Journal of Criminal Law and Criminology

Volume 51
Issue 2 *July-August*

Article 9

Summer 1960

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Double jeopardy arises from a second prosecution for one criminal act by one authority (single sovereignty double jeopardy), or a second prosecution by an authority other than the one that first prosecuted (dual sovereignty double jeopardy). A second prosecution for the same offense by the federal government is prohibited by the fifth amendment of the federal constitution.[1] Such a second prosecution is also prohibited by the constitutions of forty-five states; and in the five states where no constitutional bar exists, there is a common law rule to the same effect.[2]

In dual sovereignty situations, the constitutional bars do not apply, for "A single act which violates both federal and state criminal laws is generally held to result in a distinct offense against the two separate governments . . . and may be punished by both."[3] Thus, "In the absence of a statute, the rule against double jeopardy applies only to offenses against the same sovereignty."[4]

A majority of the states recognize the rule that an accused may be tried twice for the same criminal act by two separate sovereignties;[5] but in seventeen states, a state prosecution is barred by statute if there was a prior federal prosecution for the same crime.[6] With the passage of a new statute, Illinois has become the eighteenth state to join these ranks. The Illinois statute provides:

> "Whenever on the trial of an accused person for the violation of any criminal law of this State it is shown that he has *previously been tried and convicted or acquitted under the laws of the Federal government, which former trial was based on the act or omission for which he is being tried in this State, it is a sufficient defense.*"[7] (Emphasis added.)

The Illinois statute allows the bar to be raised only for previous acquittals or convictions by the federal government, thereby eliminating from discussion previous trials by another state.[8] This statute also would not affect a subsequent federal prosecution.[9]

The words of the Illinois statute, in themselves, do not indicate how effective it will be in barring an Illinois prosecution subsequent to a federal prosecution for the same offense. The probable

[1] U.S. CONST. amend. V.

[2] See Barktus v. Illinois, 359 U.S. 121, 154, n.9 (1958), (Justice Black, dissenting). See also: ALASKA CONST. art. I, §9; HAWAII CONST. art. I, §8.

[3] People *ex rel.* Liss v. Supt. of Women's Prison, 282 N.Y. 115, 118, 25 N.E.2d 869, 871 (1940). See also: Abbate v. United States, 359 U.S. 187 (1959); Barktus v. Illinois, note 2 *supra.*

[4] People v. Eklof, 179 Misc. 536, 537, 41 N.Y.S.2d 557, 558 (1942). The federal offense was for taking goods, in the flow of interstate commerce, with the intent to convert them to one's own use. The state charge was for bringing stolen property into the state: i.e., the same goods, the same act.

[5] State v. Gendron, 80 N.H. 394, 118 Atl. 814 (1922); State v. Garcia, 198 Iowa 744, 200 N.W. 201 (1924); Annot., 48 A.L.R. 1107 (1927).

[6] These statutes are in addition to any prohibitions in the constitutions or common law of the states: ARIZ. REV. STAT. ANN. §13-146 (1956); CAL. PEN. CODE §656; IDAHO CODE ANN. §19-315 (1948); IND. ANN. STAT. §9-215 (1956); MINN. STAT. §610-23 (1947); MISS. CODE ANN. §2432 (1957); MONT. REV. CODES ANN. §94-4703 (1949); NEV. REV. STAT. §171-070 (1955); N.Y. PEN. LAWS §33; N.Y. CODE CRIM. PROC. §139; N.D. REV. CODE §§12-0505, 29-0313 (1943); OKLA. STAT. tit. 21, §25 (1958); ORE. REV. STAT. §131.240 (1957); S.D. CODE §§13.0506, 34.0813 (1939); TEX. CODE CRIM. PROC. art. 208 (1926); UTAH CODE ANN. §76-1-25 (1953); VA. CODE ANN. §19-232 (1950); WASH. REV. CODE §10.43.040 (1951); WIS. STAT. ANN. §939.71 (1957). While there are some federal statutes barring a second prosecution by the federal government after a state trial for the same offense, they are limited to the specific offense covered by the federal statute. *E.g.*, 18 U.S.C. §659 (1958). This section of the Federal code prohibits the taking of goods that are in interstate commerce but allows "[A] judgment of conviction or acquittal on the merits under the laws of any State. . . ." to bar a prosecution under the federal statute for the same act or acts.

