DATE FILED: February 1, 2016 1:34 PM
FILING ID: DB558C12955E5
CASE NUMBER: 2015SC261

SUPREME COURT
STATE OF COLORADO

2 East 14th Avenue
Denver, CO 80203

On Certiorari to the Colorado Court of Appeals, 12CA1142
Jefferson County District Court, 08CR1501

Petitioner,

ZACHARIAH CLARK DOBLER,

v.

Respondent,

THE PEOPLE OF THE STATE OF COLORADO.

▲ **COURT USE ONLY** ▲

Case No. 15SC0261

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ANSWER BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g) or C.A.R. 28.1(g).

It contains 3,949 words

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

In response to each issue raised, the appellee has provided under a separate heading before the discussion of the issue, a statement indicating whether appellee agrees with appellant's statements concerning the standard of review and preservation for appeal and, if not, why not.

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ISSUE PRESENTED FOR REVIEW

This Court granted certiorari on the following issue:

> Whether the district court violated double jeopardy principles by resentencing petitioner to a period of incarceration exceeding his original prison sentence after he moved for a sentence reduction pursuant to Crim. P. 35(b), was placed on probation, and then violated the terms of his probation.

INTRODUCTION

Zachariah Dobler challenges his prison sentence as a violation of double jeopardy. The district court originally sentenced Dobler to four years in prison and recommended the boot camp program. When Dobler completed the program, the court granted him probation. While on probation, he killed a man. The district court revoked his probation and sentenced him to six years in prison.

The Double Jeopardy Clause has limited application to re-sentencing because the imposition of a sentence does not carry the same constitutional significance as an acquittal. A court is only prevented from increasing a sentence when the offender has developed a legitimate expectation of finality in that sentence. But when, as is the

case here, the legislature has suspended the finality of the sentence, a court may increase that sentence without violating double jeopardy.

The governing statutory provisions—provisions Dobler voluntarily agreed to in order to participate in the boot camp program and to earn his release on probation—allowed the district court to modify Dobler's sentence. Based on these provisions, Dobler did not have an expectation of finality, and the court was permitted to increase his sentence.

STATEMENT OF THE CASE AND FACTS

A. Dobler is sentenced to boot camp.

Dobler pleaded guilty to burglary. Based on his lengthy criminal history, the district court rejected a recommendation for probation. Instead, the court felt that the regimented inmate program, known as "boot camp," was an appropriate sentence. So the court sentenced Dobler to four years in the Department of Corrections and recommended the boot camp program. (R. Tr. 3/2/09, pp. 3-5).

The district court explained, "Mr. Dobler, if you successfully complete that program I will reconsider your sentence and put you on probation." (R. Tr. 3/2/09, p. 5).

On March 2, 2009, Dobler began serving his sentence. (PR. CF, pp. 50-51). Four months later, Dobler petitioned the court to reconsider his sentence even though he had not yet been placed in the boot camp program. (PR. CF, pp. 52-56). The court denied his request, indicating that it would reconsider his sentence once he completed the boot camp program. (PR. CF, p. 57).

In November 2009, Dobler began the boot camp program. (PR. CF, p. 58). Sixty days later, Dobler completed the program, and his case manager recommended that the trial court reconsider his sentence and grant intensive supervised probation. (PR. Env. 2, p. 6).

B. Dobler is granted probation and kills a man.

In February 2010, the trial court granted Dobler's request and reconsidered his sentence. The court granted Dobler 30 months of intensive supervised probation. (PR. CF, p. 61).

While on probation, Dobler violated numerous conditions. Most significantly, Dobler got drunk, stole his parents' car, and hit a tow truck driver who was responding to a different DUI crash. The impact

killed the tow truck driver, and Dobler fled the scene. (R. Tr. 4/11/12, pp. 59-69).

C. Dobler is resentenced to an increased sentence.

Dobler pleaded guilty to vehicular homicide and leaving the scene of an accident. The trial court sentenced him to the maximum sentence available under the plea agreement. At the same sentencing hearing, the court revoked Dobler's probation and resentenced him to six years in prison, concurrent with his sentence in the homicide case. (R. Tr. 4/11/12, pp. 75-79).

Dobler objected to the six-year sentence and argued that the sentencing court was limited by the original four-year sentence. The court responded, "I think the law is upon resentencing a defendant following a probation violation, any of the sentences that were available at the initial sentencing would become available again." (R. Tr. 4/11/12, p. 78).

