

Summary of SC93321, *State of Missouri v. Bruce Pierce*

Appeal from the St. Louis circuit court, Judge Thomas C. Grady

Argued and submitted October 7, 2013; opinion issued June 24, 2014

Attorneys: Pierce was represented by Robert Lundt of the public defender's office in St. Louis, (314) 340-7662, and the state was represented by Karen Kramer of the attorney general's office in Jefferson City, (573) 751-3321.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A man appeals his convictions for resisting arrest, which he argues was not supported by the evidence, and for second-degree trafficking, arguing the trial court erred in refusing to give the jury an alternate instruction for the lesser-included offense of possession of a controlled substance – the difference between the two crimes being the weight of the controlled substance. In a decision to which five judges agree, the Supreme Court of Missouri affirms the man's resisting arrest conviction. In a decision to which four judges agree, the Court holds the man waived his claim that his retrial exceeded the constitutional deadline by not raising it in a timely fashion. In a decision to which four judges agree, the Court also vacates the man's trafficking conviction, holding the trial court erred in not giving the jury the lesser-included offense instruction for possession of a controlled substance, and remands (sends back) the case. Judge Paul C. Wilson writes the principal opinion; Judge Laura Denvir Stith writes an opinion concurring in part and dissenting in part; and Judge George W. Draper III writes a dissent.

Resisting arrest

In the principal opinion, Judge Wilson explains the Court's holding that the evidence was sufficient for the jury to find, beyond a reasonable doubt, that the man's flight from the police supported the charge of resisting arrest. In her separate opinion, Judge Stith agrees the evidence was sufficient to support this conviction.

Waiver of constitutional deadline for retrial

In a portion of the principal opinion joined by three other judges, Judge Wilson describes the Court's holding that, although the man's retrial did not occur until after the constitutional deadline had passed, the court did not lack authority to retry him at all because the man waived his claim. He had multiple opportunities to raise his claim – each time the court considered whether to continue his retrial up to and beyond the deadline – but he did not do so until well after it was possible for the trial court to comply.

In a portion of her separate opinion joined by one other judge, Judge Stith agrees the man's retrial did not violate the state constitutional deadline, albeit for different reasons. The deadline was violated only when the state attempted to retry him, and the man timely raised his constitutional claim as soon as retrial occurred. The totality of the circumstances, however, shows that the man impliedly consented without objection to a number of continuances before the start of his retrial, precluding him from claiming the retrial violates the constitution.

Lesser-included offense instruction

In another portion of the principal opinion also joined by three judges, Judge Wilson discusses the Court's holding regarding the lesser-included offense instruction. As explained in the companion case – No. SC93108, *State v. Jackson*, also decided today – a trial court cannot refuse to give a lesser-included offense instruction requested by the defendant when the lesser offense consists of a subset of the elements of the greater charged offense and the differential element – the element required for the charged offense but not for the lesser offense – is one on which the state bears the burden of proof. Applying these principles, the trial court erred in concluding – in light of evidence showing he was in possession of cocaine base weighing more than two grams – that every reasonable jury must believe that evidence and must find the state had proved this differential element beyond a reasonable doubt.

In another portion of her separate opinion also joined by one other judge, Judge Stith disagrees entirely with the principal opinion's holding that a trial court always must submit a lesser-included offense instruction if requested to do so. Rather, as described more fully in her separate opinion in *State v. Jackson*, also decided today, she would hold that a juror's right to disbelieve all or any of the evidence does not justify submitting a question to the jury that no reasonable juror could conclude was supported by the evidence. Applying these principles, she would hold the trial court properly refused to instruct the jury regarding possession. Because the man conceded the substance weighed more than two grams when it was seized, no reasonable juror could conclude otherwise, and the man was not entitled to the lesser-included offense instruction.

In his dissent, Judge Draper states that he would affirm the trial court's judgment. The trial court did not err in refusing to submit an instruction for a lesser-included offense when there was no evidence to support it.

