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Matter of Baim v. Eidens

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SUPREME COURT, APPELLATE DIVISION

THIRD DEPARTMENT

In the Matter of Baim v. Eidens[1]
(decided January 11, 2001)

Travis Baim was charged with criminal sale of a controlled substance, and two counts of criminal possession of a controlled substance.[2] Baim was acquitted on the charge of criminal sale, but the jury was unable to reach a verdict on either possession offense.[3] The trial court accepted the partial verdict.[4] Baim then commenced an Article 78[5] proceeding to prohibit a retrial on the possession offenses.[6] Baim argued that a retrial would violate his Fifth Amendment[7] constitutional protection against double jeopardy. In addition, Baim claimed that a retrial would be repugnant to Article I, Section 6 of New York's Constitution,[8] as well as New York's double jeopardy statute, Criminal Procedure Law Section 40.20.[9] Furthermore, Baim asserted that a retrial was precluded by collateral estoppel.[10]

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[1] 279 A.D.2d 787, 718 N.Y.S.2d 718 (3d Dep't 2001).
[2] *Id.*
[3] *Id.* at 789, 718 N.Y.S.2d at 720.
[4] *Id.*
[5] N.Y. C.P.L.R. § 7801 (McKinney 1994) provides in pertinent part:
Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article. Wherever in any statute reference is made to a writ or order of certiorari, mandamus or prohibition, such reference shall, so far as applicable, be deemed to refer to the proceeding authorized by this article.
[6] *Baim*, 279 A.D.2d at 788-89, 718 N.Y.S.2d at 720.
[7] U.S. CONST. amend. V provides in pertinent part: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb."
[8] N.Y. CONST. art. I, § 6 provides in pertinent part: "[N]o person shall be subject to be twice put in jeopardy for the same offense."
[9] *Baim*, 279 A.D.2d at 788-89, 718 N.Y.S.2d at 720. N.Y. CRIM. PROC. LAW § 40.20(2) (McKinney 1992) states in pertinent part:

> A person may not be separately prosecuted for two offenses based upon the same act or criminal transaction unless:

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The Appellate Division, Third Department, did not subscribe to any of Baim's arguments, holding that Baim failed to show the requisite necessity to resort to the extraordinary remedy of prohibition of a new trial, and that a conviction of either of the possession offenses at a retrial would not contradict Baim's acquittal on the sale offense.[11] Additionally, the Third Department found that Baim did not meet his burden of showing that the acquittal of the sale offense at the first trial would "necessarily decide a particular factual issue" in a new proceeding.[12] Finally, the Appellate Division concluded that collateral estoppel did not preclude retrial of the possession offenses.[13]

The three offenses resulted from a transaction which took place on January 19, 1999 at the home of Matthew Carter. On that day, Robert Costello, an informant for the Schenectady Police Department went to Carter's house with $200 to purchase drugs.[14] David Callahan was also present in Carter's house that day to buy drugs.[15] Callahan contacted Baim, who arrived on the scene sometime later.[16] Upon arrival, Baim conversed with Callahan, and then allegedly revealed three plastic bags of cocaine.[17] Baim traded the largest bag of cocaine with Callahan for a piece of jewelry, and it was Callahan who subsequently cut a portion of that

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> (a) The offenses as defined have substantially different elements and the acts establishing one offense are in the main clearly distinguishable from those establishing the other; or
> (b) Each of the offenses as defined contains an element which is not an element of the other, and the statutory provisions defining such offenses are designed to prevent very different kinds of harm or evil; or
> (c) One of such offenses consists of criminal possession of contraband matter and the other offense is one involving the use of such contraband matter, other than a sale thereof.

[10] *Baim*, 279 A.D.2d at 789, 718 N.Y.S.2d at 720.

[11] *Id.*

[12] *Id.* at 789-90, 718 N.Y.S.2d at 721 (quoting People v. Acevedo, 69 N.Y.2d 478, 508 N.E.2d 665, 515 N.Y.S.2d 753 (1987)).

[13] *Id.* at 790, 718 N.Y.S.2d at 721.

