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Case Comments

Constitutional Law—Double Jeopardy: Traditional, Single-Test Approach Rejected in Favor of Decision Based Upon Underlying Policies and Balancing of Interests

Defendant struck and injured two policemen with his automobile in evading their roadblock, at the same time colliding twice with the roadblock car. Following the pursuit and apprehension, defendant was charged and convicted of reckless driving and leaving the scene of an accident. Later he was tried and convicted on two counts of atrocious assault. Both convictions were affirmed on appeal. In sustaining the Appellate Division, the New Jersey Supreme Court *held* that the conviction for reckless driving and leaving the scene of an accident did not bar, on principles of double jeopardy, subsequent prosecution for atrocious assault arising out of the same incident. *State v. Currie*, 41 N.J. 531, 197 A.2d 678 (1964).¹

Most state constitutions, like the federal constitution, provide that a defendant may be prosecuted or punished no more than once for the same offense.² The purpose of these prohibitions includes (1) avoidance of excessive punishment for a single culpable act, (2) economy of judicial time and money through consolidation of prosecutions, (3) establishment of the finality of one prosecution, and (4) protection of defendants from repeated or continual prosecutions.³

The problem in applying the double jeopardy clause has been the difficulty in determining which violations constitute the "same

1. The first conviction, obtained before a municipal court having no jurisdiction over atrocious assault, N.J. REV. STAT. §§ 2A:8-21 (1951), 2A:8-22 (Supp. 1963), was affirmed on de novo trial before the county court and defendant was fined \$25 plus \$100 costs. The second conviction was before the county court, which had no original jurisdiction over reckless driving. N.J. REV. STAT. §§ 2A:3-4, 2A:3-6 (1951). It was affirmed per curiam by the appellate division. Under this conviction, defendant was sentenced to two-to-three years imprisonment.

2. Instant case at 536, 197 A.2d at 681 (1964).

3. See Note, 65 YALE L.J. 339-41 (1956). See also Bigelow, *Former Conviction and Former Acquittal*, 11 RUTGERS L. REV. 487 (1957); Knowlton, *Criminal Law and Procedure*, 11 RUTGERS L. REV. 71, 91 (1956); Lugar, *Criminal Law, Double Jeopardy, and Res Judicata*, 39 IOWA L. REV. 317, 345-47 (1954).

offense."⁴ Some courts, including those of New Jersey, employ a "same transaction" test, which bars multiple prosecutions and punishments for offenses arising out of the same act or "transaction."⁵ A majority, however, relies on a "same evidence" rule,⁶ under which a second prosecution is barred if defendant could have been convicted at the first trial by proof of facts necessary to convict at the second.⁷ Similar to the same evidence rule is

4. This problem has become increasingly serious with the multiplication of criminal statutes. Mayers & Yarborough, *Bis Vexari: New Trials and Successive Prosecutions*, 74 HARV. L. REV. 1, 29 (1960); Note, 65 YALE L.J. 339, 341-44 (1956).

5. *Haraway v. State*, 22 Ala. App. 553, 117 So. 612 (Ct. App. 1928) (if act violates several statutes, state must elect violation to prosecute). See also *Commonwealth v. Gill*, 28 Ky. L. Rep. 879, 90 S.W. 605 (Ct. App. 1906) (breach of peace conviction barred assault and battery prosecution); *State v. Mowser*, 92 N.J.L. 474, 106 Atl. 416 (Ct. Err. & App. 1919), 4 A.L.R. 695 (conviction of robbery barred prosecution for murder resulting therefrom); *Lugar*, *supra* note 3, at 325, 345-47.

Some cases applying this test have attached significance to whether one of the charges is included within the other or is a "constituent" of the other. *Copperthwaite v. United States*, 37 F.2d 846 (6th Cir. 1930); *State v. Hill*, 44 N.J. Super. 110, 129 A.2d 752 (App. Div. 1957) (robbery; assault with intent to rob). And, an offense may be deemed included although there could be no conviction of it at the second prosecution. *Territory v. Silva*, 27 Hawaii 270 (1923) (assault and battery conviction barred prosecution for rape); *State v. Labato*, 7 N.J. 137, 80 A.2d 617 (1951) (disorderly person conviction before magistrate barred harboring lottery papers prosecution). See *Kirchheimer, The Act, the Offense, and Double Jeopardy*, 58 YALE L.J. 513 (1949).