Facts: Following a brief pursuit, police arrested Bruce Pierce in May 2010. During the pursuit, one officer saw Pierce throw an object to the ground. The officer retrieved the object, a clear plastic bag containing a substance he believed to be narcotics. The state charged Pierce with second-degree trafficking and resisting arrest. His first trial, in November 2010, ended in a mistrial after the jury was unable to reach a unanimous verdict. The court set the retrial for January 2011, but it was continued seven times with no objection from Pierce. When his retrial finally began in November 2011, Pierce moved to have the charges dismissed, arguing the court lacked authority to retry him because his retrial had missed a state constitutional deadline. The court overruled his motion, and the case proceeded to trial. After the close of evidence, Pierce moved the court to give the jury an instruction for the lesser-included offense of possession of a controlled substance and also moved for a directed verdict (telling the jury what its verdict must be) acquitting him of resisting arrest. The court overruled both motions, and the jury found Pierce guilty of second-degree trafficking and resisting arrest. The court entered judgment accordingly and sentenced him to prison. Pierce appeals.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Court en banc holds: (1) The trial court did not lack authority to retry Pierce. Under article I, section 19 of the state constitution, if a jury fails to render a verdict, the court may discharge the jury and commit the defendant for trial “at the same or next term of court.” Section 478.205, RSMo, establishes four court terms each year, beginning on the second Monday of each February, May, August and November. Because Pierce’s first trial was in the November 2010 term of court; the next term began February 14, 2011, and ended May 6, 2011. Because Pierce’s retrial did not occur until November 2011, it is clear the retrial did not meet the constitutional deadline. But this does not mean the court lacked authority to retry him at all. In its 2008 decision in *State v. Fassero*, this Court held that a defendant must raise a claim based on the retrial deadline in article I, section 19 “at the first opportunity” and, if he does not do so, his claim is waived. *Fassero* also held that, if a defendant fails to raise the constitutional deadline in a timely manner, the trial court’s authority to retry the defendant is not affected by the failure to comply with that deadline. This is in accord with the usual rule that a trial court must be given the opportunity to correct error while correction is still possible. Pierce did not raise the constitutional deadline at the “first opportunity.” His retrial was scheduled to occur before the deadline; each of the multiple times the trial court considered whether to continue his retrial up to and then beyond the deadline, he had the opportunity to raise the issue but did not do so until well after it was possible for the trial court to comply. As such, Pierce waived his claim.

(2) The trial court erred in not granting Pierce’s request to give the jury the lesser-included offense instruction for possession of a controlled substance. As explained in the companion case – No. SC93108, *State v. Jackson*, also decided today – under section 556.046, RSMo, a trial court cannot refuse to give a lesser-included offense instruction requested by the defendant when the lesser offense consists of a subset of the elements of the greater charged offense and the differential element – the element required for the charged offense but not for the lesser offense – is one on which the state bears the burden of proof. The differential element between second-degree trafficking and possession is that the jury cannot convict a defendant of second-degree trafficking unless it finds beyond a reasonable doubt that the defendant was in possession of more than two grams of cocaine base. Unless the defendant waives the right to a jury trial, the jury is the sole and final arbiter of the facts and, in that role, is entitled to believe or disbelieve all or any part of the evidence before it. As such, as explained today in *Jackson*, evidence never proves any element until the jury says it does. Any possession of cocaine base, regardless of its weight, is sufficient for the jury to find Pierce guilty of possession, and if the jury disbelieved the state’s evidence about the weight, it could acquit Pierce of second-degree trafficking. In determining what instructions are supported by the evidence, the court is required to decide what facts a reasonable jury *may* find from the evidence, but it never is permitted to go further and decide what facts the jury *must* find. As such, the trial court erred in concluding – in light of evidence showing Pierce was in possession of cocaine base weighing more than two grams – that every reasonable jury must believe that evidence and must find the state had proved this differential element beyond a reasonable doubt. Pierce’s conviction for second-degree trafficking is vacated, and the case is remanded for further proceedings.

