1995

State of Utah v. Bret Ray Arbon and Kimberly Sue Milligan : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	Case No. 950277-CA
v.	:	
BRET RAY ARBON,	:	Priority No. 10
and	:	
KIMBERLY SUE MILLIGAN,	:	
Defendants/Appellants.	:	

BRIEF OF APPELLEE

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APPEALS FROM INTERLOCUTORY ORDERS DENYING DEFENDANTS' MOTIONS TO DISMISS PROSECUTIONS ON DOUBLE JEOPARDY GROUNDS, IN THE SECOND JUDICIAL CIRCUIT COURT IN AND FOR DAVIS COUNTY, STATE OF UTAH, THE HONORABLE K. ROGER BEAN, PRESIDING.

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ORAL ARGUMENT REQUESTED
PUBLISHED OPINION WARRANTED

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JURISDICTION AND NATURE OF PROCEEDINGS

Defendants appeal from interlocutory orders denying their motions to dismiss their criminal prosecutions on double jeopardy grounds. This Court has jurisdiction to hear the cases pursuant to Utah Code Ann. § 78-2a-3(2)(e) (Supp. 1994).

STATEMENT OF THE ISSUE PRESENTED AND STANDARD OF APPELLATE REVIEW

1. Does the administrative revocation of a driver's license constitute punishment for double jeopardy purposes?

The trial court's determination that an administrative driver's license revocation does not amount to a criminal punishment under the Double Jeopardy Clause is a conclusion of law that is reviewed for correctness. Cf. United States v. Rogers, 960 F.2d 1501, 1506 (10th Cir. 1992) ("We review de novo the legal conclusions made by the district court regarding double jeopardy claims.").

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

U. S. Const. Amend. V:

> No person shall be held to answer for a capitol, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The text of any other pertinent provisions, statutes or rules is incorporated in the argument section of this brief.

STATEMENT OF THE CASE

Defendants were arrested for driving while under the influence of alcohol and had their driver's licenses revoked administratively (Record of State v. Arbon at 4, 20 [hereinafter "R1."]; record of State v. Milligan at 3, 15 [hereinafter "R2."]). Upon being charged in criminal court with driving while under the influence of alcohol, defendants filed motions to dismiss their prosecution on double jeopardy grounds (R1. at 19-29; R2. at 15-25). Specifically, defendants claimed that the administrative revocation of their driving privileges constituted a punishment and that a criminal prosecution for DUI would subject them to a second punishment for the same offense (id.). The trial court denied defendants' motions without comment (R1. 53-54; R2. 48-49). (Copies of the trial court's orders are attached hereto as addendum A.)

Defendants petitioned this Court for permission to appeal from the trial court's interlocutory orders, and the State recommended that the petitions be granted (R1. at 126). This Court granted defendants' petitions and ordered the cases consolidated on appeal.

STATEMENT OF THE FACTS

The facts underlying the charges against defendants are not apparent from the records on appeal. However, because the issue raised on appeal is purely a matter of law that is not fact-dependant, the procedural facts articulated in the Statement of the Case are sufficient to allow this Court to dispose of defendants' appeals.

SUMMARY OF THE ARGUMENT

Defendants' prosecutions for driving while under the influence of alcohol are not barred by double jeopardy simply because their driver's licenses were suspended in earlier administrative proceedings. The purpose of suspending the driver's license of someone who has driven while under the influence of alcohol is "to protect the public, not to punish individuals drivers." Ballard v. State Motor Vehicle Division, 595 P.2d 1302, 1305 (Utah 1979). Because suspending the driving privileges of an intoxicated driver advances the nonpunitive goal of protecting the public from a hazardous driver, an administrative license suspension does not constitute a "criminal punishment" under the Double Jeopardy Clause of the Fifth

Amendment. This Court should therefore affirm the trial court's denial of defendants' motions to dismiss.

ARGUMENT

This case presents an issue of first impression in Utah. Although another case involving a double jeopardy claim in the context of asset forfeiture proceedings is now pending before this Court, see State v. Davis, Case No. 940574-CA, this case implicates another body of case law not involved in the area of asset forfeiture. Accordingly, in order to put the issue raised in its proper historical context, the State has provided a more extensive discussion of double jeopardy jurisprudence than it would normally include in a brief to this Court.

POINT I

THE DEVELOPMENT OF DOUBLE JEOPARDY JURISPRUDENCE FROM PEARCE TO KURTH RANCH

The Fifth Amendment's Double Jeopardy Clause provides as follows: ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb . . .." U.S. Const. Amend. V. Over a century ago, the United States Supreme Court observed that "[i]f there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offence." Ex parte Lange, 18 Wall. 163, 168 (1874). The Court has therefore interpreted the provision to extend three distinct protections to criminal defendants:

> The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal. It protects against a second

> prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076 (1969).