Some states have incorporated the same transaction rule by statute. See CAL. PEN. CODE § 654; MINN. STAT. ANN. § 609.035 (1964); N.Y. PEN. LAW § 1938. The rule is also incorporated, with minor qualifications, in MODEL PENAL CODE, §§ 1.07, 1.09(1)(c) (Proposed Official Draft 1962).

Related to the same transaction rule is the little-used test based on whether the defendant had a single motivating criminal intent. See, *e.g.*, *Holder v. Fraser*, 215 Ark. 67, 219 S.W.2d 625 (1949); *People v. De Sisto*, 27 Misc. 2d 217, 214 N.Y.S.2d 858 (Kings County Ct. 1961), *rev'd on other grounds sub nom.* *People v. Lo Cicero*, 17 App. Div. 2d 31, 230 N.Y.S. 2d 384 (Sup. Ct. 1962); Note, 47 MINN. L. REV. 255, 276-77 (1962).

6. The federal courts have in the past applied the same evidence rule, but it now appears that the Justice Department favors the same transaction test. *Petite v. United States*, 361 U.S. 529 (1960).

7. The major difficulty with this approach lies in determining the necessary quantum and elements of proof. Three viewpoints as to necessary facts prevail: (1) evidence that will actually be presented at the second trial, *e.g.*, *Nielson*, 131 U.S. 176 (1889) (cohabitation prosecution barred subsequent adultery prosecution); *United States v. Sabella*, 272 F.2d 206 (2d Cir. 1959) (selling heroin without a written order; selling illegally imported heroin); (2) evidentiary facts listed in the indictment, *e.g.*, *State v. Mark*, 23 N.J. 162, 128 A.2d 487 (1957) (disorderly person prosecution barred possession of obscene matter

one variety of the "additional fact" test, under which there is no double jeopardy if conviction of *each* offense requires proof of a fact that the other does not.⁸ A second type of additional fact test confers considerably narrower protection—double jeopardy will not be found if conviction for *either* offense requires proof of a fact that the other does not.⁹

The problem is further complicated by a number of recognized exceptions to the mechanical tests, permitting multiple prosecutions and punishments otherwise prohibited. Additional prosecution or punishment has been allowed if the first court had no jurisdiction to convict for the crime charged in the second prosecution, if the second prosecution was for a criminal offense while the first was for a noncriminal infraction, or if the existence of separate criminal statutes is viewed as a legislative fiat enabling a single act to constitute multiple offenses.¹⁰ Other exceptions

prosecution); *State v. Labato*, 7 N.J. 127, 80 A.2d 617 (1951) (disorderly person; harboring lottery papers); *Commonwealth v. Bergen*, 134 Pa. Super. 62, 4 A.2d 164 (1939) (reckless driving did not bar manslaughter—indictment failed to specify manslaughter caused by automobile); (3) facts which *must* be alleged in an indictment for the crime charged (under this reasoning a conviction of reckless driving does not preclude prosecution for manslaughter, because manslaughter can be committed by means other than reckless driving, even though the state will have to prove defendant's reckless driving in the actual case), *People v. Herbert*, 6 Cal. 2d 541, 58 P.2d 909 (1936); *State v. Midgett*, 214 N.C. 107, 198 S.E. 613 (1938). On these three viewpoints generally, see Note, 40 YALE L.J. 462 (1931).

8. *E.g.*, *Waters v. United States*, 328 F.2d 739 (10th Cir. 1964) (possession of unregistered firearm; possession of firearm with manufacturing tax unpaid); *State v. Lawrence*, 146 Me. 360, 82 A.2d 90 (1951) (driving under influence; being found drunk in public place); *State v. Leibowitz*, 22 N.J. 102, 123 A.2d 526 (1956) (assault with intent to kill with firearm; unlawfully concealing firearm). Unlike the same evidence rule, this additional fact test provides protection where defendant is prosecuted first for the greater offense and later for the lesser one. For example, had the defendant in *Currie* been tried first for atrocious assault, the same evidence test would not bar a later prosecution for reckless driving, because proof of facts necessary to convict for reckless driving would not establish the offense of atrocious assault. But the additional fact test would bar the reckless driving prosecution, since proof of that offense involves no facts in addition to those charged in the atrocious assault indictments.

