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Criminal Law--Reprosecution for Higher Degree of Crime Held Double Jeopardy (United States v. Wilkins, 348 F.2d 844 (2d Cir. 1965))

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CRIMINAL LAW—REPROSECUTION FOR HIGHER DEGREE OF CRIME HELD DOUBLE JEOPARDY.—Upon an indictment for first degree murder in New York, the defendant was convicted of murder in the second degree. On appeal, this conviction was reversed and a new trial granted. At the second trial, upon the same indictment, the defendant was convicted of first degree murder. On appeal, this conviction was also reversed and a new trial again granted. At the third trial, upon the same indictment, the defendant was found guilty of murder in the second degree. In reversing the district court's denial of an application for a writ of habeas corpus, the United States Court of Appeals *held* that a prosecution for first degree murder after reversal of a conviction of second degree murder was a denial of due process, since there was a reasonable possibility of prejudice, and since the due process clause of the fourteenth amendment places *some* limitations upon the state's right to re prosecute. *United States v. Wilkins*, 348 F.2d 844 (2d Cir. 1965).

At common law, the principle developed that "no man is to be brought into jeopardy of his life, more than once, for the same offence."¹ However, the protection given by this doctrine was restricted, generally, to Crown prosecutions for capital felonies, and jeopardy did not attach until final judgment.²

Although the English requirement of a prior final judgment remained unchanged³ in the United States prior to 1789, the fifth amendment to the Constitution extended the double jeopardy protection beyond capital felonies.⁴ This expanded protection represented two distinct policies: that no person should be punished more than once for the same offense; that no individual should be harassed by successive prosecutions for a single wrongful act or activity.⁵

In interpreting the Constitution, the federal courts have formulated certain definite standards relating to double jeopardy. For example, jeopardy attaches when a jury has been impaneled and sworn,⁶ or when the court in a nonjury trial has begun to hear evidence.⁷ Reprosecution is permitted, however, in various instances even where a former trial terminated after the jury was sworn or evidence taken. For example, reprosecution is permissible

¹ 4 BLACKSTONE, COMMENTARIES *335.

² See *id.* at *335-36.

³ See Sigler, *A History of Double Jeopardy*, 7 AM. J. LEGAL HIST. 283, 300 (1963).

⁴ "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." U.S. CONST. amend. V.

⁵ *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 169, 173 (1873).

⁶ *Downum v. United States*, 372 U.S. 734 (1963); *Cornero v. United States*, 48 F.2d 69 (9th Cir. 1931).

⁷ *E.g.*, *McCarthy v. Zerbst*, 85 F.2d 640 (10th Cir.), *cert. denied*, 299 U.S. 610 (1936).

in the event of: inability of the jury to agree;⁸ disqualification of a juror;⁹ outside influence brought to bear on a jury;¹⁰ death or other incapacity of the trial judge;¹¹ the tactical needs of the military in time of war.¹² Thus, so long as the trial is terminated because of a relatively objective "breakdown in judicial machinery,"¹³ rather than because of improper conduct or error on the part of the prosecutor or judge, the federal courts have had little difficulty in finding that a reprosecution of the accused does not violate the mandate against double jeopardy contained in the fifth amendment.¹⁴

The accused may also be reprosecuted in the federal courts for the same crime after he has successfully appealed his conviction of that crime.¹⁵ The courts have generally made use of the waiver theory¹⁶ in explaining why such a reprosecution is permissible. Justification for such a reprosecution may be found in Justice Holmes' theory of continuing jeopardy propounded in his dissenting opinion in *Kepler v. United States*: "a man cannot be said to be more than once in jeopardy in the same cause, however often he may be tried. The jeopardy is one continuous jeopardy from its beginning to the end of the cause."¹⁷ Underlying this theory is the idea that when a defendant successfully appeals a conviction, the appellate court is saying, in effect, that there was *no trial*, and the defendant, thus, was never in jeopardy. Under this theory, jeopardy does not attach until after a final judgment has been rendered.

The question with which we are concerned is this: when the defendant is charged with an offense, is convicted of a lesser included offense, appeals from the conviction, and is awarded a new trial, can he thereafter be tried for the greater offense? In *Trono v.*

⁸ *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824).

⁹ *E.g.*, *Thompson v. United States*, 155 U.S. 271 (1894).

¹⁰ *Simmons v. United States*, 142 U.S. 148 (1891).

¹¹ *People ex rel. Brinkman v. Barr*, 248 N.Y. 126, 161 N.E. 444 (1928); *People v. Valenti*, 49 Cal. Rep. 2d 199, 316 P.2d 633 (1957).

