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State v. Frazier

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CASE COMMENT: *STATE V. FRAZIER*

The double jeopardy clause, although recognizing the government's interest in efficient criminal prosecutions, mandates that the state have only one opportunity to convict a defendant.[1] However, there is a well-established principle that the clause does not "preclude the government's retrying a defendant whose conviction is set aside because of an error in the proceedings leading to conviction."[2] Historically, the United States Supreme Court justified this relaxation of the double jeopardy clause on the fiction that by appealing his case, the defendant waived double jeopardy protection.[3] In *Bryan v. United States*[4], the Supreme Court extended this rationale to permit a new trial upon a finding of insufficient evidence because although the defendant had moved for a judgment of acquittal, he had moved in the alternative for a new trial. Succeeding cases generally turned on whether the defendant on appeal moved for a new trial or for an acquittal.[5] However, in *Burks v. United States*[6], the Supreme Court signaled a new approach, saying,

> In our view it makes no difference that a defendant has sought a new trial as one of his remedies, or even as the sole remedy. It cannot be meaningfully said that a person "waives" his right to a judgement of acquittal by moving for a new trial. . . Since we hold today that the double jeopardy clause precludes a second trial once the reviewing court has found the evidence legally insufficient, the only "just" remedy available for that court is the direction of a judgment of acquittal.[7]

The United States Supreme Court has not, however, considered the combination case which results when the trial court erroneously admits certain critical evidence[8], as in the recent West Vir-

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[1] United States v. Scott, 437 U.S. 82 (1978).

[2] United States v. Tateo, 377 U.S. 463, 465 (1964).

[3] *See* Note, *Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence*, 31 U. CHI. L. REV. 365 (1964).

[4] 338 U.S. 552 (1950).

[5] Forman v. United States, 361 U.S. 416 (1960); Yates v. United States, 354 U.S. 298 (1957); Sapir v. United States, 348 U.S. 373 (1955).

[6] 437 U.S. 1 (1978).

[7] *Id.* at 17-18.

[8] The United States Supreme Court specifically refused to consider this issue in *Greene v. Massey*, 437 U.S. 19, n.9 (1978).

ginia case, *State v. Frazier*.[9] A Logan county high school teacher, Robert Frazier, was convicted of delivering marijuana to one of his students.[10] On appeal, the Supreme Court of Appeals agreed with the defendant that the trial court erred in admitting results of a polygraph test[11] and non-expert testimony relating to a controlled substance.[12] The state had relied on these two items of evidence alone to prove an essential element of the crime, that the substance was indeed marijuana.

Frazier contended that double jeopardy would attach to bar retrial where insufficient evidence was the result of trial error. The court, however, chose to ignore the hybrid nature of the case, and after excluding some evidence as inadmissible, refused to review the sufficiency of the remaining evidence.

Instead, the court carefully distinguished between "trial error" and "evidentiary insufficiency", and in so doing neatly limited its options. On a question of evidentiary insufficiency, the court may either uphold the jury's verdict or enter a judgment of acquittal. Where there is trial error, however, the case may be remanded for retrial. The impact of this approach is that even if trial error results in evidentiary insufficiency, the defendant is not entitled to a judgment of acquittal on appeal.

To support its refusal to review the sufficiency of the remaining evidence, the court relied on *Burks*, and in particular on the phrase "submitted to the jury". The court interpreted these words to mean that the focus of a test for evidentiary insufficiency should be on the entire body of evidence as it went to the jury.[13] However, another interpretation of these four words is possible. Consider them in context:

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[9] 252 S.E.2d 39 (W. Va. 1979).

[10] W. VA. CODE §§ 60A-4-401(a)(1)(ii), 60A-2-204(d)(10)(1977 Replacement Vol.).

[11] The defendant stipulated that the polygraph results could be used at trial. The trial court admitted the results over the defense counsel's motion to strike the evidence.

[12] The state attempted to prove that the delivered substance was marijuana through the testimony of a high school student.

(Also, Frazier assigned as error the fact that a state trooper, after testifying to the Grand Jury, was permitted to remain in the grand jury room and assist the prosecution in interrogating witnesses.

