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Double Jeopardy, Court of Appeals: People v. Latham

U.S. CONST. amend. V:

No person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb . . . .

N.Y. CONST. art. I, § 6:

No person shall be subject to be twice put in jeopardy for the same offense . . . .

COURT OF APPEALS

People v. Latham[1]
(decided December 17, 1997)

The New York State Court of Appeals unanimously reversed the order of the Appellate Division, Third Department, and remitted the case to the Appellate Division for an evaluation of the facts.[2] On appeal from the trial court, the Appellate Division reversed defendant's conviction of first degree manslaughter.[3] Defendant asserted "that because he was never advised that his plea allocution could be used against him in a subsequent murder trial, such use of the allocution constituted reversible error."[4] In addition, defendant contended "that the prosecution for murder in the second degree violates statutory[5] and constitutional[6]

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[1] 90 N.Y.2d 795, 689 N.E.2d 527, 666 N.Y.S.2d 557 (1997).

[2] *Id.* at 799, 689 N.E.2d at 529, 666 N.Y.S.2d at 559.

[3] *Id.* at 798, 689 N.E.2d at 528, 666 N.Y.S.2d at 558.

[4] People v. Latham, 234 A.D.2d 864, 652 N.Y.S.2d 328 (3d Dep't 1996).

[5] People v. Latham, 83 N.Y.2d 233, 237-38, 631 N.E.2d 83, 84-85, 609 N.Y.S.2d 141, 142-43 (1994) (holding that defendant's statutory claim falls within the statutory "delayed death" exemption, only the constitutional contentions need be addressed). *See also* CRIM. PROC. LAW. § 40.20(2)(d) (McKinney 1992). This section authorizes a second prosecution when:

> One of the offenses is assault or some other offense resulting in physical injury to a person, and the other offense is one of homicide based upon the death of such person from the same

protections against double jeopardy."[7] However, the Court of Appeals held that defendant's plea allocutions were presumptively voluntary and should not have been subject to judicial review from the Appellate Division.[8] The court reasoned that because defendant failed to make a timely motion to withdraw his plea, the plea was presumptively voluntary which allowed the prosecution to use the plea allocution during the defendant's murder trial.[9] In addition, the court further reasoned that the Fifth Amendment would only apply if defendant's statements were the result of legal compulsion.[10]

On May 18, 1990, defendant stabbed and strangled Marie Shambeau when she informed him that she was going to end their relationship.[11] Following his indictment, defendant plead guilty to the charge of attempted murder in the second degree and was subsequently sentenced to serve between seven and one half and twenty-two and one-half years imprisonment.[12] Seven weeks after defendant's incarceration, Marie Shambeau died and defendant was thereafter indicted and charged with second degree murder.[13] The trial court dismissed the indictment on double jeopardy grounds; however, the Appellate Division, Third Department, reversed the trial court's dismissal of the indictment

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> physical injury, and such death occurs after a prosecution for the assault or other non-homicide offense.

Id.

[6] U.S. CONST. amend. IV. The Double Jeopardy Clause of the United States Constitution provides in pertinent part: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." *Id.* N.Y. CONST. art. I, § 6. Article I, section 6 of the New York State Constitution provides in pertinent part: "No person shall be subject to be twice put in jeopardy for the same offense . . . ." *Id.*

[7] *Latham*, 83 N.Y.2d at 237, 631 N.E.2d at 84, 609 N.Y.S.2d at 142.

[8] People v. Latham, 90 N.Y.2d 795, 799, 689 N.E.2d 527, 528, 666 N.Y.S.2d 557, 558 (1997).

[9] *Id.*

[10] *Id.*

[11] *Id.* at 795, 689 N.E.2d at 527, 666 N.Y.S.2d at 557.

[12] *Id.*

[13] *Id.*

and the Court of Appeals affirmed.[14] During the trial, the prosecution used defendant's plea allocutions that were made to the attempted murder charge.[15] On appeal, the Appellate Division held that defendant's privilege against self-incrimination had not been waived.[16] Moreover, because the defendant did not understand the direct consequences of his plea, such as the possibility that his victim Shambeau may die which would allow his colloquy to be used against him, the Appellate Division reversed the trial court.[17] The Court of Appeals reasoned that "'[a] trial court has the constitutional duty to ensure that a defendant, before pleading guilty, has a full understanding of what the plea connotes and its consequences.'"[18]

In *People v. Ford*,[19] defendant pled guilty to manslaughter in the second degree for the shooting death of his girlfriend.[20] Defendant put a gun to her head and pulled the trigger believing that the bullets were removed from the gun.[21] However, the gun fired, killing his girlfriend instantly.[22] Because defendant was a legal alien, he had deportation proceedings brought against him as a result of the conviction involving moral turpitude.[23] Consequently, defendant filed a motion requesting the court to change its judgment from manslaughter to criminally negligent homicide hoping to evade deportation based on the morality issue.[24] The court responded by granting the motion, however, only to vacate his plea and order a new trial.[25] The trial court

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[14] *Id.*

[15] *Id.* "At trial, the People introduced factual admissions made by defendant during the attempted murder plea allocution." *Id.* at 798, 689 N.E.2d at 528, 666 N.Y.S.2d at 558.