¹² *Wade v. Hunter*, 336 U.S. 684, 688-89 (1949).

¹³ *Gori v. United States*, 367 U.S. 364, 372 (1961) (dissenting opinion).

¹⁴ *Cornero v. United States*, *supra* note 6; *State ex rel. Manning v. Himes*, 153 Fla. 711, 15 So. 2d 613 (1943).

¹⁵ *Stroud v. United States*, 251 U.S. 15 (1919); *United States v. Ball*, 163 U.S. 662 (1896).

¹⁶ There are two aspects to the waiver theory. Most courts hold that by appealing a conviction the defendant "waives" his right to the protection against being put twice in jeopardy in regard to the offense of which he was convicted. However, other courts have held that the reversal of the judgment of conviction opens up the whole controversy and acts upon the original judgment as if it had never existed. In other words, by successfully appealing, the defendant "waives" the protection of double jeopardy in regard to anything that occurred at the prior trial. *Trono v. United States*, 199 U.S. 521 (1905).

¹⁷ 195 U.S. 100, 134 (1904) (dissenting opinion).

United States,¹⁸ a case originating in the local courts of the Philippine Islands, the defendants were indicted for murder but were convicted of assault. They appealed to the Philippine Supreme Court, which, in accordance with local practice, entered a conviction of murder without remanding the case for retrial. The United States Supreme Court affirmed, holding that the defendants, by appealing, waived their immunity from double jeopardy. The Court reasoned that if the defendants sought a complete acquittal, they assumed the risk of being found guilty of the greater offense originally charged.

However, in *Green v. United States*,¹⁹ the Court distinguished *Trono* on the ground that the latter involved only a statutory prohibition against double jeopardy. *Green* held that where the defendant was indicted for first degree murder but was convicted of second degree murder and arson, and successfully appealed, it was a violation of the double jeopardy provision of the fifth amendment to retry him for first degree murder. The Court held that by taking a successful appeal from his improper conviction of second degree murder, the defendant did *not* waive his constitutional defense of former jeopardy to a second prosecution on the first degree murder indictment.

Thus, *Green* rejects the reasoning of *Trono* when dealing with a prosecution under the double jeopardy clause of the fifth amendment, and establishes that when a defendant is convicted in a federal court of a lesser included offense, and successfully appeals his conviction of the lesser crime, an offense greater than that of which he was convicted cannot be considered at any new trial. The difficult question is whether this limitation on reprosecution is applicable to the states.

While the states are not bound by the requirements of the first eight amendments to the Constitution, except as those prohibitions are held applicable through the fourteenth amendment,²⁰ prohibitions against a second trial for the *same* offense after a defendant has been acquitted are found in the constitutions of all but five states.²¹ In those five, the common-law prohibition against a retrial on a similar indictment after acquittal is recognized.²²

The Supreme Court, in *Palko v. Connecticut*²³ held that certain provisions of the double jeopardy clause of the fifth amendment are *not* applicable to the states through the due process clause of the fourteenth amendment. In that case, the defendant was indicted for first degree murder, but was convicted of second degree murder.

¹⁸ 199 U.S. 521 (1905).

¹⁹ 355 U.S. 184 (1957).

²⁰ *Ohio ex rel. Lloyd v. Dollison*, 194 U.S. 445 (1904).

²¹ Connecticut, Maryland, Massachusetts, North Carolina and Vermont.

²² *E.g.*, *Commonwealth v. Hart*, 149 Mass. 7, 20 N.E. 310 (1889).

²³ 302 U.S. 319 (1937).

Under a Connecticut statute,²⁴ the *state appealed*, and won a reversal on the ground that *it* was prejudiced in attempting to convict the defendant of the higher degree of the crime. At the new trial, the defendant was convicted of first degree murder. Mr. Justice Cardozo, speaking for the Court, stated that only those rights which "have been found to be implicit in the concept of ordered liberty" are absorbed by the due process clause of the fourteenth amendment and made applicable to the states.²⁵ While it is a violation of double jeopardy in the federal courts for the Government to appeal an acquittal,²⁶ the United States Supreme Court held that this type of double jeopardy did not exceed the limits imposed upon the states by the due process clause.

