DOUBLE JEOPARDY IN JUVENILE JUSTICE

State v. R.E.F., 251 So. 2d 672 (Fla. App. 1971)

A petition was filed in juvenile court against R.E.F., a sixteen year old boy, alleging that he was a juvenile delinquent on the basis of acts leading to his arrest for rape and aggravated assault. At the hearing, held within six days of the petition, the state's attorney requested waiver of the youth to criminal court. This request was denied, and R.E.F. was adjudged a juvenile delinquent. He was committed to the Division of Youth Services for an indeterminate period not to exceed his twenty-first birthday. Eleven days after this disposition, the state grand jury returned an indictment against R.E.F. for rape. While in custody on the rape charge, he sought habeas corpus on the ground that confinement on the indictment was in violation of the fifth amendment protection against double jeopardy. Treating the habeas corpus petition as a motion to quash the indictment, the lower court granted the motion.[1] The First District Court of Appeals reversed,[2] *held*: an indictment subsequent to an adjudication of delinquency does not offend the guarantee against double jeopardy even though it is based on the same act which served as the exclusive basis for the delinquency adjudication. The court grounded this conclusion on the proposition that juvenile proceedings are civil, not criminal, and that jeopardy, therefore, cannot be said to attach on an adjudication of delinquency.[3]

The fifth amendment prohibition against double jeopardy has generally taken the form of a bar to a prosecution for an offense on which an earlier prosecution was based. This bar would be effective, for example, when a defendant under a prior prosecution was either acquitted or convicted; when the prior prosecution was improperly terminated after

1. State v. R.E.F., 251 So. 2d 672, 674 (Fla. App. 1971).

2. 251 So. 2d 672 (Fla. App. 1971).

3. *Id.* The court also rejected the contention that the indictment violated "fundamental fairness" required under the due process clause of the fourteenth amendment. The court distinguished a Texas case in which an indictment of a youth after an adjudication of delinquency was held to be fundamentally unfair. Hultin v. Beto, 396 F.2d 216 (5th Cir. 1968). In that case, the juvenile had been treated for a year in a correctional facility before the indictment was handed down. The court held that "[a] juvenile cannot be adjudged a delinquent child and held in custody as such, and, without regard to how he may respond to the guidance and control afforded him under the [Texas] Juvenile Act, be indicted, tried, and convicted of the identical offense after he reaches the age 17 . . ." 396 F.2d at 217, *quoting* Sawyer v. Hauck, 245 F. Supp. 55, 57 (W.D. Tex. 1965). The *Hultin* rationale did not apply in the Florida situation because in Texas, criminal courts have no jurisdiction over a juvenile until he is seventeen, whereas in Florida the criminal courts can obtain exclusive jurisdiction over juveniles of any age by means of an indictment. 251 So. 2d at 678-79.

the jury was sworn;[4] or when the prior prosecution resolved an issue of fact or law inconsistent with guilt of the offense.[5] The double jeopardy rationale has also been invoked against multiple punishment for the same offense at one trial.[6]

Prior to 1968, the federal double jeopardy protection was not binding on the states through the due process clause of the fourteenth amendment.[7] However, if the state has no double jeopardy clause or its double jeopardy clause has been held inapplicable to a situation which would have raised the federal double jeopardy protection had the same factual case arisen under federal jurisdiction, the Supreme Court has treated the state prosecution as presenting due process problems of fundamental fairness.[8] *Benton v. Maryland*[9] changed this by incorporating the fifth amendment double jeopardy protection into the fourteenth amendment and making it binding on the states.

The double jeopardy protection does not operate in all situations to bar prosecution subsequent to prior judicial action based on the same conduct. In criminal proceedings, the double jeopardy prohibition does not bar the state from retrying a defendant whose conviction is reversed on appeal;[10] nor does it bar retrial of a defendant whose conviction is set aside on collateral attack for error in the proceedings.[11] Under certain circumstances, reprosecution can follow after a trial judge, in his discre-

4. *See, e.g.*, Downum v. United States, 372 U.S. 734 (1963).