[14] *Id.*

[15] *Baim*, 279 A.D.2d at 787, 718 N.Y.S.2d at 719.

[16] *Id.*

[17] *Id.*

cocaine for Costello.[18] Costello gave a written statement to police naming Baim as the seller of cocaine, but his testimony at trial contradicted his written statement.[19] At trial, Costello unequivocally testified that the drugs he bought came from Callahan, and it was Callahan, not Baim, who received the money for the transaction.[20] Baim took the stand and testified that although he was present at Carter's house that day, he did not possess or sell drugs to anyone.[21]

Baim was acquitted by the jury of the sale offense, but the jury could not agree on either possession offense and the Schenectady County Court accepted the partial verdict.[22] Subsequently, Baim initiated an Article 78 proceeding to prevent a retrial on the possession charges.[23]

Baim's double jeopardy argument rested on Section 40.20(2) of New York's Criminal Procedure Law.[24] He argued that all the charges were based upon the same criminal transaction and therefore, Section 40.20(2) barred prosecution on the possession offense once he was acquitted on the sale offense.[25] The Third Department dismissed this argument, holding that Section 40.20(2) was satisfied when the People indicted Baim "in a *single* accusatory instrument and tried [him] in *one* prosecution for the sale and possession offenses based on the January 19, 1999 events."[26]

The Third Department further held that New York's Criminal Procedure Law Section 310.70[27] authorizes a retrial after

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[18] *Id.*

[19] *Id.*

[20] *Baim*, 279 A.D.2d at 787, 718 N.Y.S.2d at 719.

[21] *Id.* at 787-88, 718 N.Y.S.2d at 719.

[22] *Id.* at 788, 718 N.Y.S.2d at 719.

[23] *Id.*

[24] *See supra* note 9; *Baim*, 279 A.D.2d at 788, 718 N.Y.S.2d at 720.

[25] *Baim*, 279 A.D.2d at 789, 718 N.Y.S.2d at 720.

[26] *Id.*

[27] N.Y. CRIM. PROC. LAW § 310.70(2) (McKinney 2002) provides in pertinent part:

> Following the rendition of a partial verdict pursuant to subdivision one, a defendant may be retried for any submitted offense upon which the jury was unable to agree unless:

a partial verdict on any offense upon which the jury could not agree, but a subsequent guilty verdict in the retrial must not be inconsistent with the verdict from the first trial.[28] The Third Department was not convinced that a conviction on either possession offense at a retrial would be inconsistent with the acquittal on the sale offense, in violation of Section 310.70.[29] Accordingly, the court did not agree with Baim's claim that "the jury *must* have determined that he 'had not possessed the cocaine recovered from [Costello],'" because of the acquittal of the criminal sale charge.[30] Consequently, a retrial would not produce conflicting verdicts.[31]

The Third and Fourth Departments have upheld convictions for both the crimes of criminal sale of a controlled substance and criminal possession of a controlled substance reasoning that they constitute "separate crimes."[32] In *People v. Thomas*,[33] the defendant was convicted of two counts of sale, and two counts of possession of a controlled substance.[34] On appeal to the Fourth Department, the defendant asserted the argument that the possession convictions should be dismissed "in the interest of justice," as he considered them "non-inclusory concurrent counts with the sale counts."[35] The Fourth Department upheld the convictions, holding that the possession charges were not included in the sale offenses.[36] They were separate and distinct crimes.[37]

In *People v. Freeman*,[38] the defendant on appeal also sought to have a possession offense dismissed in the interest of justice, contending that the same cocaine was the subject of both

> (a) A verdict of conviction thereon would have been inconsistent with a verdict, of either conviction or acquittal, actually rendered with respect to some other offense.