[7] ILL. REV. STAT. Ch. 38, §601.1 (1959).

[8] Senate Bill 855 and House Bill 1149 were amended by the Senate of the Illinois legislature to delete the provision allowing the prior prosecution of another state to bar a subsequent prosecution in Illinois. The house bill which sets the prior federal prosecution as a *defense* was approved on July 22, 1959, while the senate bill, which *prohibited* any prosecution after a prior federal trial, was vetoed July 24, 1959.

[9] The new Illinois statute is only one step in the direction of protecting an individual from double jeopardy in dual sovereignty situations. The Illinois statute could not, nor could any state act, preclude a federal action after a state action. Chief Justice Taft addressed himself to this point in *United States v. Lanza*, 260 U.S. 377, 385 (1922): "If the Congress sees fit to bar prosecution by the federal courts for any act when punishment for violation of state prohibition has been imposed, it can of course, do so by proper legislation." Until such time as Congress acts, we have only the reassuring statement of the Attorney-General that no federal prosecutions will be undertaken without the permission of his office. (*New York Times*, April 6, 1959, p. 19. Note that Barktus v. Illinois, note 24 *infra*, was decided (after re-argument) on March 30, 1959.)

answer can best be founded on an examination of the interpretations placed on the double jeopardy statutes of other states.

When raising the statutory defense of double jeopardy one must consider what is required to raise the bar and when the bar can be raised. The Illinois statute requires that the defendant be previously "tried and acquitted or convicted" by the federal government.[10] Thus it is unlikely that Illinois will allow less than a previous federal conviction or acquittal to raise the bar. It is also possible that the Illinois courts will only find such prior federal convictions or acquittals a bar when the federal government was first to acquire jurisdiction over the offender.[11] Thus in the situation where an accused had been indicted by the state before his prosecution by the federal government[12] the bar could not be claimed as distinguished from the situation where the accused had merely been taken into custody by the state and turned over to the federal government for the first trial.[13]

The second consideration is when, as a matter of procedure, the statutory defense may be invoked. The Illinois statute provides that the prior conviction or acquital "shall be a sufficient defense"; but does this mean that the bar may be invoked by pre-trial motion to quash or dismiss, or as a defense immediately after jeopardy has attached, or as part of the case for the defense?

New York has two statutory bars[14]—one which is a defense on the trial of the indictment, and one which prohibits prosecution. Interpreting its defense type statute in the case of *People v. Parker*,[15] the New York trial court, upon first hearing the defendant's motion to quash the indictment on the basis of the statutory bar, suggested that the defense type statute could only be raised upon the trial of the indictment. At a later hearing[16] the court allowed the preliminary motion to dismiss the basis of the prohibition type statute. In Oklahoma the court allowed a preliminary motion to dismiss[17] on the basis of the Oklahoma statute,[18] which is of the defense type. Although the Illinois court has precedent for either choice, it would seem that in pursuit of judicial efficiency, they would allow the statutory defense to be raised on preliminary motion.

To raise the statutory bar of double jeopardy, the defendant generally must show that the state prosecution is founded on the "same" charge or act or ommission for which the defendant had previously been tried in the federal courts. Both single and dual sovereignty cases present great difficulty to the state courts when they attempt to determine whether one charge can be considered the "same" as another for the purpose of raising the double jeopardy bar. In single sovereignty cases, the "same offense" test is sometimes used to mean that if one new fact were stated in the second indictment so as to change the charge, then the second trial could stand.[19] Theoretically, part of the difficulty could be eliminated if the courts interpret the statutes as requiring that no trial be based upon the same "act or omission" for which the defendant had been tried, as opposed to the "same offense" test. Under the Illinois statute, clearly

[10] See note 7 *supra*.