[13] 252 S.E.2d at 53.

> [W]hen a defendant's conviction has been overturned due to a failure of proof at trial,. . .the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble. Moreover, such an appellate reversal means that the government's case was so lacking that it should not have even been *submitted* to the jury. Since we necessarily afford absolute finality to a jury's *verdict* of acquittal — no matter how erroneous its decision — it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.[14]

Would it not be an equally reasonable interpretation of the above passage to say that it focused on the *quality* of the evidence as well as the *quantity*? Should giving the prosecution "one fair opportunity to offer whatever proof it [can] assemble" mean that the prosecution has the license to introduce a wide assortment of evidence, perhaps ultimately inadmissible, knowing that if it is indeed ruled inadmissible there will always be another chance?

The *Frazier* court further noted that the *Burks* central statement on the double jeopardy clause emphasized "the initial failure of the prosecutor to muster evidence in the first proceeding."[15] The West Virginia court also interpreted this clause as mandating as analysis of the weight of the evidence at the time the jury considered it.[16] Again, however, the question is nagging: should the court look only at the weight of the evidence and completely ignore its substance?

In addition to the *Burks* precedent, the *Frazier* court stressed the unfairness to the prosection if the appellate court were to apply the "evidentiary insufficiency" test after excluding evidence ruled inadmissible.[17] The court justified giving the prosecution another chance at conviction stating:

> Here there were evidentiary points that involved matters of first impression in this State. A reasonable prosecutor might well have concluded that [the evidence] would be admitted. . . When the new evidentiary rule is set adversely to his position on appeal, he should not be foreclosed from developing

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[14] 437 U.S. at 16.
[15] *Id.* at 11.
[16] 252 S.E.2d at 53.
[17] *Id.*

on a new trial alternate sources of proof.[18]

There are, however, several problems with this rationale. First, the court did not examine whether it was reasonable for the prosecutor to base the substance of his case primarily on evidence which was, at best, of questionable admissibility.[19] Further, even assuming that a reasonable prosecutor would have thought the evidence admissible, he would undoubtedly have some concern about it. The question ultimately is whether prosecutorial innovations should be tested at the expense of subjecting defendants to the risk of a second trial.

The overriding concern should be whether the principles and values behind the double jeopardy clause permit this emphasis on the state's interest. The clause involves a balancing of conflicting interests.

Undeniably the framers of the Bill of Rights were con-

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[18] *Id.*

[19] The reasonableness factor is particularly apt in the *Frazier* case. It should come as no surprise that the West Virginia court followed the weight of authority around the country and held polygraph tests to be inadmissible as evidence. Although the West Virginia court had not really outlined a position before *Frazier*, it had indicated that the tests were not favored. In *Cannellas v. McKenzie*, the court declared that mere mention of a lie detector test should prompt a "reasonably skillful trial counsel to move for a mistrial." 236 S.E.2d 327 (W. Va. 1977). Obviously, admitting lie detector tests would have involved a dramatic departure from the court's previous philosophy.

Similarly, a "reasonable prosecutor," it seems, would have been reluctant to rely on the testimony of a non-expert witness, particularly when that testimony was being used to prove an essential element of the crime. The federal courts have permitted lay testimony to prove that a certain substance is controlled, but the testimony must be supported by other factors. For example, in *United States v. Gregorio*, the court admitted:

> an abundance of lay testimony from users. . .who had sampled the substance that its identity. . .was unmistakable. Furthermore, there was other compelling circumstantial proof (secrecy and deviousness of transactions, high prices paid in cash for these substances, lack of complaint on the part of the purchasers, descriptive language of participants in transactions and descriptions of the physical appearance of the substance).

497 F.2d 1253, 1263 (4th Cir. 1974). *See also* United States v. Dolan, 544 F.2d 1219, 1223 (4th Cir. 1976), United States v. Agueci, 310 F.2d 817, 828-29 (2d Cir. 1962), Toliver v. United States, 224 F.2d 742, 745 (9th Cir. 1955)

In *Frazier*, the state tried to prove that the substance was marijuana by introducing only the testimony of one high school student, with no supporting factors at all.