[28] *Baim*, 279 A.D.2d at 789, 718 N.Y.S.2d at 721.
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.* at 789, 718 N.Y.S.2d at 721 n.4.
[33] 174 A.D.2d 994, 572 N.Y.S.2d 156 (4th Dep't 1991).
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] 176 A.D.2d 1090, 575 N.Y.S.2d 724 (3d Dep't 1991).

his possession and sale charges.[39] The defendant further contended that he would be punished twice for conduct which occurred in a single transaction.[40] The Third Department concurred with its own precedent, as well as the judgment of the Fourth Department, and held that the possession and sale counts constituted "separate crimes."[41]

The Third Department relied on its earlier decision of *In re Green, v. County Court of Tompkins County*.[42] In *Green*, the defendant was indicted on counts of manslaughter in the second degree, criminally negligent homicide, and driving while intoxicated.[43] Defendant was acquitted of the manslaughter and driving while intoxicated charges. However, the jury was unable to reach an agreement as to the criminally negligent homicide count and a mistrial was declared.[44] Defendant petitioned the Appellate Division, Third Department, to prohibit prosecution on the remaining charge, arguing that a retrial was barred by Criminal Procedure Law Section 40.20 and that a new proceeding is proscribed by Criminal Procedure Law Section 310.70. Defendant argued that a conviction on the criminally negligent homicide charge would be inconsistent with the acquittals for manslaughter and driving while intoxicated.[45] After reviewing each of defendant's arguments, the Third Department dismissed the petition in its entirety.[46]

The Third Department reasoned in *Green* that because the charge for criminally negligent homicide and manslaughter have substantially different elements, an acquittal for the manslaughter charge did not bar prosecution for criminally negligent homicide.[47] The key distinction against asserting double jeopardy was made by Justice Kane in a concurring opinion.[48] Justice Kane reasoned that this case was not affected by the constitutional violation of

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[39] *Id.* at 1092, 575 N.Y.S.2d at 726.
[40] *Id.*
[41] *Id.*
[42] 61 A.D.2d 1098, 403 N.Y.S.2d 560 (3d Dep't 1978).
[43] *Id.*
[44] *Id.* at 1098-99, 403 N.Y.S.2d at 561.
[45] *Id.*
[46] *Id.*
[47] *Green*, 61 A.D.2d at 1099, 403 N.Y.S.2d at 561.
[48] *Id.* at 1100, 403 N.Y.S.2d at 562 (Kane, J., concurring).

prosecuting twice for the same crime, because the new trial would be a continuation of the original prosecution, which terminated only because the jury was deadlocked.[49] A criminal occurrence may simultaneously violate several penal statutes and all charges may all be joined in a single indictment and be brought to trial.[50] Jeopardy did not attach when the jury was unable to agree on the criminally negligent homicide charge.[51] Therefore, a "direction of a new trial following a properly declared mistrial would not constitute a second prosecution in the constitutional sense."[52] Turning to the instant case, jeopardy did not attach when the jury was unable to reach a verdict on either of the possession offenses, and therefore, Baim was not successful in prohibiting a retrial based on the principle of double jeopardy.[53]

Finally, in *Baim* the Third Department was not persuaded by Baim's collateral estoppel argument.[54] Citing the New York Court of Appeals case of *People v. Acevedo*[55] for authority, the court opined that Baim did not meet his "heavy burden" of showing that the acquittal of the sale offense at the first trial, "*necessarily* decided a particular factual issue" to be decided in a retrial.[56] In *Acevedo*, the defendant was charged in two indictments with robbery and criminal possession of a weapon for two separate incidents, both occurring at approximately the same time.[57] Defendant sought to assert collateral estoppel to avoid re-litigation of issues decided in his favor at a first trial.[58] The New York Court of Appeals gave some guidance as to when the doctrine of collateral estoppel is to be applied: "The rule is not to be applied with a hypertechnical approach but with realism and

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[49] *Id.*

[50] *Id.* at 1100-01, 403 N.Y.S.2d at 563.

[51] *Id.*

[52] *Green*, 61 A.D.2d at 1101, 403 N.Y.S.2d at 563.

[53] *Baim*, 279 A.D.2d at 789, 718 N.Y.S.2d at 720.

[54] *Id.* at 790, 718 N.Y.S.2d at 721. The doctrine of collateral estoppel, or issue preclusion, operates in a criminal prosecution to bar re-litigation of issues necessarily resolved in defendant's favor at an earlier trial (People v. Goodman, 69 N.Y.2d 478, 508 N.E.2d 665, 515 N.Y.S.2d 753 (1987)).

