April 1968

Reprosecution of Ordinance Violations as Constituting Double Jeopardy

Allyn A. Brooks

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/cklawreview

Part of the Law Commons

Recommended Citation
Allyn A. Brooks, Reprosecution of Ordinance Violations as Constituting Double Jeopardy, 45 Chi.-Kent L. Rev. 90 (1968).
Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol45/iss1/9

This Notes is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.
REPROSECUTION OF ORDINANCE VIOLATIONS AS CONSTITUTING DOUBLE JEOPARDY

Early in the English law a common law maxim had developed that no man should have his life put in jeopardy twice for the same offense. ¹ Today, this maxim is found incorporated as a provision in the constitutions of 45 states as well as in the Federal Constitution. ² The discussion of double jeopardy herein will be limited to the problem of appeals by the municipality and the resulting reprosecution of ordinance violation cases after a finding adverse to a municipal corporation. The related but analytically distinct areas of double jeopardy, prosecution for split-offenses³ and multi-sovereign prosecutions, ⁴ will not be emphasized. Included will be a discussion of the legal status of an ordinance violation and the applicability of other constitutional safeguards besides double jeopardy inextricably necessary to a thorough understanding of the principal problem.

BACKGROUND OF THE PROBLEM

Even though the broad principle of protection against multiple prosecutions evolved centuries ago, protection at that time was minimal in comparison with today's standards.⁵ Today, the federal courts are bound by the ambiguous provision of the fifth amendment of the United States Constitution which provides "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb." As to the states, the rule of Palko v. Connecticut,⁶ decided under this clause of the fifth amendment, remains in force to date. Palko was charged by indictment with first degree murder but was found guilty by the jury of second degree murder. The prosecution appealed under a state statute permitting an appeal when errors are committed in the trial. Palko was retried, found guilty of first degree murder and sentenced to death. The Supreme Court held that the restrictions imposed on the federal government through the first eight amendments are not necessarily absorbed into the due process clause of the fourteenth amendment as minimum requirements of due process. The Court held that the states, therefore, are not bound by the fourteenth amendment to observe the same standards as the fifth amendment, and more specifically the double jeopardy clause in it, provides for the federal government. It

¹ 4 Blackstone, Commentaries § 335 (3rd Kerr ed. 1862).
² Connecticut, Maryland, Massachusetts, North Carolina and Vermont do not have constitutional provisions, but rather have common law decisions achieving the same effect. See A. L. I., Administration of The Criminal Law 61-72 (1935).
⁵ See, e.g., 4 Blackstone, Commentaries § 335-36 (3d Kerr ed. 1862), Jeopardy only attached in crown prosecutions for felonies, and even then not until a final judgment had been rendered.
NOTES AND COMMENTS

seems to be left entirely up to the individual state to provide constitutional or statutory protections for its citizens against reprosecution in a state criminal proceeding beyond the minimum essentials provided by the due process clause of the fourteenth amendment, as set forth in *Palko*. However, as previously noted, most states have their own prohibitions against double jeopardy. Moreover, recent Supreme Court extensions of the fourteenth amendment incorporating the Bill of Rights protections appear to make *Palko* the next precedent likely to be overruled.7

The Illinois Constitution has a provision which deals with double jeopardy8 and which provides that "no person shall . . . be twice put in jeopardy for the same offense." The Illinois constitutional provision against double jeopardy applies only after jeopardy attaches, however. The first question is, therefore, when does jeopardy attach? Recent court construction has decided that the protection against double jeopardy may not be invoked at least until the entire jury has been impaneled and sworn.9 Thus, in *People v. Watson*,10 the defendant had been indicted for burglary and larceny. At the arraignment the state entered a "nolle prosequi" as to the burglary charge. The defendant pleaded guilty to the larceny charge and was sentenced to one to ten years in prison. Six days later, by agreement of all parties, this sentence was set aside and the charge of larceny this time was nolle prosequed and the defendant pleaded guilty to the burglary charge. He was sentenced to one year to life. On appeal, he asked for a reversal of the burglary conviction because jeopardy had attached when a nolle prosequi was entered on the burglary charge at the arraignment. The court upheld the conviction, holding that a nolle prosequi is not a final disposition of the case, but is in the nature of a nonsuit or discontinuance. If entered before jeopardy has attached it does not serve as an acquittal so as to prevent a subsequent prosecution. Jeopardy will not attach until the accused has been arraigned and the entire jury is impaneled and sworn. Even if one or two panels are sworn, until the entire jury is sworn, no jeopardy can attach. Thus, at the arrest, arraignment or indictment stages, jeopardy has not attached. When there is a trial without a jury, a bench trial, jeopardy attachments upon the swearing of the first witness.11

