No. 11,682

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MATTHEW WRUBLEWSKI,
Appellant,

vs.

CAPTAIN S. X. McINERNEY, Commanding Officer of United States Naval Receiving Station, Yerba Buena Island, San Francisco, California, and REAR ADMIRAL D. B. BEARY, United States Navy, Commandant 12th Naval District, San Francisco, California,
Appellees.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

CLOSING BRIEF FOR APPELLANT.

EDWIN S. WILSON,
512 De Young Building, San Francisco 4, California,
Attorney for Appellant.

Subject Index

	Page
Statement of facts	2
Points relied upon by appellant	3
Argument	4
Summary	13

Table of Authorities Cited

Cases	Pages
Crapo v. Johnston, 144 Fed. (2d) 863	12
Daggert v. State, 93 S. W. 399	10
Ex parte Biglow, 113 U. S. 328	12
Ex parte Costello, 8 Fed. (2d) 386	5
Grafton v. United States, 206 U. S. 333	5, 10
Kastel v. U. S., 30 Fed. (2d) 687	12
People v. Greer, 78 A.C.A. 349 (1947)	12
Polko v. Connecticut, 302 U. S. 320	13
Rosborough v. Rossell, 56 Fed. Supp. 347	7
Sanford v. Robbins, 115 Fed. (2d) 435, 438 (C.C.A. 5th, 1940)	5
State v. Hoot, 120 Iowa 238	10
United States v. Haitt, 141 Fed. (2d) 664	5

Miscellaneous	
26 Amer. Jurisprudence 276	10
26 Amer. Jurisprudence 279	11
Court Martial Order 141—1918, p. 17	5
Court Martial 8, 1929, pp. 14 and 15	5
Court Martial Order 9—1945, p. 399	7
Naval Courts and Boards, Section 119	10
Naval Courts and Boards, Section 408	5
9 Ops. Attorney General 223, 230 (1858)	5

No. 11,682

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MATTHEW WRUBLEWSKI,

Appellant,

vs.

CAPTAIN S. X. MCINERNEY, Commanding Officer of United States Naval Receiving Station, Yerba Buena Island, San Francisco, California, and REAR ADMIRAL D. B. BEARY, United States Navy, Commandant 12th Naval District, San Francisco, California,

Appellees.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

CLOSING BRIEF FOR APPELLANT.

Appellant in this closing brief will confine the argument to a brief summary of the facts in the case and a reply to appellees' argument.

STATEMENT OF FACTS.

The facts which are before this court are well summarized in the transcript of record and in both the opening brief of appellant and the brief for appellees. There appears to be no controversy in the record insofar as what has taken place in this case with respect to the various trials of appellant.

Appellant has been tried by two Navy Courts Martial. The first trial was on December 11, 1944, and the charges were (1) murder and (2) assault with intent to commit murder. The facts in both charges alleged the same time and circumstances surrounding the death of one Lieutenant Roland S. Travis. This first trial resulted in a conviction of murder, and acquittal on the second charge of assault with intent to commit murder. The proceedings as to the murder charge were void for lack of jurisdiction over this crime. It is contended by appellant that the court had jurisdiction over the crime of assault with intent to commit murder.

The second trial, held on July 30, 1946, charged the accused with manslaughter (voluntary and involuntary). A plea in bar of trial was duly entered alleging that the previous acquittal at the first trial was a bar to any further prosecution for the homicide of Lieutenant Travis. This plea in bar was denied, and the court found the accused guilty of voluntary manslaughter, dismissed him from the service and sentenced him to five years in prison, which sentence the accused is now serving and which sentence began to run on February 5, 1947, which was the time that

appellant was notified by the Navy department of the final action taken in his case. When this sentence became final, a petition for a writ of habeas corpus was filed in the United States District Court, seeking the release from custody of appellant on the grounds that the second trial, conviction and sentence, and the restraint of appellant, violated that portion of the Fifth Amendment of the Constitution which guarantees one against double jeopardy. The District Court dismissed the petition on the grounds that "the specific guarantees of the Fifth Amendment to the Constitution relating to criminal prosecution may not be invoked in cases arising in the land or Naval forces of the United States." From this decision appellant appeals to this honorable court and prays that the decision of the District Court may be reversed and appellant released from imprisonment and restored to his liberty.

POINTS RELIED UPON BY APPELLANT.

The questions of law involved in this case appear to embrace the following principles:

1. Does that portion of the Fifth Amendment to the Constitution relating to double jeopardy apply to members of the Naval service? Does one upon joining the Naval service forfeit his constitutional right to immunity from punishment twice for the same offense, or does he forfeit this right to protection of the Constitution upon joining the United States Navy for the purpose of protecting that same Constitution?

