UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-50372
Summary Calendar

KIRK WAYNE McBRIDE

Petitioner-Appellant,

VERSUS

JACK BREMER, Sheriff, ET AL.

Respondents-Appellees.

Appeal from the United States District Court
for the Western District of Texas
(SA-93-CA-981)

(October 28, 1994)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:[1]

McBride challenges the district court's dismissal of his application for a writ of habeas corpus. We affirm.

I.

Wayne Kirk McBride was originally indicted on one count of sexual assault. After the trial court granted his motion to quash the indictment, McBride was reindicted on a total of four counts: one count of sexual assault, two counts of aggravated sexual assault, and one count of aggravated kidnapping. He was convicted

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[1] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

on all four counts and sentenced to 99 years imprisonment. A Texas appeals court subsequently reversed McBride's conviction because hair and blood samples taken from him were obtained in violation of state law. **McBride v. State**, 840 S.W.2d 111, 117 (Tex. App.--Austin 1992, writ ref'd). He is currently incarcerated pending retrial.

McBride filed a pretrial petition for writ of habeas corpus arguing that his retrial was barred by double jeopardy under the Fifth Amendment of the Constitution (the "Double Jeopardy Clause"), and that the increased charges were the result of prosecutorial vindictiveness. The district court denied relief and dismissed the petition. McBride filed a timely notice of appeal.

II.

A.

McBride argues first that his retrial is barred by double jeopardy because his first conviction was reversed on appeal. The Double Jeopardy Clause does not bar retrial if the reversal of the first conviction is based on ordinary trial error and the evidence, whether admissible or inadmissible, is otherwise sufficient to support the conviction. **Lockhart v. Nelson**, 488 U.S. 33, 38-39 (1988). The appeals court reversed McBride's original conviction because the trial court erroneously admitted evidence of hair and blood samples that had been obtained through a court order rather than through a search warrant as required by Texas law. However, the court noted that the record contained sufficient evidence to support McBride's conviction, even without the inadmissible hair

and blood samples. **McBride**, 840 S.W.2d at 116. The reversal of McBride's first conviction on appeal does not, therefore, bar his retrial on grounds of double jeopardy.

B.

McBride also argues that his retrial is barred because of the prosecutor's "gross negligence" in obtaining the hair and blood samples by a court order rather than by a search warrant. It is well established, however, that "prosecutorial misconduct tantamount to harassment or overreaching does not bar retrial unless it is **intended** to thwart a defendant's double jeopardy protection." **United States v. Nichols**, 977 F.2d 972, 975 (5th Cir. 1992), **cert. denied**, 114 S. Ct. 106 (1993). McBride has alleged no facts showing that the prosecution's actions in obtaining the hair and blood samples by a court order rather than a search warrant amounted to harassment or overreaching, or that the prosecution intended to thwart McBride's rights under the Double Jeopardy Clause. Accordingly, this claim also fails to bar McBride's retrial.

C.

Finally, McBride contends that his retrial on the four charges is barred because all of the charges arise from the same criminal episode and involve the same victim. The Double Jeopardy Clause bars multiple prosecutions and punishments for the same offense. **United States v. Dixon**, ___ U.S. ___, 113 S.Ct. 2849, 2856 (1993). Whether conduct that violates two statutory provisions constitutes one or two offenses turns on whether "each provision requires proof

of an additional fact which the other does not." **Blockburger v. United States**, 284 U.S. 299, 304 (1932).

The four counts in McBride's second indictment are not barred under **Blockburger**. The essential elements of aggravated kidnapping and aggravated sexual assault are different and both require proof of additional facts not required by the other.[2] Under **Blockburger**, therefore, double jeopardy does not bar prosecution for both offenses. Similarly, while sexual assault is a lesser-included offense of aggravated sexual assault, the two counts of aggravated sexual assault and one count of sexual assault in this case arise from three separate criminal acts. **McBride**, 840 S.W.2d at 113. Prosecution of multiple offenses arising from separate criminal acts does not violate the Double Jeopardy Clause. **United States v. Heffington**, 682 F.2d 1075, 1081 (5th Cir. 1982), **cert. denied**, 459 U.S. 1108 (1983). Therefore, McBride's final double jeopardy claim must also fail.

II.

McBride also claims that the prosecutor impermissibly reindicted him on greater charges after he refused to waive his

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[2] The essential elements of aggravated kidnapping are: (1) a person; (2) intentionally or knowingly; (3) abducts; (4) another person with intent to inflict bodily injury on her or to violate or abuse her sexually. **Holmes v. State**, 873 S.W.2d 123, 125 (Tex. App.-- Fort Worth 1994, no writ); Tex. Penal Code Ann. § 20.04(a)(4) (West 1994). The essential elements of aggravated sexual assault are (1) a person; (2) intentionally or knowingly; (3) causes the penetration of the anus or female sexual organ of another person by any means, without consent; and (4) uses or exhibits a deadly weapon in the course of the criminal episode. Tex. Penal Code Ann. § 22.021(a)(1)(A)(i), (a)(2)(A)(iv) (West 1994).

right to a ten-day preparation period following his reindictment. After the court granted McBride's motion to quash the initial one-count indictment for sexual assault, the State announced that it would either reindict McBride or seek an extensive amendment to his indictment. McBride refused to waive his right under Texas law to a ten-day preparation period. The prosecution subsequently charged McBride with the four-count indictment. **Id.** at 112. McBride contends that the new indictment was in retaliation for refusing to waive the ten-day period.

The defense of prosecutorial vindictiveness is an affirmative defense that the defendant must prove by a preponderance of the evidence. **United States v. Krezdorn**, 718 F.2d 1360, 1365 (5th Cir. 1983)(**en banc**). The prosecution's actions must be viewed in the context of the entire proceedings. **Id.** A presumption of vindictiveness does not arise if any objective event or combination of events "should indicate to a reasonable minded defendant that the prosecutor's decision to increase the severity of charges was motivated by some purpose other than a vindictive desire to deter or punish" the defendant's exercise of procedural rights. **Id**.

McBride points to no evidence to support his claim of prosecutorial vindictiveness. The fact that the second indictment expanded the charges against McBride does not by itself give rise to a presumption of vindictiveness. **Byrd v. McKaskle**, 733 F.2d 1133, 1135 (5th Cir. 1984). The evidence against McBride was substantial and legitimately warranted more than a one-count indictment for sexual assault. Viewing this claim in the context

of the entire proceedings, we conclude McBride has failed to raise a presumption of prosecutorial vindictiveness.

AFFIRMED.