5. Remington and Joseph, *Charging, Convicting, and Sentencing the Multiple Criminal Offender*, 1961 WISC. L. REV. 528, 552. This category includes the operation of collateral estoppel, which has been held to be incorporated into the double jeopardy clause of the fifth amendment. Ashe v. Swenson, 397 U.S. 436 (1970). Collateral estoppel "means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id.* at 443. Thus, if one man is accused of robbing six men in a poker game, and the only issue is the identity of the robber, an acquittal on a trial for one of the robberies is a bar to prosecution for the robbery of any of the others. *Id.*

6. *Ex Parte* Lange, 85 U.S. (18 Wall.) 163 (1873). The policy supporting the double jeopardy protection in the one-trial multiple punishment situation is different from the policy in the two-trial situation. In one trial, the evil to be protected against is punishing a man twice for the same act. In the two-trial situation, the issue is harassment, and the evil to be protected against is prosecuting a man twice for the same act. *See* Note, *Federal Multiple Offense Prosecutions: The Same Evidence Test and Cumulative Punishment*, 1960 WASH. U.L.Q. 98.

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

8. *See, e.g.*, Ciucci v. Illinois, 356 U.S. 571 (1958); Hoag v. New Jersey, 356 U.S. 464 (1958); Brock v. North Carolina, 344 U.S. 424 (1953).

9. 395 U.S. 784 (1968).

10. United States v. Ball, 163 U.S. 662 (1896).

11. United States v. Tateo, 377 U.S. 463 (1964).

tion, declares a mistrial, with or without the defendant's consent.[12] Since the double jeopardy protection prohibits multiple prosecution (or punishment) for the same offense, a defendant can be tried successively for each of several distinct offenses which may arise out of a single course of conduct.[13] Furthermore, a defendant in a civil action can be prosecuted in criminal court for the same conduct on which the civil action was based.[14]

Under the "dual sovereignty" exception, the attachment of jeopardy in a federal prosecution does not bar state prosecution for a substantively identical offense, and vice versa.[15] However, dual sovereignty does

12. Gori v. United States, 367 U.S. 364 (1961): Reprosecution after mistrial is not barred if done for the benefit of the defendant; Wade v. Hunter, 336 U.S. 684 (1949): Retrial is not barred when a military court martial was discharged due to tactical necessity in the field; Thompson v. United States, 155 U.S. 271 (1894): Reprosecution is not barred when the jury was discharged because one juror had served on the Grand Jury which indicted the defendant; Logan v. United States, 144 U.S. 263 (1892): Reprosecution is not barred when the jury was discharged after 40 hours of deliberation without reaching a verdict; Simmons v. United States, 142 U.S. 148 (1891): Reprosecution is not barred when a mistrial is declared because a letter published in a newspaper cast doubt on a juror's impartiality. *But see* United States v. Jorn, 400 U.S. 470 (1971): When a trial judge abuses his discretion in declaring a mistrial on his own motion, the constitutional guarantee against double jeopardy operates to forestall a trial of the case on the merits. The judge, feeling that witnesses had not been adequately warned of their constitutional rights even though the government had assured him otherwise, aborted the trial. The Court in *Jorn* saw an important difference, for double jeopardy purposes, between mistrial on the defendant's motion and mistrial *sua sponte* by the court:

> ". . . [T]he crucial difference between reprosecution after appeal by the defendant and reprosecution after a *sua sponte* judicial mistrial declaration is that in the first situation the defendant has not been deprived of his option to go to the first jury and, perhaps, end the dispute then and there with an acquittal. On the other hand, when the judge, acting without the defendant's consent, aborts the proceeding, the defendant has been deprived of his 'valued right to have his trial completed by a particular tribunal.' " 400 U.S. at 484.

13. *See, e.g.*, Hoag v. New Jersey, 356 U.S. 464 (1958).

14. *See generally* 1B J. MOORE & T. CURRIER, MOORE'S FEDERAL PRACTICE Part III (1965).

15. Federal conviction and punishment of a man previously convicted and punished for the same act by a state is permissible. *See, e.g.*, Abbate v. United States, 359 U.S. 187 (1959); United States v. Lanza, 260 U.S. 377 (1922). Likewise, there is no double jeopardy problem when a state charge and conviction follows a federal charge and acquittal. *See, e.g.*, Bartkus v. Illinois, 359 U.S. 121 (1959).

