*, 1972 OK CR 77 at ¶15, 496 P.2d at 426-27 (when the first sentencing proceeding does not involve capital punishment or did not

have the hallmarks of a trial on guilt or innocence, there is no absolute bar to a more severe sentence assessed by a jury upon reconviction at a second trial).

In this case [these cases], Petitioner has already been subjected to Oklahoma's capital sentencing procedure, and his first jury decided not to impose the death penalty. We find that the Double Jeopardy Clause protects Petitioner from the embarrassment, expense and ordeal, as well as the anxiety and insecurity, of being subjected to additional capital sentencing proceedings. *Bullington*, 451 U.S. at 445, 101 S.Ct. at 1861. The State has received one fair shot to convince a jury to sentence Petitioner to death, it is not entitled to another. *Id.*, 451 U.S. at 446, 101 S.Ct. at 1862.

Petitioner's situation is similar to a defendant who is impliedly acquitted of a greater offense, when his conviction for a lesser included offense is reversed and remanded for retrial. *See Price v. State*, 1979 OK CR 80, ¶5, 598 P.2d 668, 669; *see also Bullington*, 451 U.S. at 445, 101 S.Ct. at 1861, and *Rumsey*, 467 U.S. at 211, 104 S.Ct. at 2310 (defendants can be acquitted of the death penalty). Petitioner's situation can be distinguished from cases where the slate is wiped clean on retrial, because the sentencer did not reject the death penalty as an appropriate sentencing option and the defendant has not been acquitted of the death penalty. *E.g. Romano v. State*, 1995 OK CR 74, 909 P.2d 92; *Salazar v. State*, 1996 OK CR 25, 919 P.2d 1120; *see also Poland v. Arizona*, 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986).

We find double jeopardy precludes Petitioner from being subjected to capital sentencing procedures on retrial, even though Petitioner's first jury found that the prosecution had proven an aggravating circumstance beyond a reasonable doubt, which would allow the death penalty to be imposed. We find the prohibition on subjecting Petitioner to a second capital sentencing procedure

controls this double jeopardy issue, more than whether the State has proved its case and established whatever is necessary to impose the death penalty. *Bullington, supra; Rumsey, supra; Monge, supra.* Petitioner's first jury was not required to state it had found an aggravating circumstance. Only if its verdict was a unanimous recommendation of death was the jury required to designate in writing the statutory aggravating circumstances which it unanimously found beyond a reasonable doubt,. 22 O.S.1991, § 701.11.

IT IS THEREFORE THE ORDER OF THIS COURT that Petitioner's petition for extraordinary writ of mandamus / alternative writ of prohibition, asking for an order directing dismissal of the Bill of Particulars and precluding the State from seeking the death penalty in the retrial of Case Nos. CF-1998-51A and CF-1998-51B in the District Court of Okmulgee County, should be, and is hereby, **GRANTED.**

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 3rd day of July, 2001.

Concur in Results

GARY L. LUMPKIN, Presiding Judge

CHARLES A. JOHNSON, Vice Presiding Judge

CHARLES S. CHAPEL, Judge

RETA M. STRUBHAR, Judge

ATTEST:

Clerk

STEVE LILE, Judge