Summer 1960

Illinios Double Jeopardy Act: An Empty Gesture

Roy W. Sears

Follow this and additional works at: https://scholarlycommons.law.northwestern.edu/jclc
Part of the Criminal Law Commons, Criminology Commons, and the Criminology and Criminal Justice Commons

Recommended Citation

This Criminal Law is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.
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. 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.

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." Thus, "In the absence of a statute, the rule against double jeopardy applies only to offenses against the same sovereignty." A majority of the states recognize the rule that an accused may be tried twice for the same criminal act by two separate sovereignties; but in seventeen states, a state prosecution is barred by statute if there was a prior federal prosecution for the same crime. 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." (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. This statute also would not affect a subsequent federal prosecution.

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.
4 People v. Eklof, 117 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 Wis. REV. CODE §33; N.Y. PEN. CODE §12-0505, 29-0313 (1943); OKLA. STAT. tit. 21, §25 (1958); ORE. CODE §12-0505, 34-0813 (1939); TEX. CODE CRIM. PROC. art. 208 (1926); 557, 558 (1942). The federal offense was for taking goods that are in interstate commerce but allows violation of state prohibition 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. 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. Thus in the situation where an accused had been indicted by the state before his prosecution by the federal government 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.

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 acquittal “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 a part of the case for the defense?

New York has two statutory bars—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, 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 the court allowed the preliminary motion to dismiss on the basis of the prohibition type statute. In Oklahoma the court allowed a preliminary motion to dismiss 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 omission 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. 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.”
wored 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.

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, an analysis of the California case of People v. Candeleria 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. 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. 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.” The court then held that the charge was “founded upon the act” and the plea of double jeopardy, based on the statute, was a sufficient defense. In the third case, 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. 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, 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 are also exemplary of the varied interpretations the courts give these statutes. In 1926, in the case of People v. Arenstein, 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, based on the statute,” was a sufficient defense. In the third case, 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.

Decisions under the New York double jeopardy statutes are also exemplary of the varied interpretations the courts give these statutes. In 1926, in the case of People v. Arenstein, 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, based on the statute,” was a sufficient defense. In the third case, 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.
in another state or country, and that such offense was founded upon the act charged in the indictment filed against him in New York." 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, 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 conviction under the first, the first conviction is a bar.)

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." 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; 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 and People v. Mignogna, 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. 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

---

3 Id. at 182.  
30 148 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.