D. Dobler appeals.

Dobler challenged his sentence on appeal. The court of appeals affirmed his sentence, citing *People v. Castellano*, 209 P.3d 1208 (Colo. App. 2009). The division reasoned that this case was indistinguishable from *Castellano*, where a "defendant sought and received a reduction in his sentence to probation [and] accepted 'the relevant probation statute authorizing the possibility of a more severe sentence for a subsequent revocation.'" Slip op. at 3 (quoting *Castellano*, 209 P.3d at 1210). Dobler, the division concluded, lacked a legitimate expectation of finality in his original four-year sentence. *Id.*

SUMMARY OF THE ARGUMENT

The guarantee against double jeopardy has limited application to sentences. The driving purpose of the constitutional provision is to prevent repeated attempts to try a defendant after acquittal or conviction.

Although an acquittal has greater constitutional significance than the imposition of a sentence, case law has expanded the guarantee against double jeopardy to prevent a court from increasing an offender's

sentence if that offender has a legitimate expectation of finality in that sentence. But an offender cannot develop an expectation of finality if the legislature has suspended the finality of the sentence.

The legislature has suspended the finality of an offender's sentence if the offender participates in the boot camp program or if the offender is granted probation. Both programs require an offender's voluntary participation, and both allow a court to modify an offender's sentence. When a court revokes probation, the probation statute expressly authorizes it to sentence the offender to any sentence it could have originally imposed.

In this case, Dobler voluntarily participated in the boot camp program with the hopes of having his sentence reconsidered. When he successfully completed the program, the sentencing court granted Dobler probation. Dobler accepted all of the conditions of probation, including the provision that allowed the court to increase his sentence after revocation.

Dobler never developed a legitimate expectation of finality in his sentence. So when the court revoked his probation because he killed a man, the court was free to increase his sentence.

ARGUMENT

Dobler's new sentence did not violate double jeopardy because he did not have a legitimate expectation of finality in his original sentence.

A. Standard of Review and Preservation

The interpretation of a statute is a question of law, which is reviewed de novo. *Romero v. People*, 179 P.3d 984, 986 (Colo. 2007). Whether a defendant's sentence violates double jeopardy is also a question of law reviewed de novo. *See People v. Porter*, 2015 CO 34, ¶ 8.

Dobler's objection at the sentencing hearing preserved this issue for appeal. (R. Tr. 4/11/12, p. 77).

B. Law and Analysis

1. The Double Jeopardy Clause does not prohibit an increased sentence when authorized by the legislature.

The Double Jeopardy Clause of the United States[1] and the Colorado Constitutions preclude a defendant from being placed twice in jeopardy for the same criminal act. U.S. Const. amend. V; Colo. Const. art. II, § 18. This protection has long been interpreted to entail three components: 1) prohibition against a second prosecution for the same offense after acquittal; 2) prohibition against a second prosecution for the same offense after conviction; and 3) prohibition against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

The third feature seeks to ensure "that the total punishment did not exceed that authorized by the legislature." *Jones v. Thomas*, 491 U.S. 376, 381 (1989) (quoting *United States v. Halper*, 490 U.S. 435, 450

[1] The Double Jeopardy Clause of the Fifth Amendment is applicable to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

(1989)). In essence, courts are not free to use multiple punishments as a device to exceed the limits drawn by the legislature. *Id*. It is this third constitutional protection that Dobler contends protects him from an increased sentence.

Under this third prong, the Supreme Court held in *United States v. DiFrancesco* that an increase to a defendant's sentence violates double jeopardy only if that defendant has a legitimate expectation of finality in his or her sentence. 449 U.S. 117, 136-37 (1980). The Court began by examining the underlying rationale of the Double Jeopardy Clause, finding that "the law attaches particular significance to an acquittal" because the prohibition against multiple *trials* is the "controlling constitutional principle." *Id.* at 132 (quoting *United States v. Wilson*, 420 U.S. 332, 346 (1975), and *United States v. Scott*, 437 U.S. 82, 91 (1978)). The Court explained that the constitutional provision was "designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." *Id.* at 127 (quoting *Green v. United States*, 355 U.S. 184, 187 (1957)). These "hazards," which the Double Jeopardy Clause protects

against, include "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." *Id.* at 128.