(3) The evidence was sufficient to prove, beyond a reasonable doubt, that Pierce committed the crime of resisting arrest under section 575.150.1, RSMo. Pierce admits he knew the officer was attempting to arrest him, and he admits he ran from the officer so the officer could not do so. This leaves only the third element: whether Pierce resisted arrest by fleeing from the officer. It

does not matter, however, whether the officers were attempting to arrest Pierce at the moment he started running. What matters is that he continued to run after he dropped the cocaine, giving the officer probable cause to arrest him, and that he continued to run after the officer told him to stop because he was under arrest. Because the evidence was sufficient to support the conviction, Pierce's conviction for resisting arrest is affirmed.

Opinion concurring in part and dissenting in part by Judge Stith: (1) The author agrees the evidence is sufficient to support Pierce's resisting arrest conviction.

(2) The author also agrees that the retrial of Pierce did not violate article I, section 19 of the state constitution, albeit for reasons different from those articulated in the principal opinion. It was not his responsibility to keep track of such deadlines, nor was he required to object to its passing. To the contrary, cases explicitly hold that a defendant need not raise a double jeopardy objection until the state attempts to retry him, for only at that point is double jeopardy violated. While not involving the classic form of double jeopardy, the retrial deadline likewise is contained in article I, section 19 of the state constitution – titled “Self-incrimination and double jeopardy.” It is logical, therefore, that the principles governing application of a classic double jeopardy claim under article I, section 19 also govern application of article I, section 19's retrial deadline. As such, Pierce was not obligated to raise his article I, section 19 retrial deadline objection until retrial commenced, which he did. This does not mean, however, that his article I, section 19 rights were violated. The totality of the circumstances shows that Pierce impliedly consented to the delay in the start of his retrial. By failing to object to continuances even though he had the opportunity to do so, and by requesting two continuances himself, he consented to the delay in retrial. Such consent is valid, precluding him from claiming the retrial violates the constitution.

(3) The author disagrees entirely with the principal opinion's holding that a trial court always must submit a lesser-included offense instruction if requested to do so by a party. Rather, as described more fully in case No. SC93108, *State v. Jackson*, also decided today, she would hold that a juror's right to disbelieve all or any of the evidence does not justify submitting a question to the jury that no reasonable juror could conclude was supported by the evidence. The jury's right to find facts cannot shape the trial court's declaration of the law, and the jury's ability to believe and disbelieve evidence does not deprive the court of its fundamental authority – and obligation – to declare the law or restrict the trial court's discretion to instruct the jury. By its terms, section 556.046, RSMo, provides that Missouri courts need not give a lesser-included offense instruction unless there is a basis in the evidence to do so. Applying the principles of statutory construction here, there is no room for statutory interpretation, as the plain meaning of subsections 2 and 3 is indisputable: A trial court is required to give a lesser-included offense instruction only when there is “a basis in the evidence” for doing so. Myriad cases decided by this Court and the court of appeals have recognized that the issue is what “a reasonable juror” can infer from the evidence, not what unreasonable references might be possible if the jury chose not to act rationally. The Court should not overrule these cases lightly.

(4) Applying these principles here, I would hold the trial court properly refused to instruct the jury regarding the lesser-included offense of possession because the differential element – regarding the weight of the substance seized from Pierce – was not at issue. Pierce did not dispute the state proved the substance weighed more than two grams, and his counsel admitted to

the jury during closing argument and conceded during the instruction conference and in his motion for a new trial that the substance weighed more than two grams when it was seized. As such, no reasonable jury could conclude, based on the evidence, that Pierce did not possess more than two grams of cocaine. Pierce was not entitled to a lesser-included offense instruction.

Dissenting opinion by Judge Draper: The author would affirm the trial court's judgment. The trial court did not err in refusing to submit an instruction for a lesser-included offense when there was no evidence to support it. The statute's plain language provides that there must be a basis in the evidence to give a lesser-included offense instruction. In prior cases in which this Court required a lesser-included offense instruction to be given, conflicting testimony provided a basis in the evidence to give such instructions. Here, there was nothing in the record indicating Pierce possessed anything less than two grams of cocaine base – rather, the evidence consistently and unequivocally demonstrated that Pierce possessed more than two grams of cocaine base. There was no evidence whatsoever to support the lesser-included offense instruction.