Is that kind of double jeopardy to which the statute has subjected him [the accused] a hardship so acute and shocking that our polity will not endure it? Does it violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'? . . . The answer surely must be 'no.'²⁷

Thus, *Palko* stands for the proposition that the states are not bound by all of the federal prohibitions in regard to double jeopardy—but the Court indicated that due process, as applied to the states, encompasses *certain* of the double jeopardy provisions of the fifth amendment.²⁸

Prior to the disposition of the instant case it had been held in New York that it was not double jeopardy to reprosecute a defendant for first degree murder after he successfully appealed his conviction of second degree murder.²⁹ In addition, the law in New York is firmly established that when a defendant procures a reversal of a conviction he may again be tried on the original indictment.³⁰ The decisions in this area are buttressed by two provisions of the New York Code of Criminal Procedure which provide that "the granting of a new trial places the parties in the

²⁴ CONN. GEN. STAT. REV. § 6494 (1930), now contained in CONN. GEN. STAT. ANN. § 54-96 (1960).

²⁵ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

²⁶ *Kepler v. United States*, 195 U.S. 100 (1904).

²⁷ *Supra* note 25, at 328.

²⁸ *Ibid.* For example, "if the state were permitted after a trial free from error to try the accused over again or to bring another case against him," or if the state was "attempting to wear the accused out by a multitude of cases with accumulated trials," such actions would be found unconstitutional. *Ibid.*

²⁹ *People ex rel. Hetenyi v. Johnston*, 10 App. Div. 2d 121, 198 N.Y.S.2d 18 (3d Dep't), *appeal dismissed*, 8 N.Y.2d 913, 168 N.E.2d 830, 204 N.Y.S.2d 158 (1960).

³⁰ *People v. Ercole*, 4 N.Y.2d 617, 152 N.E.2d 77, 176 N.Y.S.2d 649 (1958); *People v. McGrath*, 202 N.Y. 445, 96 N.E. 92 (1911); *People v. Palmer*, 109 N.Y. 413, 17 N.E. 213 (1888).

same position as if no trial had been had,"³¹ and that "when a new trial is ordered, it shall proceed in all respects as if no trial had been had."³² Thus, the rule in New York is at variance with the federal rule, as enunciated in *Green*.

Judge Marshall, speaking for the Court in *Wilkins*, resolved this conflict by declaring the New York rule unconstitutional to the extent that it permitted reprosecution for the greater offense. He determined that the fourteenth amendment imposes some limitations on a state's power to reprosecute an individual for the same crime, and pointed out that in *Green* the United States Supreme Court held that this type of reprosecution was double jeopardy under the fifth amendment.³³ Thus, Judge Marshall concluded that it was also double jeopardy under the fourteenth amendment, "for *Green* involved more than a 'subtle technical controversy' and the decision rested on that aspect of the Fifth Amendment double jeopardy provision that must be ranked as fundamental."³⁴ He indicated that *Palko* does not stand for the proposition that due process includes no part of the protection against double jeopardy; rather, it merely stands for the proposition that the particular type of double jeopardy found there is not applicable to the states, since it is not necessary to the concept of ordered liberty and fundamental fairness. To permit the state to reprosecute the accused for the greater charge in *Palko* "was to provide the state with an opportunity 'to do better a second time' only because it had been prejudiced by substantial legal error the first time. . . . This could hardly be classified as fundamentally unfair."³⁵

In contrast, it was the *defendant* who appealed in the instant case. The success of this appeal meant that he was prejudiced by substantial legal error, and there is no basis for supposing that these errors impaired the substantial rights of the prosecution and contributed to its failure to obtain a conviction on the first degree murder charge. If anything was to be inferred, it was that the state was aided in obtaining a conviction for murder in the second degree by the errors at the trial. To permit the state to reprosecute for the greater charge here would be to provide it with an opportunity "to do better a second time," not because *it* had been prejudiced by substantial legal error the first time, but because the *accused* had been so prejudiced, and because this prejudice to his cause had been perceived on appeal.³⁶ The *Wilkins* Court held that forcing the accused to waive the protection of double jeopardy as regards the greater offense is patently unjust, since a severe

³¹ N.Y. CODE CRIM. PROC. § 464.

³² N.Y. CODE CRIM. PROC. § 544.

³³ *Green v. United States*, 355 U.S. 184 (1957).

³⁴ *United States v. Wilkins*, 348 F.2d 844, 856 (2d Cir. 1965).

³⁵ *Id.* at 860.

³⁶ *Ibid.*

limitation is placed upon the right of a defendant to appeal his conviction.³⁷

The first effect of this case is, therefore, to declare that the previous interpretation of Sections 464 and 544 of the New York Code of Criminal Procedure is inconsistent with the due process clause of the fourteenth amendment. The application of the holding, however, is not necessarily limited to New York. By declaring that this type of re prosecution is forbidden by the fourteenth amendment, the Court is applying those standards which it feels the United States Supreme Court would apply.

