

Circuit Court for Baltimore City
Case No. 116251018

UNREPORTED
IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 929

September Term, 2017

STATE OF MARYLAND

v.

CHRISTOPHER WISE

Wright,
Nazarian,
Leahy,

JJ.

Opinion by Nazarian, J.

Filed: March 5, 2018

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Christopher Wise was indicted and tried in the Circuit Court for Baltimore City on several charges related to a drive-by shooting, including attempted murder, conspiracy to commit murder, first-degree assault, reckless endangerment, and conspiracy to commit first-degree assault. The jury acquitted him on all charges except the last two—on those, the jury hung. The State intended to re-try Mr. Wise on the conspiracy to commit murder charge, but the court granted a motion to dismiss by Mr. Wise, finding that a re-trial would constitute double jeopardy in light of the acquittal for conspiracy to commit first-degree assault. The State appeals this decision and we affirm.

I. BACKGROUND

In April 2016, Richard Bailey was shot while he sat in his car outside an apartment building on Belvedere Avenue in Baltimore. The shots were fired from the passenger or back seat of a white Honda Accord with tinted windows that had pulled up next to him.

From witness accounts and video footage, the police were able to determine that Mr. Bailey had been followed from the Alameda Shopping Center by a car matching the description of the Honda involved in his shooting. After the shooting, Mr. Bailey pursued the Honda and apparently fired his own shots in return. But he crashed into a fence at some point during the pursuit, and was found near the site of the accident suffering from gunshot wounds.

Police found shell casings in Mr. Bailey's car, and a loaded gun near Mr. Bailey in the bushes. The shell casings in Mr. Bailey's car were linked to the loaded gun found in the bushes, and the gun was linked to the shooting of Jamal Gardner several days earlier.

Mr. Gardner was a friend of Mr. Wise, and according to witness testimony, Mr. Wise may have been aware that Mr. Bailey was involved in the shooting of Mr. Gardner. Further, Mr. Wise was known to drive a 2010 white Honda Accord with tinted windows.

The State's theory of the case was that Mr. Wise was the getaway driver for the shooting, or, at the very least, had lent his car to the shooters with the understanding that it would be used to shoot Mr. Bailey. He was indicted on September 7, 2016 on several charges arising from the shooting: attempted murder; conspiracy to commit murder; first-degree assault; conspiracy to commit first-degree assault; wearing, carrying, and transporting a handgun on his person; use of a handgun in the commission of a crime of violence; and reckless endangerment. At trial, the State produced historical cell site evidence that placed Mr. Wise in the area of Belvedere Avenue at the time of the shooting. At close of argument, the jury was given the following instructions for attempted murder; conspiracy to commit murder; first-degree assault; and conspiracy to commit first-degree assault:

THE COURT: [Mr. Wise] is charged with the crime of assault. Assault is causing offensive physical contact to another person. In order to convict [Mr. Wise] of assault, the State must prove that [Mr. Wise] caused offensive physical contact to Richard Bailey; that the contact was a result of an intentional or reckless act of [Mr. Wise] and was not accidental; and that the contact was not consented to by Richard Bailey.

[Mr. Wise] is charged with the crime of first degree assault. In order to convict [Mr. Wise] of first degree assault, the State must prove all the elements of assault and also must prove that 1) [Mr. Wise] used a firearm to commit assault, or 2) [Mr. Wise] intended to cause serious physical injury in the commission of the assault.

A firearm is a weapon that propels a bullet by gunpowder or similar explosive. Serious physical injury means injury that 1) creates a substantial risk of death, or 2) causes a serious and permanent or a serious and protracted disfigurement.

[Mr. Wise] is charged with the crime of conspiracy to commit the crime of first degree murder and conspiracy to commit the crime of first degree assault. Conspiracy is an agreement between two or more person to commit a crime. In order to convict [Mr. Wise] of conspiracy, the State must prove 1) that [Mr. Wise] agreed with at least one other person to commit the crime of first degree murder and the crime of first degree assault and that [Mr. Wise] entered into an agreement with intent that the crimes of first degree murder and first degree assault be committed.

[Mr. Wise] is charged with the crime of attempted murder. Attempt is a substantial step beyond mere preparation toward the commission of a crime. Attempted first degree murder is a substantial step beyond mere preparation toward the commission of murder in the first degree.