[16] *Id.*

[17] *Id.*

[18] *Id.* (quoting People v. Ford, 86 N.Y.2d 397, 402-03, 657 N.E.2d 265, 267, 633 N.Y.S.2d 270, 272 (1995)).

[19] 86 N.Y.2d 397, 657 N.E.2d 265, 633 N.Y.S.2d 270 (1995).

[20] *Id.* at 402, 657 N.E.2d at 267, 633 N.Y.S.2d at 272.

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

held that even if defendant's statement to the court was one not involving moral turpitude, he should be advised that a deportation risk still exists.[26] The Appellate Division reversed and reinstated the conviction holding that "under the doctrine of collateral consequences the court was not obligated to warn defendant of possible deportation before accepting his plea . . . ."[27] The Appellate Division recognized a "distinction between consequences of which the defendant must be advised, those which are 'direct,' and those of which the defendant need not be advised, 'collateral consequences.'"[28] The Court of Appeals held that there was no obligation to inform a defendant of any collateral consequences of his plea, including deportation.[29]

In determining whether a defendant's plea was voluntary, the *Latham* court stated that even though defendant must be informed of direct consequences, his plea is considered voluntary and intelligent without being informed of collateral consequences.[30] The *Latham* court further noted that unlike the defendant in *Ford,* defendant did not move to vacate the judgment of conviction nor did he challenge the voluntariness of his plea before sentencing in a timely manner.[31] Additionally, the court stated that "[i]f defendant had successfully moved to withdraw or to set aside the plea to attempted murder as involuntary, the allocution could not have been used against defendant in the later trial."[32]

In *People v. Moore*,[33] the New York Court of Appeals held that it would be unfair to allow the prosecution to use withdrawn

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[26] *Id.*

[27] *Id.*

[28] *Id.* at 403, 657 N.E.2d at 267, 633 N.Y.S.2d at 272. "A direct consequence is one which has a definite, immediate and largely automatic effect on defendant's punishment . . . ." *Id.*

[29] *Id.* at 405, 657 N.E.2d at 269, 633 N.Y.S.2d at 274.

[30] People v. Latham, 90 N.Y.2d 795, 799, 689 N.E.2d 527, 528, 666 N.Y.S.2d 557, 558 (1997).

[31] *Id.*

[32] *Id.* (citing People v. Moore, 66 N.Y.2d 1028, 489 N.E.2d 1295, 499 N.Y.S.2d 393 (1985)). *See also* People v. Curdgel, 83 N.Y.2d 862, 634 N.E.2d 199, 611 N.Y.S.2d 827 (1994); *Latham*, 90 N.Y.2d at 799, 689 N.E.2d at 528, 666 N.Y.S.2d at 558.

[33] 66 N.Y.2d 1028, 489 N.E.2d 1295, 499 N.Y.S.2d 393 (1985).

admissions made at plea allocution, either for People's direct or for impeachment purposes, because that "is not something the People have bargained for and would be decidedly unfair to the defendant."[34] Therefore, "[i]n the absence of such a motion, however, the plea and the resulting conviction of attempted murder are presumptively voluntary, valid and not otherwise subject to collateral attack."[35]

In *United States v. Broce*,[36] the United States Supreme Court reversed the New York Court of Appeals' decision holding "that the double jeopardy challenge is foreclosed be the guilty pleas and the judgments of conviction."[37] The Court stated that the Court of Appeals erred by allowing respondent's guilty plea to go only toward the "acts" of the crime and not toward the "crime" itself which allowed the court to "[misapprehend] the nature and effect of the plea."[38] Furthermore, the Court noted that, for respondents to have plead guilty to two conspiracies, an indictment does not have to allege that two different and separate conspiracies existed, as it was enough for the indictments to allege that only two separate agreements existed, upon which the

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[34] *Id.* at 1030, 489 N.E.2d at 1296, 499 N.Y.S.2d at 394.

[35] *Latham*, 90 N.Y.2d at 799, 689 N.E.2d at 528, 666 N.Y.S.2d at 558. (citing United States v. Broce, 488 U.S. 563, 574 (1989)). "'[I]t is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked.'" *Broce*, 488 U.S. at 574 (quoting Mabry v. Johnson, 467 U.S. 504, 508 (1984)). "That principle controls here. Respondents have not called into question the voluntary and intelligent character of their pleas, and therefore are not entitled to the collateral relief they seek." *Id.* at 574.