In this case, only the third prong of Pearce, the prohibition against multiple punishments for the same offense, is at issue. Specifically, defendants allege that they were punished by the State when the State administratively revoked their driving privileges for driving while under the influence of alcohol. Accordingly, defendants claim that the State cannot seek to punish them a second time and that the State is therefore barred from prosecuting them in criminal court for driving under the influence of alcohol. In making their argument, defendants rely primarily on three cases: United States v. Halper, 490 U.S. 435, 109 S. Ct. 1892 (1989); Department of Revenue of Montana v. Kurth Ranch, ___ U.S. ___, 114 S. Ct. 1937 (1994); and Austin v. United States, ___ U.S. ___, 113 S. Ct. 2801 (1993). As demonstrated below, defendants have read far too much into Halper and Kurth Ranch, and their reliance on Austin is wholly misplaced because that case arises under the Eighth Amendment Excessive Fines Clause rather than the Fifth Amendment Double Jeopardy Clause at issue here.

A. The Supreme Court Has Nearly Always Held that Civil Sanctions are Not Punishment for Double Jeopardy Purposes.

Although multiple criminal prosecutions and multiple criminal punishments for the same offense are impermissible, the

Supreme Court has held that "Congress may impose both a criminal and a civil sanction in respect to the same act or omission." United States v. One Assortment of 89 Firearms, 465 U.S. 354, 359, 104 S. Ct. 1099, 1103 (1984) (quoting Helvering v. Mitchell, 303 U.S. 391, 399, 58 S. Ct. 630, 633 (1938)). Where both the civil and criminal sanctions are imposed in the same proceeding, there is no double jeopardy violation. Halper, 490 U.S. at 450. Where there are two separate proceedings and one is criminal while the other is civil, there ***may*** be a double jeopardy violation based on Pearce's prohibition against multiple punishments if the defendant can demonstrate that the civil sanction was exacted solely as a punishment. Halper, 490 U.S. at 448-49. The standard for establishing that a civil sanction constitutes punishment for double jeopardy purposes is, however, very demanding.

Historically, the Supreme Court found that sanctions arising from civil actions held after completion of a criminal prosecution did not violate the double jeopardy clause.[1] See, e.g., 89 Firearms, 465 U.S. at 366 (civil forfeiture obtained after acquittal on charge of illegal sale of firearms without a

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[1] The sequential order of the criminal and civil proceedings does not impact the analysis of whether a defendant has been subjected to "multiple punishments" for the same offense. See, e.g., United States v. Tilley, 18 F.3d 295, 298 n.5 (5th Cir.) ("Regardless of the order of the civil and criminal proceedings, the Double Jeopardy Clause will ban the second sanction if both the first and the second sanction are deemed punishment." (citations omitted)), cert. denied, ___ U.S. ___, 115 S. Ct. 574 (1994). Accord United States v. Mayers, 897 F.2d 1126, 1127, reh'g and reh'g en banc denied, 907 F.2d 1145 (11th Cir.), cert. denied, ___ U.S. ___, 111 S. Ct. 178 (1990).

license upheld against double jeopardy challenge); One Lot Emerald Cut Stones and One Ring v. United States, 409 U.S. 232, 237, 93 S. Ct. 489, 493 (1972) (civil forfeiture after an acquittal on smuggling charge upheld); Rex Trailer Co. v. United States, 350 U.S. 148, 154, 76 S. Ct. 219, 222 (1956) (upholding civil damages suit filed after conviction of fraud). In short, the Supreme Court concluded that "the risk to which the [Double Jeopardy] Clause refers is not present in proceedings that are not 'essentially criminal [prosecutions].'" Breed v. Jones, 421 U.S. 519, 528, 95 S. Ct. 1779, 1785 (1975).

The 89 Firearms line of authority applied a two-part test based primarily on principles of statutory construction to determine whether a particular civil penalty was so punitive as to be deemed criminal punishment:

> First we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly, a preference for [a civil] label or [a criminal label]. Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.

89 Firearms, 465 U.S. at 362-63 (quoting United States v. Ward, 448 U.S. 242, 248, 100 S. Ct. 2636, 2641 (1980) (internal citations omitted)).

In United States v. Halper[2], the Court clarified the significance of its earlier double jeopardy cases:

> The relevant teaching of [such cases as Helvering, Hess, Rex Trailer and Emerald Cut Stones] is that the Government is entitled to rough remedial justice, that is, it may demand compensation according to somewhat imprecise formulas, such as reasonable liquidated damages or a fixed sum plus double damages, without being deemed to have imposed a second punishment for the purpose of double jeopardy analysis. These cases do not tell us, because the problem was not presented in them, what the Constitution commands when one of those imprecise formulas authorizes a supposedly remedial sanction that does not remotely approximate the Government's damages and actual costs, and rough justice becomes clear injustice.

Halper, 490 U.S. at 446.

