[Cite as *State v. Calhoun*, 2009-Ohio-6097.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92103

STATE OF OHIO

PLAINTIFF-APPELLANT

vs.

WILLIAM CALHOUN

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-490330

BEFORE: Blackmon, J., McMonagle, P.J., and Jones, J.

RELEASED: November 19, 2009
JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant state of Ohio ("appellant") appeals the trial court's dismissal of an indictment against appellee William Calhoun ("Calhoun"). The appellant assigns the following error for our review:

> **"I. The trial court erred by dismissing the case because the principles of double jeopardy did not apply. (Sep. 15, 2008 Journal Entry)"**

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court's decision. The apposite facts follow.

{¶ 3} It is undisputed that appellant charged Calhoun with attempted murder with a firearm specification, felonious assault with a firearm specification, and having a weapon under disability (referred to as the first indictment, CR-490330). The victim in the first indictment was Curtis Johnson. Before a trial on the attempted murder shooting, Curtis Johnson was shot again and identified Calhoun as the shooter; Johnson later died. Appellant thereafter indicted Calhoun for the aggravated murder of Curtis Johnson, which included mass murder and murder to escape specifications (referred to as the second indictment, CR-497811). Calhoun was also charged with numerous other counts that are not the subject of this appeal.

{¶ 4} It is undisputed that Calhoun was tried on the second indictment that contained the following specifications:

"<u>Mass Murder Specification</u>:

The Grand Jurors further find and specify that the offense presented above was part of a course of conduct in which the offender purposely killed Curtis Johnson and purposely attempted to kill Curtis Johnson.

<u>Murder To Escape Accounting For Crime</u>:

The Grand Jurors further find and specify that the offender committed the offense presented above for the purpose of escaping trial for another offense committed by him to wit: attempted murder and/or felonious assault and/or having weapons while under disability in CR 490330."[1]

{¶ 5} In order to prove the above specifications in the second indictment, appellant had to prove that Calhoun attempted to murder Curtis Johnson, committed felonious assault "and/or" had a weapon under disability as defined in the first indictment. The jury did convict Calhoun under the second indictment, and the trial judge sentenced him to 23 years in prison, which must be served before he serves a life sentence without parole.

{¶ 6} Before appellant could try him on the first indictment, Calhoun filed a motion to dismiss it on double jeopardy grounds. The trial court agreed and pointed out that appellant opted to try the aggravated murder, and as such ruled that a trial on the attempted murder would constitute jeopardy. Appellant appealed and argued that jeopardy does not apply.

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[1]True Bill Indictment June 26, 2007.

Motion to Dismiss Indictment

{¶ 7} In affirming Calhoun's conviction in his direct appeal, we detailed Calhoun's course of conduct as follows:

> **"In the case at bar, Curtis Johnson was originally shot by appellant on October 29, 2006. The very next day, the victim scribbled appellant's nickname, 'Booka,' on a piece of paper at the hospital when he was asked who shot him. In addition, the victim was also presented with a photo array that included appellant's picture. After viewing the photo array, the victim identified appellant as the shooter. On November 25, 2006, the victim made a written statement identifying appellant as the shooter.**
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> **Appellant was subsequently indicted in Case No. CR-07-490330 and a trial was set for March 21, 2007. Sometime before trial, the victim told various family members that appellant and/or his friends had contacted him and tried to bribe him not to testify at the trial. On March 18, 2007, just three days before trial, Curtis Johnson was ambushed in his driveway and shot a second time by appellant. After he was shot, but before losing consciousness, Curtis Johnson identified appellant as one of the shooters.**
>
> **The State properly demonstrated that Calhoun engaged in wrongdoing that resulted in the witness's unavailability, and the State further demonstrated that one of Calhoun's reasons for shooting the victim was to cause the witness to be unavailable at trial. This is demonstrated by the attempted bribes, police officer testimony, ballistics tests, witness identifications, and other evidence presented at trial. Accordingly, Calhoun forfeited his right to confront Curtis Johnson in this case, and the trial court did not err in allowing Curtis Johnson's statements to be admitted as evidence at trial."**[2]

[2]*State v. Calhoun*, Cuyahoga App. No. 91328, 2009-Ohio-2361.

{¶ 8} As reflected above, the details of Calhoun's attempted murder of Johnson were before the jury in his trial on the aggravated murder charge in the second indictment. Because Calhoun was tried and found guilty of aggravated murder, including the specification relating to his attempted murder of Johnson, jeopardy has attached. Calhoun has been tried, convicted, and as part of the specification, punished for the murder of Curtis Johnson.

{¶ 9} The Double Jeopardy Clause prohibits the following: a second prosecution for the same offense, a second prosecution for the same offense after conviction, and multiple punishments for the same offense.[3] The substance of the Double Jeopardy Clause is to protect a defendant from repeated prosecutions for the same offense.[4] It is also designed to protect against multiple punishments.

{¶ 10} Calhoun argues, and we agree, that had the state tried Calhoun on the first indictment, no jeopardy would have attached if they had later used that conviction as a specification on the second count. It is the backwards approach to this case that raises jeopardy. No defendant may be punished twice for the same offense chosen by the state.

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[3] *North Carolina v. Pearce* (1969), 395 U.S. 711, overruled on other grounds (1982), 457 U.S. 368.

[4] *State v. Gresham*, 2nd Dist. No. 22766, 2009-Ohio-3305, citing *Oregon v. Kennedy* (1982), 456 U.S. 667, 671, 102 S.Ct. 2083, 2087, 72 L.Ed.2d 416.

{¶ 11} The state argues that to use this approach results in the use of specifications as a separate offense and this is forbidden under *State v. Blankenship.*[5]

{¶ 12} Calhoun did not argue allied offenses. He argued that he cannot be tried and punished multiple times for shooting and killing Curtis Johnson. In *State v. Blankenship*, the court held "a firearm specification is not a separate offense and thus cannot be an allied offense of similar import for purposes of R.C. 2941.25. Therefore, no merger is required of the firearm specification and the underlying weapons charge. Consequently, *State v. Blankenship* is not helpful in the resolution of this case.

{¶ 13} We recognize that the attempted murder shooting and the later aggravated murder shooting of Curtis Johnson are separate events occurring on separate dates. Our concern, and the trial court rightfully noted, is the dual trials on the same matter and dual punishments for the same act? In the trial, appellant, in order to prove the specification, had to prove the first indictment. Consequently, jeopardy prohibits subsequent trial on a matter previously tried.

{¶ 14} Additionally, the trial court has punished Calhoun for the offenses. He was sentenced to life without possibility of parole. Finally, judicial economy supports the trial court's decision to grant Calhoun's motion to dismiss.

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[5](1995), Ohio App.3d 534.

Accordingly, we affirm the trial court's decision and overrule appellant's assigned error.

Judgment affirmed.

It is ordered that appellee recover of appellant his costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

PATRICIA ANN BLACKMON, JUDGE

CHRISTINE T. McMONAGLE, P.J., and
LARRY A. JONES, J., CONCUR