

SUPREME COURT OF LOUISIANA

No. 95-KA-2226

STATE OF LOUISIANA

Versus

EDMOND J. SANDIFER

**ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
FOURTH CIRCUIT, PARISH OF ORLEANS, STATE OF LOUISIANA**

JOHNSON, Justice,

I respectfully dissent.

The words and phrases used in an indictment or bill of particulars are to be construed according to their usual meaning. La. C.Cr.P. art. 478. Clear language and the plain reading of an indictment or bill of particulars are necessary to insure that a defendant has proper notice of the charges against him. Any ambiguous, obscure, unusual or complex interpretation or reading of an indictment tends to lead to a violation of the defendant's right to due process.

Because the usual meaning of joining any two terms or elements with "and" means a combination of both terms, the bill of information as written charges defendant with possession of both marijuana and cocaine -- not one or the other. Any contrary reading or interpretation of this bill of information is a violation of La. C.Cr.P. art. 478. The State should have used the disjunctive term "or" if it intended to have the option of either the marijuana or the cocaine possession charge to proceed under La. R.S. 14:95(E). Under these circumstances, use of "and" in lieu of "or" amounted to a defect of substance. The State refers to its defective drafting of

the bill of information as a "technical flaw." In criminal proceedings, there is no room for such "technical flaws" at the expense of the defendant's right to due process.

The Louisiana double jeopardy provision states two requirements for the existence of double jeopardy, and provides:

"Double jeopardy exists in a second trial only when the charge in that trial is:

(1) Identical with or a different grade of the same offense for which the defendant was in jeopardy in the first trial, whether or not a responsive verdict could have been rendered in the first trial as to the charge in the second trial; or

(2) Based on a part of a continuous offense for which offense the defendant was in jeopardy in the first trial."
La. C.Cr.P. art. 596.

In the present case, prosecution of this defendant under R.S. 14:95(E) is violative of both requirements of double jeopardy under La. C.Cr.P. art. 596. The bill of particulars alleging the La.R.S. 14:95(E) violation conjunctively charges Mr. Sandifer with possession of "marijuana and cocaine." Mr. Sandifer pled guilty to the underlying charge of possession of marijuana. Consequently, a second trial pursuant to La. R.S. 14:95(E), which is inclusive of the underlying marijuana charge, is identical with or a different grade of the same offense for which the defendant was in jeopardy in the first trial. La. C.Cr.P. art 596. Thus, the facts in this case satisfy the first requirement for double jeopardy under La. C.Cr.P. art. 596. Moreover, prosecution of Mr. Sandifer under La. R.S., 14:95(E) should be barred for failure of the "same evidence" test. The "same evidence" used to convict Mr. Sandifer of the marijuana charge under La. R.S. 40:966(D)(1) is included in the bill of information alleging the La. R.S. 14:95(E) violation. Thus, the gravamen of the

second offense is essentially included within the offense for which first tried. See State v. Buckley, 344 So.2d 980 (La. 1977).

Prosecution of Mr. Sandifer under La. R.S. 14:95(E) is also violative of the second requirement of double jeopardy under La. C.Cr.P. art. 596. At the time the police approached him while he was sleeping in his automobile, the police allegedly observed the marijuana and cocaine on the car's dashboard, both of which are the subjects of the La. R.S. 14:95(E) violation. Therefore, a second trial under La. R.S. 14:95(E) is based on a part of a continuous offense for which offense the defendant was in jeopardy in the first trial.

Additionally, La. C.Cr.P. Art. 493 provides:

"Two or more offenses may be charged in the same indictment or information **in a separate count for each offense** (*emphasis added*) if the offenses charged, whether felonies or misdemeanors, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan; provided that the offenses joined must be triable by the same mode of trial."

The State failed to provide a separate count for marijuana and cocaine in its La. R.S. 14:95(E) bill of particular.

For the foregoing reasons, I respectfully dissent.