[55] 69 N.Y.2d 478, 508 N.E.2d 665, 515 N.Y.S.2d 753 (1987).

[56] *Baim*, 279 A.D.2d at 790, 718 N.Y.S.2d at 721.

[57] *Acevedo* 69 N.Y.2d at 480, 508 N.E.2d at 667, 515 N.Y.S.2d at 753.

[58] *Id.* at 485, 508 N.E.2d at 669, 515 N.Y.S.2d at 758.

rationality by examining all parts of the record of the prior proceeding and concluding from it whether a rational jury could have grounded its decision on an issue other than that which the defendant seeks to foreclose from consideration."[59] In the instant case, the Third Department reasoned that when the jury reached an acquittal on the sale offense it did not also implicitly determine that Baim did not possess drugs on that day.[60] Consequently, collateral estoppel did not attach, barring a retrial of the possession offenses.[61] The Third Department examined the record of the jury trial, and determined that the jury could have based its decision to acquit the defendant of the charges related to the alleged sale of drugs on "an issue other than that which Baim seeks to foreclose from consideration."[62] The acquittal, however, did not necessarily lead to a finding that Baim did not possess drugs on the day in question.[63]

Baim was unable to persuade the Third Department that a retrial on the two charges of possession of a controlled substance should be precluded on either double jeopardy or collateral estoppel grounds.[64] The Third Department dismissed Baim's petition because he did not show an absolute right to the remedy of prohibition, and he failed to show that a conviction on either possession offense would be inconsistent with the acquittal on the sale offense.[65] Lastly, Baim was not able to successfully assert collateral estoppel, because the acquittal of the sale offense did not necessarily decide a factual issue to be decided in a new trial.[66]

Baim's contentions would most likely be given the same treatment if analyzed by a federal court under federal law. Under federal law, the concept of double jeopardy is enumerated in the Fifth Amendment of the United States Constitution.[67] However, case law dealing with the prohibition against placing a defendant in double jeopardy following a mistrial due to a hung jury dates back

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[59] *Id.* at 487, 508 N.E.2d at 671, 515 N.Y.S.2d at 760.
[60] *Baim*, 279 A.D.2d at 790, 718 N.Y.S.2d at 721.
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.* at 789-90, 718 N.Y.S.2d at 721.
[65] *Baim*, 279 A.D.2d at 789, 718 N.Y.S.2d at 720.
[66] *Id.* at 790, 718 N.Y.S.2d at 721.
[67] *See supra* note 7.

to the 1824 United States Supreme Court decision of *United States v. Perez*.[68] In *Perez*, the defendant was on trial for a capital offense, and the jury, unable to agree on a verdict, was discharged by the court.[69] The issue then arose as to whether discharge of the jury by the court acted as a bar to a future trial on the same charge.[70] In an opinion by Justice Story, the Court held that a failure of the jury to agree on a verdict was an instance of "manifest necessity," which permitted a trial judge to retry the defendant, because "the ends of public justice would otherwise be defeated."[71]

Over the ensuing years, the Court has adhered to the rule that a retrial following a "hung jury" does not violate the Double Jeopardy Clause of the Fifth Amendment.[72] In *Logan v. United States*, the defendants were indicted on charges of conspiracy and of murder during the prosecution of the conspiracy.[73] After the jury was unable to agree on a verdict, the defendants filed a special plea averring former jeopardy.[74] The Court held the plea of former jeopardy "bad," as the Court found that it was within the trial court's discretion to discharge the jury after they were unable to agree as to these defendants.[75] The rationale for this rule was stated by the Court in *Arizona v. Washington*:[76] "[Without] exception, the courts have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial. This rule accords recognition to society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws."[77] In *Arizona*, the Court held that when the jury is unable to reach a verdict, it has long been considered a "classic basis for a proper mistrial."[78] The Court further held that "the argument that a jury's inability to agree