[11] Perry v. Harper, 307 P.2d 168 (Okla. Crim. 1957). The state arrested and indicted a service man and released him on bond. While on bond he was tried by courts-martial and acquitted. The state on the basis of prior jurisdiction allowed their indictment to go to trial.

[12] *Ibid.*

[13] State v. Mills, 163 P.2d 558 (Okla. Crim. 1945). The defendant, an army officer, was taken into custody by the state but later turned over to the military authorities. After his acquittal at the courts-martial the state proceeded against him. His motions to quash and dismiss were sustained by the state court because of their statute.

[14] N.Y. PEN. LAWS §33. "Whenever it appears upon the trial of an indictment that the offense was committed in another state or country, or under such circumstances that the courts of this state or government had jurisdiction thereof, and that the defendant has already been acquitted or convicted on the merits upon a criminal prosecution under the laws of such state, or country, founded upon the act or omission in respect to which he is upon trial, such former acquittal or conviction is a sufficient defense."

N.Y. CODE CRIM. PROC. §139. "When an act charged as a crime is within the jurisdiction of another state, territory or country, as well as within the jurisdiction of this state, a conviction or acquittal thereof in the former, is a bar to a prosecution or indictment therefor in this state."

[15] People v. Parker, 174 Misc. 49, 19 N.Y.S.2d 1007 (Kings County Court 1940).

[16] People v. Parker, 175 Misc. 776, 25 N.Y.S.2d 247 (Kings County Court 1941). This case was decided under section 139 of the Code of Criminal Procedure which allowed the accused to invoke the protection before the attachment of jeopardy and have the indictment dismissed.

[17] State v. Mills, note 13 *supra*.

[18] OKLA. STAT. ANN. tit. 21, §25 (1958). "Whenever it appears upon the trial that the accused has already been acquitted or convicted upon any criminal prosecution under the laws of another State, government or country, founded upon the act or omission in respect to which he is upon trial, this is a sufficient defense."

[19] State v. Thompson, 241 Minn. 59, 62 N.W. 2d 512 (1954). After defendant had once been acquitted on a charge of having received stolen funds, he was indicted a second time under another section of the same statute and tried on a charge of having received the same sum of money and of having misappropriated it to his own use.

worded to include the "act or omission" test, the court will find it difficult to construe the statute otherwise. Therefore, the statute does attempt to preclude the application of the "same offense" test, as used in single sovereignty double jeopardy cases, to any dual sovereignty, double jeopardy cases.[20]

If it is assumed that the purpose of the passage of the Illinois statute was to prevent a recurrence of a state prosecution after a completed federal action,[21] an analysis of the California case of *People v. Candeleria*[22] will be helpful in predicting the fulfillment of that purpose. Actually, there were three *Candeleria* cases; the first was a federal trial resulting in conviction of Candeleria for the *robbery* of a federally insured bank.[23] The federal judge commuted the prisoner's sentence to sixty days. After release from the federal prison, Candeleria was arrested and tried by the state for *robbery* of the same bank.[24] The state court said, "if the federal conviction was 'founded upon' that act, then the fact that there was such a previous conviction is a sufficient defense to the state charge."[25] The court then held that the charge was "founded upon the act" and the plea of double jeopardy, based on the statute,[26] was a sufficient defense. In the third case,[27] the state prosecuted Candeleria for *burglary*, and it was found that the defendant's entering with intent to commit robbery was not the same act as robbery; hence, the defendant was convicted of burglary.

A comparison of the California code with the Illinois statute will show very little difference in wording or logic.[28] Thus, where before the statute was passed, Illinois could prosecute a person for robbery after the federal government had prosecuted him for robbery of the same federally insured bank,[29] after the passage of the statute, the state would have to change the charge in the indictment to read burglary, as the California prosecutor was forced to do in the third *Candeleria* case.

