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Criminal Procedure - State Conviction Subsequent to Federal Acquittal for the Same Act Not Double Jeopardy or Due Process Violation

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ject matter of theft which the 1942 Criminal Code sought to eliminate.

J. C. Parkerson

CRIMINAL PROCEDURE — STATE CONVICTION SUBSEQUENT TO FEDERAL ACQUITTAL FOR THE SAME ACT NOT DOUBLE JEOPARDY OR DUE PROCESS VIOLATION

Defendant was acquitted in federal court for robbery of a federally insured savings and loan association. Subsequently he was convicted in a state court under a state robbery statute, the same conduct being the basis for both prosecutions. On appeal to the Illinois Supreme Court, defendant pleaded that the former acquittal was a bar to the subsequent state prosecution, but the court affirmed the conviction. The United States Supreme Court granted certiorari to determine whether there was a due process or double jeopardy violation. On rehearing,[1] *held,* in a five to four decision, conviction affirmed. Conviction in a state court subsequent to an acquittal in a federal court for the same act is not a violation of the due process clause of the Fourteenth Amendment or of the double jeopardy clause of the Fifth Amendment. *Bartkus v. Illinois*, 79 S.Ct. 676 (U.S. 1959).

The problem of dual prosecutions has been presented to the Supreme Court many times in cases of a federal prosecution subsequent to a state prosecution for the same act, and the federal conviction has been upheld. The possibility that the double jeopardy clause of the Fifth Amendment might apply to such cases was precluded by the early development of a double sovereignty theory.[2] Under this theory the Supreme Court has consistently held that the offensive conduct may be prosecuted under both federal and state statutes without violation of double jeopardy when both sovereignties have separate interests to protect,[3] because such punishments are not two punishments for one

1. Bartkus v. Illinois, 355 U.S. 281 (1958), in which the Illinois Supreme Court decision was affirmed by an evenly divided court.

2. Moore v. Illinois, 55 U.S. (14 How.) 13, 20 (1852): "[Every citizen] may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either . . . . Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other."

3. If there is an absence of separate interests, the problem would probably fall in the area of preemption. See note 5 *infra.*

crime, but punishment for two crimes arising out of the same act.[4]

In the case of a state prosecution subsequent to a federal prosecution the double jeopardy clause of the Fifth Amendment is not involved because it does not apply to the states.[5] Aside from the possibility that a state conviction may sometimes be void where the subject matter has been preempted by the federal government,[6] the only other basis for invalidation is the situation where the second prosecution is deemed "repugnant to the conscience of mankind"[7] to such a degree as to be violative of the due process clause of the Fourteenth Amendment. While there have been no prior Supreme Court decisions squarely in point, the state courts have repeatedly upheld subsequent state trials on the dual sovereignty theory,[8] despite state constitutional prohibitions against double jeopardy.[9]

In facing the problem of a state conviction following a federal acquittal in the instant case the Supreme Court could have drawn a logical analogy from its decisions upholding a federal conviction after a state trial by employing the dual sovereignty theory. In these cases the court made broad, definite statements that a person "could not plead the punishment by one [sovereignty]

4. See note 2 *supra*. See also United States v. Lanza, 260 U.S. 377 (1922), which has become the leading case stating the dual sovereignty theory. It was followed in Jerome v. United States, 318 U.S. 101 (1943); Westfall v. United States, 274 U.S. 256 (1927); Hebert v. Louisiana, 272 U.S. 312 (1926).

5. Fox v. Ohio, 46 U.S. (5 How.) 418 (1847). Nor do the first eight amendments apply per se to the states through the due process clause of the Fourteenth Amendment. Palko v. Connecticut, 302 U.S. 319 (1937); Hurtado v. California, 110 U.S. 516 (1884).

6. This is outside the scope of this Note. If there are not separate interests involved, and there is both federal and state legislation in the field, the state courts may be preempted by the federal exercise of power. See Notes, 19 LOUISIANA LAW REVIEW 864, 868 (1959).

7. Palko v. Connecticut, 302 U.S. 319, 323 (1937). It may be seen, by looking at the judicial definitions of substantive due process violations that an overwhelming revulsion to the action is necessary, not mere distaste. Thus, it is expressed as action which "shocks the conscience" in Rochin v. California, 342 U.S. 165 (1956). In Malinski v. New York, 324 U.S. 401, 416 (1945), substantive due process was defined as a deprivation which offends "those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." For a discussion of substantive due process, see Note, 18 LOUISIANA LAW REVIEW 726 (1958).

8. Heier v. State, 191 Ind. 410 (1921). State conviction for transportation of alcoholic beverages following federal conviction for possession of the liquor so transported held to be valid. See Annot., 16 A.L.R. 1231 (1922), 22 A.L.R. 1551 (1923), for discussion of additional state decisions in this area.