The problem of duplicated prosecutions, constitutionally permissible under the "dual sovereignty" rule, has been partially resolved as a practical matter: about 15 states have statutes prohibiting state prosecutions subsequent to a federal prosecution; and since 1959, the policy of the Justice Department has been not to duplicate state prosecutions. *See* Note, *Twice in Jeopardy*, 75 YALE L.J. 262 (1965), and authorities cited therein.

Similarly, it has been Justice Department policy to avoid multiple federal prosecutions based on several offenses arising out of a single course of conduct. *See, e.g.*, Petite v. United States, 361 U.S. 529 (1960): the defendant, after being convicted in Federal District Court in Pennsylvania of conspiring to make false statements to an agency of the United States at deportation hearings, was

not preclude double jeopardy protection when successive prosecutions occur in different political subdivisions of a state.[16] If the conduct on which a state prosecution is based is the same as that on which a municipal violation is based, the double jeopardy protection applies, since the municipality's law-making power springs from the state.[17]

Traditionally, jeopardy has not been held to attach as a consequence of juvenile delinquency proceedings. The rationale has been that juvenile proceedings are civil in nature, cast in a *parens patriae* mold. The protection against double jeopardy, on the other hand, is a right accorded to individuals accused of crime, and is therefore inappropriate in the juvenile setting.[18]

The traditional view of juvenile delinquency proceedings was changed by the decisions of *Kent v. United States*,[19] *In re Gault*,[20] and *In re Winship*.[21] In those cases the civil label was held to be insufficient justification for denying specific constitutional rights when a consequence of the juvenile proceeding might be the incarceration of the juvenile. Al-

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indicted in the District of Maryland for suborning the perjury of two witnesses at the hearing. The testimony of these two witnesses was among the overt acts relied on in the Pennsylvania conspiracy indictment. After his conviction of the latter charge was affirmed and certiorari granted on the single question of double jeopardy, the Supreme Court granted a motion, filed by the government, for an order dismissing the indictment. This motion was based on the ". . . general policy of the federal government 'that several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement.' The Solicitor General on behalf of the government represents this policy as closely related to that against duplicating federal-state prosecutions . . ." 361 U.S. at 530-31, *quoting* Department of Justice Press Release, Apr. 6, 1959.

16. Reynolds v. Sims, 377 U.S. 533 (1964).

17. Waller v. Florida, 397 U.S. 387 (1970).

18. *See, e.g.*, People v. Silverstein, 121 Cal. App. 2d 140, 262 P.2d 656 (1953); Dearing v. State, 151 Tex. Crim. App. 6, 204 S.W.2d 983 (1947). *But see* United States v. Dickerson, 168 F. Supp. 899 (D.D.C. 1958), *rev'd on other grounds*, 271 F.2d 487 (D.C. Cir. 1959), holding that the double jeopardy provision of the Federal Constitution does apply in federal juvenile court proceedings. Also in some cases decided before *Benton*, courts held that criminal prosecution of a juvenile who had been adjudicated delinquent and committed to a juvenile correctional facility violated "fundamental fairness" and due process if no consideration was given by the court to the rehabilitative effect of the committment on the juvenile; *see, e.g.*, Hultin v. Beto, 396 F.2d 216 (5th Cir. 1968), and Sawyer v. Hauck, 245 F. Supp. 55 (W.D. Tex. 1965). A discussion of whether the application of the double jeopardy clause to the juvenile system would have an effect on the operation of res judicata and collateral estoppel in that system [*see* Ashe v. Swenson, 397 U.S. 436 (1970)] or whether a contrary finding would have any effect on the workings of those doctrines is beyond the scope of this comment.

19. 383 U.S. 541 (1966).

20. 387 U.S. 1 (1967).

21. 397 U.S. 358 (1970).

though the holdings of those cases were carefully tailored to the specific rights at issue,[22] their rationale makes it difficult for courts confronting claims of other rights to deny them to juveniles by labelling the proceedings "civil." The "spirit" of *Kent, Gault,* and *Winship* suggested to some courts that the bar against double jeopardy should be a protection for juveniles in juvenile delinquency proceedings.[23]

There are three factual categories in which the issue of double jeopardy can be raised in the juvenile setting: (1) when successive proceedings are brought in juvenile court, both based on the same act, (2) when a criminal proceeding is followed by a juvenile proceeding based on the same act, and (3) when a juvenile proceeding is followed by a criminal proceeding based on the same act. In each case, two separate conceptual problems exist: whether application of the protection against double jeopardy is appropriate in the juvenile context, and at what point jeopardy attaches, if at all, in a juvenile proceeding.[24]