9. *E.g.*, *State v. Shoopman*, 11 N.J. 333, 94 A.2d 493 (1953) (reckless driving did not bar causing death by reckless driving); *State v. Williams*, 21 N.J. Misc. 329, 34 A.2d 141 (Recorder's Ct. 1943) (alternate holding) (driving without license; driving after revocation of license); *State v. Empey*, 65 Utah 609, 239 Pac. 25 (1925) (reckless driving; manslaughter).

10. See, *e.g.*, *Commonwealth v. Jones*, 288 Mass. 150, 192 N.E. 522 (1934) (no jurisdiction, legislative fiat); *People v. Townsend*, 214 Mich. 267, 183 N.W. 177 (1921) (no jurisdiction); *State v. Garner*, 360 Mo. 50, 226 S.W.2d 604 (1950) (no jurisdiction, noncriminal); *State v. Shoopman*, *supra* note 9

have been made where the victim has, since defendant's first trial, died due to defendant's wrongdoing,¹¹ and where the act is an offense against different jurisdictions.¹²

Defining the scope of constitutional "sameness" by using any single test has consistently proved unsatisfactory both in terms of the factors evaluated and the results reached. A particular offense may be factually distinguished from or classified the "same" as another on the basis of a variety of equally descriptive characteristics, such as motivational, evidentiary, and factual. The single-test approaches, therefore, in focusing on only one factor, seem unjustifiably narrow. In addition, the use of any single test forecloses consideration of the fundamental competing policy objectives underlying the safeguard. To avoid this some jurisdictions apply contradictory standards,¹³ choosing whichever rule dictates the desired result, apparently predetermined on other unannounced grounds. Furthermore, reliance on these superficial tests often produces unpredictable and inconsistent results because of ambiguities and intricacies in determining whether offenses are part of the same transaction or possess the requisite evidentiary similarities.¹⁴

(all three exceptions). *Contra*, *State v. Pennsylvania R.R.*, 9 N.J. 194, 87 A.2d 709 (1952) (legislative fiat); *State v. Labato*, 7 N.J. 137, 80 A.2d 617 (1951) (quasi-criminal); Note, 24 MINN. L. REV. 522, 544-45 (1940) (no jurisdiction).

11. *Territory v. Nihipali*, 40 Hawaii 331 (1953).

12. This exception is most familiarly applied to successive prosecutions for state and federal offenses. See, e.g., *Abbate v. United States*, 359 U.S. 187 (1959). But it has also been applied to conduct which violates both a municipal ordinance and a state law. See, e.g., *State v. Garner*, 360 Mo. 50, 226 S.W.2d 604 (1950); *State v. Reid*, 19 N.J. Super. 32, 87 A.2d 562 (Essex County Ct. 1952).

13. *State v. Leibowitz*, 22 N.J. 102, 123 A.2d 526 (1956), applied the additional-fact-required-for-each-prosecution rule. That test is inconsistent with New Jersey's same transaction rule. See New Jersey cases cited *supra* note 5. The New Jersey cases cited *supra* note 9 apply the additional-fact-required-for-either-prosecution rule, which contradicts both of the above rules. Thus, New Jersey has applied three logically inconsistent rules. See Note, 7 BROOKLYN L. REV. 79, 81 (1937).

14. Courts' views of transactions vary widely. In *State v. Willhite*, 40 N.J. Super. 405, 123 A.2d 237 (Morris County Ct. 1956), the court held defendant's journey through three local jurisdictions constituted a single transaction of reckless driving. However, in *Burnett v. Commonwealth*, 284 S.W.2d 654 (Ky. Ct. App. 1955), defendant's commission of assault and battery with his automobile was found to be a separate transaction from his reckless driving. One court found a conviction of breach of the peace barred prosecution for assault and battery. *Commonwealth v. Gill*, 28 Ky. L. Rep. 879, 90 S.W. 605 (Ct. App. 1906). Another held a conviction of disturbing a religious meeting (by an attempted shooting) did not bar an attempted murder prosecution. *State v. Ross*, 72 Tenn. (4 Lea) 442 (1880).

