Buffalo Law Review

Volume 9 | Number 2 Article 10

1-1-1960

Double Jeopardy: Prosecution For Underlying Felony Following Acquittal For Felony-Murder.

Richard Kania

vigorously defend what he considers to be a hopeless cause solely for the reason that in this way he will be assured that his being found guilty to a traffic infraction will not be brought into evidence in a later civil suit.

The Court in the instant case has cast aside legal niceties in order to render a decision that is significant in its practical approach to a problem that has harrassed many civil magistrates, not to mention countless defense counsel. In the harsh realities of today's courtroom procedure, technical concepts must give way to practical solutions, and *Ando v. Woodberry* does just that.

JOSEPH M. AUGUSTINE

DOUBLE JEOPARDY: PROSECUTION FOR UNDERLYING FELONY FOLLOWING ACQUITTAL FOR FELONY-MURDER.

The petitioner, in *People ex rel. Santangelo v. Tutuska,*[1] brought a writ of *habeas corpus* while awaiting trial for burglary and attempted robbery. He based his writ on the ground that the charges in the indictment would subject him to double jeopardy, in that he had previously been tried and acquitted of murder in the first degree on a felony-murder theory in which indictment the underlying felonies were the burglary and robbery for which he was presently indicted.

In New York the prohibition against twice placing an individual in peril for a single offense is embodied in several provisions of the law.[2] Since it has been held that Section 1938 of the Penal Law embodies,[3] if not perhaps extends, the constitutional immunity against double jeopardy,[4] the Court considered and rejected the petitioner's contention under that section. The Court dismissed petitioner's writ holding that robbery or burglary, unlike assault which is inherent in every murder, is a separate and distinct crime, a crime that may be committed without committing the crime of murder.

Although courts agree that to try a defendant twice for the same offense is deplorable, they have considerable difficulty, due to the large number of statutory offenses, in determining whether or not given sets of facts supporting two or more charges are, in law, the same offense.[5]

Section 1938 prohibits not only a second prosecution for the same offense,

1. 19 Misc. 2d 308, 192 N.Y.S.2d 350 (Sup. Ct. 1959).

2. N.Y. Const., art. 1, § 6, "No person shall be subject to be twice put in jeopardy for the same offense"; N.Y. Code of Crim. Proc. § 9, "No person can be subject to a second prosecution for a crime for which he has been prosecuted and duly convicted or acquitted."; N.Y. Penal Law § 1938.

3. Section 1938 of the Penal Law provides that "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. Snyder, 241 N.Y. 81, 148 N.E. 796 (1925); People v. Repola, 280 App. Div. 735, 117 N.Y.S.2d 283 (1st Dep't 1952), aff'd, 305 N.Y. 740, 113 N.E.2d 42 (1953).

5. See: Kirchheimer, The Act, The Offense, and Double Jeopardy, 58 Yale L.J. 513 (1949); Note 7 Brooklyn L.R. 79 (1938).

but double punishment as well. Under the multiple punishment provision, if the same act is alleged to have violated various provisions of the law, the defendant can be sentenced for only the more serious of the convictions. However, if separate and distinct acts can be established as a basis for each of the violations, consecutive sentences will stand. In any event, the test to determine the identity of offenses is the same under the multiple punishment provision and the multiple prosecution provision.[6]

In a situation where one is prosecuted a second time for a different substantive offense arising out of the same criminal acts, most courts, including those in New York, utilize a "same evidence" rule to determine the identity of offenses.[7] As generally stated the test is not whether a single act violates two statutes,[8] but ". . . whether each provision requires proof of a fact which the other does not."[9] This broad test is subject to the qualification, at least in New York's multiple punishment cases, that ". . . if there were merely a *single inseparable* act violative of more than one statute, or if there were an act which itself violated one statute and was a material element of the violation of another, there would have to be a single *punishment* . . ."[10] [Court's emphasis.] Nor is multiple punishment, or multiple prosecution permitted for crimes which necessarily must be committed in the commission of another crime, generally classified as "included" crimes.[11]

The Court in the instant case concluded that because the indictment in the first prosecution would not have supported a conviction for the underlying felony subsequently put to proof in the trial, the defendant was not previously acquitted, nor put in jeopardy, for the felonies charged in the second indictment. The form of the indictment in the first prosecution charged the defendant with having killed with malice aforethought, and the necessity of showing malice could have been satisfied by showing that the homicide occurred while the defendant was engaged in the commission of another felony. He could not have been convicted of the underlying felony under an indictment so drawn. Thus, because the indictments were not *eo nomine,* there was no merit to the plea of double jeopardy. Nor, held the Court, did the underlying felony become an element of the murder so as to become an included crime. Proof of these crimes was only evidence of an inferred criminal intent and not the element of criminal intention itself.