The Halper Court then indicated that "the [statutory] labels 'criminal' and 'civil' are not of paramount importance." Id. at 447. Rather, because the double jeopardy protection against multiple punishments for the same offense is "intrinsically personal[, its] violation can be identified only by assessing the character of the actual sanctions imposed on the individual by the machinery of the state." Id. (footnote

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[2] In Halper, the defendant was the manager of a medical laboratory that provided services to Medicare patients. Halper submitted 65 falsified claims for reimbursement that resulted in his company being overpaid a total of $585. Halper was convicted of 65 violations of the false-claims act and was fined $5,000 and sentenced to two years of incarceration. Subsequently, the government was granted summary judgment against Halper in an action filed under the civil false-claims act, which mandated the assessment of a fixed penalty of $2,000 for each of the 65 false claims filed by Halper for a total of $130,000.

omitted). The Court explained:

> This is not to say that whether a sanction constitutes punishment must be made from the defendant's perspective. On the contrary, our cases have acknowledged that for the defendant even remedial sanctions carry the sting of punishment. Rather, we hold merely that in determining whether a particular civil sanction constitutes criminal punishment, it is the purpose actually served by the sanction in question, not the underlying nature of the proceeding giving rise to the sanction, that must be evaluated.

Id. at 447 n.7.

Against this backdrop, the Court articulated its test for determining whether a civil sanction constitutes criminal punishment for double jeopardy purposes and stated the holding of Halper as follows:

> We therefore hold that under the Double Jeopardy Clause a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but ***only*** as a deterrent or retribution.

Halper, 490 U.S. at 448-49 (emphasis added).

Despite the clarity of the Court's express holding, defendants argue that another sentence in the Halper opinion creates ambiguity about what test for determining whether a civil sanction constitutes punishment should be applied to their case. Br. of Appellants at 4-5. Instead of the test articulated in the Court's holding, defendants argue the following language is controlling:

> [A] civil sanction that cannot be said solely to serve a remedial purpose, but rather can

> only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

Halper, 490 U.S. at 448.

On their face, the above passages from the Halper opinion are difficult to reconcile. However, when viewed in the context of the Halper case itself, it is clear that the Court did not intend to hold that the existence of any incidental retributive or deterrent effect of an otherwise remedial measure will render that remedial measure punishment for double jeopardy purposes. The Double Jeopardy Clause is implicated only in those rare instances where a purportedly remedial measure becomes so grossly disproportionate to the harm suffered by the government as a result of the defendant's conduct that it totally loses its remedial characteristics and becomes purely punitive.

B. The Halper Court Made Clear That Its Holding Was Not Intended To Require Sweeping Changes In The Way Civil Sanctions Are Viewed Under The Double Jeopardy Clause.

The Halper Court emphasized the limited scope of its holding and said it was announcing a rule for the "rare case, the case . . . where a fixed-penalty provision subjects a prolific but small-gauge offender to a sanction overwhelmingly disproportionate to the damages he has caused." Id. at 449. The Halper rule "is one of reason" that should seldom result in civil sanctions being deemed punishment. Id. As the Halper Court concluded: "[T]he only proscription established by our ruling is that the Government may not criminally prosecute a

defendant, impose a criminal penalty upon him, and then bring a separate civil action based on the same conduct and receive a judgment that is not rationally related to the goal of making the Government whole." Id. at 451.

Under Halper, courts must first decide whether the sanction sought "bears [a] rational relation to the goal of compensating the Government for its loss." Id. at 449. If so, then the sanction is proper and should not be deemed punishment for double jeopardy purposes. However, if a defendant demonstrates that the sanction "***appears*** to qualify as 'punishment' in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment." Id. (footnote omitted) (emphasis added). In providing that accounting, the Government need not be exacting but can instead use "imprecise formulas" to approximate its damages. Id. (emphasizing that its decision "cast no shadow on [its] time-honored judgments" in which it had accepted such imprecise formulas as liquidated damages for calculating remedial sanctions). Trial courts have "the discretion to determine on the basis of such an accounting the size of the civil sanction the Government may receive without crossing the line between remedy and punishment." Id. (citations omitted).

Having explained its standard for determining whether a civil sanction constitutes punishment for double jeopardy purposes, the Supreme Court noted its agreement "with the

District Court['s determination] that the disparity between its approximation of the Government's cost [($16,000)] and Halper's $130,000 liability [was] sufficiently disproportionate that the sanction constitutes a second punishment in violation of double jeopardy[.]" Halper 490 U.S. at 452. Nevertheless, the Court remanded the case so that the Government could have "an opportunity to present . . . an accounting of its actual costs arising from Halper's fraud, to seek an adjustment of the District Court's approximation, and to recover its demonstrated costs." Id.