The *Currie* court recognized the futility of employing a single test of sameness.¹⁵ It sought instead to accommodate the underlying policies of the double jeopardy prohibition, and the state's interest in punishing criminal conduct commensurate with culpability.¹⁶ Both offenses stemmed from the act of driving and subsequent collisions with the roadblock car, and no doubt the collisions were considered by the magistrate in the reckless driving conviction. Thus a liberal view of constitutional sameness would support a finding that the second conviction constituted double jeopardy. By forcing a consolidation of the state's prosecutions, judicial energy would be conserved and defendants would avoid the oppression of repeated prosecutions.¹⁷ However, motor vehicle

Difficulties also apparently exist in applying the test based upon whether the defendant was motivated by a single criminal intent. See note 5 *supra*. In *People v. De Sisto*, 27 Misc. 2d 217, 214 N.Y.S.2d 858 (Kings County Ct. 1961), *rev'd on other grounds sub nom.* *People v. Lo Cicero*, 17 App. Div. 2d 31, 230 N.Y.S.2d 384 (Sup. Ct. 1962), where the defendant kept the victim captive in a truck to facilitate hijacking it, the court found the kidnapping and robbery to be motivated by the same intent. Compare *Holder v. Fraser*, 215 Ark. 67, 219 S.W.2d 625 (1949), in which the court found separate criminal intents for the death of each of two victims simultaneously killed by defendant's reckless driving.

15. The court pointed to *State v. Hoag*, 21 N.J. 496, 122 A.2d 628 (1956), *aff'd*, 356 U.S. 464 (1958), as being exemplary of the tests' inadequacies.

16. 41 N.J. at 538, 539, 197 A.2d at 682, 683.

Some cases indicate an unarticulated consideration of the interest in appropriate punishment. See, *e.g.*, *State v. Hoag*, *supra* note 15, at 506, 122 A.2d at 633. One of the few cases openly considering this factor is *State v. Simmons*, 48 Del. (9 Terry) 166, 169, 99 A.2d 401, 403 (Super. Ct. 1953). Other courts apparently have not considered appropriate punishment to be an overriding consideration. See, *e.g.*, *United States v. Sabella*, 272 F.2d 206 (2d Cir. 1959), holding double jeopardy bars a prosecution for selling illegally imported heroin subsequent to a prosecution for selling heroin without a written order, even though the first conviction carried no penalty because of an inadvertent mistake in the statute. See also *State v. Greely*, 30 N.J. Super. 180, 191, 103 A.2d 639, 645 (Hudson County Ct. 1954).

Concern for appropriate punishment is indicated by the line of cases permitting a second prosecution for conduct already the subject of a criminal conviction where the victim dies as a result of the offense, after the first prosecution. See, *e.g.*, *Territory v. Nihipali*, 40 Hawaii 331 (1953); *State v. Randolph*, 61 Idaho 456, 102 P.2d 913 (1940); *Hill v. State*, 141 Tex. Crim. 169, 149 S.W.2d 93, *aff'd*, 144 Tex. Crim. 57, 161 S.W.2d 80 (1941).

17. See *Lugar*, *supra* note 3, at 345; Note, 24 MINN. L. REV. 522, 545-46 (1940).

Prior to *Currie* the New Jersey courts have twice rejected the argument that, notwithstanding identity of offenses, a second prosecution is justified because of difficulties in local-state coordination. *State v. Mark*, 23 N.J. 162, 163, 128 A.2d 487, 490 (1957); *State v. Labato*, 7 N.J. 137, 151, 80 A.2d 617, 624 (1951).

regulations are enforced by summary proceedings and minor penalties are designed to punish conduct very different from that necessary to support a conviction for an intentional criminal act.¹⁸ The difficulties inherent in requiring coordination among state, county, and local prosecuting authorities in acting on multiple violations arising from operation of a vehicle would seem to outweigh the inconvenience of separate trials to the defendant.¹⁹ Furthermore, prohibiting a prosecution for the criminal conduct because of the prosecution for a traffic violation, carrying only a small fine, would not accord with the defendant's reasonable expectations and would adversely affect the state's law enforcement function.²⁰

