St. John's Law Review

Volume 22
Number 2 *Volume 22, April 1948, Number 2*

Article 7

July 2013

Criminal Law--Double Jeopardy (People v. Morrisohn, 74 N.Y.S.2d 775 (Co. Ct. 1947))

St. John's Law Review

jurors, and in view of the further fact that whatever influence they exert adverse to the interests of the defendant is counteracted by the oath of each juror to decide the issues solely on the basis of the evidence adduced and to render an impartial verdict.

H. P.

CRIMINAL LAW—DOUBLE JEOPARDY.—Defendant was charged, pleaded guilty to and convicted of three separate offenses in separate indictments, for reckless driving, driving without a license, and for violating Section 43 of the Penal Law [1] by blowing the horn of his car in a manner to annoy and disturb people, racing his car through the street at a high and dangerous rate of speed, using profane and indecent language, causing a crowd to collect and failing to stop his car when ordered to do so. He contended on appeal that he was twice placed in jeopardy [2] because the acts comprising the violation of Section 43 were the same as those constituting the reckless driving. *Held,* conviction affirmed. The acts constituting the offense in the third indictment were separate and distinct. There was no double jeopardy in violation of Section 1938 of the Penal Law.[3] *People v. Morrisohn,* — Misc. —, 74 N. Y. S. 2d 775 (Co. Ct. 1947).

Defendant's position is that the acts separately charged are part of the same transaction. Since reckless driving must be determined from all of the surrounding circumstances where a statute does not designate particular acts,[4] he contends that the racing of the car through the street, the failure to stop the car, the blowing of the horn, the use of profane language and the causing of a crowd to collect were all part and parcel of the same transaction, comprising those circumstances from which the court already deduced that he drove recklessly and for which he has been punished. To again punish him for the same offense would be double jeopardy.

---

[1] N. Y. PENAL LAW § 43. "A person who willfully and wrongfully commits any act which seriously injures the person or property of another, or which seriously disturbs or endangers the public peace or health, or which openly outrages public decency, for which no other punishment is expressly prescribed by this chapter is guilty of a misdemeanor; . . ."

[2] U. S. CONST. AMEND. V: a person shall not be subject for the same offense to be twice put in jeopardy of life or limb; N. Y. CONST. § 6: "no person shall be subject to be twice put in jeopardy for the same offense."

[3] N. Y. PENAL LAW § 1938. "An act or omission which is made criminal and punishable in different ways, by different provisions of law, may be punished under any one of those provisions but not under more than one; and a conviction or acquittal under one bars a prosecution for the same act or omission under any other provision."

[4] People v. Devoe, 246 N. Y. 636, 159 N. E. 682 (1927); see Note, 86 A. L. R. 1274 (1933).

His position is best supported by the decision in the case of *People v. Krank*,[5] where there was double jeopardy because both indictments depended on the same criminal act, and prosecution under both would be in violation of Section 1938 of the Penal Law. There, the charge was the sale of liquor on a Saturday without a license, the proofs revealing, however, a sale on Sunday which was illegal with or without a license. The question was whether the added charge of a sale of liquor on Sunday would result in double jeopardy. There is concurrence by both prosecution and defense here that under those circumstances defendant would be twice placed in jeopardy because in each charge the criminal act was basically the same.[6] On what grounds, then, did the court here decide against defendant?

In *People v. Krank,* the facts proving a sale without a license had to be added to the basic act of disposing of liquor before the offense of the first indictment could be made criminal. There remained only the evidentiary fact of a transaction on Sunday, which, added to the basic fact of disposition of liquor, failed to constitute the criminal act, unless there was added thereto the evidentiary fact of a sale. And the sale was the very fact which made the first indictment criminal. Therefore, in *People v. Krank* criminality depended on the same evidentiary fact of sale. Without it the second charge could not succeed. It could form the basis of either charge but not of both. To hold to the contrary would be, in effect, to say that an assault culminating in murder does not merge into the murder and might therefore be punishable separately after the charge for murder. This would be adverse to the weight of authority.[7]

In the instant case, however, the lawful act of operating a vehicle was made unlawful as soon as it was proven that the driver operated without a license. When it was proven from all of the facts related to the operation of the vehicle that the driver evinced an attitude of disregard of the probable or possible injurious consequences of his operation, he was guilty of reckless driving. It was not the mere racing of the car through the streets alone or the speed of the vehicle, but a consideration of all the related acts as a whole that determined the necessary unlawful state of mind. Although it might be argued that the act of racing a car through the street carried great weight in determining reckless driving and was again used in the third indictment, the third indictment does not rely on that act alone. It stands because proof of the blowing of a horn, the failure to stop the

---

[5] 110 N. Y. 488, 18 N. E. 242 (1888).

[6] *See* People v. Skarezewski, 178 Misc. 160, 164, 33 N. Y. S. 2d 299, 303 (Co. Ct. 1941).