In order to convict [Mr. Wise] of attempted murder in the first degree, the State must prove 1) that [Mr. Wise] took a substantial step beyond mere preparation toward the commission of murder in the first degree; 2) that [Mr. Wise] had the apparent ability at that time to commit the crime of murder in the first degree; and 3) that [Mr. Wise] willfully and without premeditation – or, and with premeditation and deliberation intended to kill Richard Bailey.

Willfully means that [Mr. Wise] actually intended to kill Richard Bailey; deliberate means that [Mr. Wise] was conscious of the intent to kill; premeditated means that [Mr. Wise] thought about the killing and that there was enough time, though it may only have been brief, for [Mr. Wise] to consider the decision whether or not to kill and enough time to weigh the reasons for and against the choice.

The jury acquitted Mr. Wise of all charges except conspiracy to commit murder and reckless endangerment. On those two charges, the jury hung, so the court declared a mistrial and set a new trial date.

Before the new trial date, Mr. Wise filed a motion to dismiss the remaining charges on grounds of double jeopardy and collateral estoppel. On May 9, 2017, the trial court heard arguments and asked both sides how a defendant can attempt to murder or agree to murder someone without assaulting them:

THE COURT [TO MR. WISE'S COUNSEL]: So I guess what I'm asking is, can you conspire to kill someone without agreeing to offensively physically contact them?

MR. WISE'S COUNSEL: I don't think you can.

THE COURT [TO THE STATE]: Well, they're arguing that the jury must have concluded factually and legally, for that matter, that Mr. Wise did not agree with one or more individuals to cause offensive physical contact to Richard Bailey. And if that's what the jury concluded based on that acquittal of that count, how could they conclude that, in a future case, that he did intend or agree with one or more individuals to murder Richard Bailey? That's – how could those two go together?

THE STATE: . . . [I]n [the jury's] minds, is it possible they believed that [Mr. Wise] wanted to – that he wanted to murder the victim as opposed to simply just hurt him? Possibly that could be it. But again, that's more of the legal inconsistency as opposed to a factual inconsistency.

The trial court issued an order on May 15, 2017 granting Mr. Wise’s motion to dismiss the conspiracy to commit murder charge,¹ finding that the jury had resolved in Mr. Wise’s favor elements of conspiracy to commit murder:

Upon consideration of the Defendant’s motion any [sic] the responses thereto, the arguments of the parties at the hearing, and a review of the record of the first trial, including the pleadings, evidence, prosecution’s theory, the disputed issues, and the jury instructions in accordance with the directions of *Ferrell v. State*, 318 Md. 235 (1990), it is this 15th day of May 2017, hereby

ORDERED the motion is **GRANTED** as to conspiracy to commit first degree murder as the State is barred by the doctrine of collateral estoppel from retrying the Defendant on conspiracy to commit first degree murder because the underlying facts necessary to convict the Defendant of conspiracy to commit first degree murder have already been decided in the Defendant’s favor at the first trial[.]

The State filed a timely appeal.

II. DISCUSSION

This is one of those cases where the parties seem to talk past each other. The State argues that the acquittals for attempted murder and first-degree assault don’t preclude it from re-trying Mr. Wise for conspiracy to commit first-degree murder.² Mr. Wise agrees that this appeal is about the application of collateral estoppel principles, but points to a

¹ The trial court permitted the State to try the reckless endangerment charge, but the State *nol prossed* that charge on June 7, 2017.

² In its brief, the State phrased its Question Presented as follows:

Did the circuit court err when it determined that acquittals on the charges of attempted first degree murder and first degree assault estopped the State from proving reckless endangerment and conspiracy to commit first degree murder?

different acquittal. He contends that a defendant acquitted of conspiracy to commit first-degree assault cannot be re-tried for conspiracy to murder the same person in connection with the same shooting.³ We agree with Mr. Wise and the trial court that the relevant acquittal is the acquittal for conspiracy to commit first-degree assault, and the jury’s findings in reaching that verdict resolved in his favor facts common to a charge of conspiracy to commit first-degree murder.

“Both the Fifth Amendment to the United States Constitution and Maryland common law provide that no person shall be put in jeopardy twice for the same offense.” *Ferrell v. State*, 318 Md. 235, 241 (1990); *see also State v. Taylor*, 371 Md. 617, 630 (2002); *Green v. United States*, 355 U.S. 184, 187 (1957). To that end, collateral estoppel principles prevent the State from re-trying a defendant when a prior acquittal has resolved common issues of fact in the defendant’s favor:

“[T]he doctrine of collateral estoppel applies after a jury, at a single trial, acquits on one count of a multicount indictment and is unable to agree upon a verdict on a related count of the same indictment involving a common issue of ultimate fact, which if found in favor of an accused would establish his innocence on both counts.”