In the first category, courts have held, for example, that an unsuccessful hearing, resulting in either a dismissed petition,[25] a declaration of mistrial,[26] or a non-suit,[27] is a bar to subsequent proceedings against the juvenile for the same acts on which the unsuccessful proceeding was based. These courts have based their reasoning on the applicability in juvenile proceedings of all the protections accorded to criminals on trial, including the protection against double jeopardy.[28] Implicit in these

22. *Kent* held that when a statute provides for transfer after "full investigation", a judicial type hearing is required, 383 U.S. 541 (1966). *Gault* accorded to juveniles the right to adequate notice, advice as to right of counsel, confrontation and cross-examination, and the privilege against self-incrimination, 387 U.S. 1 (1967). *Winship* applied to juvenile proceedings the evidentiary standard of "beyond a reasonable doubt" applicable to criminal proceedings, 397 U.S. 358 (1970).

23. *See, e.g.*, Anonymous v. Superior Court in and for County of Pima, 457 P.2d 956 (Ariz. 1969); Richard M. v. Superior Court of Shasta County, 4 Cal. 3d 370, 482 P.2d 664, 93 Cal. Rptr. 752 (1971); People v. Brown, 13 Cal. App. 3d 876, 91 Cal. Rptr. 904 (1971), Collins v. State, 429 S.W.2d 650 (Tex. Civ. App. 1968); *See also* Note, *Double Jeopardy and Due Process in Juvenile Courts*, 29 U. PITT. L. REV. 756 (1968), and cases cited therein.

24. In criminal proceedings, ". . . jeopardy attaches when a person has been placed on trial before a court of competent jurisdiction under a valid indictment, has been arraigned and has pleaded, and a proper jury has been impanelled and sworn to hear the evidence." Dangel, *Double Jeopardy in Massachusetts*, 16 BOSTON U.L. REV. 389, 391 (1936).

25. Richard M. v. Superior Court of Shasta County, 4 Cal. 3d 370, 482 P.2d 664, 93 Cal. Rptr. 752 (1971); People v. P.L.V., 490 P.2d 685 (Colo. 1971).

26. Tolliver v. Judges of Family Court, 59 Misc. 2d 104, 298 N.Y.S.2d 237 (1969).

27. Collins v. State, 429 S.W.2d 650 (Tex. Civ. App. 1968).

28. "Juveniles are entitled to the fundamental protections of the Bill of Rights in proceedings that may result in confinement or other sanctions, whether the state labels these proceedings 'criminal' or 'civil' ". Richard M. v. Superior Court of Shasta County, 4 Cal. 3d 370, 376, 482 P.2d 664, 668 (1971), 93 Cal. Rptr. 752, 756 (1971).

holdings is the determination that jeopardy first attaches no later than at the conclusion of the adjudicatory stage.

In Colorado, it has been held that jeopardy does not attach at a preliminary hearing before a referee, even though the referee recommended dismissal of the petition.[29] The court reasoned that since the referee's finding has no "final effect" until "approval by the court", jeopardy does not attach.[30] Presumably, an adjudicatory hearing would give the referee's finding "final effect".[31]

Courts which recognize that jeopardy attaches during delinquency proceedings for purposes of a bar against subsequent delinquency proceedings would appear bound to find that it also attaches when the delinquency proceeding is preceeded or followed by a criminal proceeding based on the same act. One court indicated that the double jeopardy bar would apply in a juvenile proceeding following acquittal in a criminal court, but the paucity of opinions dealing with the situation suggests that such a sequence is rare.[32] A sequence occuring more frequently is a juvenile proceeding followed by a criminal proceeding based on the same act. The post-*Gault* cases generally agree in this situation that the protection against double jeopardy is one of the rights to which juveniles are entitled, but have not agreed on when jeopardy attaches in the multistage proceeding typical of juvenile justice administration. The issue is most commonly raised on the state's motion for transfer to adult criminal jurisdiction, made before the conclusion of proceedings at the dispositional stage. In California, a transfer made during the dispositional hearing, after the conclusion of the adjudicatory hearing, was affirmed over the juvenile's contention that to avoid the double jeopardy prohibition transfer must be made before the end of the adjudicatory hearing.[33] The California court held that "until one court or the other reaches a final disposition of the case, only a single jeopardy is involved."[34] In Arizona, the point in the proceedings at which the double jeopardy bar is effective against transfer is the conclusion of the adjudicatory hear-