9. In 1935 in the introductory note of the Official Draft of Administration of Criminal Law, covering double jeopardy, the American Law Institute stated that thirty-five states have double jeopardy prohibitions worded identically to the Fifth Amendment proscription of double jeopardy. Eight other states had some type prohibition of second trials.

in bar to a conviction by the other,"[10] with no mention of the sovereignty in which the first prosecution must occur. It may be noted that in these cases, after the double jeopardy problem was surmounted by the dual sovereignty theory, there was no mention of possible violations of due process.[11] In the instant case the Supreme Court did not base its decision on these analogous prior decisions, but reasoned from the more specific principle that the numerous decisions allowing double prosecutions for the same act by different sovereignties showed that such dual prosecutions were not so "repugnant to the conscience of mankind"[12] as to constitute violations of due process. For example, the court relied on numerous state decisions holding subsequent convictions by state courts valid by applying the dual sovereignty theory as being indicative of an absence of sufficient repugnancy to constitute a due process violation.[13]

The surprisingly vigorous three-judge dissent[14] attacked the majority opinion's view that the numerous state and Supreme Court decisions are indicative of an absence of abhorrence of two prosecutions for the same act, and even denounced the dual sovereignty theory. They would have reversed the Supreme Court's prior decisions,[15] and in a dissenting opinion by the same Justices in a case decided this term of court, would have held that a federal conviction subsequent to a state conviction is unconstitutional.[16] Concluding that the cases which were held by the majority to be indicative of an acceptance of dual prosecutions are based on an invalid fiction, Mr. Justice Black declared: "Looked at from the standpoint of the person who is being prosecuted, this notion is too subtle for me to grasp. If double punishment is what is feared, it hurts no less for two 'Sovereigns' to inflict it than for one."[17] The dissent appears to have

10. Moore v. Illinois, 55 U.S. (14 How.) 13, 20 (1852).

11. It must be remembered that the due process clause of the Fifth Amendment applied to the federal courts hearing these subsequent prosecutions just as the due process clause of the Fourteenth Amendment applies to the state court involved in the hearing of the instant case.

12. Palko v. Connecticut, 302 U.S. 319, 323 (1937).

13. See note 11 *supra*.

14. The dissent referred to here is Mr. Justice Black's dissenting opinion in which Mr. Justice Douglas and the Chief Justice joined, concurring. Mr. Justice Brennan's dissenting opinion is referred to separately when discussed *infra*.

15. Bartkus v. Illinois, 79 S. Ct. 676, 695 (U.S. 1959), dissenting opinion by Mr. Justice Black: "I would hold that a federal trial following either state acquittal or conviction is barred by the Double Jeopardy Clause of the Fifth Amendment."

16. Abbate & Falcone v. United States, 3 L.Ed.2d 729 (1959), dissenting opinion by Mr. Justice Black.

17. Bartkus v. Illinois, 79 S. Ct. 676 (U.S. 1959), dissenting opinion by Mr. Justice Black.

been based on a fundamental belief that such dual prosecutions are violative of the spirit and purpose of the Fifth Amendment and are examples of abuse of the separateness of the states and the federal government. Referring to early Greek and Roman concepts as well as early Christian writings,[18] the dissent concluded that dual prosecutions have always been considered grossly unjust and still "shock the conscience"[19] of moral societies. Mr. Justice Brennan's separate dissenting opinion was based upon a different conclusion. It was his opinion from the facts that the state prosecution was brought about by the federal prosecutors and made only upon their insistence, and that therefore the second prosecution was actually a double jeopardy violation disguised by the use of the state courts.

The decision in the istant case is supported by a well-settled line of jurisprudence which recognizes the separate sovereignities of the state and federal governments. The majority opinion also expressed some fear, that, as a practical consideration, a contrary decision might result in a breakdown of law enforcement on the state level if the states' rights to prosecute for basic criminal offenses were interfered with. On this point the majority opinion seems weak. It cannot be assumed, as pointed out by the three-judge dissent, that the federal government and the states are each attempting to undermine the other's system of law enforcement; and there is little possibility that a rule, making a former prosecution by either a bar to subsequent prosecution by the other, would result in a serious impediment to maintaining order. This dissent bears careful scrutiny for it may well reveal a trend toward prohibitions against dual prosecutions altogether.[20]

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18. *Ibid.*

19. Rochin v. California, 342 U.S. 165 (1952).

20. It is interesting to note that the position taken by the American Law Institute Model Penal Code is somewhat similar to that taken by the dissenting opinion. Section 1.11 of the Model Penal Code provides: "When conduct constitutes an offense within the concurrent jurisdiction of this state and of the United States or another state, a prosecution in any such jurisdiction is a bar to a subsequent prosecution in this state under the following circumstances:

"(1) The first prosecution resulted in an acquittal or in a conviction as defined in Section 1.09 and the subsequent prosecution is based on:

"(a) the same conduct; or

"(b) the same series of acts or omissions, unless the offense of which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other or the