UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1520

September Term, 2015

KEITH ANDERSON

v.

STATE OF MARYLAND

Woodward,
Graeff,
Arthur,

JJ.

Opinion by Graeff, J.

Filed: May 5, 2017

Keith Anderson, appellant, appeals from the ruling of the Circuit Court for Baltimore City denying his motion to dismiss an indictment against him on the ground of double jeopardy.[1] He presents the following question for this Court's review, which we have reworded slightly as follows:

> Did the circuit court err in denying appellant's motion to dismiss the indictment against him on the ground of double jeopardy because the crimes charged in the Indictment required proof of acts for which [appellant] previously had been tried and acquitted?

For the reasons set forth below, we shall affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

The first set of charges against appellant involved the distribution of narcotics on October 31, 2012. On August 7, 2013, appellant was acquitted of those charges.

On November 6, 2013, the State charged appellant by indictment on eight counts. The first two counts charged gang-related activity: Count 1 – conspiracy to "establish and entrench" a gang by criminal means; and Count 2 – participation in a criminal gang. The remainder of the charges alleged that appellant possessed illegal drugs on October 17, 2012: possession with intent to distribute (Count 3) cocaine; (Count 4) heroin; and (Count 5) marijuana; and possession of (Count 6) cocaine; (Count 7) heroin; and (Count 8) marijuana.

The counts of the charging document addressing gang activity noted that the Black Guerilla Family was a nationwide criminal gang that operated in numerous cities, including

[1] A defendant has "the right to immediate appellate review of an adverse ruling concerning a double jeopardy claim." *Kendall v. State*, 429 Md. 476, 484 n.10 (2012).

Baltimore City, and it had "as two of its primary objectives the commission of violent crimes and the distribution of controlled dangerous substances." The indictment then listed approximately 90 such offenses by various individuals, from 2005-2013, including the following:

> 79. On October 17, 2012, in the 300 block of E. North Avenue, Keith ANDERSON possessed with the intent to distribute heroin, cocaine, and marijuana.
>
> 80. On October 31, 2012, in the 300 block of E. Lanvale Avenue, Keith ANDERSON and Kenneth FAISON distributed cocaine to Adam Parks.

On September 3, 2015, appellant filed a motion to dismiss the indictment, arguing that double jeopardy barred him from being retried for the offenses of which he previously had been acquitted. That same day, the circuit court heard argument. The defense argued that paragraph 80 violated double jeopardy principles because it referenced the alleged October 31, 2012, drug transaction, of which he was acquitted.

The State argued that the alleged offenses referenced in paragraph 80 were not substantive charges, but rather, they were intended as a "predicate act," i.e., evidence of appellant's participation in a criminal gang. The State asserted that the elements of the underlying offenses in each case, i.e., distribution of cocaine and participation in a criminal gang, were not the same, and therefore, it was not a violation of double jeopardy to allege the prior distribution offense in the indictment.

The court ruled that paragraph 80 of the indictment was impermissible, and it ordered that paragraph to be excised or redacted from the indictment. The court ruled that

the prosecutor could not reference those events at trial, but it denied appellant's motion to dismiss the indictment.

DISCUSSION

Appellant contends that the circuit court erred in denying his motion to dismiss the indictment, asserting that "the crimes charged required proof of crimes for which [he] was previously acquitted," and therefore, the indictment violated the prohibition against double jeopardy. He argues that the "appropriate remedy for a charging document that violates double jeopardy is dismissal," and although the court "correctly concluded that [appellant] cannot be retried for the [a]cquitted charges, it erred by failing to dismiss the entire [i]ndictment."

The State argues that appellant's "appeal is premised on a fundamental misstatement of the proceedings." It asserts that appellant previously was "charged with possessing and distributing narcotics on October 31, 2012," but he now is being "charged with conspiracy, participating in a criminal gang, and distributing narcotics on October 17, 2012." The State contends that the two sets of charges do not violate double jeopardy because they neither "arise out of the same incident," nor do they have the same elements. It asserts that the State's use of the October 31 incident was to demonstrate knowledge of a "pattern" of criminal activity on the part of the gang; it does not mean that appellant was being charged with these crimes a second time.

"Both the Federal Constitution, through the Fifth and Fourteenth Amendments, and Maryland common law prohibit the State from placing a person twice in jeopardy for the

same offense." *Anderson v. State*, 385 Md. 123, 130 (2005); U.S. Const. amend. V. ("[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb").[2] The Double Jeopardy Clause affords a criminal defendant "three basic protections: '[It] protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.'" *Ohio v. Johnson*, 467 U.S. 493, 498 (1984) (quoting *Brown v. Ohio*, 432 U.S. 161, 165 (1977)). "[T]he two common law pleas in bar" used to invoke the protections of the double jeopardy clause are "*autrefois acquit* (former acquittal) and *autrefois convict* (former conviction)." *Copsey v. State*, 67 Md. App. 223, 225 (1986). As this Court has explained:

> The purpose served by the plea of former acquittal is that of preventing a defendant who has once survived his initial jeopardy from being "twice vexed" by a fresh exposure to the hazard of conviction for that same offense. The purpose served by the plea of former conviction is that of preventing a defendant who has once been convicted of an offense from being exposed to the hazard of being twice punished for that same offense.