Decisions under the New York double jeopardy statutes[30] are also exemplary of the varied interpretations the courts give these statutes. In 1926, in the case of *People v. Arenstein*,[31] the New York court held that a conviction in the District of Columbia for "conspiracy to bring stolen certificates of stock into the District of Columbia" was not a bar to a trial and conviction in the New York courts on the charge of "criminally receiving stolen property"—i.e., the same stock certificates. To reach this end, the court reasoned that the legislative intent was to assure the defendant freedom from second prosecution only when he could show the second offense was "the particular offense of which he was convicted or acquitted, on the merits,

[20] See note 40 *infra*. The Illinois statute carefully avoids the use of the word "offense" and refers to the criminal law of the state and the law of the federal government. This could be indicative of the legislative intent to avoid confusion in interpreting the word "offense" or of their displeasure with the results reached under the "same offense" test.

[21] The Illinois legislature passed this act shortly after the Supreme Court handed down its decision in Barktus v. Illinois, 359 U.S. 121 (1959), upholding the decision of the Illinois Supreme Court in People v. Barktus, 7 Ill. 2d 138, 130 N.E. 2d 187 (1955), to the effect that the defendant's acquittal in federal court of the charge of robbing a federally insured bank did not bar prosecution of the defendant in the state courts for the same robbery of the same bank.

[22] People v. Candeleria, 139 Cal. App. 2d 432, 294 P.2d 120 (1956).

[23] United States v. Candeleria, 131 F. Supp. 797 (S.D. Cal. 1955). The federal trial was for armed robbery of a federally insured bank. Candeleria was sentenced to a federal prison and the state enforcement agency placed a detainer on the prisoner which had the effect of cutting off any of the rehabilitation possibilities that the federal court had envisioned. The case came back for modification of sentence on the motion of the sentencing judge.

[24] People v. Candeleria, note 25 *infra*.

[25] People v. Candeleria, 139 Cal. App. 2d 432,440, 294 P.2d 120 (1956). In the state prosecution for robbery, it was found that the prior federal prosecution involved only one other element, the fact that the bank was federally insured. This was said to be a jurisdictional element and did not pertain to any act on the part of the defendant in committing the robbery. "All the acts constituting the state offense were included in the federal offense and were necessary to constitute the federal offense."

[26] CAL. PEN. CODE §656. "Whenever on the trial of an accused person it appears that upon a criminal prosecution under the laws of another state, government or country, founded upon the act or omission in respect to which he is on trial he has been acquitted or convicted, it is a sufficient defense."

[27] People v. Candeleria, 139 Cal. App. 2d 879, 315 P.2d 386 (1957). The prosecution for different offenses, composed of the different acts, did not give rise to double jeopardy.

[28] See, California statute cited note 26 *supra*; and Illinois statute in text at note 7 *supra*. Both statutes allow a former prosecution to be a defense and neither makes use of the word "offense".

[29] See note 21 *supra*.

[30] Statutes cited note 14 *supra*.

[31] 128 Misc. 176, 182, 218 N.Y. Supp. 633 (Ct. of Gen'l Sessions 1926). The New York statute originally read: "But whenever it appears upon the trial of an indictment that the accused has already been acquitted or convicted upon any criminal prosecution under the laws of another state, government, or country, founded upon the act or omission in respect to which he is on trial, this is a sufficient defense." This statute was amended to the present Section 33 of the Penal Law cited note 14 *supra*. The court held that the changes indicate that the intent of the legislature was to make the defense available in a more narrow scope; hence, the statute was inapplicable.

in another state or country, and that such offense was founded upon the act charged in the indictment filed against him in New York."[32] Thus, in 1929, the New York court was very strict and required the accused to pass both the "act" and "offense" tests to be protected by the statutory bar.

The strict view in New York was altered slightly in 1933 in the case of *People v. Spitzer*,[33] where the court held that when facts of a conviction, under the first indictment, would support a conviction under the second, the first conviction is a bar to the second. The test here (although the court named many) actually came to be that where there are no new facts to differentiate the second indictment from the first conviction, the statute is a complete bar or defense. There seems to be an implication that if one new fact was necessary or available, the bar would not have been raised.

