DATE FILED: April 15, 2016 11:16 AM
FILING ID: B06DD3D5363C2
CASE NUMBER: 2015SC261

SUPREME COURT, STATE OF COLORADO Ralph L. Carr Judicial Center 2 East 14th Avenue Denver, CO 80203 Certiorari to the Colorado Court of Appeals Case No. 2012CA1142	
Petitioner ZACHARIAH CLARK DOBLER v. Respondent THE PEOPLE OF THE STATE OF COLORADO	
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REPLY BRIEF OF PETITIONER

CERTIFICATE OF COMPLIANCE

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

This brief complies with the applicable word limit and formatting requirements set forth in C.A.R. 28(g).

It contains 2,920 words.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

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1. After Mr. Dobler's four year sentence was lawfully imposed and he began serving it the Double Jeopardy Clause prohibited subsequently increasing his sentence to six years.

In the Opening Brief, Mr. Dobler discussed the cases establishing a component of the Double Jeopardy Clause's "multiple punishments doctrine": double jeopardy's prohibition of increasing a defendant's sentence after he has begun serving it. OB at 4-8.[1] As stated in that discussion, this Court, as well, has noted this prohibition of double jeopardy. *Romero v People*, 179 P.3d 984, 989 (Colo. 2007) ("[I]ncreasing a lawful sentence if the defendant has begun to serve it violates the double jeopardy protection ... [h]owever, double jeopardy does not bar the imposition of an increased sentence if the defendant lacked a legitimate expectation of finality in the sentence.").

The State grudgingly recognizes this prohibition. AB at 11 ("[T]he 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."). Thus, the parties necessarily agree that the

[1] The State limits its response to this discussion to addressing the Supreme Court's decision in *DiFrancesco*, mentioning *Jones v. Thomas* only in passing, but as set out in the opening brief, this component of double jeopardy is derived from the synthesis of the majority and dissenting opinion in Jones and the view of *DiFrancesco* expressed therein. OB at 5-7 discussing, *inter alia*, *Jones v. Thomas* 491 U.S. 376 (1989).

outcome of this case turns on whether Mr. Dobler had a legitimate expectation of finality in the four-year sentence that he began serving on March 2, 2009.

The State says he did not, first basing its claim on the boot camp statute's provision for the possibility of a sentence modification. AB at 14 ("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.").

That claim is wrong for several reasons.

First, the Court did not sentence Mr. Dobler to boot camp on March 2, 2009. It sentenced him to the DOC, and Mr. Dobler began serving that lawfully imposed sentence. Indeed, as explained in the opening brief, the Court *could not* sentence Mr. Dobler to boot camp; that decision can only be made by the executive director of the DOC. OB at 12-13 citing § 17-27.7-103 (1), C.R.S.

The fact that eight months into Mr. Dobler's four-year sentence the executive director decided to move Mr. Dobler from a prison facility to a boot camp facility does not mean Mr. Dobler's sentence was not final or that he had no expectation in the finality of the sentence he was serving or that he had somehow forfeited the constitutional protection of the Double Jeopardy Clause.

After all, the DOC determines the appropriate placement of felony offenders. *See* §§ 17-5-105 (1), 17-27.7-103, 17-40-102-103, C.R.S.; *White v. Adamek*, 907 P.2d 735, 738 (Colo. App. 1995) ("The General Assembly has granted the executive director of the DOC the sole authority to determine the appropriate placement of a felony offender."). The fact that the executive director exercised this authority during the course of Mr. Dobler's sentence has no bearing on its finality. Were that the case, no felony offender's sentence would ever be final because there is always the possibility that the DOC could change his or her placement.

Second, as set out in the opening brief, in addition to DOC having to decide to place Mr. Dobler in a boot camp facility, several more contingencies had to come to pass in order for the sentence he had been serving to be modified. OB at 12-14. None of these contingencies existed on March 2, 2009 when he began serving the four-year sentence.