In concluding that the underlying felonies were separate and distinct crimes, the Court relied on *People v. Nichols,*[12] where it had been contended that the trial court had erred in refusing to charge the jury that the defendant could have been convicted of the underlying felony under an indictment similar

6. People v. Savarese, 1 Misc. 2d 305, 114 N.Y.S.2d 816 (County Ct. 1952).
7. Ibid.
8. People v. Repola, supra note 4.
9. Blockburger v. United States, 284 U.S. 299, 304 (1932).
10. People ex rel. Maurer v. Jackson, 2 N.Y.2d 259, 264, 159 N.Y.S.2d 303, 205 (1957).
11. People v. Saverese, supra note 6.
12. 230 N.Y. 221, 129 N.E. 883 (1921).

to that in the instant case. The Court rejected this position and held that the crimes of murder and burglary are substantively separate offenses. In order to constitute murder in the first degree the felony must be so separated from the homicide as not to be an element of that homicide. Also, in *People v. Lytton*,[13] it was held that only a single crime is charged under this type of indictment, and the felony, akin to deliberation and premeditation, is utilized to characterize the degree of the crime charged.

In other jurisdictions that have considered the problem, the courts have nearly unanimously held the underlying felony to be a separate and distinct crime,[14] and that a prosecution for a felony-murder is not a prosecution for the entire transaction as one offense, but only for one of the offenses committed within the transaction.

In New Jersey, however, in *State v. Greely*,[15] on facts similar to the instant case, the Court considered the immunity violated since the prosecution separated into its component parts, for purposes of separate prosecution, an episode that constitutes a single criminal act. The Court there felt that robbery is no less inherent in felony-murder than assault is inherent in battery, and any idea that there was no jeopardy on the score of robbery is unrealistic since it was essential to the murder charged. The result is a second trial which attempts to place the defendant, not in a new jeopardy, but the same jeopardy to a reduced degree.

As interpreted by the Supreme Court of the United States, the due process clause of the 14th Amendment has little restrictive effect on state policies regarding double jeopardy.[16] In *Hoag v. New Jersey*,[17] the Court, in a five-to-three decision, held that the defendant was not placed twice in jeopardy contrary to the 14th Amendment. There the defendant had, in a single act, robbed five people. The State chose to indict him for robbery of only three of the victims, and although all five were witnesses at the trial, only one victim identified the defendant who had claimed he was elsewhere at the time. After being acquitted, the defendant was found guilty in an identical second trial under an indictment charging robbery of one of the victims not included in the first indictment. This the Court said was not an attempt to wear the accused out by a multitude of cases with accumulated trials. However, the case may have a distinguishing factor in that the Court mentioned that the actions of the prosecutor were not arbitrary or lacking in justification since two of the witnesses, after having previously identified the defendant, refused to do so at the trial. Thus it

13. 257 N.Y. 310, 178 N.E. 290 (1931).

14. Duvall v. State, 111 Ohio St. 657, 146 N.E. 90 (1924); People v. Andrae, 305 Ill. 530, 137 N.E. 496 (1922); State v. Ragan, 123 Kan. 399, 256 P. 169 (1927); Commonwealth v. Crecorian, 264 Mass. 94, 162 N.E. 7 (1928); State v. Orth, 106 Ohio App. 35, 153 N.E.2d 395 (1957), appeal dismissed, 167 Ohio St. 388, 148 N.E.2d 917 (1958).

15. 30 N.J. Super. 180, 103 A.2d 639 (1954), aff'd, 31 N.J. Super. 542, 107 A.2d 439 (1954).

16. Palko v. Connecticut, 302 U.S. 319 (1937).

17. 356 U.S. 464 (1958).

would appear that even though different offenses are involved, successive prosecutions to litigate them may, if without justification, violate the due process concept under the 14th Amendment.