Once jeopardy has attached, a culmination of the proceedings on the merits, either by conviction or acquittal, will bar any attempt at reprosec-

---


8 Ill. Const. art. II, § 10 (1870), provides, "No person shall . . . be twice put in jeopardy for the same offense."


10 394 Ill. 177, 68 N.E.2d 265 (1946).

11 *People v. Laws*, 29 Ill. 2d 221, 193 N.E.2d 806 (1963).
The test generally applied to determine whether a former conviction or acquittal is a bar to a subsequent prosecution is whether the facts of the later indictment would, if true, have sustained a conviction on the earlier indictment. If so, then the previous judgment is a complete bar to the subsequent prosecution, as in People v. Bain, in which case a second conspiracy indictment recited facts similar to the first indictment. Reprosecution can occur in the form of an attempted appeal by the state after an outcome favorable to the defendant as well as in the usual form of a repetitious reprosecution for the same crime. Any attempted appeal by the state is expressly forbidden by article six, section seven of the Illinois Constitution which provides, "...[A]fter a trial on the merits in a criminal case, no appeal shall lie from a judgment of acquittal..." Nor may the state appeal from a conviction on the merits, except in a limited number of situations provided by statute.

In addition, once the jury is sworn and jeopardy attaches, a termination of the prosecution by nonsuit or dismissal of the charges, even though there has been no trial on the merits, will forever bar prosecution of the offense charged. People v. Gallos involved a prosecution for theft. The prosecutor, believing there was insufficient evidence to sustain the charge, had the judge dismiss the charges. A short time later the judge reinstated the charges. On appeal, the court held that these charges could not be reinstated either before or after the jury was discharged because such action would violate the defendant's constitutional rights against double jeopardy.

Another question which may arise is, of what crimes has the defendant been placed in jeopardy? This question will arise in cases where the indictment charges an offense upon which there may be a conviction on one or more lesser included offenses. In People v. Carrico, the defendant was...

12 People v. Bain, 358 Ill. 177, 193 N.E. 137 (1935), holds that a judgment of conviction is a complete bar to later prosecution on a later indictment charging facts which would have justified a conviction on the earlier indictment. In addition, it has long been held that acquittal bars the prosecution of a writ of error by the state in a criminal proceeding, whether misdemeanor or felony. People v. Minor, 144 Ill. 308, 33 N.E. 40 (1893).

13 358 Ill. 177, 193 N.E. 137 (1935).

14 The factual situation in Palko v. Connecticut, supra note 6, could not arise in Illinois today. The reason is that the state is permitted an appeal only in certain situations. Ill. Rev. Stat. ch. 38, § 120-1 (1967), provides:
(a) Except as authorized by this Article and Rules of the Supreme Court the State may not appeal in a criminal case.
(b) The State may appeal from any court an order or judgment the substantive effect of which results in:
   (1) dismissing an indictment, information or complaint; or
   (2) arresting judgment because of a defective indictment, information or complaint.

15 In People v. Watson, 394 Ill. 177, 68 N.E.2d 265 (1946), an untried defendant was freed when the court held that while a nolle prosequi before the jury is sworn is like mere nonsuit in a civil case, once jeopardy attaches, a "nolle" is an acquittal and the defendant can never be retried on the same charges.


