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Former Jeopardy on Retrial

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RECENT FEDERAL CASE

Former Jeopardy on Retrial. The Supreme Court of the United States, in *Green v. United States*,[1] was for the first time squarely presented with a much-debated and much-litigated question involving former jeopardy. Defendant Green was indicted on two counts, the first alleging arson and the second, the death of a woman resulting from that arson. If the defendant were guilty of arson and the arson caused the death of the woman, it would clearly amount to murder in the first degree under the felony-murder doctrine, as provided in Washington, D.C., Code 22-2401.[2] The trial court, mistakenly believing that second degree murder[3] was a lesser-included offense, as is the usual case, instructed the jury that they might find the defendant guilty of either first or second degree murder. The jury found the defendant guilty of arson and second degree murder. On appeal, the defendant challenged only the conviction of second degree murder. This verdict was reversed upon the grounds of insufficient evidence.[4]

On the new trial, the defendant raised the defense of former jeopardy as to the charge of first degree murder, asserting that the conviction of second degree murder was an implied acquittal of the greater charge and that a retrial on that charge would place him twice in jeopardy for the same crime.[5] This defense was overruled by the trial court, and the defendant was convicted of murder in the first degree. The verdict was later affirmed by the court of appeals, sitting en banc, with three judges dissenting.[6]

The United States Supreme Court, splitting five to four, reversed the court of appeals and held that the defendant had been placed twice in jeopardy for the same crime in contravention of the fifth amendment[7] of the United States Constitution. The Court, in its decision, specifically rejected the continuing jeopardy theory espoused by Justice Holmes[8] and the implied waiver doctrine recognized by many state courts.[9] Asserting that the conviction of the defendant of second degree murder was a conviction of a separate and distinct offense, the Court held that, by appealing this conviction, the defendant did not waive his former jeopardy on the

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[1] 355 U.S. 184 (1957).

[2] "Whoever, being of sound memory and discretion, kills another purposely, . . . or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in . . . this Code, . . . , is guilty of murder in the first degree."

[3] Washington D.C. Code 22-2403. "Whoever with malice aforethought, . . . except as provided in sections 22-2401 or 22-2402, kills another, is guilty of murder in the second degree."

[4] 95 App. D.C. 45, 218 F.2d 856 (1955).

[5] 355 U.S. at 190, note 11.

[6] 236 F.2d 708 (D.C. Cir. 1956). See also 7 Duke L.J. 37 and 66 Yale L.J. 592 for notes on this decision.

[7] "(N)or shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . ."

[8] See dissenting opinion in Kepner v. U.S., 195 U.S. 100 (1904).

[9] See cases cited in note 4 of Justice Frankfurter's dissent. 355 U.S. at 216.

charge of first degree murder, of which he had been impliedly acquitted by the jury.[10]

One of the most significant aspects of this holding is the basis upon which the Court chose to reverse the court of appeals. It seems apparent that the Court could have arrived at its decision without involving a construction of the Constitution. But this the Court chose not to do. As was pointed out by Justice Frankfurter in his dissent,[11] the Court, instead of practicing its long-standing rule of avoiding constitutional issues unless they are inescapable, ignored the simple alternative contained in the Court's supervisory jurisdiction over federal criminal procedure and bluntly asserted that the Constitution required such a result. Therefore, this decision, if followed, has seemingly foreclosed any possible change by legislative enactment.

The decision rendered in the *Green* case is not without supporting precedent on the state level.[12] However, the majority of the Supreme Court, in deciding the case, ran headlong into the previous decision of *Trono v. United States,*[13] which inclined toward a different result. In that case, arising in the Philippine Islands, the defendant was charged with first degree murder but was convicted of the lesser-included offense of assault. On defendant's appeal, the appellate court set aside the conviction of assault, but at the same time adjudged him guilty of the greater crime, first degree murder.[14] The defendant challenged this verdict in the Supreme Court upon the ground of prior jeopardy.[15] The Court, following a prior decision,[16] agreed that the doctrine of former jeopardy was applicable, by statute, to prosecutions arising in the Philippines but held that by appealing his conviction of assault the defendant had waived his claim to former jeopardy and stood as if convicted of the greater crime upon retrial.