The Halper Court's decision to remand the case makes clear that civil sanctions having retributive or deterrent consequences in addition to their primarily remedial functions are not punishment per se for double jeopardy purposes. Rather, monetary remedies that appear punitive must be evaluated on a case-by-case basis to see if they are in fact punishment or are instead "rationally related to the goal of making the Government whole." Id. at 451 (footnote omitted). If the sanction bears a rational relationship to a nonpunitive government objective, or the government can demonstrate that the amount of the sanctions is roughly proportional to its damages based on an accounting of its damages, then any punitive characteristics that incidentally accompany the sanction will not result in the sanction being deemed a punishment for double jeopardy purposes.

C. The Supreme Court Recently Recognized the Continuing Vitality of the Halper Test for Determining Whether A Civil Sanction Constitutes Punishment For Double Jeopardy Purposes.

In its most recent double jeopardy case, Dept. of Revenue of Montana v. Kurth Ranch, ___ U.S. ___, 114 S. Ct. 1937, 1948 (1994), the Court held that a purported "tax" that is "the functional equivalent of a successive criminal prosecution" may not follow a separate criminal punishment. In reviewing the Montana tax, the Court first noted that the legislative history of the tax demonstrated it was intended to deter drug use, Id. at 1946, and that the tax rate was high, Id. at 1947. The Court made clear, however, that "while a high tax rate and deterrent purpose lend support to the characterization of the drug tax as punishment, these features, in and of themselves, d[id] not necessarily render the tax punitive." Id. (citation omitted). That notion squares with the Court's recognition in Halper that even remedial sanctions carry the sting of punishment, Halper, 490 U.S. at 447 n.7. More importantly, it confirms that civil sanctions and taxes will not be deemed "punishment" for double jeopardy purposes simply because they are punitive in part.

The Kurth Ranch majority explained why several other factors prompted it to conclude that the Montana tax was in fact not a tax but instead a punishment. Perhaps most telling was the Court's observation that liability under the unique Montana drug stamp tax at issue in Kurth Ranch was statutorily conditioned upon the commission of a crime. Id. at 1947. Indeed, liability

did not even arise unless the "taxpayer" was arrested. Id. Accordingly, arrestees "constitute[d] the entire class of taxpayers subject to the Montana tax." Id. Finally, the Court emphasized that the tax was levied on the taxed goods at a time when the "taxpayer" neither owned nor possessed the goods. Id. at 1948. Considering the totality of the above factors, the Court concluded that "[t]aken as a whole, [Montana's] drug tax [wa]s a concoction of anomalies, too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment for purposes of Double Jeopardy analysis." Id.

While not applying Halper ***per se***, the Court in Kurth Ranch made clear that the Halper definition of "punishment" for double jeopardy purposes was still valid. For instance, the majority relied on Halper for the proposition that a civil sanction constitutes punishment for double jeopardy purposes if "'the sanction may not be fairly characterized as remedial, but only as a deterrent or retribution.'" Kurth Ranch, 114 S. Ct. at 1945 (quoting Halper, 490 U.S. at 448-49). Similarly, Chief Justice Rehnquist, writing in dissent, emphasized that the proper inquiry was whether the tax rate was "so high that it can only be explained as serving a punitive purpose." Id. at 1952. While the majority concluded that the Montana drug stamp tax proceedings were the "functional equivalent of a successive prosecution," Chief Justice Rehnquist concluded that "the Montana tax has a nonpenal purpose of raising revenue, as well as the

legitimate purpose of deterring conduct, such that it should be regarded as a genuine tax[, and not punishment,] for double jeopardy purposes." Id. Justice O'Conner, likewise said that: "Our double jeopardy cases make clear that a civil sanction will be considered punishment to the extent that serves only the purposes of retribution and deterrence, as opposed to furthering any nonpunitve objective." Id. at 1953 (citing Halper, 490 U.S. at 448-49). Finally, Justice Scalia, joined by Justice Thomas, argued that the double jeopardy clause prohibits only multiple prosecutions, not multiple punishments. Accordingly, Justice Scalia advocated a return to the pre-Halper "civil" versus "criminal" proceeding distinction and urged that Halper be overruled. Id. at 1955-60.

In sum, the Halper test for determining whether a civil sanction is remedial or punitive is not altered, but is indeed revitalized, under Kurth Ranch. The Court in both cases recognized that just because a non-criminal sanction is partly punitive does necessarily mean the sanction constitutes punishment for double jeopardy purposes. Accordingly, despite defendants' attempts to the contrary, Halper's demanding standard for deeming a civil sanction punishment for double jeopardy purposes should not be confused with the easily met definition of punishment for purposes of the Excessive Fines Clause of the Eighth Amendment that the Court announced in Austin v. United States, ___ U.S. ____, 113 S. Ct. 2801 (1993).

D. Halper's Definition of Punishment for Fifth Amendment Purposes Is More Stringent Than Austin's Definition of Punishment for Eighth Amendment Purposes.

Defendants essentially attempt an end-run around the express holding of Halper by claiming that under Austin anytime an otherwise remedial sanction is accompanied by an element of deterrence or retribution -- no matter how slight that punitive element might be -- the sanction is deemed a punishment per se for both Eighth and Fifth Amendment purposes. Defendants' analysis of Halper in light of Austin -- though perhaps appealing because of its simplicity -- is fundamentally flawed and ignores the more recent double jeopardy case of Kurth Ranch.