17 310 Ill. 543, 142 N.E. 164 (1924).
indicted for murder. The jury found him guilty of manslaughter, a lesser included offense. The defendant appealed and the case was reversed and remanded for a new trial. At the subsequent trial on the same indictment, the jury was properly instructed that the highest offense that the defendant could be convicted for was manslaughter. The previous conviction for manslaughter was an implied acquittal of the offense of murder. Since jeopardy had attached, the defendant could not be retried for murder or any offense greater that that of which he was found guilty at the original trial.

**Ordinance Violations in Particular**

Ordinance prosecution cases retain the peculiar distinction of being criminal in nature but civil in proceedings. This classification results in the conflict in the applicability of civil and criminal rules, especially where reprosecution and appeals from trial decisions are involved. There are various reasons for the retention of the predominance of the civil aspect of ordinance proceedings and thus the resulting application of the civil rules of procedure. These reasons, along with various legislative changes which may affect the result, will be discussed next.

**Pre-1963 Status**

The Illinois Constitution prohibits an accused from being put in double jeopardy for the "same offense." One way to analyze the problem is to define "offense." Previous to 1963, The Criminal Code defined "offense" as "a violation of any penal statute of this state." It is evident that municipal ordinances are not state statutes and thus were not included within either the definition of "offense" or the constitutional protection against double jeopardy. There were, however, additional reasons that indicate reprosecution or appeals by the municipality were not considered double jeopardy.

**Legal Nature of an Ordinance**

To fully appreciate the status which the ordinance occupies in the law, an analysis of the legal nature of an ordinance is required. Under the so-called Dillon rule, a municipality has only the powers which are either expressly granted by the state through a charter, or those which are necessarily implied or essential to the operation of the city. Ordinance regulations

---

18 *Supra* note 8.
19 Ill. Rev. Stat. ch. 38, § 2-12 (1963). Prior to January 1, 1964, the criminal substantive and procedural law was contained in the provisions of chapter 38 of the Illinois Revised Statutes under the heading "Criminal Code," as the new code of 1961 was called. In 1963, the procedural aspects of the law were separated from the code, and, although remaining in chapter 38, were placed in a separate section entitled "Code of Criminal Procedure." Each of the sections contains its own definitions.
may be passed by virtue of the city's express powers.\textsuperscript{21} This exercise of expressly granted power is valid even to the extent of exercising the police power concurrently with the state.\textsuperscript{22} These "police power" ordinance regulations may differ from the state's regulations, that is, they may regulate the same subject matter, but may not be inconsistent with them.\textsuperscript{23} The penalty for violation of an ordinance is limited by statute to a fine of no more than five hundred dollars.\textsuperscript{24} A jail sentence may be provided, but only as a means of enforcing payment of the fine.\textsuperscript{25}

The fact that only a fine may be imposed as punishment for a violation has caused many to observe the similarity between punitive damages in a civil case and the imposition of a fine in a criminal case. The fact that criminal sanctions and punitive damages are substantially identical in nature and purpose is one rationale for the argument that an ordinance violation prosecution is a civil proceeding. Punitive damages serve as a deterrent to future conduct of the same nature, and also serve as public retribution and as a rehabilitative factor. A fine serves the same purposes, but with perhaps more emphasis on the punitive-deterrent factor.\textsuperscript{26}

A civil remedy lies to recover a penal fine.\textsuperscript{27} The early case of \textit{Town of Jacksonville v. Black}\textsuperscript{28} held that an action of debt would lie to recover a fine for violation of an ordinance regulating the sale of intoxicating liquor. The theory that a fine may be recovered by an action of debt or assumpsit, as in any other civil suit, arose from the practice of collecting fines for violation of corporate by-laws by a civil suit at common law.\textsuperscript{29}

