

MASSACHUSETTS SUPREME JUDICIAL COURT

Brittle v. City of Boston

439 Mass. 580 (2003) · Decided June 20, 2003

SUMMARY

The Massachusetts Supreme Judicial Court held that a suspended Boston police officer was not entitled to back pay under G. L. c. 268A, § 25, where related Federal criminal proceedings ended in his guilty plea. The court interpreted “criminal proceedings” to include the related Federal indictments, not merely the State indictments that initially triggered the suspension. The court affirmed the Superior Court’s summary judgment for the City of Boston.

OPINION

MARSHALL, J.

Marshall, C.J. On November 5, 1997, Wilbur Brittle, a suspended Boston police officer, pleaded guilty to a six-count Federal indictment, the culmination of a law enforcement investigation into his international heroin smuggling activities. Brittle now seeks back pay for the forty-month period preceding his plea of guilty during which he was suspended without *581pay.¹ No law requires that result.

We affirm the judgment of the Superior Court denying Brittle all compensation lost during his suspension. 1. Background. We summarize the undisputed material facts, paying particular attention to those recited by the Federal prosecutor at Brittle’s plea colloquy.² Beginning at least as early as 1992, Brittle, while serving as a Boston police officer, was an active participant in an international heroin smuggling ring, traveling to Asia to import heroin into the United States, recruiting other couriers and assisting in the planning of other smuggling trips.

Láveme Cotton was the ring leader. In mid-1992, Brittle and Cotton had a falling-out: the two had “a physical confrontation,” and Cotton obtained a protective order against Brittle.³ See G. L. c. 209A. Brittle then took a “hiatus” from Cotton’s drug smuggling operation.

In May, 1994, Brittle resumed his illegal activities as a courier for Cotton, traveling to Asia to acquire large amounts of heroin.⁴ Shortly thereafter, Brittle and Cotton had another falling-out: Brittle “barreled his way” into Cotton’s house, the two had “a physical confrontation,” and Cotton obtained a second protective order against Brittle.

The physical confrontation followed a “strong dispute” that commenced earlier in the day when Brittle delivered a suitcase of heroin to Cotton. Over the following days, Brittle made threatening telephone calls to Cotton, demanding payment for his most recent smuggling trip and threatening

to inform the Drug Enforcement Agency of Cotton's operation unless she paid him for the heroin delivery.

In response, Cotton sought charges against Brittle and, on July 8, 1994, a grand jury indicted Brittle on two charges: stalking, G. L. c. 265, § 43, and threatening to commit an assault and battery, G. L. c. 275, § 2.* *5 Brittle was immediately suspended from his duties as a police officer; the police commissioner of Boston notified Brittle of his suspension on July 13, 1994.

While the Commonwealth's indictments against Brittle were pending, Cotton and Brittle's illegal drug activities were under investigation by Federal law enforcement officials. A Federal grand jury was convened, and on June 13, 1996, Brittle and thirteen others were indicted by the grand jury on numerous drug-related charges involving conspiracy, importation of heroin, and possession of heroin with intent to distribute.

At the time of the 1996 Federal indictment, Brittle remained suspended from his duties as a Boston police officer, and the Commonwealth's indictment against Brittle for threatening to commit an assault and battery on Cotton was still pending.⁶ On November 19, 1996, while the Federal case was proceeding toward trial, the Commonwealth sought and obtained an order of nolle prosequi of its pending indictments against Brittle.

The assistant district attorney explained the reason for seeking the nolle prosequi: the State and Federal charges were "directly related," Cotton was to be called as a witness in the Federal trial against Brittle, and if the State charge proceeded to trial as scheduled, Cotton would be required to testify about "the same issues."⁷ At the time, Brittle did not ask the city to remove his suspension, he did not claim that he was entitled to receive back pay or benefits, and he did not attempt to return to work.

On November 5, 1997, Brittle pleaded guilty in the United States District Court for the District of Massachusetts to all of the Federal charges. At Brittle's plea colloquy, the assistant United States attorney recited Brittle's activities in the Cotton drug-smuggling conspiracy, recited Cotton's activities, and explicitly referred to the earlier State charges triggered by the falling out between Brittle and Cotton over the payment for heroin.