The defendant in Austin was convicted of state drug charges. The United States then filed an in rem action seeking forfeiture of Austin's mobile home and body shop, based on his having retrieved two grams of cocaine from the mobile home and distributed them to an undercover agent at the body shop. Although Austin advanced no double jeopardy claim -- presumably because the two cases were brought by separate sovereigns -- he did argue that the forfeiture violated the Excessive Fines Clause of the Eighth Amendment. Both the trial court and the Eighth Circuit Court of Appeals rejected that claim and held the Excessive Fines Clause was inapplicable to civil in rem forfeitures.

The Supreme Court reversed, holding that any sanction that is "at least in part, punishment" is subject to review under

the Excessive Fines Clause. Austin, 113 S. Ct. at 2806. In so holding, the Court relied on ***dicta*** contained in Halper. Significantly, however, the Court did not indicate that its definition of punishment for Eighth Amendment purposes was applicable to double jeopardy claims. On the contrary, the Austin Court cited 89 Firearms and Emerald Cut Stones for the proposition that the Double Jeopardy Clause does not apply to civil forfeiture proceedings where the forfeiture could properly be characterized as remedial and implied that Halper's prohibition of a civil sanction following a criminal punishment would apply only if the civil sanction may not fairly be characterized as remedial. Austin, 114 S. Ct. at 2805 n.4.

Austin's assertion that a civil forfeiture is subject to review under the Eighth Amendment if it is punitive "at least in part" cannot be squared with Halper's holding that a civil sanction is punishment for double jeopardy purposes only if it "the sanction may not be fairly characterized as remedial, but only as a deterrent or retribution." Moreover, while the Court in Halper recognized that defendant will feel the "sting of punishment" from even "remedial sanctions," Halper, 490 U.S. at 447 n.7, the Austin Court extended no similar latitude in determining whether to subject an only partly punitive civil sanction to Eighth Amendment review.

While making much of the fact that the Court in Austin borrowed dicta from Halper to articulate a definition of punishment for Eighth Amendment purposes, defendants fail to

recognize that the Court has never borrowed language from Austin to define "punishment" for Fifth Amendment purposes. Quite the contrary, in Kurth Ranch (the Court's only double jeopardy case to be decided after both Halper and Austin) the majority cited Austin only once. Even then, the Court merely cited Austin for the unremarkable proposition that a civil forfeiture may violate the Eighth Amendment's proscription against excessive fines. Kurth Ranch, 114 S. Ct. at 1945. Writing in dissent, Justice Scalia cited Austin in a similar fashion. Id. at 1958 n.2.

If the Supreme Court really intended the Austin definition of punishment under the Excessive Fines Clause to be applicable in double jeopardy cases as defendants suggest, Austin would have figured more prominently in Kurth Ranch. Instead, as discussed above, the Court repeatedly used language similar that contained in its ***holding*** in Halper rather than the Halper ***dicta*** upon which Austin was based.

The Minnesota Court of Appeals recently rejected attempts by two DUI defendants to rely on Austin as the basis for their double jeopardy claims for precisely the reasons advanced by the State above:

> The defendants in these appeals argue that civil sanction is "punishment" under Halper unless it can "fairly be said to solely serve a remedial purpose." But this statement is not the explicit holding of Halper. . . . Moreover, this "solely remedial" language is derived from a broader analysis of the civil-criminal distinction for purposes of due process. That analysis does not apply in determining whether a civil

> sanction is "punishment."
>
> The defendants argue that the Supreme Court in Austin v. United States pointed to the "solely remedial" language as the holding of Halper. But Austin involves the Excessive Fines Clause of the Eighth Amendment, not the Double Jeopardy Clause. In a more recent opinion that does involve double jeopardy, [Kurth Ranch,] the Court has referred to the explicit Halper holding . . . as the holding of that case.

State v. Hanson, 532 N.W.2d 598, 601 (Minn. App. 1995) (citations omitted).

When viewed in context, the passage from Halper upon which defendants predicate their claim is out-of-sync with Halper itself as well as the remaining body of double jeopardy jurisprudence. Given that the Halper Court stated that its rule was one of "reason" that should result in civil monetary sanctions being deemed punishments in only "rare" case, defendants' expansive interpretation of Halper based on the Austin Eighth Amendment "excessive fines" standard is unfounded. Rather, as demonstrated below, numerous appellate courts have rejected double jeopardy claims similar to that advanced by defendants based on their determination that Halper was intended to be read very narrowly. Indeed, many have held that Halper and its progeny apply only to monetary sanctions and that non-monetary sanctions, such a license revocations, are beyond the reach of the Halper test.

