St. John's Law Review

Volume 11, November 1936, Number 1 Article 17

Criminal Law--Double Jeopardy--Sunday Judgment Void (People ex rel. Meyer v. Warden, 269 N.Y. 426 (1936))

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it is established that these same tools were used in the perpetration of the crime, it would raise a strong inference of guilt.[6] Even more so if the property stolen was found on the accused in the vicinity of the crime committed.[7] But no such facts were established in this case. Circumstantial evidence must meet the standard required in a criminal case [8]—namely to prove the defendant guilty beyond a reasonable doubt.[9] The evidence against the defendant was as consistent with his innocence as with his guilt, therefore a conviction could not be sustained.[10]

H. R. K.

CRIMINAL LAW—DOUBLE JEOPARDY—SUNDAY JUDGMENT VOID. —The relator-appellant was arrested and charged with disorderly conduct. The trial, held before a police magistrate and jury, began Saturday evening and was held over into Sunday morning when the relator was convicted and sentenced. He was released from custody on a writ of *habeas corpus* granted him on his contention that a Sunday judgment was absolutely void, but was again arrested on the same charge and secured his release on a second writ of *habeas corpus* setting up a plea of "double jeopardy." This writ was granted at Special Term but denied by a divided court at the Appellate Term.[1] On appeal to the Court of Appeals, *held,* writ granted (one dissenting opinion). Although no valid judgment had been obtained at the first trial, the relator had been sufficiently jeopardized to render a further trial unlawful. *People* ex rel. *Meyer* v. *Warden,* 269 N. Y. 426, 199 N. E. 647 (1936).

From the days of the early common law,[2] down to the present

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jectures to draw inference of guilt from—People v. Harris, 136 N. Y. 423, 33 N. E. 65 (1893).

[6] A blade used in prying open a window snapped off, it was found to match the remainder of the knife in the accused's possession thereby raising a strong inference of guilt. WILLS, CIRCUMSTANTIAL EVIDENCE (3d ed.) 96; State v. Campbell, 7 N. D. 58, 72 N. W. 935 (1897).

[7] State v. Guild, 149 Mo. 370, 50 S. W. 909 (1899); State v. Janks, 26 Idaho 567, 144 Pac. 779 (1914).

[8] People v. Fitzgerald, 156 N. Y. 253, 50 N. E. 846 (1898); Ruppert v. B'klyn Heights R. R. Co., 154 N. Y. 90, 47 N. E. 971 (1897).

[9] People v. Mantin, 184 App. Div. 767, 172 N. Y. Supp. 371 (1st Dept. 1918); People v. Owens, 148 N. Y. 648, 43 N. E. 71 (1896).

[10] State v. Rankin, 50 P. (2d) 3 (Idaho 1935); Hogant v. State, 170 Ark. 1143, 282 S. W. 984 (1926); State v. Blackwelder, 182 N. C. 899, 109 S. E. 644 (1921); People v. Razezicz, 206 N. Y. 249, 99 N. E. 557 (1912).

[1] 245 App. Div. 828, 281 N. Y. Supp. 186 (2d Dept. 1935).

[2] Story v. Elliot, 8 Cow. 27 (N. Y. 1827); Van Vechten v. Paddock, 12 Johns. 178 (N. Y. 1815); Hoghtaling v. Osborn, 15 Johns. 118 (N. Y. 1818).

time, no judicial act could be performed on Sunday.[3] It is well settled today that a verdict may be delivered, received and entered on Sunday,[4] since this is all ministerial work. All judicial acts however, such as pronouncing judgment,[5] charging the jury,[6] submitting the cause of action to the jury,[7] performed on a Sunday are absolutely void.

The right not to be tried twice for the same offense, guaranteed by Constitution [8] and statute,[9] as in other jurisdictions [10] of the United States, is as old as the common law and as zealously guarded as the right to trial by jury. A valid acquittal or conviction is not necessary to form the basis of a plea [11] of double jeopardy.[12] It is the settled rule of this jurisdiction that once jeopardy has attached,[13] no matter how short the period of attachment, the party thus endangered can never again be tried or punished on the same charge, even though he escapes further prosecution because of an irregularity of the court,

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[3] N. Y. JUDICIARY LAW § 6: "A court shall not be open on Sunday * * *, except to receive a verdict or discharge a jury."

[4] People *ex rel.* Margus v. Ramsey, 128 Misc. 39, 217 N. Y. Supp. 799 (1926).

[5] Hoghtaling v. Osborn, 15 Johns. 118 (N. Y. 1818).

[6] Moss v. State, 131 Tenn. 94, 173 S. W. 859 (1915) (Charging the jury is a high judicial function and cannot be lawfully exercised on Sunday.).

[7] Pulling v. Peo., 8 Barb. 384 (N. Y. 1850).

[8] U. S. CONST. Amend. 5; N. Y. CONST. art. 1, § 6.

[9] N. Y. CODE OF CRIM. PROC. § 9.

[10] LA. CONST. (1901) art. 1, § 9; ALA. CONST. (1901) § 9; KY. CONST. par. 13.

[11] The plea is personal and must be pleaded by the accused. "A former acquittal or conviction is not available as a defense and cannot be proved unless specially pleaded before trial. A plea of not guilty is not sufficient for this purpose." UNDERHILL ON CRIMINAL EVIDENCE (1935).