Contrary to the State, there was no "suspension of finality provided for by statute." AB at 20. Mr. Dobler's four-year sentence was final when it was imposed. Again, if the State is correct that the mere existence of a statutory possibility for sentence modification "suspended finality" of a lawfully imposed

sentence, no sentence would ever be final. After all, the governor has the power to commute any offender's sentence. COLO. CONST. Art. IV, §7; § 16-17-102-103, C.R.S.; *People ex rel. Dunbar v. District Court*, 502 P.2d 420, 422 (Colo. 1972). Does the existence of that constitutional and statutory provision provide for a "suspension of finality" of every offender's sentence? This Court must avoid this absurd result; a result that necessarily follows from the State's position. *People v. Cross*, 127 P.3d 71, 74 (Colo. 2006) (supreme court "also consider[s] the consequences of a particular construction and avoid[s] constructions that produce illogical or absurd results.").

Third, in addition to the several contingencies that must come to pass before an offender's sentence may be modified if the DOC happens to place him in boot camp – OB at 12-14 – the boot camp statute expressly provides only for a possible reduction of sentence. OB at 16-17 citing § 17-27.7-104 (2)(a) ("If an offender successfully completes a regimented inmate training program such offender ... shall automatically be referred to the sentencing court so that the offender may make a motion for *reduction of sentence* ...") (emphasis added).

The State ignores this statutory language, instead responding with this red herring: "There is no controlling law that indicates that the Double Jeopardy

Clause operates as a one-way ratchet to lower the sentencing ceiling." AB at 15. But the Double Jeopardy Clause does bar *increasing a sentence* if the offender has begun serving it (and therefore has a legitimate expectation in its finality). *Romero*, *supra*. Provided those two conditions are met the "sentencing ceiling" imposed by the Double Jeopardy Clause is the length of the original sentence. And nothing about a statute providing for a possibly *reducing a sentence* negates an offender's expectation that his sentence will not exceed the sentence originally imposed.

Notwithstanding the State's misdirection, *DiFrancesco* is not to the contrary. There, the federal special offender statute specifically allowed the prosecution to appeal the offender's sentence and thus *increase* it. Accordingly, the Court held the offender lacked an expectation of finality in the original sentence.

> Although it might be argued that the defendant perceives the length of his sentence as finally determined when he begins to serve it, and that the trial judge should be prohibited from thereafter increasing the sentence, that argument has no force where, as in the dangerous special offender statute, Congress has specifically provided that the sentence is subject to appeal. Under such circumstances there can be no expectation of finality in the original sentence.

United States v. DiFrancesco, 449 U.S. 117, 139 (1980).

The State is wrong when it claims that anytime the legislature provides "a mechanism to *alter* the offender's sentence" the offender cannot have a legitimate expectation of finality in his sentence. AB at 16 (emphasis added). Only a statute authorizing an increase in a lawfully imposed sentence defeats the expectation of finality, not one holding out the possibility of a reduction. *DiFrancesco, supra; c.f. Downing v. People*, 895 P.2d 1046, 1049 (Colo. 1995) ("[Crim.P. 35(b) authorizes a trial court to reduce an offender's original sentence. It does not authorize a trial court to increase such sentence unless the original sentence was erroneously imposed or is void."; holding that trial court acted illegally by increasing defendant's original sentence by 2 years upon transferring him to community corrections on reconsideration).

Thus, any claim that upon beginning to serve the four-year sentence imposed on May 2, 2009 Mr. Dobler did not acquire a legitimate expectation of finality in that lawfully imposed sentence fails. And Mr. Dobler's legitimate expectation that his sentence could not be increased beyond 4 years was protected by the Double Jeopardy Clause.

2. Admitting Mr. Dobler to intensive supervised probation almost a year into his four-year sentence did not allow the court to thereafter increase his sentence and it did not constitute an "abandonment" or "waiver" of the Double Jeopardy protection.

The only remaining question is what effect, if any, did Mr. Dobler's subsequent release on probation have on Mr. Dobler's constitutionally protected expectation of finality in his 4-year sentence.

The State claims that Mr. Dobler "abandoned" his constitutional claim in exchange for release on probation. AB at 17. To make this claim the State relies on the 10th Circuit's decision in *Montoya*. AB at 17-18 discussing *Montoya v. State of New Mexico*, 55 F.3d 1496 (10th Cir. 1995). That case lends no support to the State's claim.