Immediately after his change of plea, Brittle submitted his resignation to the Boston police department. In April, 1998, Brittle filed this action, seeking compensation pursuant to G. L. c. 268A, § 25.* *8 A judge in the Superior Court allowed the city's motion for summary judgment, reasoning that, although G. L. c. 268A, § 25, did not explicitly address circumstances where, as here, multiple indictments had been brought against a suspended employee, it would be inconsistent with the statute's underlying intent to award Brittle compensation.

A divided panel of the Appeals Court reversed, concluding that this case was controlled by our decision in *Madden v. Secretary of Pub. Safety*, 412 Mass. 1010 (1992). Brittle v. Boston, 54

Mass. App. Ct. 820 (2002). It awarded Brittle back pay from the date that he was suspended, July 13, 1994, to the date that he was indicted on the Federal charges, *584June 13, 1996.⁹ We granted the city's application for further appellate review.

2. Discussion. Brittle contends that he is entitled to back pay for the entire period of his suspension because the State indictments, which initially triggered his suspension, terminated "without a finding or verdict of guilty." G. L. c. 268A, § 25.

Although Brittle did plead guilty to the Federal indictments, he asserts that those indictments are "not relevant" to whether he is entitled to lost compensation while he was suspended. The relief he seeks is neither compelled by the language of G. L. c. 268A, § 25, nor consistent with the statute's purpose. General Laws c. 268A, § 25, provides in pertinent part: "If the criminal proceedings against the [suspended employee] are terminated without a finding or verdict of guilty on any of the charges on which he was indicted, his suspension shall be forthwith removed, and he shall receive all compensation or salary due him for the period of his suspension...." By its express terms, the statute contemplates that payment for a period of suspension shall occur if, and only when, the employee is entitled to removal of his suspension.

The suspended employee, of course, is entitled to removal of his suspension, only when the "criminal proceedings" against him terminate "without a finding or verdict of guilty on any of the charges on which he was indicted" (emphasis added). Brittle was under indictment throughout the entire forty-month period of his suspension before he resigned. He was never eligible to perform any public duties during that time; he was not entitled to "remov[al]" of his suspension, and he most assuredly was not entitled to reinstatement during that forty-month period.¹⁰ "Criminal proceedings" against him did not terminate until he pleaded *585guilty to the Federal indictments on November 5, 1997, and those proceedings terminated in a "finding or verdict of guilty." G. L. c. 268A, § 25.

Brittle in effect asks us to construe the phrase "criminal proceedings" narrowly to encompass only the State court proceedings. There is no reason to do so. A statute should not be "unduly constricted so as to exclude matters fairly within [its] scope." *Tilton v. Haverhill*, 311 Mass. 572, 577 (1942), quoting *Commonwealth v. Welosky*, 276 Mass. 398, 401 (1931), cert. denied, 284 U.S. 684 (1932).

Rather, "[i]f the language of the statute is 'fairly susceptible [of] a construction that would lead to a logical and sensible result' we will construe [it] so as 'to make [it an]... effectual piece[] of legislation in harmony with common sense and sound reason.'" *Commonwealth v. Williams*, 427 Mass. 59, 62 (1998), quoting *Commonwealth v. A Juvenile*, 16 Mass. App.

Ct. 251, 254 (1983). The Legislature surely recognized that there are numerous circumstances, such as here, where an initial indictment may give rise to or be related to other indictments, as the

fullness of the criminal conduct of a defendant comes to light.¹¹ One indictment may spawn several, or a defendant may be convicted of charges arising from a course of criminal conduct on which multiple indictments are based, but not necessarily of each indictment arising out of that conduct.¹² The Legislature reasonably withheld from the employee the right of removal of suspension (and corresponding back pay) only when “criminal proceedings” against him were “terminated” without a finding of wrongdoing on “any” of the charges against him.