2. If the answer to the first question is resolved to be that members of the Naval service are protected by the double jeopardy clause of the Constitution, then is it double jeopardy to prosecute an accused for a homicide where that same accused has been acquitted by a court of competent jurisdiction of the assault from which the homicide resulted? This second question may be put another way. Where the first court, having all of the facts before it, finds the accused not guilty of assault with intent to commit murder, may the same authority ignore this finding and imprison the accused as the result of a prosecution for homicide in which the prosecution's evidence was necessarily the same as that produced in the first trial?

3. The appellee raises the question as to whether or not habeas corpus is the proper method of effecting the release of one in confinement, allegedly confined on a void sentence.

ARGUMENT.

DOES THE FIFTH AMENDMENT PROTECT NAVAL PERSONNEL FROM DOUBLE JEOPARDY?

Appellees, in quoting the opinion of the District Court, admit that that portion of the Fifth Amendment relating to due process does apply to Naval personnel, and in the same opinion bases its conclusion in the statement that "the specific guarantees of the Fifth Amendment to the Constitution relating to criminal prosecution may not be invoked in cases arising in the land or Naval services of the United States." The

cases cited by the court and relied upon by appellees in their brief, page 5, have been pointed out in appellant's opening brief to have no bearing on the instant case, as in not one of those cases was the question of double jeopardy discussed. The fact that Naval personnel are protected by the clause of the Fifth Amendment concerning double jeopardy was unquestioned by the Judge Advocate General of the Navy in Court Martial Order 141-1918, p. 17. This guarantee was likewise unquestioned by the Attorney General in his opinion, 9 Ops. Attorney General 223, 230 (1858).

The case of *Sanford v. Robbins,* 115 Fed. (2d), 435, 438 (C.C.A. 5th, 1940) held:

"We have no doubt that the provisions of the Fifth Amendment 'nor shall any person—be twice put in jeopardy'—is applicable to courts martial. The immediate preceding exception of 'cases arising in the land or Naval forces' from the requirement of an indictment apparently shows that such cases were excepted from the other provisions."

See also

Grafton v. U. S., 206 U. S., 333;
U. S. v. Haitt, 141 Fed. (2d), 664;
Ex parte Costello, 8 Fed. (2d) 386;
Section 408, Naval Courts and Boards Courts Martial 8, 1929, pages 14 and 15.

Particular attention is again called to the quotation in the case of *U. S. v. Haitt,* 141 Fed. (2d), 664, which is quoted on page 10 of appellant's opening brief.

The above entitled authorities appear to resolve this question of whether or not the specific guarantees of the Fifth Amendment apply to cases arising in the land and Naval forces. Appellant failed to find one case cited by the appellees which hold to the contrary. As stated before, the cases relied upon by the District Court dealt with material foreign to double jeopardy.

It is interesting to note the analysis of the present case *In re Wrublewski,* 71 Fed. Supp. 145 (N. D. Cal., 1947), as made by the University of Pennsylvania Law Review. This Law Review discusses this case as follows:

> "Those properly under military jurisdiction are specifically excepted by the Fifth Amendment from the right to grand jury indictment. The clause providing this exception is relied upon in the instant case further to except military personnel from the protection against double jeopardy. The court's authority for this extension is broad language in cases where the applicability of the double jeopardy clause was not in issue. Observing that all of the Fifth Amendment relating to criminal prosecutions is inapplicable to courts martial, the court curiously then bases its refusal to review the findings on the due process clause of the same amendment, on the grounds that under the fairness doctrine the latter clause has not been violated."

Further quoting the University of Pennsylvania Law Review (supra):

> "The decision as to the double jeopardy clause is contrary to the plain language of the Fifth Amendment—A just result, however, will only be

available upon the recognition that the holding in the instant case is based on inappropriate dicta."

Appellant agrees with this Law Review article in its criticism of the erroneous conclusions reached by the District Court in stating that a member of the Naval forces can be subjected to double jeopardy with impunity and there can be no relief under the Constitution.

DOES AN ACQUITTAL OF ASSAULT WITH INTENT TO COMMIT MURDER PRECLUDE FURTHER PROSECUTION FOR A HOMICIDE RESULTING FROM THIS SAME ASSAULT ON THE SAME PERSON?

Appellee cites many cases in his brief which are predicated on the fact that where the proceedings of a trial are void for lack of jurisdiction no jeopardy emerges. Appellant agreed with this statement of the law but contends here that those cases cited by appellees are not in point for the reason that in appellant's first trial the proceedings as to the charges of assault with intent to commit murder were valid: the military court clearly has jurisdiction over a charge of this kind. The fact that the court lacked jurisdiction over the offense of murder did not invalidate the entire proceedings. This statement is substantiated by *Rosborough v. Rossell,* 56 Fed. Supp., 347, Court Martial Order 9-1945, p. 399. In this case the accused was tried on one charge, that of murder; the proceedings were set aside for want of jurisdiction, and later accused was tried for manslaughter. No double jeopardy resulted here as the first court had absolutely no juris-

diction to try the accused for murder *and there was no other charge before the court.* The court said:

> "Rosborough might have been brought to trial on a charge of murder and the specification thereunder and a separate charge of manslaughter and a specification thereunder. In such a case, the court martial would have no jurisdiction of the murder charge. That would not have rendered the proceedings wholly void since it would have had jurisdiction of the charge of manslaughter, since a finding of guilty of manslaughter only and a sentence therefor would have been valid."