But the Court found that these considerations do not have "significant application to the . . . review [of] a sentence." *Id.* at 136. Although the Double Jeopardy Clause renders an acquittal final and unreviewable, the imposition of a sentence is not an "implied acquittal" of any greater sentence. *Id.* at 133. Accordingly, the Court concluded that the imposition of a sentence "does not have the qualities of constitutional finality that attend an acquittal." *Id.* at 134.

In *DiFrancesco*, the Court addressed the imposition of a new sentence after the government successfully appealed the original sentence. It held that a statute authorizing a sentencing appeal by the prosecution, on the ground that a sentence was too lenient, did not violate double jeopardy. *Id.* at 143. The Court also discussed its earlier holding in *Pearce*, which dealt with the imposition of a new sentence following a retrial. In *Pearce*, the Court held that "there was no absolute

constitutional bar to the imposition of a more severe sentence on reconviction after the defendant's successful appeal of the original judgment of conviction." *Id.* at 134. The differences between the two, the Court pointed out, were immaterial and were no more than a "conceptual nicety." *Id.* at 136. And in both cases, the Court held that the guarantee against double jeopardy did not require that the original sentence function as a "ceiling" for subsequent sentencing proceedings. *Id.*

Thus, the Supreme Court has held that the Double Jeopardy Clause only prohibits increasing an offender's sentence when that offender has a legitimate expectation of finality in the original sentence. And the Court has recognized that an offender's expectation of finality is subject to the parameters created by the legislature.

This Court applied *DiFrancesco* in *Romero v. People* and held that a court may resentence an offender to a longer term than the original sentence following the offender's rejection from community corrections. 179 P.3d 984, 989 (Colo. 2007). This Court first examined the relevant statutory provisions and determined that the legislature both implicitly

and explicitly provided for the possibility of an increased sentence following an individual's rejection from community corrections. *Id*. at 986-88. Based on the conclusion that the legislature specifically provided for the possibility of a sentence increase, this Court determined that Romero lacked a legitimate expectation of finality in his original sentence, and therefore, his increased sentence did not violate double jeopardy principles. *Id*. at 989-90. Critical to this Court's analysis in *Romero* was that the individuals rejected from community corrections were subject, by incorporation, to the probation statute—the exact same statute at issue in this case.

Examination of the statutory provisions at issue in this case reveal the same result: the legislature has contemplated and approved of an increased sentence after the revocation of probation.

2. The legislature has allowed for an increased sentence when an offender's probation has been revoked.

The boot camp program was established to benefit inmates convicted of certain non-violent crimes by promoting their personal

development and self-discipline. § 17-27.7-101, C.R.S. (2015). The program functioned through rigorous military-style training and provided job skills, health education, and drug and alcohol education and treatment. *Id.* Successful completion of the voluntary boot camp program qualified an inmate for a sentence modification within the discretion of the court. § 17-27.7-104(2)(b).[2]

The boot camp statute specifically requires the Department of Corrections to refer an inmate to the trial court following the completion of the program. If the inmate requested reconsideration under Crim. P. 35(b), "the boot camp statute makes clear that sentencing courts are to give special consideration to requests for a reduction in sentence made pursuant to its provisions." *People v. Keller*, 29 P.3d 290, 294 (Colo. 2000). When considering a sentence modification, the court may "plac[e] the offender on probation or in a community corrections program." § 17-27.7-104(2)(b).

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[2] The Department of Corrections has discontinued the boot camp program. *See* Kirk Mitchell, *Colorado Boot Camp Graduates Final Class of Inmates*, DENVER POST (May 28, 2010), http://www.denverpost.com/ci_15179128.

If an inmate is granted probation, he or she is subject to the all the same terms and conditions of any other probationer. Important here, if a probationer violates a condition of probation, "the court may then impose any sentence . . . which might originally have been imposed or granted." § 16-11-206(5). This includes the possibility of a sentence longer than the one originally imposed. *Romero*, 179 P.3d at 984.

3. Dobler never had a legitimate expectation of finality because the statutory provisions that governed his progression through boot camp and probation authorized an increased sentence after revocation.

In this case, Dobler did not develop a legitimate expectation of finality because the boot camp statute provided for the modification of his sentence, which included probation. § 17-27.7-104(2)(b). Once granted probation, the probation statute also provided for the modification of his sentence. § 16-11-206(5). In both stages of Dobler's sentence, the legislature provided for the possibility that his sentence could be modified. Accordingly, Dobler did not have a legitimate expectation of finality in his sentence.