One seeming inconsistency is the fact that, in most states, imprisonment is available as a method of collecting a fine, while, at the same time, the state constitution, including Illinois', forbids imprisonment for a debt.\textsuperscript{30} To circumvent this objection, the courts have construed "debt" in its constitutional sense to include only the debtor-creditor relation which arises out of a civil contract.\textsuperscript{31}

\textsuperscript{22} City of Highland Park v. Curtis, 83 Ill. App. 2d 218, 226 N.E.2d 870 (2d Dist. 1967).
\textsuperscript{23} Ibid.
\textsuperscript{24} Ill. Rev. Stat. ch. 24, § 1-2-1 (1967). This section also allows a jail sentence not to exceed six months to enforce the payment of any fine imposed for a violation.
\textsuperscript{25} Ibid.
\textsuperscript{26} Gardiner, \textit{The Purposes of Criminal Punishment}, 21 Mod. Rev. 117 (1958); 34 U. of C. L. Rev. 408, 412-415 (1966); see also 38 Wash. L. Rev. 819 (1964).
\textsuperscript{27} People v. Dummer 274 Ill. 637, 113 N.E. 934 (1916). See also Atchison, T. & S. Ry, Co. v. People, 227 Ill. 270, 81 N.E. 342 (1907), where a railroad was fined for failure to observe an ordinance requiring prompt use of cars for transporting goods as a common carrier.
\textsuperscript{28} 36 Ill. 507 (1864).
\textsuperscript{29} Ibid.
\textsuperscript{30} Ill. Const. art. II, § 11 (1870), provides: "no person shall be imprisoned for debt....".
\textsuperscript{31} City of Chicago v. Morrell, 247 Ill. 383, 93 N.E. 295 (1910); Harlow v. Clow, 110 Ore. 257, 223 Pac. 541 (1924). Note also that article II, section 11 of the Illinois Constitution allows imprisonment for failure to deliver property to pay a debt.
The confusion is this area and the impossibility of pigeon-holing this type of case is aptly illustrated by the following excerpt from *City of Clayton v. Nemours*:

[A] prosecution for the violation of a city ordinance is a civil action... though concededly resembling a criminal action in its effects and consequences. Regarding it with respect to both form and substance, it partakes of some of the features of each character of action...

In the sense that its primary object is to punish, a prosecution for the violation of a city ordinance is undoubtedly criminal in its purpose but nevertheless civil in form, and especially so when regarded as an action for the recovery of a debt representing the amount of the fine or penalty imposed against the defendant for violation of the ordinance. Where the punishment prescribed by the ordinance may, in the first instance, be the imprisonment of the defendant, the conception of the action as one for the recovery of the debt will of course no longer obtain... but even so the proceeding, though its sole object is to punish, is nevertheless not a proceeding to punish for the commission of a crime in the accurate legal sense of the term. This for the reason that a crime is an act committed in violation of the public law, that is, a law coextensive with the boundaries of the state which enacts it, while an ordinance, on the contrary, is no more than a mere local police regulation passed in pursuance of and in subordination to the general or public law for the preservation of peace and the promotion of good order in a particular locality.

**Applicability of Civil or Criminal Rules**

Since prosecution for the violation of a city ordinance is deemed to be a civil proceeding, the rules of civil and not of criminal procedure apply. There are a great many ramifications of this broad statement, including the resultant inapplicability of the criminal safeguards of the Federal Constitution. Procedural steps, such as arraignment, are not necessary. The action is brought in the name of the city, by a complaint which only need be as specific as the civil practice act requires, and which complaint may be amended at any time before judgment.

It is well established that civil litigants are entitled to be represented by counsel. Since the proceedings are civil, however, the constitutional rights in a criminal case to have counsel either appointed or retained are absent. Moreover, the right to be free from self-incrimination is absent.

