

**STATE OF LOUISIANA  
COURT OF APPEAL, THIRD CIRCUIT**

**04-269**

**STATE OF LOUISIANA**

**VERSUS**

**RICKY J. LANGLEY**

THIBODEAUX, C.J., concurring in part and dissenting in part.

I agree with Parts I, II, III, and V of the majority opinion. I disagree that Parts IV and VI are necessary in deciding this case for the following reasons.

Structural error deals with legal transgressions. The majority addresses what appears to be ethical mishaps in Part IV. Even if these implied ethical transgressions had not occurred, the structural errors would still exist and would require reversal.

Part VI entitled “Effect of Absolutely Null Verdict” is advisory. We must remember that it is the defendant who appealed. None of the fifteen assignments of error asserted by the defendant deal with the effect of an absolutely null verdict. The consequences of a reversal was addressed at oral argument only when, somewhat presciently, the State determined that its position was quite tenuous. The Louisiana Constitution implicitly prohibits us from issuing advisory opinions. Absent a justiciable issue that is brought by adverse parties with opposing claims, judicial determination of any action by a court is improper. *Perschall v. State*, 96-0322 (La. 7/1/97), 697 So.2d 240. The issues of double jeopardy and the character

of the charge upon remand are simply not before us. We typically address only those issues or specifications of error that were presented to the trial court and which are properly before us.

Moreover, the majority's opinion clearly states that: "[t]he question to be resolved is whether the trial judge's conduct constitutes trial error, which is subject to review for harmless error, or structural error, which defines analysis by harmless error standards." That is exactly what we are asked to decide. Nothing more and nothing less.

However, to the extent that the majority feels it is necessary to respond to the State's request at oral argument to proceed upon remand with a first degree murder charge, I am compelled to respond.

*State v. Goodley*, 423 So.2d 648 (La.1982) supports the *defendant's*, not the State's, position. The defendant was charged with first degree murder but convicted of manslaughter. The defendant appealed on the basis of excessiveness. His conviction was reversed on the basis of a patent error. The State sought to retry him on first degree murder. He filed a motion to quash. The Louisiana Supreme Court agreed that *double jeopardy* would not bar retrial of the defendant on a first degree murder charge, as stated in the majority opinion. However, the *Goodley* court said that, while double jeopardy did not bar retrial, there were *other* constitutional protections which did. The Louisiana Supreme Court specifically held that . . . "we are of the opinion that *to retry Goodley for the crime of first degree murder would be inconsistent with the right to appeal in Louisiana.*" *Id.* at 650. It forbade the trial court from retrying the defendant on a first degree murder charge based on Article 1, § 19 of the Louisiana Constitution which guarantees that a defendant in felony cases has a right to appeal. Similarly, to retry Langley on first degree murder would be

inconsistent with the right to appeal based on Article 1, § 19 of the Louisiana Constitution. That is exactly what *Goodley* held. In *Goodley*, the supreme court held that the State's actions in attempting to retry Goodley on a first degree murder charge would be unconscionable. Similarly, to retry Langley in this present case on a first degree murder charge, as the State suggests, would be unconscionable.

Likewise, *State v. Campbell*, 95-1404 (La. 2/22/96), 670 So.2d 1212 does not support allowing the State to retry the defendant on a first degree murder charge. In *Campbell*, the jury rendered an improper responsive verdict. The defendant was convicted of "attempted jury tampering." On appeal, his convictions and sentences were vacated. When defendant was charged with jury tampering, the jury returned a verdict of attempted jury tampering. Attempted jury tampering was not a valid crime. The court concluded that it could not "say that the jury's return of the purportedly lesser verdicts of attempt necessarily and implicitly acquitted [defendant] of any material element of the crime charged." Consequently, retrial of the defendant of the original charged offense of jury tampering with correct instructions was held not to constitute double jeopardy. The *Campbell* circumstances are not present in this case.

*Sattazahn v. Pennsylvania*, 537 U.S. 101, 123 S.Ct. 732 (2003) is easily distinguishable for the present case and does not support allowing the State to retry Langley on a first degree murder charge after his successful appeal of his second degree murder conviction. The issue in *Sattazahn* was *not* whether the State could retry the defendant on first degree murder charges after his conviction was reversed on the same charges. *Sattazahn* decided the sentence enhancement of death as opposed to the life sentence he received from the first conviction. Thus, the *Sattazahn* court was faced with the issue of whether double jeopardy applied to

capital *sentencing* proceedings. In *Sattazahn*, the defendant did not attack his conviction of first degree murder, but the fact that on retrial, he was subject to the peril of receiving the death penalty. It is clear that the constitution does not limit the imposition of a harsher sentence after conviction upon retrial. *See North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072 (1969). However, that harsher sentence must be for the *same* offense, not for a harsher offense for which one has been acquitted by virtue of being found guilty of a lesser included offense. *See La.Code Crim.P. art. 598.*

*State v. Self*, 00-633 (La.App. 3 Cir. 11/12/00), 772 So.2d 337 did conclude that the double jeopardy provision of the Fifth Amendment does not bar retrial of the defendant. However, the issue of whether any *other* constitutional provisions or protections, such as Article 1, § 19 of the Louisiana Constitution, would bar retrial on the original charge was not discussed as it was in *State v. Goodley*.

*State v. Williams*, 00-1725 (La. 11/28/01), 800 So.2d 790 referred to the correction of an illegal sentence and involved increased *punishment*. The possibility of an increased punishment upon remand is constitutionally permissible, according to *North Carolina v. Pearce*. *Williams* did not refer to remand for retrial on a more severe charge than that for which one was convicted. In *State v. Normand*, 34,868 (La.App. 2 Cir. 10/31/01), 799 So.2d 619, the court concluded that double jeopardy does not preclude retrial on the *same* charge. To find the defendant guilty of both theft and illegal possession of stolen goods would be double jeopardy. However, double jeopardy did not prevent retrial on either charge. Hence, the retrial must be on the *same* charge for which the defendant was convicted or on a lesser charge.

For the foregoing reasons, I respectfully concur in part and dissent in part.