The New Jersey State Bar Association, fearing that the trend toward "finespun distinctions" found in *State v. Shoopman*, 11 N.J. 333, 94 A.2d 493 (1953), would nullify the double jeopardy safeguard, recommended magistrate-prosecutor coordination. The suggested legislation authorized and required a magistrate, upon request of the prosecutor, to stay his proceedings for a limited period in order that a grand jury could consider the matter. If an indictment were returned, the magistrate proceedings would then be dismissed. 77 N.J.L.J. 408 (1954).

See also the Justice Department Press Release, in *New York Times*, April 6, 1959, p. 19, col. 2, announcing a Department policy against prosecuting if a state already has done so.

18. The court's reliance on *State v. Shoopman*, *supra* note 17, might possibly indicate that double jeopardy is never a defense to a prosecution subsequent to a motor vehicle violation proceeding. However, *Shoopman* has been criticized. Knowlton, *supra* note 3, at 78, 89; 21 *FORDHAM L. REV.* 296 (1952); 77 N.J.L.J. 408 (1954) (bar association comment); 8 *RUTGERS L. REV.* 413 (1953). *State v. Albertalli*, 112 Atl. 724 (N.J. Sup. Ct. 1915), and *State v. Williams*, 21 N.J. Misc. 329, 34 A.2d 141 (Recorder's Ct. 1943), cited by the instant court, may also be read as indicating that double jeopardy is never a defense in this context. The *Currie* court's multifaceted analysis, however, leads to the conclusion that a second prosecution would be barred at least when the criminal charge was substantially the same as the vehicle conviction. See *State v. Francis*, 67 N.J. Super. 377, 381, 170 A.2d 476, 478 (App. Div. 1961); *State v. Willhite*, 40 N.J. Super. 405, 123 A.2d 237 (Morris County Ct. 1956); *cf.* *State v. Berry*, 41 N.J. 547, 197 A.2d 687 (1964).

19. *Cf.* *Abbate v. United States*, 359 U.S. 187, 195 (1959), in which the Court said "it would be highly impractical for the federal authorities to attempt to keep informed of all state prosecutions which might bear on federal offenses." The Court's concern appears to apply equally to law enforcement coordination among local, county, and state officials.

20. 41 N.J. at 545, 197 A.2d at 685-86. Further support for the court's conclusion was apparently found in the extreme dissimilarity between penalties and "reasonable expectations" as to the gravity of the criminal charge compared with the vehicle violations. See N.J. REV. STAT. § 39:4-96 (Supp. 1958) which provides up to 60 days imprisonment or up to \$200 or both for the first conviction for reckless driving. See also N.J. REV. STAT. § 39:4-129

Since the *Currie* result is not novel,²¹ the significance of the case lies in its analytically sound and helpful approach.²² By rejecting complete reliance on a single test,²³ while recognizing the

(Supp. 1941) which authorizes a penalty for leaving the scene of an accident of up to six months or up to \$500 or both for subsequent convictions. Compare N.J. REV. STAT. §§ 2A:85-6, 2A:90-1 (1951), which provide a penalty of up to \$2,000 or up to seven years or both for atrocious assault and battery.

21. *Burnett v. Commonwealth*, 284 S.W.2d 654 (Ky. Ct. App. 1955), and *State v. Garner*, 360 Mo. 50, 226 S.W.2d 604 (1950), were the only cases discovered in which assault was prosecuted subsequent to reckless driving. Both found double jeopardy was no bar. Several cases hold that a reckless driving conviction does not bar a homicide prosecution. *E.g.*, *Bacom v. Sullivan*, 200 F.2d 70 (5th Cir. 1952), *cert. denied*, 345 U.S. 910 (1953); *People v. Herbert*, 6 Cal. 2d 541, 58 P.2d 909 (1936); *State v. Bacom*, 159 Fla. 54, 30 So. 2d 744 (1947); *State v. Empey*, 65 Utah 609, 239 Pac. 25 (1925); see Annot., 172 A.L.R. 1053 (1948). *But cf.* *Territory v. Nihipali*, 40 Hawaii 331 (1953). Although the court in *Nihipali* upheld a negligent homicide conviction subsequent to a reckless driving prosecution, it intimated that the homicide prosecution would have been barred had the victim been dead at the time of defendant's reckless driving conviction.