Dobler argues that although there was a possibility that his sentence could decrease, he still maintained an expectation that the sentence would not increase. This is untrue. There is no controlling law that indicates that the Double Jeopardy Clause operates as a one-way ratchet to lower the sentencing ceiling. To the contrary, the Supreme Court has rejected such an approach because the imposition of a sentence does not have the same constitutional significance as an acquittal. *DiFrancesco*, 449 U.S. at 133-34. And Dobler's original sentence of four years did not operate as an "implied acquittal" of all other greater sentences. *Id*. at 133.

To be sure, some dissenting Justices have suggested a more expansive understanding of the Double Jeopardy Clause. *See, e.g.*, *DiFrancesco*, 449 U.S. at 143-52 (Brennan, J., dissenting). But their views do not reflect the controlling law. Further, the prevailing understanding of an offender's legitimate expectation of finality is consistent with the contours of other rights protected by the Double Jeopardy Clause.

For example, an individual has a constitutional right against multiple punishments for the same offense. But the right "manifests more as a rule of construction than a limitation on the authority of the legislature." *People v. Abiodun*, 111 P.3d 462, 465 (Colo. 2005). This Court has emphasized that "[a]s long as the general assembly makes clear its intent to punish the same offense with more than one conviction and sentence, it is not constitutionally prohibited from doing so." *Id.* In other words, if the legislature has provided for multiple punishments, there is no double jeopardy violation. Thus, resolution of the constitutional claim is actually a question of statutory authorization.

The same reasoning applies here because an offender cannot have a legitimate expectation of finality if the legislature has provided a mechanism to alter the offender's sentence. Therefore, statutory interpretation resolves the constitutional question. And because the boot camp statute and probation statute both allowed for the modification of Dobler's sentence, he could not have had a legitimate expectation of finality.

4. Dobler abandoned any expectation of finality in exchange for his release on probation.

Dobler places significant weight on the fact that he was not directly sentenced to probation. Instead, he contends that he acquired an expectation of finality *before* his sentence was modified and he was released on probation. As explained above, the Supreme Court has rejected the claim that the Double Jeopardy Clause operates as a one-way sentencing ratchet. But even if he is correct, his claim still fails.

In *Montoya v. State*, the Tenth Circuit held that the defendant had "by his own hand, defeated his expectation of finality." 55 F.3d 1496, 1499 (10th Cir. 1995) (quotation omitted). In that case, the defendant served one year in prison and then was released on probation. When he violated the terms of his probation and had his probation revoked, he was sentenced to an additional four years of prison as a habitual offender. *Id.* at 1498.

The court held that, although the defendant was first incarcerated and then released on probation, he did not have a legitimate

expectation of finality because the plea agreement placed him on notice that the state might seek habitual offender enhancement if he violated the terms of the agreement. *Id.* at 1499. The same principle is true here.

Probation is a privilege. It is an alternative to an otherwise harsher prison sentence. And an offender must apply for probation and voluntarily accept the court's terms. If the offender does not consent to the terms of probation, he may reject probation. *People v. Smith*, 2014 CO 10, ¶ 8.

Dobler voluntarily accepted the terms of probation, which included a provision for the possibility of an increased sentence. Assuming that Dobler acquired an expectation of finality while serving the original prison sentence, he relinquished that expectation in exchange for the more lenient probationary sentence. If Dobler did not want to risk a sentence greater than four years, he was free to reject probation. *See also Williams v. Wainwright*, 650 F.2d 58, 61-62 (5th Cir. 1981) ("We would find it inappropriate to strike down a state procedure which has afforded appellant the benefit of a reduced sentence conditioned upon his own efforts to reform . . . Appellant derived the

benefits of such leniency. In accepting these benefits, he also was bound to all terms of the agreement. This included the statutory provisions regarding resentencing in the event of revocation of probation.").

5. *People v. Castellano* was correctly decided.

In *Castellano*, the court of appeals affirmed a lengthier sentence imposed after the revocation of probation. In that case, as in this case, the defendant was first sentenced to the Department of Corrections, completed the boot camp program, requested reconsideration of his sentence, and was granted probation.