[12] King v. Peo., 5 Hun 297 (N. Y. 1875); Peo. v. Warden, 202 N. Y. 138, 95 N. E. 729 (1911); Peo. v. Goldfarb, 152 App. Div. 872, 135 N. Y. Supp. 62 (1st Dept. 1912), *aff'd*, 213 N. Y. 664, 17 N. E. 1083 (1914).

[13] When the accused is arraigned on a valid indictment, and pleads to that indictment, before a jury properly sworn and impaneled in a court of competent jurisdiction, he is in jeopardy. King v. Peo., 5 Hun 297 (N. Y. 1875); Peo. v. Warden, 202 N. Y. 138, 95 N. E. 729 (1911). The rule is substantially the same in other jurisdictions.

"The general rule established by the preponderance of judicial opinion and by the best considered cases is that when a person has been placed on trial on a valid judgment or information before a court of competent jurisdiction, has been arraigned, and has pleaded and a jury has been impaneled and sworn, he is in jeopardy, but that, until all these things have been done, jeopardy does not attach." 16 C. J. 236.

Ex parte Glenn, 111 Fed. 257 (N. D. W. Va. 1901); Alexander v. Com., 105 Pa. 1 (1882).

A plea of former jeopardy was not available in the following casese because they lacked one of the prerequisites for the attachment of jeopardy.

Peo. v. Barrett, 1 Johns. 55 (N. Y. 1806) (deficient indictment); Peo. v. Connor, 142 N. Y. 130, 36 N. E. 307 (1894) (court had no jurisdiction); King v. Peo., 5 Hun 297 (N. Y. 1875) (accused did not plead to the charge); Huey v. State, 88 Tex. Cr. Rep. 377, 227 S. W. 186 (1920) (verdict returned by unsworn jury); Peo. v. Rosenthal, 197 N. Y. 394, 90 N. E. 991 (1909) (accused not arraigned on the indictment).

such as an erroneous dismissal of the jury,[14] or the mistaken release of the accused after a hearing by a magistrate, rather than on the merits of the case.[15] The plea of former jeopardy will not be available although all other prerequisites are present in cases where the jury has failed to reach a verdict,[16] where the court is compelled to adjourn before the verdict is reached,[17] where a judge or juror is taken sick or dies,[18] where a juror is disqualified,[19] or where a mistrial is declared on motion of the accused.[20] The court, following a long line of adjudicated cases in this state,[21] correctly ruled that the relator could utilize the void judgment obtained against him by the state as a basis for his plea, religiously upholding his constitutional right. It was an excellent opportunity for the Court of Appeals to impress upon the lower courts the necessity for a strict adherence to adjective law.

M. M. B.

HUSBAND AND WIFE—PERSONAL INJURY TO WIFE IN FOREIGN STATE—WIFE TO BRING ACTION IN NEW YORK—PUBLIC POLICY—CONFLICT OF LAWS.—Plaintiff sues in New York to recover for personal injuries sustained by her in Connecticut through the negligence of her husband in the operation of an automobile in which the wife was a passenger. Such actions are maintainable in Connecticut,[1] while

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[14] In New York the dismissal of the jury is governed by the CODE OF CRIM. PROC. § 428. Compare Peo. v. Warden, 202 N. Y. 138, 95 N. E. 729 (1911) (where the discharge of the jury not in accordance with § 428 and without the consent of the defendant was held to be an acquittal by operation of law) with Peo. v. Montlake, 184 App. Div. 578, 172 N. Y. Supp. 102 (2d Dept. 1918) (*held,* no acquittal, when the judge discharged the jury by necessity and the defendant did not object).

[15] Compare Peo. v. Goldfarb, 152 App. Div. 870, 135 N. Y. Supp. 62 (1st Dept. 1912), *aff'd,* 213 N. Y. 664, 17 N. E. 1083 (1914) (where a further trial was barred when the magistrate ordered the discharge of accused and a new complaint drawn up) with Peo. v. Dillon, 194 N. Y. 254, 90 N. E. 820 (1910) (where the discharge of the accused by a magistrate at a preliminary hearing was held not to be a bar to further prosecution).

[16] Peo. v. Goodwin, 18 Johns. 187 (N. Y. 1820); Peo. v. Hays, 166 App. Div. 507, 151 N. Y. Supp. 1075 (2d Dept. 1915).

[17] Peo. v. Fishman, 64 Misc. 256, 119 N. Y. Supp. 89 (1909); Peo. v. Neff, 191 N. Y. 210, 83 N. E. 970 (1908) (manifest necessity).

[18] Peo. v. Smith, 172 N. Y. 210, 64 N. E. 814 (1902) (illness of juror).

[19] Gardes v. U. S., 87 Fed. 172 (C. C. A. 5th, 1898).

[20] Peo. v. Dowling, 84 N. Y. 478 (1881); Peo. v. Palmer, 109 N. Y. 413, 17 N. E. 413 (1888); Peo. v. McGrath, 202 N. Y. 445, 96 N. E. 92 (1911) (The plea being a personal one, the constitutional privilege is deemed waived when an appeal on the case is had.).

[21] King v. Peo., 5 Hun 297 (N. Y. 1875); Peo. v. Warden, 202 N. Y. 138, 95 N. E. 729 (1911).

[1] Brown v. Brown, 88 Conn. 42, 89 Atl. 889 (1914).