As mentioned previously, Section 1938 prohibits not only multiple prosecutions, but also multiple punishment. Although the test for each is the same, the policy underlying each differs. Under the latter, it would seem that the dominant policy is to insure that the punishment is commensurate with the crime. A narrow search into the nature of the offense may prevent double punishment without being unduly lenient with a criminal who offends several provisions of the law with a single act. However, the inquiry should broaden when successive prosecutions are involved. Underlying the idea of double jeopardy is the fact that the state, a powerful unit with vast resources, should not be permitted to make repeated attempts to convict an individual for an alleged offense. Not only is the accused to be protected from excessive harassment, but the public also must be protected from the expense of unnecessary litigation, i.e., a series of trials to adjudicate what is factually a single case.[18]

Justice Brennan, in *Abbate v. United States*,[19] described the distinction between multiple punishment and multiple prosecution as follows; " . . . [though there is] . . . no violence to the guarantee against double jeopardy when the same acts are made to do service for several convictions at one trial, I think not mere violence to, but virtual extinction of, the guarantee results if the Federal Government may try people over and over again for the same criminal conduct just because each trial is based on a different federal statute protecting a separate federal interest."[20] Professor Wechsler has supported this immunity to successive prosecutions as intended ". . . to cast the balance in favor of cleaning up the charges against a particular man at one time, in the view that he is only one man, and that however many things he has done, the slate ought so far as possible to be cleaned so that he may be dealt with as the one man that he is, and appropriately disposed of.[21]

Although it appears that under the present holdings the felony in a felony murder trial is doubly punishable, this determination should not end inquiry into what is essentially a different problem. In the first instance, the *Nichols* and *Lytton* cases involved a determination that the felonies were independent, separate from the crime of homicide. Without this qualification every homicide would be a felony-murder prosecution. However, this characterization should not be extended to serve as a substitute for analysis of the double jeopardy concept and determining whether the independence of the felony so separates the felony from the homicide as to become a separate act in the sense of the double jepoardy prohibition. Secondly, assuming the separateness of the felony,

18. People v. Ercole, 4 N.Y.2d 617, 176 N.Y.S.2d 649 (1958); Green v. United States, 355 U.S. 184 (1957).
19. 359 U.S. 187 (1959).
20. 359 U.S. 187, 196 (1959).
21. A.L.I. Proceedings 139 (1956).

numerous proceedings to litigate several substantive offenses arising from one transaction may well be subject to criticism even though common questions of fact and law are not involved. When the subsequent proceedings involve substantially identical evidence, requiring no additional proof to that shown in the first trial, the immunity offered by Section 1938 provides little protection when applied as it was here.

The decision in the instant case also tends to obscure the fact that although an additional element had to be proved in the first prosecution, i.e., the homicide while the felony was in progress, the offense, at least to some of the co-defendants involved, is the same in both prosecutions, in fact and in law. Their single act of participating in the felony did not offend against two statutes. Although they were, through legislative definition, held accountable to conviction under both, in each trial their single offense is identical.

As a question of fairness, the defendant is forced to run the gantlet on a charge which gives the jury only a single alternative to conviction of murder in the first degree, an outright acquittal. And this is merely because the prosecution considers this form of indictment as offering less of an advantage to the defendant. Yet, having successfully defended the charge, the accused must again submit to another charge that should properly have been considered and disposed of at the first trial.

With the number of statutory offenses greatly increased, and because of the expense and delay involved in awaiting trial on burdened court calendars, it appears that a formidable weapon has been forged to prevent release of an individual currently running the gantlet of successive and related charges. Regardless of the results desired in any specific problem before the courts, the concept of double jeopardy should be deserving of a more acute analysis instead of a somewhat mechanical approach.

RICHARD KANIA

LIMITATION ON EXPANDING SCOPE OF LEGALITY OF SEARCHES AND SEIZURES IN MICHIGAN

For years prior to 1914, but even more so since that time, the states in our country have vigorously belabored the issue of admissibility of evidence obtained during an illegal search and seizure. The United States Supreme Court stated its position on the subject in 1914 in the famous *Weeks* decision.[1] The rule promulgated in that case, for the Federal courts to follow in instances where a Federal officer did the searching, was that any evidence obtained in the course of an illegal search and seizure was inadmissible. Such exclusion, the court felt, was dictated by the Fourth Amendment to our Federal Constitution in order to safeguard the individual's right to privacy.

1. Weeks v. United States, 232 U.S. 383 (1914).