GREEN v. UNITED STATES

SUPREME COURT OF THE UNITED STATES
355 U.S. 184
December 16, 1957
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OPINION: Mr. Justice BLACK…Everett Green was indicted by a District of Columbia grand jury in two counts. The first charged that he had committed arson by maliciously setting fire to a house. The second accused him of causing the death of a woman by this alleged arson which if true amounted to murder in the first degree punishable by death. Green entered a plea of not guilty to both counts and the case was tried by a jury. After each side had presented its evidence the trial judge instructed the jury that it could find Green guilty of arson under the first count and of either (1) first degree murder or (2) second degree murder under the second count. The trial judge treated second degree murder, which is defined by the District Code as the killing of another with malice aforethought and is punishable by imprisonment for a term of years or for life, as an offense included within the language charging first degree murder in the second count of the indictment.

The jury found Green guilty of arson and of second degree murder but did not find him guilty on the charge of murder in the first degree. **Its verdict was <u>silent</u> on that charge.** The trial judge accepted the verdict, entered the proper judgments and dismissed the jury. Green was sentenced to one to three years' imprisonment for arson and five to twenty years' imprisonment for murder in the second degree. He appealed the conviction of second degree murder. The Court of Appeals reversed that conviction because it was not supported by evidence and remanded the case for a <u>new trial</u>.

When the Court of Appeals finds that the evidence presented to a jury was not legally sufficient to support the jury's verdict, they have power to effectively overrule the jury. They then "remanded" the case (sent it back) to the trial court to be re-tried.

On remand Green was tried again for first degree murder under the original indictment. At the outset of this second trial he raised the defense of former jeopardy but the court overruled his plea. <u>This time a new jury found him guilty of first degree murder and he was given the mandatory death sentence</u>. Again he appealed. The Court of Appeals… affirmed the conviction…

As you know, I am not a criminal lawyer. I will be seeking the answer to what appears to be a mystery of sorts. Apparently, second degree murder in D.C. is the killing of another with "malice aforethought." It was punishable by life imprisonment, not by death. As you will see momentarily, first degree murder is the killing of another "while perpetrating a felony" and it was punishable by death. It seems to me that premeditated murder is far worse on the scale of societal sins than torching a house (a felony) that just happens to have a person in it who dies. What am I missing?

The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense…The underlying idea…is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

In accordance with this philosophy it has long been settled under the Fifth Amendment that a verdict of acquittal is final, ending a defendant's jeopardy, and even when 'not followed by any judgment, is a bar to a subsequent prosecution for the same offence.' *United States v. Ball*. **Thus it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means of an appeal even though an acquittal may appear to be erroneous.**

That would appear to mean that the state cannot seek a new trial of someone found not guilty by a jury even if it appears the jury did the wrong thing. But, what if the defendant's attorney either negligently or intentionally introduced evidence that the jury should not have heard or, for some other reason, caused the trial to be "unfair" to the State? I will also be searching for this answer as we proceed.

Moreover it is not even essential that a verdict of guilt or innocence be returned for a defendant to have once been placed in jeopardy so as to bar a second trial on the same charge. This Court, as well as most others, has taken the position that a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again. This prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears that the jury might not convict. At the same time jeopardy is not regarded as having come to an end so as to bar a second trial in those cases where unforeseeable circumstances…arise during the first trial making its completion impossible, such as the failure of a jury to agree on a verdict. *Wade v. Hunter*.

At common law a convicted person could not obtain a new trial by appeal except in certain narrow instances. As this harsh rule was discarded courts and legislatures provided that if a defendant obtained the reversal of a conviction by his own appeal he could be tried again for the same offense. Most courts regarded the new trial as a second jeopardy but justified this on the ground that the appellant had 'waived' his plea of former jeopardy by asking that the conviction be set aside. Other courts viewed the second trial as continuing the same jeopardy which had attached at the first trial by reasoning that jeopardy did not come to an end until the accused was acquitted or his conviction became **final**. But whatever the rationalization, this Court has also held that a defendant can be tried a second time for an offense when his prior conviction for that same offense had been set aside on appeal. *United States v. Ball*.