The court of appeals reasoned that "a defendant can have no legitimate expectation of finality in a sentence, that by statute, is subject to further review and revision." *Castellano*, 209 P.3d at 1209. (quoting *People v. Chavez*, 32 P.3d 613, 614 (Colo. App. 2001)). And because Crim. P. 35(b) allows a defendant to request a reduction (or for a court to reduce a sentence on its own initiative), the finality of the original sentence is suspended.

In *Castellano*, as in this case, the defendant took advantage of the suspension of finality provided for by statute. He then successfully obtained an alternative sentence to probation and voluntarily accepted the conditions of the probation statute, which included the possibility of an increased sentence following revocation.

The court of appeals correctly decided *Castellano* because it properly recognized that in the circumstances of that case, as in this case, the relevant statutory provisions prevented the defendant from developing a legitimate expectation of finality.

Dobler attempts to distinguish his case from *Castellano*, arguing that Castellano filed a motion to reconsider his sentence within the 120-day period provided by Crim. P. 35(b). He points out that he did not file such a motion within the same time limit.

This argument ignores that Dobler still filed a motion under Crim. P. 35(b). Although outside of 120 days, it was still considered timely because the boot camp statute explicitly incorporates the provision of Crim. P. 35(b) and allows such a motion as long as it is filed 60 days after the completion of the boot camp program. § 17-27.7-104 (2)(a).

Functionally, the boot camp statute provides a contingent extension to the 120-day deadline in Crim. P. 35(b). Thus, there is no constitutionally significant difference between this case and *Castellano*. In both cases, the defendants filed a motion to reconsider their sentences in a manner approved by the legislature. And in both cases, the legislative scheme suspended the finality of their sentences.

6. Probation inherently requires the suspension of the finality of a sentence.

As noted above, probation is privilege. It is a sentencing alternative under which the offender is granted significantly greater liberty. *People v. Ledford*, 477 P.2d 374, 375 (Colo. 1970). But an offender's liberty is governed by a number of conditions, which are imposed by statute and the sentencing court. *See* § 18-1.3-204. The purpose of these conditions is twofold: 1) to rehabilitate the offender and 2) to protect society while the offender is released from confinement. *People v. Ressin*, 620 P.2d 717, 719 (Colo. 1980).

To achieve these objectives, the offender remains under the supervision of the court, which may modify the conditions at any time.

See § 18-1.3-204(4). And one of those conditions is that the court may impose a greater sentence if the offender violates the terms of probation and it is revoked. § 16-11-206(5).

This statutory provision is a vital component to the probation scheme for two reasons. First, it provides an important incentive for the offender's continued compliance with the conditions of probation. Second, the sentencing court is faced with a different factual predicate after probation has been revoked. *Montoya v. People*, 864 P.2d 1093, 1096 (Colo. 1993). In some cases, the offender will have demonstrated himself unworthy of the benefits of probation or as a danger to society.

No case better illustrates the importance of the re-sentencing provision than this case. The district court was hopeful that the boot camp program had reformed Dobler enough that probation was an acceptable option. (R. Tr. 2/16/10, p. 3). But Dobler's behavior on probation demonstrated that the court was wrong.

The court recognized its error and determined that rehabilitation was not possible for Dobler: "Mr. Dobler, I took a chance on you when I reconsidered that sentence. And now a man is dead . . . . I don't think

there's any chance at rehabilitation here." (R. Tr. 04/11/12, p. 73). The legislature has ensured that sentencing courts, like the court here, are not stuck with an inappropriate sentence when an offender proves unfit for the benefits of probation.

In the legislature's judgment, it is important to preserve a sentencing court's discretion and permit it to consider a probationer's behavior during release. Because the legislature provided for the suspension of finality, no offender who voluntarily accepts probation can develop or maintain a legitimate expectation of finality in a previously imposed sentence. And because probation inhibits a legitimate expectation of finality, the Double Jeopardy Clause is not violated.

CONCLUSION

In the context of an increased sentence, the Double Jeopardy Clause provides only a narrow right because the imposition of a sentence does not have the same constitutional significance as an acquittal. This narrow right is not violated in this case because the

legislature expressly provided the sentencing court with mechanisms to reconsider Dobler's sentence after completing boot camp and after revoking his probation. These statutory provisions suspended the finality of Dobler's original sentence.

For these reasons, the People respectfully request that this Court affirm the Court of Appeals' judgment.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **ANSWER BRIEF** upon **NED JAECKLE**, via Integrated Colorado Courts E-filing System (ICCES) on February 1, 2016.

/s/ Tiffiny Kallina