---

32 237 Mo. App. 167, 170 164 S.W.2d 935, 938 (1942).
34 City of Chicago v. Walcher, 327 Ill. App. 556, 64 N.E.2d 594 (1st Dist. 1946).
The only area in which the courts have seen fit to compromise the civil rules of procedure with the criminal safeguards is in the area of the burden of proof. In *City of Chicago v. Butler*, the city claimed that only the civil requirement of a preponderance of evidence was necessary to collect a fine for violation of a smoke abatement ordinance. The defendant claimed that since the proceeding was criminal in nature, proof beyond a reasonable doubt was necessary. The court compromised and said that more than a mere preponderance was necessary because the recovery of a penalty was involved, apparently feeling the predominant punitive factor warranted this added protection for the defendant. The result is that a "clear preponderance" of proof was required, a "clear preponderance" being more than a "preponderance" and less than "beyond a reasonable doubt.

**Double Jeopardy in Particular**

The majority of cases assume without extended argument that a prosecution to collect a fine is a civil proceeding and therefore the constitutional protection against double jeopardy does not apply. Thus, the double jeopardy provision does not protect a defendant against reprosecution by the city for the same offense, or from an appeal by the city from a verdict in the trial court, or from possible prosecution later of a lesser included offense. However, other civil protections may in fact apply.

There are many cases, including appeal by a city, in which the defendant claims double jeopardy would result from a reprosecution for an ordinance violation after a judgment of conviction or acquittal on the merits. For example, in *Village of Maywood v. Houston*, a Justice of the Peace found a defendant not guilty of violating a village ordinance making it unlawful to maintain a trailer camp in the Village. The Criminal Court of Cook County dismissed an appeal by the Village on the grounds that a city may not appeal any errors in the proceedings at the trial. The Supreme Court of Illinois held that the Village had a right to appeal and remanded the case to the Criminal Court. The court reviewed the authorities and said that an ordinance violation case has been customarily and correctly termed a civil case from which any error at the trial level may be reviewed upon an appeal by either side.

In a more recent case, the defendant was found guilty of driving while intoxicated and the court levied a fine. The magistrate then suspended the fine. The Village appealed and the upper court reversed the suspension of the fine after confirming the Village's right to appeal the conviction and suspension.

---

38 10 Ill. 2d 117, 139 N.E. 2d 233 (1956). See 10 I.L.P., Cities & Villages § 1193 (1957); McQuillan, Municipal Corporations § 27.05 (3d ed. rev. 1957); Annot., 116 A.L.R. 120 (1944).
No illustrative cases have been discovered in which a defendant claimed double jeopardy upon reprosecution for an ordinance violation after the charges had been dropped or the case terminated by a nolle prosequi. Here, however, a proper analogy may be made to a civil case in which a defendant takes a voluntary nonsuit and later refiles his action. The only bar to such a procedure by a civil litigant would be the running of the applicable statute of limitations. As for retrial for the same offense, repetitious retrials on the merits are barred in civil actions because the case becomes res judicata on its facts.

Another rather sticky problem occurs where two offenses arise out of the same conduct. In the civil law, the Illinois Revised Statutes, chapter 110, section 44, provides no mandatory joinder of actions. Thus, actions in simple negligence and for recklessness arising from the same act or conduct could be brought separately. In the criminal law, however, where two offenses arise out of the same conduct, the Illinois Revised Statutes, chapter 110, section 3-8, provides that both offenses must be prosecuted in the same action or the one not prosecuted will be barred. Applying the civil rules which are generally applicable, it appears the defendant could be tried separately for several different offenses arising out of the same conduct, such as reckless driving and negligent driving.

Post 1963—The New Code of Criminal Procedure

On January 1, 1964, the new Illinois Code of Criminal Procedure of 1963 became effective. This Code defines "offense" as "a violation of any penal ordinance of this state or of any penal ordinance of its political subdivisions." However, the definition of "offense" in the Illinois Criminal Code, the substantive criminal law of the state, still excludes the penal ordinances of the political subdivisions of the state. The question is, has the change in definition in The Code of Criminal Procedure affected, or will it affect, the fact that a state can appeal an ordinance violation case, that criminal safeguards are not applicable to a defendant in such a case and that the burden of proof is a clear preponderance of the evidence?