To cabin the term “criminal proceedings” to refer solely to proceedings concerning the initial indictment is thus inconsistent with the language of the statute, and with its purpose: “to remedy the untenable situation [that] arises when a person who has been indicted for misconduct in office continues to perform his public duties while awaiting trial.” *Springfield v. Director of the Div. of Employment Sec.*, 398 Mass. 786, 788-789 (1986), quoting *Massachusetts Bay Transp.*

Auth. v. Massachusetts Bay Transp. Auth. Retirement Bd., 397 Mass. 734, 739 (1986). See *Sterilite Corp. v. Continental Cas. Co.*, 397 Mass. 837, 839 n.3 (1986), quoting *International Org. of Masters v. Woods Hole, Martha’s Vineyard & Nantucket S.S. Auth.*, 392 Mass. 811, 813 (1984) (“Our primary duty is to interpret a law so as to effectuate the intent of the Legislature in enacting it”).¹³ Our reading of the statute is also consistent with the converse purpose of the statute: to ensure that a suspended public employee is fully compensated if no misconduct by him is established.

See *Bessette v. Commissioner of Pub. Works*, 348 Mass. 605, 608 (1965) (“The statute fully protects the suspended employee upon his vindication...”).¹⁴ *Madden v. Secretary of Pub. Safety*, 412 Mass. 1010 (1992), ¹⁵on which Brittle relies, is readily distinguishable. Madden was indicted on State charges and suspended. All the State charges were nol pressed, and there were at the time no other indictments pending against him; all “criminal proceedings” had terminated.

Seven weeks later he was again indicted, this time on unrelated Federal charges.¹⁵ Within that seven-week period, Madden could have sought, and in fact did seek, reinstatement. He also sought “all compensation or salary due him.” G. L. c. 30, § 59.

In contrast, Brittle’s State charges were nol pressed only after (and indeed because) he had been indicted on “directly related” Federal charges. Unlike Madden, Brittle’s “criminal proceedings” did not terminate until he ultimately pleaded guilty. Had Brittle, like Madden, sought reinstatement when the State charge was nol pressed, his request to resume his duties as a police officer would undoubtedly have been summarily denied because of the pending Federal indictments.

See *Bessette v. Commissioner of Pub. Works*, *supra* at 608 (“It is the ascertainable and indisputable fact of the indictment, quite apart from guilt, that makes continuance in office

unsuitable”). Our decision today does not overrule *Madden v. Secretary of Pub. Safety*, supra. Post at 592.

The result here is consistent with the holding in that case, which retains its full precedential value. We need not decide whether we would reach the same result in a case where various indictments brought at different times or by different prosecuting authorities overlap in time but are unrelated.

Here, there is an obvious and close relationship between the conduct that gave rise to Brittle’s State indictments *588 and the conduct that resulted in his Federal indictments. Both involve the Brittle-Cotton drug smuggling conspiracy. Brittle and Cotton were engaged in a violent dispute concerning money Brittle claimed he was due on the delivery of a suitcase of heroin to Cotton.

His violent conduct led initially to the State indictments. As Brittle’s illegal conduct came to light in full measure, State and Federal law enforcement officials coordinated their strategy against Brittle. Cotton was the complaining witness in the State indictments against Brittle. She was also a critical witness in Brittle’s Federal trial and, according to the assistant district attorney, would testify to “the same issues” in both the State and Federal proceedings, i.e., to the conduct that ultimately ended Brittle’s involvement with Cotton and her drug-smuggling operation.

It is of no consequence that the remaining State indictment was not fully detailed at the Federal plea colloquy, or that the Federal indictment was not laid bare in minute detail when the State charge was nol pressed.

For it is abundantly clear from the representations of both the district attorney for the Suffolk district and the United States attorney that those two respective offices were proceeding in tandem precisely because the conduct giving rise to the State and Federal indictments was related. Had Cotton been subjected to cross-examination by Brittle’s attorney in the relatively insignificant State case, the Federal indictment against Brittle might well have been compromised.

Neither office would have accepted that risk, as any punishment of Brittle resulting from a conviction of international heroin smuggling would be far greater than, and indeed would eclipse, any punishment that Brittle might receive in the State proceedings.¹⁶ Nol pressing the State indictment to strengthen the closely related and more serious Federal indictment was not only reasonable, it would have been foolhardy for the district attorney to proceed otherwise.

To grant Brittle the relief he seeks would provide a perverse incentive to prosecutors to pursue a less weighty State claim and possibly jeopardize a far *589 more serious Federal case, or vice versa, in order to avoid the distasteful obligation of back pay to a subsequently convicted public employee.