In this case, however, we have a much different question. At Green's first trial the jury was authorized to find him guilty of either first degree murder (killing while perpetrating a felony) or, alternatively, of second degree murder (killing with malice aforethought). The jury found him guilty of second degree murder, but on his appeal that conviction was reversed and the case remanded for a new trial. At this new trial Green was tried again, not for second degree murder, but for first degree murder, even though the original jury had refused to find him guilty on that charge and it was in no way involved in his appeal. For the reasons stated hereafter, we conclude that this second trial for first degree murder placed Green in jeopardy twice for the same offense in violation of the Constitution.

Green was in direct peril of being convicted and punished for first degree murder at his first trial…and the jury refused to convict him. When given the choice between finding him guilty of either first or second degree murder it chose the latter. In this situation the great majority of cases in this country have regarded the jury's verdict as an **implicit acquittal** on the charge of first degree murder. But the result in this case need not rest alone on the assumption, which we believe legitimate, that the jury for one reason or another acquitted Green of murder in the first degree. For here, the jury was dismissed without returning any express verdict on that charge and without Green's consent. Yet it was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so. Therefore it seems clear, under established principles of former jeopardy, that Green's jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for that offense. In brief, we believe this case can be treated no differently, for purposes of former jeopardy, than if the jury had returned a verdict which expressly read: 'We find the defendant not guilty of murder in the first degree but guilty of murder in the second degree.'

After the original trial, but prior to his appeal, it is indisputable that Green could not have been tried again for first degree murder for the death resulting from the fire. A plea of former jeopardy would have absolutely barred a new prosecution even though it might have been convincingly demonstrated that the jury erred in failing to convict him of that offense. **And even after appealing the conviction of second degree murder he still could not have been tried a second time for first degree murder had his appeal been unsuccessful.**

Nevertheless the Government contends that Green 'waived' his constitutional defense of former jeopardy to a second prosecution on the first degree murder charge by making a successful appeal of his improper conviction of second degree murder. We cannot accept this paradoxical contention. 'Waiver' is a vague term used for a great variety of purposes, good and bad, in the

law. In any normal sense, however, it connotes some kind of voluntary knowing relinquishment of a right. When a man has been convicted of second degree murder and given a long term of imprisonment it is wholly fictional to say that he 'chooses' to forego his constitutional defense of former jeopardy on a charge of murder in the first degree in order to secure a reversal of an erroneous conviction of the lesser offense. In short, he has no meaningful choice. And as Mr. Justice Holmes observed, with regard to this same matter in *Kepner v. United States*: 'Usually no such waiver is expressed or thought of. Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States.' …

The Government alternatively argues that Green, by appealing, prolonged his original jeopardy so that when his conviction for second degree murder was reversed and the case remanded he could be tried again for first degree murder without placing him in new jeopardy. We believe this argument is also untenable. Whatever may be said for the notion of continuing jeopardy with regard to an offense when a defendant has been convicted of that offense and has secured reversal of the conviction by appeal, here Green was not convicted of first degree murder and that offense was not involved in his appeal. If Green had only appealed his conviction of arson and that conviction had been set aside surely no one would claim that he could have been tried a second time for first degree murder by reasoning that his initial jeopardy on that charge continued until every offense alleged in the indictment had been finally adjudicated.

Reduced to plain terms, the Government contends that in order to secure the reversal of an erroneous conviction of one offense, a defendant must surrender his valid defense of former jeopardy not only on that offense but also on a different offense for which he was not convicted and which was not involved in his appeal. Or stated in the terms of this case, he must be willing to barter his constitutional protection against a second prosecution for an offense punishable by death as the price of a successful appeal from an erroneous conviction of another offense for which he has been sentenced to five to twenty years' imprisonment. As the Court of Appeals said in its first opinion in this case, a defendant faced with such a 'choice' takes a 'desperate chance' in securing the reversal of the erroneous conviction. The law should not, and in our judgment does not, place the defendant in such an incredible dilemma. Conditioning an appeal of one offense on a coerced surrender of a valid plea of former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy…Reversed.

DISSENT: Mr. Justice FRANKFURTER / BURTON / CLARK / HARLAN … [Not provided.]