Justice Frankfurter in his dissent in the *Green* case[17] relied primarily upon the *Trono* decision to sustain his position. At first glance this reliance seems justified, since the *Trono* case was considered as if it arose from a lower federal court of the United States[18] and raised an issue under the fifth amendment.

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[10] The court held that even if there was not an "implied acquittal," the discharge of the jury without an express verdict on the first degree murder count and without the consent of the accused, worked a former jeopardy. 355 U.S. at 191.

[11] 355 U.S. at 215.

[12] See 59 A.L.R. 1160, and ALI CODE OF CRIMINAL PROCEDURE, Official Draft, June, 1930, Commentary to § 368, p. 1061.

[13] 199 U.S. 521 (1905).

[14] Seemingly under the holdover Spanish procedure the trial was continuous until reviewed and finalized by the highest court, with power in each appellate court to arrive at an independent decision on the record.

[15] Although the constitution, per se, did not pertain to the Philippine Islands, the Congress had enacted a statute providing like protections. See Kepner v. U.S., 195 U.S. 100 (1904) for a discussion of the effect of this statute.

[16] Kepner v. U.S., 195 U.S. 100 (1904).

[17] 355 U.S. at 205.

[18] "We may regard the question as thus presented as the same as if it arose in one of the Federal courts in this country, where, upon an indictment for a greater offense, the jury had found the accused not guilty of that offense, but guilty of a lower one which was included in it, and, upon an appeal from that judgment by the accused, a

However, as pointed out by Justice Black, speaking for the Court, second degree murder under the felony-murder doctrine is not a lesser-included offense.[19] Although under a charge of felony-murder, second degree murder may be established, this occurs when the state fails to prove facts necessary to support the underlying felony but does prove, independently, sufficient facts to support a conviction of second degree murder. In the *Green* case the act was first degree murder *only* if the underlying felony, arson, was established as a separate crime, and it was second degree murder *only* if supported by facts which themselves constituted another type or degree of a crime.[20] This situation must be contrasted with the facts of the *Trono* case, which involved a conviction of a lesser-included offense.[21]

A situation more analogous to the *Green* case arises where an indictment alleges different and distinct crimes in separate counts, the defendant being convicted of some of them and acquitted by implication, e.g., silence, of others. The weight of authority in such circumstances is that the defendant, on reversal and remand for a new trial, cannot be charged on those counts of which he was impliedly acquitted.[22] The rule is that the defendant's appeal from a conviction of one separate count does not waive his claim of former jeopardy in respect to the counts of which he was impliedly acquitted.

The only case found by the minority of the Court which was decided in the federal courts and related to facts somewhat analogous to the *Green* case was *United States v. Harding*.[23] But in this case, as in *Trono*, the court was concerned with a conviction of a lesser-included offense. This, of course, permits of the same reconciliation as above.

The majority of the Court, however, did not rest upon this distinction in the *Green* case. They held that even though the inclination of the court in the *Trono* case was to treat the issue as a constitutional one, the decision involved only a statutory interpretation and was not binding upon the Court when the constitutional issue was squarely placed before it.

The holding in the *Green* case is an extension of the felony-murder situation to include the doctrine that an implied acquittal of one separate offense is not waived by an appeal from the conviction of another separate offense. The question remains whether the Court is now prepared to: (1) adopt the position of the minority of the state courts[24] that a conviction of a lesser-included offense bars a charge of the greater offense on retrial or (2) whether the *Green* case will be limited to its facts—the felony-murder situation.

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new trial had been granted by the appellate court, and the question was whether upon the new trial accorded, the accused could be again tried for the greater offense set forth in the indictment, or must the trial be confined to that offense of which the accused had previously been convicted, and which conviction had, upon his own motion, been set aside and reversed by the higher court." 199 U.S. at 530.

[19] 355 U.S. at 194, note 14.

[20] Malice aforethought, Washington D.C. Code 22-2403. See note 3, *supra*.

[21] See note 18, *supra*.

[22] 114 A.L.R. 1406, 80 A.L.R. 1106.

[23] 26 Fed. Cas. 131 (1846).

[24] See note 12, *supra*.