The plain wording of the statute forecloses any such result. Brittle may not benefit from his criminal conduct at the expense of the city’s taxpayers merely because the prosecutors of his drug-

related crimes cooperated to bring him to justice.¹⁷ Because of our conclusion, we need not address the city's argument that Brittle should be equitably estopped from seeking back pay.

See, e.g., *Yetman v. Cambridge*, 7 Mass. App. Ct. 700, 708-709 (1979) (city permitted to raise affirmative defense of laches, "an equitable defense consisting of unreasonable delay in instituting an action which results in some injury or prejudice to the defendant").

We note that the statute is silent as to the proper resolution of a claim by a suspended employee for back pay in circumstances where a city, acting in good faith, does not forthwith remove a suspension, and the employee does not seek reinstatement or back pay.

The statute gives no indication that the employer has a duty to monitor the disposition of the "criminal proceedings," or that the prosecuting authority has any duty to advise the employer of an outcome favorable to the employee.

The Legislature could reasonably have assumed that a suspended employee vindicated of every charge would promptly assert his right to removal of the suspension, or to receive compensation for the period of his suspension, or both. See *Madden v. Secretary of Pub. Safety*, 412 Mass. 1010, 1011 (1992) (suspended employee sought back pay ten days after entry of order of nolle prosequi).

Judgment affirmed. Alternatively, Brittle seeks back pay for the twenty-three month period from the date he was suspended until the date he was indicted on Federal charges to which he ultimately pleaded guilty. But see note 9, *infra*.

As the judge in the Superior Court noted, Brittle "was given the opportunity at the change of plea hearing in the Federal case to dispute the Government's synopsis of its evidence.... Aside from challenging several dates and objecting to evidence of criminal activity from 1986 to 1991, [Brittle] did not dispute the other allegations...." Before 1992, Brittle and Cotton had had a long-standing personal relationship, and Brittle is the father of two of Cotton's children.

As early as 1986, Brittle had been aware of Cotton's illegal drug smuggling activities and had shared in its proceeds, but it appears that it was not until 1992 that Brittle became an active participant in Cotton's operation. It appears that, by then, Brittle and Cotton were no longer in a personal relationship, and Cotton was pregnant with the child of another man.

During that period, Brittle "began to drink heavily." Nothing in the record suggests that the Commonwealth knew at that time that Cotton's allegations against Brittle concerned a payment dispute over their joint drug operation. Earlier, on May 19, 1995, the indictment against Brittle on the charge of stalking had been dismissed, perhaps in response to *Commonwealth v. Kwiatkowski*, 418 Mass. 543, 546-547 (1994), holding that the stalking statute was unconstitutionally vague in certain respects.

The Commonwealth continued to press its indictment against Brittle for threatening to commit an assault and battery. Specifically, the assistant district attorney informed the judge: “1. The defendant, Wilbur Brittle, is presently being prosecuted in the Federal District Court; 2.

The complainant will be called to testify for the government against the defendant Wilbur Brittle; 3. The indictments [in the] Federal District Court *583pending against the defendant, Wilbur Brittle, are directly related to the indictment against Wilbur Brittle in Suffolk Superior Court; 4.

The complainant, if asked to testify in Suffolk Superior Court would also be required to testify about the same issues in [the] Federal District Court trial of the defendant Wilbur Brittle” (emphasis added). General Laws c. 268A, § 25, provides, in pertinent part: “An officer or employee of a county, city, town or district... may, during any period such officer or employee is under indictment for misconduct in such office or employment... be suspended by the appointing authority....

If the criminal proceedings against the person suspended are terminated without a finding or verdict of guilty on any of the charges on which he was indicted, his suspension shall be forthwith removed, and he shall receive all compensation or salary due him for the period of his suspension, and the time of his suspension shall count in determining sick leave, vacation, seniority and other rights, and shall be counted as creditable service for purposes of retirement.” The Appeals Court ruled that Brittle was entitled to compensation from July 13, 1994 until June 13, 1996, when he was indicted in Federal court (twenty-three months), and not until November 5, 1997, when he pleaded guilty (forty months), because Brittle had made no “argument concerning the appropriate terminal date for the back pay.” *Brittle v. Boston*, 54 Mass. App.