> cerned to protect defendants from oppression and from efforts to secure, through the callousness of repeated prosecutions, convictions for whose justice no man could vouch. On the other hand, they were also aware of the countervailing interest in the vindication of criminal justice, which sets outer limits to the protections for those accused of crimes.[20]

The question in *Frazier* centered on which interest must be protected when evidentiary insufficiency arises *as a result of* trial error. The court determined that the state's interests were controlling, noting that "the considerations which permit a new trial after reversal for error should control over the considerations which should prohibit a new trial after reversal for insufficient evidence."[21]

The *Frazier* court emphasized the unfairness if the prosecution were unable to rely on the trial court's rulings.[22] The problem with this argument is that it endorses a second chance for the prosecution, and "another opportunity to supply evidence it failed to muster in the first proceeding. . ."[23] the very opportunity the double jeopardy clause seeks to prohibit. Instead of automatically assuming that the prosecution, relying on favorable evidentiary rulings, didn't introduce other available evidence, the court could raise a rebuttable presumption that the prosecution gave the case its best shot in the original trial.[24] From a purely practical point of

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[20] Green v. United States, 355 U.S. 184, 218-19 (1957)(Frankfurter, J., dissenting).

[21] Note, *Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence*, 31 U. CHI. L. REV. 365, 372 (1964).

[22] In *United States v. Mandel*, the Federal Court, after ruling key evidence inadmissible, posited this reliance as a policy argument in support of a decision to give the prosecution another chance. United States v. Mandel, 591 F.2d 1347, 1374 (4th Cir. 1979). The West Virginia Supreme Court of Appeals adopted this argument in *Frazier*.

[23] 437 U.S. at 11, *cited in* 252 S.E.2d at 50.

[24] In *United States v. Block*, the Fourth Circuit noted:

> The traditional justification for considering inadmissible as well as admissible evidence in reviewing acquittal motions has been that the government may have foregone other available evidence in reliance upon obviously stronger evidence admitted by the trial judge and only revealed as inadmissible on appeal. . . .*Burks* of course did not deal with a situation where this justification for a second chance of proof is as appealing. For in the situation where no misplaced reliance on proof admitted on trial is revealed on appeal, the contrary assumption—that the government has already had and given its best shot—is more reasonable.

view, prosecutors should have no interest in retrying cases they can't possibly win. If the evidence at the original trial was the government's entire case, what could possibly be gained in a retrial? Thus, in addition to protecting defendants from double jeopardy, permitting review of evidentiary sufficiency after ruling some evidence inadmissible would save the state needless time and expense.

In conclusion, the court should not ignore that the double jeopardy clause attempts to balance society's interest and individual rights. The *Frazier* decision gave undue weight to the state's interest. However, with proper analysis of the conflicting interests the court could have struck a better balance. The court could have developed a two-step process for review: First, an appellate court, after declaring some evidence inadmissible, could review the remaining evidence. Upon a finding of glaring insufficiency, it could enter a judgment of acquittal.[25] If it could not make that determination, as a second step, it could remand the case to the lower court. On remand, the lower court could examine the residual evidence for evidentiary insufficiency before ordering a retrial, considering a rebuttable presumption that the state had presented its best case at the first trial. This solution would ultimately serve the designs of the double jeopardy clause: to preserve the state's interest in prosecution of criminals, while protecting the defendant from continued harassment by the judicial system.

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> In this latter situation to permit retrial to perfect proof seems much more likely merely to license the kind of harassment that double jeopardy guards against.

590 F.2d 535, 544 n.12 (4th Cir. 1978).

[25] There have been cases where the appellate court has reviewed the remaining evidence for sufficiency. In *United States v. Edmons*, where the government's case rested solely on identifications made as a result of illegal arrests, and there was no suggestion that the government could produce any more evidence on retrial, the court directed that the indictments be dismissed. 432 F.2d 577 (2d Cir. 1970).