22. See Note, 24 MINN. L. REV. 522, 562 (1940). *But see* 11 OKLA. L. REV. 318, 320 (1958).

23. Under the same transaction test as liberally applied in previous New Jersey cases, the defendant would have prevailed. See, *e.g.*, *State v. Mowser*, 92 N.J.L. 474, 106 Atl. 416 (Ct. Err. & App. 1919) (murder and robbery); *State v. Willhite*, 40 N.J. Super. 405, 123 A.2d 237 (Morris County Ct. 1956) (reckless driving in three different jurisdictions). This same attitude would undoubtedly view assault with an automobile as part of the transaction of reckless driving. *But see* *Burnett v. Commonwealth*, 284 S.W.2d 654 (Ky. Ct. App. 1955).

Also, under the same evidence rule it is likely that double jeopardy would have been found to bar the action since proof of the evidentiary facts in the indictments—atrocius assault committed “with a motor vehicle then and there being operated by defendant”—would be ample to convict defendant of reckless driving.

Since the MODEL PENAL CODE (Proposed Official Draft 1962) is merely an amalgam of the widely used tests, it appears from the facts of this case to be analytically capable of supporting opposite results. Arguably, however, defendant would prevail under that Code. Section 1.07 provides:

(1) He may not, however, be convicted of more than one offense if:

(a) one offense is included in the other, as defined in Subsection

(4)

. . . .

(4) An offense is so included when:

(a) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged

Section 1.09 provides:

Although a prosecution is for a violation of a different provision of the statutes than a former prosecution or based on different facts, it is

relevance of each, the court was able to consider all appropriate facets of sameness. The *Currie* analysis focuses attention on the principles underlying the double jeopardy prohibition and the competing policies in a given factual situation. This emphasis provides a generally applicable analytical framework, assures that fundamental policy objectives will be considered, and may enhance the predictability of results.

Corporations: Dominant Shareholder in Close Corporation Allowed To Vote Without Regard to Interests of the Corporation

Complainant, a director and stockholder in a close family corporation, challenged a vote of the majority stockholders refusing shares offered to the corporation pursuant to a first option provision.¹ Complainant's stepmother, a second director, controlled the corporation by virtue of a life interest in approximately 80 percent of the outstanding stock. Upon her death the shares

barred by such former prosecution under the following circumstances:

(1) . . . the subsequent prosecution is for:

. . . .
 (c) the same conduct, unless (i) the offense of which the defendant was formerly convicted or subsequently prosecuted each requires proof of a fact not required by the other and the law defining each of such offenses is intended to prevent a substantially different harm or evil

. . . .
 Under § 1.07, arguably the offense of reckless driving is included within the charge of atrocious assault because it could be established by proof of the facts "required to establish" the atrocious assault. Here, just as in the same evidence test, however, difficulty lies in determining which facts are required to establish the *including* offense. See note 7 *supra*. Depending on the view chosen as to required proof, opposite results could be reached.

Assuming both offenses were committed by the same conduct, § 1.09 would bar the atrocious assault prosecution unless each offense "requires proof of a fact not required by the other." Here again opposite results can be reached depending on how the evidentiary problems noted above and in note 7 *supra* are resolved.

1. The option provided that any shareholder desiring to sell stock must first offer it to the corporation which may then purchase within one month from the time of the offer. *Boss v. Boss*, 200 A.2d 231, 233 (R.I. 1964). Such provisions are universally held to be for the benefit of the corporation and therefore valid. See 48 MINN. L. REV. 808 (1964). First options are designed to allow the original shareholders to control the entry of new shareholders and to protect their proportionate interest in the corporation. For extensive discussion of first option provisions, see 2 O'NEAL, CLOSE CORPORATIONS §§ 7.02-29 (1958).