Ct. 820, 824 (2002). The statute does not provide that removal of suspension is “automatic,” nor that the payment of back pay is “automatic,” post at 590, if and when any one of a number of criminal indictments is terminated without a finding or verdict of guilt. Such a reading finds no support in the statute.

In contrast, notice properly given “shall automatically suspend the authority of [the *585indicted employee],” and the suspension remains in effect until the employee “is notified... that the suspension is removed” (emphasis added). G. L. c. 268A, § 25. Brittle was never notified that his suspension had been removed. Contrary to the dissent, post at 592 n.3, the legislative history reveals that the Legislature has successively expanded the scope of G. L. c. 30, § 59, which is “identical in its operative language” to G. L. c. 268A, § 25.

Springfield v. Director of the Div. of Employment Sec., 398 Mass. 786, 788 (1986). Compare 1962 House Doc. No. 3387 (original bill providing that suspension would not result in loss of compensation or other benefits) with 1962 Senate Doc. No. 863 (amended bill, enacted as St.

1962, c. 798, providing that suspension would result in loss of compensation and accrual of other benefits).

See 1963 House Doc. 3498, enacted as St. 1963, c. 829 (granting replacement employees authority to perform tasks of suspended employees); 1964 House Doc. No. 3565 (Governor submitting amendment to G. L. c. 30, § 59, as amended through St. 1964, c. 528, “to broad[en] the authority to suspend certain officers or employees for misconduct in office”).

In enacting the various amendments, the Legislature has not once cut back the scope of either statute. Such circumstances may occur when, for instance, a defendant is reindicted after a successful motion, see *Commonwealth v. McCarthy*, 385 Mass. 160 (1982), or when the victim of an assault with intent to murder dies and the defendant is reindicted on murder charges.

Our holding neither “ignores the plain language and intent” of the statute, nor “rewrit[es] it,” nor engages in “judicial legislation” to reach a “pleasing” result. Post at 590. Eleven judges have considered Brittle’s claim for back pay, of whom six have concluded that he is not entitled to recovery under the terms of G. L. c. 268A, § 25, while five have concluded that he is entitled to compensation.

That reasonable minds disagree on a matter of statutory interpretation does not warrant the charge that judges seek to subvert the Legislature’s policy decision with their own. Post at 591. We do not interpret the “restrictive language of the statute” more “broadly” than the Legislature intended. Post at 594.

The Legislature limited suspension without pay to public employees who are indicted for misconduct committed while in office, presumably for at least two reasons: (1) before an *587 indictment is properly issued, a grand jury must hear sufficient evidence to identify the defendant and probable cause to arrest him, see *Commonwealth v. McCarthy*, 385 Mass. 160, 163 (1982), and (2) many misdemeanors and other crimes that do not involve “misconduct in office” do not raise the kind of “untenable” concerns that we noted in *Springfield v. Director of the Div. of Employment Sec.*, 398 Mass. 786, 788-789 (1986).

We give full effect to the Legislature’s obvious intent, reflecting as it does a careful balance of the rights of public employees against whom wrongdoing is not proved, and protection of the public from those employees who do engage in illegal conduct.

The Secretary of Public Safety made no claim that Madden’s Federal charges were related in any manner to the earlier State indictments. See *Madden v. Secretary of Pub. Safety*, 412 Mass. 1010, 1011 (1992). We have reviewed the briefs in that case and are confident that a claim of relatedness could not have been sustained. Brittle was sentenced by the United States District Court judge to ten years in prison, with five years of supervised release to follow.

Had he been convicted of the State charge of threatening to commit an assault and battery, the sentence could have been a fine of not more than \$100 or a prison sentence of not more than six months. See G. L. c. 275, §§ 2, 4.

The dissent posits that the Commonwealth could have “delay[ed] its proceeding until after the disposition of the Federal charges,” post at 596, thereby recognizing that suspension of Brittle until the conclusion of the Federal prosecution was fully warranted.

We see nothing in the statute that requires a prosecutor to manipulate proceedings so as to delay a trial, or to require the Commonwealth to expend unnecessary resources to bring to trial a defendant already convicted of far more serious crimes arising from his related conduct.

In short, the solution preferred by the dissent elevates form over substance.