POINT II

THE RULE ANNOUNCED IN HALPER APPLIES ONLY TO MONETARY CIVIL SANCTIONS AND WAS NEVER INTENDED TO INVALIDATE NON-MONETARY SANCTIONS THAT ADVANCE LEGITIMATE GOVERNMENT OBJECTIVES

When examining double jeopardy claims involving non-monetary sanctions, several courts have refused to apply Halper's "particularized assessment" test in favor of looking to Halper for only general guidance. See, e.g., Loui v. Board of Medical Examiners, 889 P.2d 705, 711 (Hawaii 1995) (Halper test does not apply to question of whether suspension of physician's license following his conviction of sexual abuse and kidnapping constituted a second punishment but looking "more broadly at the principles enunciated in Halper" to reject double jeopardy claim); Manocchio v. Kusserow, 961 F.2d 1539, 1542 (11th Cir. 1992) (Halper inapplicable to physician's claim that five year suspension from participation in Medicare programs constituted a punishment because it did not involve the assessment of a monetary sanction and finding suspension was remedial measure to protect program); United States v. Reed, 937 F.2d 575, 577 (11th Cir. 1991) ("Halper test simply does not apply" to issue of whether 30-day disciplinary suspension of letter carrier constituted a punishment that would bar subsequent prosecution for conduct underlying suspension but Halper was nonetheless helpful for "framing [the court's] analysis"); Greene v. Sullivan, 731 F.Supp. 838, 840 (E.D.Tenn. 1990) (Halper inapplicable because the government was not seeking any monetary

recovery from defendant but only seeking to bar him from participating in Medicaid programs).

Similarly, Halper is not directly applicable to the question of whether an administrative license revocation constitutes punishment for double jeopardy purposes. Because revoking a person's driver's license in no way compensates the government for the damage caused by the inebriated driver, some courts have looked beyond the narrow holding of Halper to resolve double jeopardy claims similar to those advanced by defendants. See, e.g., State v. Higa, 897 P.2d 928, 933 (Hawaii 1995) (holding Halper test inapplicable because driver's license suspension did compensate government for monetary loss, but applying "broader principles enunciated in Halper" to find license suspension was a remedial measure designed to protect the public from unsafe drivers). Accord Ellis v. Pierce, 282 Cal.Rprt. 93, 95 (Cal.App. 1 Dist. 1991); Freeman v. State, 611 So.2d 1260, 1261 (Fla. App. 2 Dist. 1992) (per curiam).

Other courts have emphasized that permission to drive on the public roads is a privilege voluntarily granted by the government and that revocation of a driver's license is therefore not a punishment. Johnson v. State, 622 A.2d 199, 205 (Md. App. 1993). Cf. Helvering v. Mitchell, 303 U.S. 391, 398, ___ S. Ct. ___, ___ (1938) (revocation of a privilege voluntarily granted "is characteristically free of the punitive criminal element" necessary to deem such action a punishment for double jeopardy purposes).

In keeping with the cases cited, this Court should reject defendants' double jeopardy claims on the ground that the privilege of having a driver's license is one that is voluntarily granted by the State and that revocation of that privilege in the interest of public safety is therefore a remedial measure. The mere fact that defendants may incidentally be inconvenienced by that action, or even feel the "sting of punishment," does not mean that they have been subjected to a criminal punishment as envisioned by the Supreme Court in Halper. Such suspensions are reasonable measures designed to protect the public safety by quickly removing dangerous drivers from the public highways. Indeed, everything about the driver's license scheme is aimed at ensuring that only those people who can safely drive a vehicle are permitted to carry a driver's license.[3]

POINT III

EVEN APPLYING A HALPER ANALYSIS, THE ADMINISTRATIVE SUSPENSION OR REVOCATION OF A DRIVER'S LICENSE DOES NOT CONSTITUTE PUNISHMENT FOR DOUBLE JEOPARDY PURPOSES

The United States Supreme Court's double jeopardy cases dealing with the question of whether civil sanctions constitute

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[3] For instance, Utah Code Ann. § 53-3-206 (1994) requires that the driver's license division test each applicant's: 1) eyesight, 2) ability to read and understand highway signs, 3) physical and mental abilities and 4) ability to exercise ordinary and responsible control driving a motor vehicle. Under Utah Code Ann. § 53-3-208 (1994), the division may impose safety restrictions on a licensee (i.e., requiring a licensee with vision problems to wear eyeglasses while driving). Revoking a license of someone who has engaged in such hazardous driving behavior as driving while under the influence of alcohol is but another reasonable means of protecting the public from unsafe drivers.

criminal punishment, including Halper and Kurth Ranch, all share a common theme. Civil sanctions and taxes will not be deemed punishment for double jeopardy purposes unless "the clearest proof" demonstrates that they have lost their remedial or revenue-generating characteristics and become solely punitive in "purpose and effect." 89 Firearms, 465 U.S. at 365. Similarly, an administrative license revocation should not be considered punishment for double jeopardy purposes unless the clearest proof demonstrates that administrative license revocations have lost their safety regulating characteristics and become solely punitive in both purpose and effect. As demonstrated below, numerous courts have relied on Halper to determine that the non-monetary sanction of revoking or suspending a person's driving privileges does not constitute punishment for double jeopardy purposes.