A New York court, in 1940, shifted to an even more liberal view in the case of *People v. Parker*,[34] by extending the doctrine of the *Spitzer* case to the limit of its logic. The federal government charged Parker with a conspiracy to transport in inter-state commerce a kidnapped person. Subsequent to his conviction in the federal court, New York charged Parker with kidnapping. To the statutory defense of double jeopardy, the prosecution contended that although the facts proved in the federal conviction were similar to those in the state indictment, they were not identical. Only an identity of facts, the prosecution contended, would allow the statutory bar to be raised. In holding the suggested construction too narrow, the judge stated:

> "It appeals to me as a more reasonable construction that if it be imperative that an essential fact be established to secure a conviction under both statutes, it is sufficient to raise the bar."[35]

In 1942, however, a New York court recognized that the state barring statute would stop a case of dual sovereignty double jeopardy, when the state constitution would not; however, the court went on to apply the test of "same in law and fact."[36] Essentially, this is the same as the test in the *Spitzer* case, and when it was found that the same proof would convict under both indictments, the court quashed the second indictment. Thus, while recognizing the narrow scope of the constitutional law of the state, the court retreated a step from the *Parker* case and accepted the *Spitzer* doctrine, requiring more than mere duplication of one essential fact on the part of the state to raise the bar.

Two later cases, *People v. Adamchesky*[37] and *People v. Mignogna*,[38] have further developed methods of circumventing the statutes. In these cases, where the indictment for the federal offense had charged one crime, such as larceny, the later state indictment would charge burglary. The court could then apply either the test of the same offense or the test which allows the state to proceed if it can prove one new fact; and, as a result, the convictions were upheld.

From these New York cases, we can see that there are several possible interpretations that the Illinois court can accept.[39] Even if the Illinois court takes at face value the words in the Illinois statute and applies the test based on the same act or omission, the second indictment can be worded so that the second prosecution can be brought for the act of taking when the first conviction was for the act of breaking. Or, the court could require that all facts needed to prove the "act" be the

[32] *Id.* at 182.

[33] 148 Misc. 97, 266 N. Y. Supp. 522 (Sup. Ct. 1933). The court in applying the test of whether the offenses were the same in fact and law, found that the facts were the same and the law could not be separated from the facts in as much as one was used to prove the other.

[34] People v. Parker, note 16 *supra*.

[35] *Id.* at 781.

[36] People v. Eklof, note 4 *supra*.

[37] People v. Adamchesky, 184 Misc. 769, 55 N.Y.S. 2d 90 (Ct. of Gen'l Sess. 1945). Although the driver was a thief there was no necessity for the federal government to offer evidence of this fact. There was only necessity for showing that the driver had knowledge of the nature of the goods: i.e.—stolen.

[38] People v. Mignogna, 54 N.Y.S.2d 233 (Queens County Ct. 1945), Aff'd. People v. Mangano, 269 App. Div. 954, 57 N.Y.S.2d 891 (1945). The defendant (a man with many aliases) broke into an office and stole federal gas ration stamps. The federal government convicted him for larceny and the state government convicted him for the breaking and entering.

[39] The Oklahoma barring statute, which is similar to that of Illinois, has been interpreted in a manner essentially similar to the New York act. The Oklahoma cases however seem to run to more narrow interpretations. The statutory defense was allowed "by virtue of the statute alone" when the second prosecution was based on the "same act or omission". LaForge v. State, 28 Okla. Crim. 37, 228 Pac. 1111 (1924). Indictments charging different offenses but proved by facts cooperatively gathered were allowed to stand in Rambo v. State, 38 Okla. Crim. 192, 259 Pac. 602 (1927). The fact that the indictments were differently worded and differently proved was the ambiguous ground for holding no double jeopardy in Hazelwood v. State, 42 Okla. Crim. 38, 273 Pac. 1017 (1929).