Unlike here, in *Montoya*, probation was imposed as a component of the offender's *original sentence*. *Montoya*, 55 F.3d at 1498 ("Pursuant to the plea agreement Mr. Montoya was sentenced on January 19, 1989 to an eighteen month suspended sentence for [car theft], one year in prison as a habitual offender ... *and eighteen months probation after confinement*.") (emphasis added). His "release on probation", as the State calls it, was simply part of his original sentence and was not, as here, a modification of the original sentence.

Moreover in *Montoya*, "[t]he plea agreement unambiguously put Mr.

Montoya on notice that the state would seek a further habitual offender enhancement if he violated the terms of the agreement...". *Id.* at 1499. Thus, unlike Mr. Dobler, Montoya never acquired an expectation in the finality of the length of his originally imposed sentence. Unlike Mr. Dobler, Montoya was 1) originally sentenced to probation and 2) on notice from the start that his sentence was not final and could be increased. The State's quotations from *Montoya* are taken out of context and have no bearing on the issue here.

Unlike the inapposite *Montoya*, the cases discussed in the opening brief from the supreme courts of Ohio and New Jersey are on point. OB at 14-16 citing *State v. Draper*, 573 N.E.2d 602, 604 (Ohio 1991); *State v. Ryan*, 429 A.2d 332, 335-336 (N.J. 1981). Like Mr. Dobler here, the defendants in *Draper* and *Ryan* were originally sentenced to prison and had begun serving their sentences before, in a later proceeding, each was released on probation. And like Colorado, both Ohio and New Jersey had statutes just like §16-11-206(5) allowing a court to impose any sentence that might have been originally imposed upon revocation of probation. *Compare* §16-11-206(5), C.R.S. ("If probation is revoked, the court may then impose any sentence ... which might originally have been imposed...") *with* Ohio Rev. Code 2951.09 ("When a defendant on

probation is brought before the judge or magistrate under section 2921.08 of the Revised Code, such judge or magistrate ... may terminate the probation and impose any sentence which might originally have been imposed.")[2] *and* N.J. Stat. Ann. 2A: 168-4 (authorizing "the imposition of any sentence that could have been imposed for the underlying crime after probation violation has occurred.").[3]

In *Draper*, the Ohio Supreme Court interpreted its similar statute as applying only to those defendants originally sentenced to probation and not to those like Draper (and Mr. Dobler) who had partially served their sentences and were mid-sentence released on probation. The Ohio Supreme Court presumed that the legislature knew that allowing a court to increase the sentence of defendants in the latter category would violate double jeopardy and therefore intended the statute to apply only to the former.

> The essential distinction between probation imposed in lieu of execution of sentence and probation granted after a term of incarceration has been served has long been recognized in Ohio. It must be presumed by this court that the General Assembly was aware of these constitutional imperatives when it enacted R.C. 2951.09. We therefore hold that the authority conferred upon a trial court by [this statute] to revoke the probation of an offender and impose a greater sentence

[2] As quoted in *Draper*, 573 N.E.2d at 603 prior to its later amendment.
[3] As quoted in R*yan*, 429 A.22d at 333 prior to its later repeal.

> of incarceration is limited to probation [imposed by the original sentence].

Draper, 573 N.E.2d at 604-605.

In *Ryan*, the New Jersey Supreme Court reached the same result, but for different reasons. While allowing that the statute ostensibly permitted any lawful sentence upon probation revocation, the Court nevertheless held that increasing the sentence that the defendant has partially served would violate double jeopardy. *Ryan,* 429 A.2d at 335-338; *e.g.* at 336: "Simply stated the contention is that jeopardy attached as soon as defendant commenced serving his prison term, hence principles of double jeopardy foreclosed the imposition of any increased term after violation of probation. We agree." See also 6 Wayne R. LaFave, et al., *Criminal Procedure*, § 26.7(c) at 846 (3rd ed. 2007) (noting that double jeopardy likely bars increasing the offenders sentence in this circumstance).

Indeed, this Court has at least suggested that the discretion afforded by § 16-11-206(5) likely applies only when a defendant has originally been sentenced to probation. *Romero*, 179 P.3d at 987 and 989 (noting that "had Romero been placed on probation, the sentencing court could have modified his sentence by increasing it", but thereafter observing "increasing a lawful sentence if the

defendant has begun to serve it violates the double jeopardy protection..."); *see also* OB at 15-16 (arguing that the statute covers only those situation where a defendant is originally sentenced to probation or community corrections). Unlike Mr. Dobler, a defendant directly sentenced to probation (like the defendant in the State's *Montoya* case) is on notice at the outset that he is subject to any lawful sentence upon revocation of probation.