Ferrell, 318 Md. at 242 (*quoting Powers v. State*, 285 Md. 269, 288 (1979)). Our task, then, is to determine from the trial court record “whether the offense for which the

³ Mr. Wise re-phrased the State’s Question Presented as follows:

Did the circuit court correctly rule that retrial on the charge of conspiracy to commit murder was barred by principles of double jeopardy and collateral estoppel where the jury acquitted appellee of conspiracy to commit first degree assault of the same person?

defendant was earlier acquitted, and the offense for which he is being retried, each involved a common issue of ultimate fact, and whether that issue was resolved in the defendant's favor at the earlier trial." *Id.* at 243.

Nobody disputes this analytical framework—the parties disagree only about the relevant comparator charge. And we might agree with the State if Mr. Wise had been acquitted only of attempted murder and assault, since it's possible that he could have entered into an agreement to carry out this drive-by shooting without himself undertaking any of the overt acts.⁴ But there is no way to separate the jury's decision to acquit him for

⁴ *Compare*

[Mr. Wise] is charged with the crime of assault. Assault is causing ***offensive physical contact to another person***. In order to convict [Mr. Wise] of assault, the State must prove that [Mr. Wise] caused offensive physical contact to Richard Bailey; that the ***contact was a result of an intentional or reckless act*** of [Mr. Wise] and was not accidental; and that the contact was not consented to by Richard Bailey.

[Mr. Wise] is charged with the crime of first degree assault. In order to convict [Mr. Wise] of first degree assault, the State must prove all the elements of assault and also must prove that 1) [Mr. Wise] used a firearm to commit assault, or 2) [Mr. Wise] ***intended to cause serious physical injury in the commission of the assault***.

and

In order to convict [Mr. Wise] of attempted murder in the first degree, the State must prove 1) that [Mr. Wise] took a substantial step beyond mere preparation toward the commission of murder in the first degree; 2) that [Mr. Wise] had the apparent ability at that time to commit the crime of murder in the first degree; and 3) that [Mr. Wise] willfully and

conspiracy to commit assault from the alleged conspiracy to commit murder—the acts comprising both substantive charges are the same, and a finding that he didn't enter into an agreement to commit an assault in that manner precludes a new jury from considering whether he entered into an agreement to murder in the identical fashion.⁵ Accordingly, the trial court correctly granted Mr. Wise's motion to dismiss.

without premeditation – or, and *with premeditation and deliberation intended to kill Richard Bailey*.

Willfully means that [Mr. Wise] actually *intended to kill* Richard Bailey; deliberate means that [Mr. Wise] was *conscious of the intent to kill*; premeditated means that [Mr. Wise] thought about the killing and that there was enough time, though it may only have been brief, for [Mr. Wise] to consider the decision whether or not to kill and enough time to weigh the reasons for and against the choice.

with

[Mr. Wise] is charged with the crime of conspiracy to commit the crime of first degree murder and conspiracy to commit the crime of first degree assault. Conspiracy is an agreement between two or more person to commit a crime. In order to convict [Mr. Wise] of conspiracy, the State must prove 1) that [Mr. Wise] agreed with at least one other person to commit the crime of first degree murder and the crime of first degree assault and that [Mr. Wise] entered into an agreement *with intent that the crimes of first degree murder and first degree assault be committed*.

(emphasis added).

⁵ The trial court did not differentiate between the charges of conspiracy to commit murder and conspiracy to commit first degree assault in its jury instructions:

[Mr. Wise] is charged with the crime of conspiracy to commit the crime of first degree murder and conspiracy to commit the crime of first degree assault. Conspiracy is an agreement

**JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE CITY AFFIRMED. THE
MAYOR AND CITY COUNCIL OF
BALTIMORE TO PAY THE COSTS.**

between two or more persons to commit a crime. *In order to convict [Mr. Wise] of conspiracy, the State must prove 1) that [Mr. Wise] agreed with at least one other person to commit the crime of first degree murder and the crime of first degree assault and that [Mr. Wise] entered into an agreement with intent that the crimes of first degree murder and first degree assault be committed.*

(emphasis added).