A. Under Halper, A Civil Sanction May Carry The "Sting of Punishment" Without Being Deemed A Criminal Punishment For Double Jeopardy Purposes.

Even if license revocations were construed as a "civil remedy" within the meaning of Halper, it is clear that revoking the driving privileges of people who have revealed their propensity to drive while under the influence of alcohol is a remedial measure intended to protect the public from hazardous drivers.

In 1983, the Utah Legislature revamped Utah's DUI and license suspension laws. In so doing, the Legislature passed

Utah Code Ann. § 53-3-222 (1994) to make clear that its purpose in requiring license suspensions for apparent violations of section 41-6-44 was not to exact a punishment from the driver, but rather to protect public safety:

> The Legislature finds that a primary purpose of this title relating to suspension or revocation of a person's license or privilege to drive a motor vehicle for driving with a blood alcohol content above a certain level or while under the influence of alcohol, any drug, or a combination of alcohol and any drug, or for refusing to take a chemical test as provided in Section 41-6-44.10, is protecting persons on the highways by quickly removing from the highways those persons who have shown they are safety hazards.[4]

That the Legislature's intent in requiring suspensions a person's driving privileges for violations of section 41-6-44 was to protect the public safety is bolstered by the fact that the Legislature prohibited the Division of Driver's Licenses from reinstating the suspended license following a driver's DUI

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[4] Defendants make much of the phrase "a primary purpose" and suggest that the legislature implicitly acknowledged that it had other "primary purposes" for permitting administrative license revocations. Although defendants indicate that their review of the legislative history of section 53-3-222 revealed no insight into what those other purposes may have been, they proceed as though the legislative history indicates that the legislature had punitive purposes in mind. While that may be true with respect to individual legislators, the fact remains that only one purpose -- the desire to protect the public from unsafe drivers -- garnered enough support to merit codification.

Moreover, during the 1995 legislative term, the legislature amended section 53-3-222 to make clear that the sole purpose of administrative license suspensions for driving while under the influence of alcohol was to promote swift action in the interest of protecting the public safety. Specifically, the legislature substituted the words "the purpose" for its earlier language of "a primary purpose." Utah Code Ann. § 53-3-222 (Supp. 1995).

conviction until the driver completes statutorily prescribed alcohol and drug dependency assessments, education, treatment and rehabilitation. See Utah Code Ann. § 41-6-44(8)(b)(i) (1994). Indeed, the Legislature has even prohibited license reinstatement for drivers convicted of three violations within a six year period unless a licensed alcohol or drug dependency facility certifies that they no longer use alcohol or drugs in an abusive or illegal manner. See Utah Code Ann. § 41-6-44(8)(b)(iii) (1994). If deterrence and retribution were the Legislature's ***only*** purpose for requiring suspension of driving privileges for violations of section 41-6-44, it would not have enacted such elaborate safeguards to ensure that those privileges were not reinstated until after convicted DUI offenders had taken significant steps to show that they were no longer a threat to the public safety.

Even before the enactment of section 53-3-222, the Utah Supreme Court recognized that the purpose of suspending a person's driving privileges for violations of section 41-6-44 was protection of public safety:

> The purpose of this administrative [license revocation] procedure is not to punish the inebriated drivers; such persons are subject to separate criminal prosecution for the purpose of punishment. The administrative revocation proceedings are to protect the public, not to punish individual drivers.

Ballard, 595 P.2d at 1305. Accord City of Orem v. Crandall, 760 P.2d 920, 922 (Utah App. 1988) (post-Halper case rejecting claim that administrative license suspension hearing was a criminal

proceeding that barred subsequent criminal prosecution for DUI). See also Barnes v. Tofany, 261 N.E.2d 617, 620 (N.Y. Ct. App. 1970) ("the suspension or revocation of the privilege of operating a motor vehicle is essentially civil in nature, having as its aims chastening of the errant motorist, and, more importantly, the protection of the public from such a dangerous individual"); People v. Esposito, 521 N.E.2d 873, 879-82 (Ill. 1988); Ruge v. Kovach, 467 N.E.2d 673, 678-81 (Ind. 1984); Heddan v. Dirkswager, 336 N.W.2d 54, 59-63 (Minn. 1983) (all holding that due process is not offended by summary suspension of driver's license because state has important interest in keeping its highways safe by removing drunken drivers from its roads).