Similarly, in the instant case, there were two charges, murder, over which the court had no jurisdiction, and assault with intent to commit murder, over which the court did have jurisdiction. The proceedings under the second charge were valid. This constituted being put in jeopardy once for assault with intent to commit murder and all included offenses and all greater offenses of which this offense may be a part. Therefore, following the herein mentioned acquittal, the Naval General Court Martial, on July 30, 1946, had no authority to try appellant.

The acquittal of appellant by the first court cannot be attacked by any civil court. This is for the reason that where a court has jurisdiction and does not exceed its jurisdiction the civil courts may not attack the judgment of the military court regardless of how erroneous its decision might have been. This principle has been relied upon by both appellant and appellee and clearly is not disputed. Therefore, it was error on the part of the District Court to indulge in an

attempt to excuse the Naval court's action in acquitting appellant of the assault charge. That acquittal stands and cannot be attacked. It may have been erroneous, but the error committed by the Naval authorities in preferring a charge of murder when it had no jurisdiction of this charge cannot be the basis of ignoring a valid legal acquittal. There is just no provision whereby an acquittal by a court of competent jurisdiction may be set aside. We are not permitted to speculate on how the trial court arrived at an acquittal. It is contended by appellee that the charge of assault with intent to commit murder was preferred to provide for the exigencies of proof. This might have been, but legally the proceedings as to the murder charge and that alone were void, and legally the acquittal of the second charge was valid. There we have the result of the first trial, and the result is the only phase of the trial which concerns us, which leads us to the conclusion, once establishing that there was a valid acquittal of assault, can the Navy Department put appellant in jeopardy a second time on the same facts for the same offense, whether that offense be identical or whether there is a greater offense of which the first charge was a part?

Appellee cites no authority to indicate that a trial by Court Martial is void as to its entire proceedings if the court should lack jurisdiction over one of many charges before it. In the instant case let us assume for the sake of discussion that the assault charge was preferred to provide for the exigencies of proof or any other exigencies. In this case the first court might

have convicted the accused of both charges, referring it to the reviewing authority to set aside any lesser offense. Had they done this, then when someone in the Navy department finally realized that Courts Martial have no jurisdiction of murder allegedly committed within the territorial jurisdiction of the United States, the accused would have stood convicted of the second charge and not escaped punishment if the facts warranted punishment. The first court in acquitting the accused of assault with intent to commit murder assumed that it had a valid conviction of the murder charge. When this was proved to be a nullity, by process of simple elimination, there was left standing one valid act of that court, namely an acquittal. The second court had no jurisdiction over the second charge as the Constitution bounds and limits all jurisdiction, and whenever there is a violation of an express provision of the Constitution, this violation ousts the court of jurisdiction.

As to the question of whether or not an acquittal of an assault with intent to commit murder may bar a prosecution involving the same facts on a charge of manslaughter, it may be readily recognized that according to Section 119 of *Naval Courts and Boards* "an assault is a lesser included offense of manslaughter whether voluntary or involuntary."

The cases of *Grafton v. U. S.,* 206 U. S., 333; *Daggert v. State,* 93 S. W., 399; *State v. Hoot,* 120 Iowa, 238, and in 26 Amer. Jurisprudence 276, are all sufficient authority for the proposition that in double jeopardy the offenses do not have to be identical, but

it is sufficient if the facts are the same and one charge includes the other, or one charge is a part of a greater charge.

Agreeing with 26 Amer. Jurisprudence, 279,

> "It is rather difficult to conceive of a prosecution for homicide resulting from an assault where the defendant has been found innocent of committing the assault."

The crime of assault is certainly included in a crime of manslaughter. An assault is a lesser offense of the aggravated charge of assault with intent to commit murder. To permit the prosecution for an alleged assault with intent to commit murder, then a second prosecution for manslaughter clearly places the accused twice in jeopardy for the crime of assault, and this is not permitted by the Constitution. Were this not so, accused could have been acquitted of assault, then tried for manslaughter and acquitted again, then brought to trial a third time for scandalous conduct, all three trials having presented before it the same facts. There would be no end to prosecutions in the Navy if we say that Naval personnel are not protected by the Constitution against prosecution for included offenses.

From appellees' point of view it may be awkward to admit the mistake committed by the first court, if it did make a mistake, in acquitting the accused, but again, since that court had jurisdiction, its findings are final, and this acquittal must be recognized by all courts.

lant's imprisonment, and the decision of the District Court should be reversed and appellant released from confinement and restored to duty as an officer of the United States Navy.

Dated, San Francisco, California,
December 3, 1947.

Respectfully submitted,
EDWIN S. WILSON,
Attorney for Appellant.