[36] 488 U.S. 504 (1984). Respondents were indicted twice and pled guilty to two charges of conspiracy to rig constructions bids "in violation of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 1." *Id.* at 565.

[37] *Id.* at 565. The district court, on remand, held that respondents were charged twice for the same conspiracy and vacated both the judgments and the sentences that were related to the second indictment. *Id.* at 568. On appeal, the New York Court of Appeals noted that now, because of an intervening decision, double jeopardy is now considered waivable. *Id.* However, the New York Court of Appeals affirmed the district court's holding stating "that the guilty pleas in this case did not themselves constitute such waivers." *Id.* at 568-69.

[38] *Id.* at 570.

respondents plead guilty.[39] Moreover, respondents had ample opportunity to attack the sufficiency and content of the indictments before pleading and show that there existed only one conspiracy.[40] However, by foregoing their rights, respondents were without the right to posit that they lie in double jeopardy.[41] Finally, the Court answered respondent's claim, that they did not intentionally forego a double jeopardy defense because they were unaware of its existence as a defense before pleading, by stating that the Court's "decisions have not suggested that conscious waiver is necessary with respect to each potential defense relinquished by a plea of guilty."[42]

In the instant case, the *Latham* court found that because the defendant failed to seek appropriate judicial procedures to review "whether his plea was voluntary," then the Court should not create an alternative procedure allowing the defendant to attack his plea's voluntariness."[43] Finally, there was no Fifth Amendment constraint against the prosecution from using defendant's plea allocution at the defendant's murder trial because the plea was not legally compelled, as it was presumed voluntary.[44]

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[39] *Id.*

[40] *Id.* at 571.

[41] *Id.*

[42] *Id.* at 573.

[43] People v. Latham, 90 N.Y.2d 795, 799, 689 N.E.2d 527, 528, 666 N.Y.S.2d 557, 558 (1997). (citing People v. Knack, 72 N.Y.2d 825, 526 N.E.2d 32, 530 N.Y.S.2d 541 (1988)). In *Knack*, the court held that a judicially created remedy is not necessary to protect the defendant's due process rights. *Id.* at 827, 526 N.E.2d at 33, 530 N.Y.S.2d at 542. (cf., People v. Bachert, 69 N.Y.2d 593, 597-600 (1987) (holding that because the statutory provisions were inadequate with respect to a claim for ineffective assistance of counsel, the court allowed an alternative of bringing a motion for a writ of error coram nobis)).

[44] *Latham*, 90 N.Y.2d at 799, 689 N.E.2d at 528, 666 N.Y.S.2d at 558. (citing People v. Sobotker, 61 N.Y.2d 44, 47(1984) holding narrowly that: "defendant who pleads guilty and then happens to give Grand Jury testimony concerning the offense before sentence is imposed cannot claim to have acquired statutory immunity from prosecution or punishment for the offense to which he has pleaded guilty.").

As discussed, once a plea has been offered and a sentence issued, the judgment is final and cannot be collaterally attacked for want of facts or lack of knowledge.[45] In addition, New York courts have not recognized, with respect to double jeopardy, a defense for a person who foregoes the opportunity to challenge an indictment before admitting guilt to those charges. Notwithstanding the New York courts' position on double jeopardy, an exception has been established and recognized by the Supreme Court.[46] In situations "'where the state is precluded by the United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty.'"[47] Again, there are no significant or distinguishing factors between the United States and New York Constitutions with respect to the courts' disposition of a double jeopardy issue.

People v. Vasquez[48]
(decided March 20, 1997)

In February 1994, Vasquez was incarcerated at the Elmira Correctional Facility.[49] During a routine metal detector search, corrections officer's saw Edwin Vasquez throw a metal object into a laundry basket.[50] The object that was recovered by the correction officers was a sharpened piece of metal, commonly known as a shank.[51] During the time of the incident, "Vasquez was serving an indeterminate sentence of five to ten years for criminal possession of a controlled substance and a concurrent

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[45] *Latham*, 90 N.Y.2d at 798-99, 689 N.E.2d at 527-28, 666 N.Y.S.2d at 557-58.

[46] *See Broce*, 488 U.S. at 574.

[47] *Id.* at 575 (citing Blackledge v. Perry, 417 U.S. 21 (1974) (quoting Menna v. New York, 423 U.S. at 62 (1975)).

[48] 89 N.Y.2d 521, 678 N.E.2d 482, 655 N.Y.S.2d 870 (1997).

[49] *Id.* at 525, 678 N.E.2d at 484, 655 N.Y.S.2d at 872.

[50] *Id.*

[51] *Id.*