29. People v. J.A.M., 483 P.2d 362 (Colo. 1971).

30. *Id.*

31. People v. P.L.V., 490 P.2d 685 (Colo. 1971).

32. People v. Brown, 13 Cal. App. 3d 876, 91 Cal. Rptr. 904 (1971) (dictum).

33. *In re* Gary Steven J., 17 Cal. App. 3d 704, 710, 95 Cal. Rptr. 185, 189 (1971).

34. *Id.* This holding appears inconsistent with the determination implicit, in an earlier California holding, that in successive cases in the juvenile system jeopardy first attaches no later than at the conclusion of the adjudicatory hearing. Richard M. v. Superior Court of Shasta County, 4 Cal. 3d 370, 482 P.2d 664, 93 Cal. Rptr. 752 (1971). *See* note 25 *supra* and accompanying text.

ing.[35] Thus, a transfer order made during the adjudicatory hearing is not barred.[36]

In contrast to these cases, the principal case reverts to the traditional pre-*Gault* approach, seizing on the civil label to deny the applicability of double jeopardy to the juvenile situation. It relies strongly on the limiting language of *Kent, Gault,* and *Winship* for support; it chooses not to embrace what other courts have regarded as the "spirit" of those cases.[37]

Unlike the post-*Gault* cases with which it is in conflict, *R.E.F.* was decided after *McKeiver v. Pennsylvania*,[38] in which the Supreme Court held that a jury trial is not constitutionally required in juvenile delinquency proceedings. The *R.E.F.* court relied on *McKeiver* for support, and to some extent the reliance is well founded. Mr. Justice Blackmun, writing for the majority in *McKeiver*, made it clear that *Kent, Gault,* and *Winship* had not, separately or collectively, ruled that all rights constitutionally assured to an adult are to be imposed in a juvenile proceeding.[39] To the extent that courts finding the double jeopardy protection applicable in delinquency proceedings rested their holdings on the opposite conclusion, their authority is clearly weakened.

On the other hand, it does not follow that because a jury trial is inappropriate in delinquency proceedings, the double jeopardy protection is inappropriate as well. The *McKeiver* Court rested its holding on the conclusion that a jury trial is not necessary to accurate fact finding and that it could disrupt the desirable "uniqueness" of juvenile proceedings. Recognition of the double jeopardy protection to bar criminal prosecutions subsequent to an adjudication of delinquency would in no way interfere with juvenile proceedings. On the other hand, under the *R.E.F.* holding, the criminal justice system can interfere with the juvenile process at any point, thereby depriving it of its effectiveness. Thus, neither the holding nor the rationale of *McKeiver* compels the conclusion that double jeopardy protection should not apply in delinquency proceedings where confinement might be the result. The lesson of *McKeiver* is that the incorporation into the juvenile process of rights

35. Anonymous v. Superior Court in and for the County of Pima, 457 P.2d 956 (Ariz. 1969).

36. *Id.*

37. *See, e.g.*, Anonymous v. Superior Court in and for the County of Pima, 457 P.2d 956 (Ariz. 1969) and Richard M. v. Superior Court of Shasta County, 4 Cal. 3d 370, 482 P.2d 664, 93 Cal. Rptr. 752 (1971).

38. 403 U.S. 528 (1971).

39. *Id.* at 545.

traditionally accorded the criminally accused must proceed in thoughtful steps with independent consideration of each right at issue. The test to be applied for incorporation looks to, first, whether application of the right is necessary to the maintenance of "fundamental fairness", and, second, the extent to which the right can be applied without disrupting the juvenile process. Neither *McKeiver* nor cases preceding it offered any suggestion as to whether the right against double jeopardy would meet these standards; it is left to the courts to make the analysis using the criteria suggested there with reference to the right to jury trial.

R.E.F., in relying on *McKeiver et. al.*, without making this independent analysis, merely begs the question: is the protection against double jeopardy a constitutionally required right for juveniles in the juvenile justice system?