Construing §16-11-206(5) as the Ohio Supreme Court construed its Ohio counterpart in *Draper* would also be sensible and consistent with its placement Article 11 of Title 16. That article is entitled "Imposition of Sentence" and is geared to sentencing alternatives for offenders' facing initial sentencing. *C.f. Douglas Cty. Bd. v. Public Utilities Commission of Colorado*, 829 P.2d 1303, 1312-13 (Colo. 1992) (using a statutory provision's placement in a particular article as an aid to interpret legislative intent). Moreover, construing this statutory provision as applying only to defendants originally sentenced to probation or community corrections avoids the double jeopardy violation that follows from the construction suggested by the State. *Fields v. Suthers*, 984 P.2d 1167, 1172 (Colo. 1999) (recognizing the "duty to construe statutes in a way that does not raise constitutional concerns"); *see also Almendarez-Torres v. United*

States, 523 U.S. 224, 237-38 (1998) (doctrine of constitutional doubt requires that a statute 'be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score").

Finally, the boot camp statute did not put Mr. Dobler on notice that by successfully completing boot camp and then seeking the benefit the statute allowed he was somehow waiving the constitutional protection of double jeopardy. Indeed, the statute notified him that he was applying only for a possible reduction of sentence, not a possible increase. Section 17-27.7-104 (2)(a) ("If an offender successfully completes a regimented inmate training program, such offender ... shall automatically be referred to the sentencing court so that the offender may make a motion for *reduction* of sentence...") (emphasis added).

And when after a year of serving his prison sentence the court told Mr. Dobler it was releasing him on probation, it did not advise him that he was thereby "abandoning" his expectation of finality, or exposing himself to a possible increase in sentence if revoked, or that he was somehow waiving the constitutional protection of the Double Jeopardy Clause. The Court did nothing more than congratulate Mr. Dobler on his success in boot camp, send him to the probation department, and wish him good luck. (Tr. 2.16.2010 p2-7).

For the State to suggest that this perfunctory proceeding should result in a waiver by Mr. Dobler of a fundamental constitutional right offends the very essence of due process. *C.f. Van Sickle v. Boyes*, 797 P.2d 1267, 1273-74 (Colo. 1990) (essence of due process is fundamental fairness and requires notice at a minimum); *Mullane v. Cent. Hanover Bank*, 339 U.S. 306, 313 (1950) (due process requires at a minimum that an adjudication affecting life, liberty or property is preceded by notice). Yet that is the necessary implication of the State's position. And the State would have this Court hold that this waiver transpired in a proceeding where the largely silent Mr. Dobler was advised of nothing more than that he was required to report to the probation department (*Id.* p6), and was asked nothing more than if he had his "civilian clothes" with him (*Id.* p5).

This Court has previously stated that under United States Supreme Court precedent even "a guilty plea does not waive a valid double jeopardy claim of being punished twice for the same offense." *Patton v. People*, 35 P.3d 124, 132 (Colo. 2001). If a guilty plea does not suffice to waive the double jeopardy protection against multiple punishments, the perfunctory proceeding here surely does not. *C.f. Ortiz v. District Court*, 626 P.2d 642, 647 (Colo. 1981) (holding

that motion for new trial does not relinquish the right to invoke double jeopardy guarantee against retrial of the charges on which no verdicts were returned); *Green v. United States*, 355 U.S. 184, 191-92 (1957) (successful appeal of second-degree murder conviction did not "waive" constitutional defense of double jeopardy against first-degree murder charge).

Conclusion

After Mr. Dobler began serving his four-year sentence, the Double Jeopardy Clause prohibited increasing it to six years in a subsequent proceeding. And nothing that occurred after he began serving his sentence constituted an "abandonment" or waiver of that constitutional protection.

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CERTIFICATE OF SERVICE

I certify that, on April 15, 2016, a copy of this Reply Brief was electronically served through ICCES on Michael D. McMaster of the Attorney General's Office.