Id. at 225-26. *Accord Warren v. State*, 226 Md. App. 596 (2016).

For two charges to constitute the same offense for double jeopardy purposes, "they must be the same 'in fact' and 'in law.'" *Scriber v. State*, 437 Md. 399, 408 (2014). In determining "whether charges are the same in fact, we look to whether they arise out of the same incident or course of conduct." *Id.* In determining whether two offenses are the same

[2] "The federal constitutional law of double jeopardy and the Maryland law of double jeopardy are now one and the same." *Warren v. State*, 226 Md. App. 596, 604 (2016) (citing *Benton v. Maryland*, 395 U.S. 784 (1969)).

in law, we apply the "required evidence" test. *Anderson*, 385 Md. at 131; *Scriber*, 437 Md. at 408. Under that test, "[i]f each offense requires proof of a fact which the other does not, neither multiple prosecutions nor multiple punishments are barred by the prohibition against double jeopardy even though each offense may arise from the same act or criminal episode." *Cousins v. State*, 277 Md. 383, 388-89, *cert. denied*, 429 U.S. 1027 (1976). *Accord State v. Long*, 405 Md. 527, 537 (2008). Where, however, only "one offense requires proof of a fact not required by the other, or where neither offense requires proof of an additional fact," the offenses are deemed the same for double jeopardy purposes. *Cousins*, 277 Md. at 389. Thus, for example, "[l]esser-included and greater-inclusive offenses are considered the same offense for double jeopardy purposes." *Scriber*, 437 Md. at 408.

With those principles in mind, we must determine whether the offenses charged in the November 2013 indictment were that same "in fact" and "in law" as the first set of charges, which involved the distribution of narcotics on October 31, 2012. Appellant's claim is based on Counts 1 and 2, which charged a violation of, and conspiracy to violate, Maryland Code (2012 Repl. Vol.) § 9-804 of the Criminal Law Article ("CR"), Maryland's gang statute.[3] CR § 9-804 provides, in pertinent part, as follows:

[3] There is no dispute that Counts 3 through 8 of the November 2013 indictment, which involve possession of drugs on October 17, 2012, are factually distinct from the earlier charges, which involved drug allegations on October 31, 2012, a different day. These two sets of charges clearly did not involve the same conduct because they involved conduct that occurred during two entirely separate criminal "events" or "episodes."

> (a) A person may not:
>
> > (1) participate in a criminal gang knowing that the members of the gang engage in a pattern of criminal gang activity; and
> >
> > (2) knowingly and willfully direct or participate in an underlying crime . . . committed for the benefit of, at the direction of, or in association with a criminal gang.

CR § 9-801(c) defines a "criminal gang" as:

> [A] group or association of three or more persons whose members:
>
> > (1) individually or collectively engage in a pattern of criminal gang activity;
> >
> > (2) have as one of their primary objectives or activities the commission of one or more underlying crimes . . . ; and
> >
> > (3) have in common an overt or covert organizational or command structure.

An "underlying crime" includes distribution of a controlled dangerous substance. CR § 9-801(f)(3)

Appellant's contention of double jeopardy is based on Paragraph 80, three lines in the 24-page indictment, which lists as an example of the gang activity distribution of cocaine by appellant on October 31, 2012. The trial court, however, ruled that this paragraph was to be redacted from the indictment. With this paragraph gone, appellant's double jeopardy claim crumbles. There can be no claim that appellant is being subjected to a second prosecution for the distribution offense for which he was acquitted.

Appellant argues, however, that striking Paragraph 80 was not appropriate. He asserts that the appropriate remedy for a charging document that violates double jeopardy is dismissal, and the court cannot, instead, strike a portion of the indictment to remedy a

potential double jeopardy problem and proceed with the remainder of the indictment. Appellant cites no authority in support of this argument, and we are not persuaded.[4]

Maryland Rule 4-204 provides: "On motion of a party or on its own initiative, the court at any time before verdict may permit a charging document to be amended except that if the amendment changes the character of the offense charged, the consent of the parties is required." Here, the amendment ordered by the court, i.e. the deletion of one of approximately 90 predicate acts for the gang offenses, did not change the character of the offenses charged, and we cannot conclude that this remedy, as opposed to the dismissal of the indictment was erroneous. *See Bolden v. State*, 44 Md. App. 643, 654-55 (permitting amendment to strike names of three of nine named conspirators did not change substance of offense charged), *cert. denied*, 287 Md. 750, *cert. denied sub nom. Taylor v. State*, 287 Md. 758 (1980); *Hawthorn v. State*, 56 Md. 530, 535-36 (1881) (court did not err in allowing amendment of indictment to delete surplusage). As indicated, with Paragraph 80 redacted from the indictment, there is no viable double jeopardy argument.