[7] Comment, 40 YALE L. J. 462, 468 (1931). *But cf.* State v. Ford, 117 Kan. 735, 736, 232 Pac. 1023, 1024 (1922) (possession is distinct from sale. Possession is cut short the instant prior to delivery); Chandler v. State, 89 Tex. Cr. 599, 601, 232 S. W. 337, 338 (1921) (possession not included in sale. One can be guilty of possessing without selling, or of selling liquor in the manual possession of another).

vehicle when directed to do so, the use of profane and indecent language and the causing of a crowd to collect are so added to and incidentally related to the operation of the vehicle as to constitute the offense against the public contemplated under Section 43 of the Penal Law. These latter acts contributed in no way to the determination of recklessness. They were separate and distinct. The acts comprising the offense in each of the three indictments were distinct in law and in fact.[8]

The defendant's contention could only succeed if the same transaction test were the rule in New York. Although this test finds support in New Jersey,[9] the rule in New York is that double jeopardy will exist only if the acts constituting the offenses charged are the same in law and fact, irrespective of the consideration that they relate to and grow out of the same transaction.[10] New York decisions favorable to defendant and composed of similar facts [11] have since been overruled in New York as "illogical" and "not good law." [12]

The greatest difficulty in measuring double jeopardy has been encountered where the second offense is wholly contained within the first; [13] or where a crime of degrees or an attempt to commit a crime [14] or a continuing offense is involved.[15] Successive prosecutions in such instances are more likely to result in double jeopardy. And this is logical, for the greater includes the lesser, a degree is a portion of the whole and an attempt is inferior to the thing attempted. Tests to measure double jeopardy have made inconsistent appearances in other jurisdictions.[16]

---

[8] People v. Skarezewski, 178 Misc. 160, 33 N. Y. S. 2d 299 (Co. Ct. 1941), *aff'd*, 287 N. Y. 826, 41 N. E. 2d 99 (1942) (three dissenting).

[9] State v. Cosgrove, 103 N. J. L. 412, 135 Atl. 871 (1927); State v. Mowser, 92 N. J. L. 474, 106 Atl. 416 (1919).

[10] People v. Skarezewski, *supra*.

[11] People v. Aldrich, 191 N. Y. Supp. 899 (Co. Ct. 1922); People v. Fitzgerald, 101 Misc. 695, 168 N. Y. Supp. 930 (Co. Ct. 1917).

[12] People v. Skarezewski, *supra*.

[13] Comment, 40 YALE L. J. 462, 463 (1931).

[14] N. Y. PENAL LAW § 32. "Where a prisoner is acquitted or convicted upon an indictment for a crime consisting of different degrees, he cannot thereafter be indicted or tried for the same crime, in any other degree, nor for an attempt to commit the crime so charged or any degree thereof."

[15] People v. Farson, 218 App. Div. 488, 218 N. Y. Supp. 41 (1st Dep't 1926), *aff'd*, 244 N. Y. 413, 155 N. E. 724 (1927).

[16] State v. Shannon, 136 Me. 127, 3 A. 2d 899 (1939) (not merely whether same evidence supports both charges, but whether both offenses are essentially independent and hence distinct); State v. Andrews, 108 Conn. 209, 142 Atl. 840 (1928) (whether the facts required to prove the first are sufficient to prove the second); State v. Cosgrove, *supra* (same transaction test); Medlock v. Commonwealth, 216 Ky. 718, 720, 288 S. W. 670, 671 (1926) (no double jeopardy if the facts needed to convict on the second charge would not necessarily have convicted on the first); People v. Brannon, 70 Cal. App. 225, 232, 233 Pac. 88, 91 (1925) (measures via facts, not as brought forth in the evidence, but as alleged in the record of the second indictment).

In the instant case the continuity of events in the entire transaction was not too difficult to measure. Sharp intelligible lines could be drawn between the acts constituting the offense in each charge. In fact the charges might have more easily been proven distinct by adherence to a rule, that, where the acts of the accused up to a certain point are declared by the legislature to constitute one crime, and that his acts committed thereafter constitute a second crime, and that each series of acts constituting separate crimes are subject to separate punishment, there is no double jeopardy.[17]

B. F. N.

CRIMINAL LAW — WHO ARE ACCOMPLICES — STATUS OF LAW REQUIRING CORROBORATION.—Defendant Wallin has appealed from his conviction as an accessory to the murder of the incurably ill daughter of Jeanette Paz, for which crime the latter had been convicted as principal prior to the trial of defendant. Evidence convicting Wallin consisted largely of the uncorroborated testimony of Jeanette Paz to the effect that defendant had encouraged her to commit the crime, suggested methods (none of which she used), and later, helped dispose of the body. The evidence did not tend in any way to link Wallin with the immediate act of murder. In his appeal for reversal of his conviction, defendant relied mainly upon the contention that he and Jeanette Paz were accomplices, and that her testimony standing alone is not sufficient in view of the rule requiring corroboration of an accomplice to convict. *Held,* conviction affirmed. Jeanette Paz was not the accomplice of Wallin; her testimony required no corroboration. *People v. Wallin,* — Cal. 2d —, 188 P. 2d 64 (1948).

Were it not for the fact that this case presents the comparatively infrequent situation of a principal's uncorroborated testimony convicting an accessory, rather than accessory testifying against the principal, this decision would be only another in the several century old quest for a solution to the vexing problem presented by using accomplices' testimony in evidence.[1] California here presents a solution which is not altogether satisfactory, for while it accomplishes the laudatory purpose of restricting the ease with which the guilty may escape punishment, simultaneously it exposes the innocent to injustice. Prior to 1915 the failure to corroborate the testimony of Jeanette Paz would have been fatal to the state's case, for under the then existing liberal definition of an accomplice, Jeanette Paz would have been an accomplice, and her evidence standing alone would have

[17] People v. Snyder, 241 N. Y. 81, 148 N. E. 796 (1925).

[1] See 7 WIGMORE, EVIDENCE § 2056 (3d ed. 1940).