It would seem from the tenor of the opinion that the court would adopt the first of these two alternatives and that, although it distinguished the *Trono* decision on its facts, it rejected entirely the theory supporting it.

The *Green* case highlights the inadequacies of the Court's approach to the former jeopardy problem. The decision strikes a curious balance between the rights of an accused to be protected against multiple prosecutions for the same crime and the interests of the community in the punishment of crime.

In the *Green* case the jury must have found all the facts needed to convict the defendant of first degree murder: (1) arson and (2) death caused by that arson. Yet, under the rule enunciated by the majority, because of an error by the trial court which redounded to the benefit of the defendant, he emerges armored against the logical result of the jury's verdict.

The rule of the *Green* case seems sound in that situation where a defendant is charged with first degree murder, is convicted of second degree murder, and appeals that conviction for error *prejudicial* to him. When a conviction of a lesser offense is reversed for error prejudicial to the defendant, it is difficult to understand why the state should be given another opportunity to obtain a conviction of the greater offense which it could not obtain in the first instance, even with the aid of error helpful to it, for example, admission of illegal evidence. The jury in such a case refuses to find the necessary elements of the greater crime. Whether this conclusion is reached on humanitarian considerations or on a true belief that an element of the greater crime is lacking, the defendant has been judged by a jury of his peers. No more should be demanded of him.

However, a different situation is presented on the facts of the *Green* case. Here the defendant, if guilty of murder at all, was guilty of murder in the first degree.[25] The court, perhaps being overly cautious or mistakenly believing that second degree murder was a lesser-included offense,[26] instructed the jury that the defendant could be guilty of second degree murder under the facts. The instruction, realistically appraised, redounded entirely to the benefit of the defendant. It might be argued that it was prejudicial to the defendant in that the jury was permitted to find the lesser degree of murder when they might have acquitted of the greater. However, this assertion would be illogical, for a finding of death caused by the defendant was necessary for the conviction of any degree of murder, and if found at all was, together with the arson, murder in the first degree.[27]

The suggested test would do away with this inconsistency and work as follows: If the error complained of worked to the disadvantage of the defendant, the prosecution should not be permitted to capitalize upon it and recharge the greater crime on the new trial. But if the error, realistically appraised, redounded to the benefit of the defendant, and he sought by this error to obtain a reversal of his conviction, the prosecution, without

[25] Such was the holding on the prior appeal. 95 App. D.C. 45, 218 F.2d 856 (1955).
[26] See note 19, *supra*.
[27] Washington D.C. Code 22-2401, see note 2, *supra*.

hindrance of error *prejudicial to it,* should have an opportunity to proceed on the original indictment.

Under this analysis the *Green* case is wrong. It does not follow, however, that the *Trono* decision is right. The test should apply whether the defendant is impliedly acquitted of one separate offense and appeals from his conviction of another separate offense or whether he appeals from his conviction of a lesser-included offense, as the damage is just as great to the party prejudiced thereby in either case.

The effect of such a test would be demonstrably clear in this state. Washington originally followed, in *State v. Murphy,*[28] the rule that a conviction of a lesser-included offense bars the charge of the greater offense on retrial. Subsequently the court, in *State v. Ash,*[29] was presented with facts which exposed the weakness of this rule. There the defendant, if guilty at all, was guilty of murder in the first degree,[30] but the trial court had erroneously instructed on manslaughter, of which the defendant was convicted. Rather than follow the *Murphy* rule, which would have permitted the defendant to escape entirely, the court withdrew from its prior position and held that when the defendant appealed, he waived his jeopardy as to the greater crime originally charged.

If the court were to follow the test suggested above, it could reconcile the *Murphy* and *Ash* cases and adhere to the basic philosophy underlying the doctrine of former jeopardy—that a man, fairly proceeded against, should have to face the judgment of his peers only once for the same crime.

LAWRENCE M. ROSS

[28] 13 Wash. 229, 43 Pac. 44 (1895).
[29] 68 Wash. 194, 122 Pac. 995 (1912).
[30] Here the defendant had lain in wait for the victim and hence was clearly guilty of premeditation. Therefore he was either guilty of murder in the first degree or innocent by reason of insanity.