Moreover, even if the court was not permitted to order Paragraph 80 to be redacted, we would conclude that the indictment did not violate double jeopardy. In *Garrett v. United States*, 471 U.S. 773 (1985), the United States Supreme Court held that it was not a violation of double jeopardy to prosecute a person for a "continuing criminal enterprise"

[4] Appellant seized on language in *Warren v. State*, 226 Md. App. 596, 608 (2016), that double jeopardy is a "plea in bar." This Court in *Warren*, however, did not at all address the propriety of an amendment to the indictment as a remedy for a potential double jeopardy problem.

(CCE) after a prior conviction for one of the three predicate offenses that must be shown for a CCE violation. In that case, Garrett pleaded guilty to importation of marijuana and subsequently was indicted for, among other things, engaging in a CCE. *Id.* at 775. The Supreme Court stated that, assuming *arguendo* that the importation conviction was a lesser included offense of the CCE offense, as Garrett contended, the "'lesser included offense' principles of double jeopardy" in "the classically simple situation" of a single crime were not readily transposed to the "multilayered conduct, both as to time and place," involved in *Garrett*. *Id.* at 789.[5] The Court held that, where "Congress intended CCE to be a separate offense," it did not violate the Double Jeopardy Clause "to prosecute the CCE offense after a prior conviction for one of the predicate offenses" because the CCE offense was not the "same" offense as one of the predicate offenses. *Id.* at 793. *Accord United States v. Crosby*, 20 F.3d 480, 484 (D.C. Cir. 1994) (holding both CCE and Racketeering Influenced and Corrupt Organizations Act ("RICO") violations "are separate offenses from their predicates" and successive prosecutions for a RICO offense and a predicate does not violate the Double Jeopardy Clause), *cert. denied*, 513 U.S. 883 (1994), *and cert. denied sub nom. Williams v. United States*, 514 U.S. 1052 (1995); *People v. Martin*, 721 N.W.2d 815, 829-30 (Mich. Ct. App. 2006) (predicate offenses of racketeering "not necessarily

[5] Garrett contended that the importation offense was a lesser included offense because it did "not require proof of any fact not necessary to the CCE offense," and the CCE offense "requires proof of additional facts" that the predicate offenses did not. *Garrett v. United States*, 471 U.S. 773, 779 (1985). The Supreme Court noted that it had "serious doubts" that the importation was a lesser included offense of the CCE offense, but it assumed for the purposes of its decision that it was. *Id.* at 790.

included lesser offenses of that offense" where legislature intended to permit punishment for both racketeering and the underlying predicate offenses) (citation omitted), *aff'd*, 752 N.W.2d 457 (Mich. 2008).

In *United States v. Esposito*, 912 F.2d 60, 61 (3d Cir. 1990), the United States Court of Appeals for the Third Circuit addressed an issue similar to the one we address here: "whether acquittal on a RICO charge bars subsequent prosecution on the predicate acts." The court concluded that the

> same analysis that led [the court] to conclude that a RICO charge of racketeering and a charge of distribution of narcotics listed as a predicate act are not the same offense for purposes of successive prosecution leads us to inexorably to conclude that the predicate act is not a lesser included offense of the RICO charge.

Id. at 67. The court stated that "the government is 'not required to make an election between seeking a conviction under RICO, or prosecuting the predicate offenses only.'" *Id.* (quoting *United States v. Grayson*, 795 F.2d 278, 283 (3d Cir. 1986)), *cert. denied*, 481 U.S. 1018 (1987), *and cert. denied sub nom. Robinson v. United States*, 479 U.S. 1054 (1987); *see also Grayson*, 795 F.2d at 283 ("[S]uccessive prosecutions for a RICO offense and its underlying predicate offenses are not inconsistent with the double jeopardy clause."); *United States v. Arnoldt*, 947 F.2d 1120, 1127 (4th Cir. 1991) ("[I]n the context of successive prosecutions for a substantive RICO violation and for the predicate crimes used to prove RICO, the double jeopardy analysis is controlled by *Garrett*."), *cert. denied*, 503 U.S. 983 (1992).

Although we are not addressing a RICO charge, CR § 9-804 was modeled after the federal RICO Act. *See* Dep't of Legis. Servs., Fiscal and Policy Note, H.B. 713 at 4 (2007 Reg. Sess.), *available at* https://perma.cc/WYY7-QWSW. And the General Assembly has made clear the legislative intent that a crime that establishes a violation of the gang statute be treated separately from a predicate act. CR § 9-804(c)(2), the penalty section of the gang statute, provides that a sentence imposed under that statute, for a first offense, "may be separate from and consecutive to or concurrent with a sentence for any crime based on the act establishing a violation of this section," and for a second or subsequent offense, "shall be separate from and consecutive to a sentence for any crime based on the act establishing a violation of this section."

Accordingly, even if Paragraph 80 was improperly redacted, the October 31, 2012, offense of which appellant was acquitted was not the same offense for double jeopardy purposes as the offenses charged in the November 2013 indictment. The circuit court properly denied the motion to dismiss the indictment.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.