Very few cases have raised the exact points. In City of Chicago v. Joyce, the defendant claimed error in the court's failure to instruct the jury that the violation of a disorderly conduct ordinance must be proved beyond a reasonable doubt. The court held that the burden of proof in ordinance violation cases remains a "clear preponderance" of the evidence. The court emphasized that The Criminal Code, which requires proof beyond a reasonable doubt for conviction of an offense, contains its own definition of "offense" which does not include ordinance violations. Thus, the new definition

---

41 38 Ill. 2d 368, 232 N.E.2d 289 (1967).
of "offense," as contained in the Code of Criminal Procedure, has no effect on the burden of proof required.

On the other hand, the Illinois Supreme Court has recently held that the complaint in all ordinance violation cases must be verified, as in all criminal cases. This is the only semblance of an extension of the criminal rules into the area of ordinance violations since the change in the definition of "offense."

Some recent cases have involved the problem of double jeopardy in ordinance violations under the new Code of Criminal Procedure. **Gibson City v. McClellan** held without discussion that a village could no longer appeal in light of the enlarged scope of "offense" and Illinois Supreme Court Rule 604, regulating appeals in criminal cases. However, in **Village of Park Forest v. Bragg**, the defendant was found guilty of driving while intoxicated. The magistrate suspended the fine, from which order the Village appealed. The defendant contended that under the new and broader definition of "offense" in the Illinois Code of Criminal Procedure the Village cannot appeal because Illinois Supreme Court Rule 604 enumerates the decisions from which the state may appeal in criminal cases, and the present case was not included in those enumerated. The defendant cited the **Gibson City** case in support of his position. The Supreme Court of Illinois held that Rule 604 applies only to appeals by the state and not its subdivisions, and that rule 604 applies only to criminal cases. An ordinance violation, while included within the new definition of "offense," is not included within the scope of a "criminal case." "Offense" has a wide scope and includes both criminal cases and ordinance violations, and therefore is not synonymous with "criminal case." Thus, Rule 604 does not prevent an appeal by the state in a non-criminal, ordinance violation case. The court proceeded to reverse the holding of the **Gibson City** case and restore the viability of the rule that a city may appeal an ordinance case and the defendant is not subjected thereby to double jeopardy. The court expressly mentioned that the opinion is to stand as precedent for questions of double jeopardy only and it refused to examine whether the legislature intended new application of the Rules of Criminal Procedure in other areas involving ordinance violations.

It was not argued that since "offense" now includes ordinance violation cases, that this type of case is brought within the constitutional prohibition

---

44 Supra note 39.
45 Adopted pursuant to and in substantially the same language as Ill. Rev. Stat. ch. 38, § 120-1(1967), as set forth supra note 12, and providing:
. . . the State may appeal only from an order or judgment, the substantive effect of which results in dismissing an indictment, information or complaint; arresting judgment because of a defective indictment, information or complaint; quashing an arrest or search warrant; or suppressing evidence. . . .
against double jeopardy for the same "offense." The court apparently tacitly assumed that "offense," as used in this section of the Constitution, is defined narrowly as set forth in the Criminal Code, which includes only "criminal cases," rather than broadly, as in the Code of Criminal Procedure.

CONCLUSION

It is not unforeseeable that the Supreme Court of the United States should make the double jeopardy clause of the fifth amendment applicable to the states as a minimum essential of due process. This decision would immediately overrule Palko v. Connecticut and no state could appeal an adverse decision, regardless of any state statute or court rule to the contrary. However, in the absence of a change in the present status of an ordinance prosecution from civil to criminal, this type of case would remain immune to all arguments of double jeopardy. However, in view of the fact that a guilty and indigent defendant is faced with imminent imprisonment to enforce a fine which he is unable to pay, it is quite possible and often urged that additional criminal safeguards should be afforded to such a defendant even though the courts continue to characterize the ordinance violation cases as civil.

Allyn A. Brooks

46 Ill. Const. art. II, § 10 (1867).