In determining which rights guaranteed by the Bill of Rights are made applicable to the states through the due process clause, the Supreme Court has been using, basically, the test formulated in *Palko*—they are those fundamental rights essential to ordered liberty.

The Supreme Court has not, as yet, held the protection against double jeopardy to be a fundamental right. However, as Mr. Justice Cardozo pointed out in *Palko*, while the particular type of re prosecution involved there was not fundamentally unfair, there were instances in which re prosecution would "violate those 'fundamental principles of all our civil and political institutions.'" ³⁸ The result would be different, indeed, if the statutory scheme permitted a new trial after a verdict free from error, or if the defendant could be harassed by a "multitude of cases." ³⁹

An affirmance of the instant case may be predicated upon a finding by the United States Supreme Court that re prosecution under these circumstances is fundamentally unfair, either because it limits a defendant's right to appeal or because the due process clause of the fourteenth amendment includes the protection against double jeopardy. The recent trend of the Court has been to incorporate into the fourteenth amendment many of the rights contained in the first eight amendments.⁴⁰ Thus, it is likely that it will also incorporate the protection against double jeopardy. However, it is not likely that the Court will incorporate the double jeopardy provision in its entirety, since to do so would require

³⁷ *Id.* at 859.

³⁸ *Supra* note 25, at 328, citing *Herbert v. Louisiana*, 272 U.S. 312, 316 (1926).

³⁹ *Supra* note 25, at 328.

⁴⁰ See, e.g., *Griffin v. California*, 380 U.S. 609 (1965) (protection against self-incrimination forbids both comment by prosecutor on accused's silence and instructions by the court that such silence is evidence of guilt); *Pointer v. Texas*, 380 U.S. 400 (1965) (right of confrontation guaranteed by the sixth amendment); *Malloy v. Hogan*, 378 U.S. 1 (1964) (prohibition against self-incrimination contained in the fifth amendment); *Gideon v. Wainwright*, 372 U.S. 333 (1963) (right to counsel contained in the sixth amendment); *Mapp v. Ohio*, 367 U.S. 643 (1961) (prohibition against unreasonable search and seizure contained in the fourth amendment).

overruling the *Palko* determination that only a part of the double jeopardy provision—that which is fundamental—is applicable to the states. Since the states do not now enjoy *carte blanche* with respect to reprosecution for the offense originally charged, it seems likely that the Supreme Court will only extend the prohibition to include reprosecution for a higher offense, where the defendant has been convicted of, and successfully appeals the lesser offense included in the indictment.



TORTS—DRAM SHOP ACT—STATUTORY COVERAGE DOES NOT PRECLUDE COMMON-LAW NEGLIGENCE ACTION.—Plaintiffs brought an action against a tavern owner for wrongful death and personal injuries on the ground that he had negligently served liquor to two intoxicated men who thereafter caused an automobile collision resulting in the alleged injuries and deaths. In denying defendant's motion to dismiss the negligence cause of action, the New York Supreme Court *held* that an action under the Dram Shop Act was not the exclusive remedy—that recovery for common-law negligence was also available. *Berkeley v. Park*, 47 Misc. 2d 381, 262 N.Y.S.2d 290 (Sup. Ct. 1965).

At common law, the sale of liquor to an intoxicated person was not considered the proximate cause of any injury inflicted by the purchaser.¹ Thus, while the intoxicated person remained liable for any injury he caused to others, the act of the vendor in selling liquor to him was not actionable by the injured third party,² unless the injury took place on the vendor's premises.³ When such liability attached, the seller's act was considered a willful breach of his duty to use reasonable care in policing the premises, which breach was the proximate cause of the injury.⁴

To afford a remedy against vendors for the acts of intoxicated persons to whom they had served liquor, about one-half of the states, including New York, passed so-called Civil Damage Acts, better known as Dram Shop Acts.⁵ These statutes arose out of the temperance movement of the 1870's. The purpose of these laws was to suppress the sale of intoxicating liquor by making persons who sold it liable for damages which resulted from the ensuing intoxication.⁶ A plaintiff, thereunder, was not required

¹ *Belding v. Johnson*, 86 Ga. 177, 12 S.E. 304 (1890).

² *Seibel v. Leach*, 233 Wis. 66, 288 N.W. 774 (1939).

³ *Tyrrell v. Quigley*, 186 Misc. 972, 60 N.Y.S.2d 821 (Sup. Ct. 1946).

⁴ *Ibid.*

⁵ *Ogilvie, History and Appraisal of the Illinois Dram Shop Act*, 1958 U. ILL. L.F. 175, 180 n. 30.

⁶ *Mead v. Stratton*, 87 N.Y. 493 (1882).