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[68] 22 U.S. 579 (1824).
[69] *Id.*
[70] *Id.*
[71] *Id.* at 580.
[72] Logan v. United States, 144 U.S. 263 (1892).
[73] *Id.* at 281-82.
[74] *Id.* at 297.
[75] *Id.* at 298.
[76] 434 U.S. 497 (1978).
[77] *Id.* at 509.
[78] *Id.*

establishes reasonable doubt as to the defendant's guilt, and therefore requires acquittal, has been uniformly rejected in this country."[79]

The United States Supreme Court has addressed double jeopardy claims as recently as 1984, in *Richardson v. United States*.[80] In *Richardson*, the defendant was indicted in the United States District Court for the District of Columbia on "two counts of distributing a controlled substance, and one count of conspiring to distribute a controlled substance."[81] The jury acquitted the defendant of one count of distributing a controlled substance, but was unable to agree on the other two counts.[82] A mistrial was declared as to the two remaining counts and a retrial was ordered.[83] Defendant then argued that a retrial was barred by the Double Jeopardy Clause of the Fifth Amendment, because the Government failed to produce convictions on the remaining counts at the first trial.[84] The United States Supreme Court found the claim unpersuasive, as the mistrial did not terminate the original jeopardy on the two remaining counts, which is a necessary condition to the assertion of the Double Jeopardy Clause of the Fifth Amendment.[85] The Supreme Court rejected Richardson's reliance on *Burks v. United States*,[86] for the contention that if the Government failed to establish his guilt beyond a reasonable doubt at his first trial, he may not be tried again following a mistrial due to a hung jury.[87] The Court distinguished the facts of *Richardson* from *Burks*, holding that *Burks* stood for the narrow rule that "if a defendant obtained an unreversed appellate ruling that the Government had failed to introduce sufficient evidence to convict him at trial, a second trial was barred by the Double Jeopardy Clause."[88] The Court was unwilling to depart from 160 years of case law, and echoing the viewpoint of *Perez*, held that "a failure of the jury to

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[79] *Id.*
[80] 468 U.S. 317 (1984).
[81] *Id.* at 318.
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] Richardson. 468 U.S. at 318.
[86] 437 U.S. 1 (1978).
[87] *Richardson*, 468 U.S. at 322-23.
[88] *Id.* at 323.

agree on a verdict was an instance of 'manifest necessity' which permitted a trial judge to terminate the first trial and retry the defendant, because 'the ends of public justice would otherwise be defeated.'"[89] The Court cited its opinion in *Wade v. Hunter*,[90] which aptly described the relationship between mistrials and double jeopardy:

> The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. There may be unforeseeable circumstances that arise during a trial making its completion impossible, such as the failure of a jury to agree on a verdict. In such event the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again. What has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.[91]

The federal and state courts appear to be in agreement as to when a defendant can seek to bar a retrial on charges that were not decided in an initial proceeding on double jeopardy grounds. In New York, this protection is found in Section 40.20 of the Criminal Procedure Law,[92] and in the United States Constitution, the notion is found in the Double Jeopardy Clause of the Fifth Amendment.[93] When a defendant is charged with more than one offense stemming from the same transaction, courts generally will

[89] *Id.* at 323-24 (quoting *Perez*, 22 U.S. at 580).
[90] 336 U.S. 684 (1949).
[91] *Id.* at 688-89.
[92] *See supra* note 9.
[93] *See supra* note 7.

not allow the assertion of double jeopardy to bar the prosecution of one of the counts, as the offenses constitute "separate crimes."[94] However, a subsequent guilty verdict in the retrial must not be inconsistent with the verdict from the first trial.[95] Furthermore, when a jury is unable to agree upon a verdict, the effect of a court declaring a mistrial is not a bar to the prosecution of those offenses at some future time, and as such, not a violation of double jeopardy on either the state or federal level.[96]

Evan M. Zuckerman

[94] *Baim*, 279 A.D.2d at 789, n.4, 718 N.Y.S.2d at 721 n.4.
[95] *Id.* at 789, 718 N.Y.S.2d at 721.
[96] *See, e.g.*, *Richardson*, 468 U.S. at 324; *Baim*, 279 A.D.2d at 787, 718 N.Y.S.2d at 719.

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