Defendants suggest that Ballard is no longer valid because Halper eliminated the distinction between civil and criminal proceedings for double jeopardy purposes. That argument is flawed for two reasons. First, the Court in Halper did not eliminate that distinction; the Court merely held, as it had implied in its earlier cases, that the distinction was not "paramount" because civil penalties that are not "rationally related to the goal of making the Government whole" can become punitive. Halper, 490 U.S. at 447, 451. More importantly, Ballard satisfies the Halper criteria. Specifically, the Ballard Court found that the purpose of license revocations is to protect the public safety and not to punish the driver. Nothing in Halper, Kurth Ranch or even Austin calls for a reconsideration of that finding. Until the Utah Supreme Court overturns Ballard,

all lower courts in Utah are bound by the Ballard Court's determination that the purpose of administrative drivers' license revocations for DUI and related offenses is to protect the public safety. See generally State v. Menzies, 889 P.2d 393, 398-99 (Utah 1994) (discussing importance of stare decisis and heavy burden that must be met before overturning precedent). Accordingly, this Court need look no further than Ballard to affirm the trial court's denial of defendants' motions to dismiss.

Even if this Court were inclined to revisit the issue of whether administrative license suspensions constitute punishment for double jeopardy purposes, it should follow the majority and better reasoned view and hold that they do not.

In the years between Halper and Kurth Ranch every appellate court that addressed double jeopardy issues akin to that raised by defendants rejected those arguments. See, e.g., State v. Murray, 644 So.2d 533, 535 (Fla. App. 4 Dist. 1994) ("Because the primary purpose of [suspending a driver's license for DUI] is to provide an administrative remedy for public protection, and not to punish the offender, a double jeopardy prohibition does not arise."); Johnson v. State, 622 A.2d 199, 204-06 (Md.App. 1993) (purpose of suspension is to protect public safety and deter drunk driver; punitive effect was incidental and did not elevate suspension to level of punishment required under Halper); Butler v. Dept. of Public Safety & Corrections, 609 So.2d 790, 795-97 (La. 1992) (while license suspension statute

"is to some extent deterrent and thus of a punitive nature . . . [its] primary effect is remedial; it removes those drivers from our state highways who have proven to be reckless or hazardous . . . [and therefore does not] amount to a second punishment for the same offense"); Vermont v. Strong, 605 A.2d 510, 513 (Vt. 1992) (summary license suspension is not punishment under Halper because it "serves the rational remedial purpose of protecting public safety by quickly removing potentially dangerous drivers from the roads"); State v. Nichols, 819 P.2d 995, 1000 (Ariz. App. 1991) (while license suspension "may be punitive from the viewpoint of the license holder . . . its purpose is to remove from our highway drivers who are a danger to the public").

The double jeopardy analysis provided by the Vermont Supreme Court in Strong is typical of the cases cited above. In Strong, the court explained the purpose of its license suspension statute:

> The summary suspension scheme serves the rational remedial purpose of protecting public safety by quickly removing potentially dangerous drivers from the roads. License reinstatement requirements reinforce this purpose. Suspended licenses are reinstated only after operators have met screening and treatment requirements designed to identify unsafe drivers and to help them to the point where they no longer pose the same risk. The minimum suspension period is not excessive in relation to the remedial purpose, and we must defer to the Legislature in determining the remedial action necessary to achieve its goals.

Strong, 605 A.2d at 513 (citations omitted).

Having identified the remedial purpose of the Vermont suspension scheme, the Strong Court acknowledged and then rejected the defendant's claim that Halper had fundamentally altered double jeopardy analysis:

> Our reading of Halper is more narrow than that of defendant. The Halper Court pointed out that its holding that a particular civil penalty was punitive "is a rule for the rare case." [490 U.S.] at 449, 109 S.Ct. at 1902. The rule requires finding that the civil sanction may fairly be characterized "***only*** as a deterrent or retribution." Id. (emphasis added). [T]he fact that a statute designed primarily to serve remedial purposes incidently serves the purpose of punishment as well does not mean that the statute results in punishment for double jeopardy purposes.

Strong, 605 A.2d at 514 (some quotation marks and citations omitted).

Finally, the Strong Court emphasized that other courts had uniformly rejected similar double jeopardy claims:

> We note that no court has held that the suspension of a motor vehicle operator's license is so punitive as to involve a criminal punishment for double jeopardy purposes. The decisions prior to Halper held that license suspension is not a criminal punishment invoking double jeopardy protection. The few decisions since Halper hold similarly. In short, a "bright line" has developed because the nonpunitive purpose of the license suspension is so clear and compelling. We see nothing in Halper that induces us to cross that line.

Id. (citations omitted).

Strong could well have been written in response to defendant's motion in this case. As discussed above, Utah's license suspension scheme, like Vermont's, is driven by the

desire to protect public safety and includes elaborate safeguards to ensure that driving privileges are not reinstated until the offender no longer poses a risk to society. While individual driver's may feel the "sting of punishment" when their driving privileges are revoked, that sting is merely incidental to the advancement of compelling public safety considerations. Accordingly, under Halper, driver's license suspensions and revocations cannot be deemed punishment for double jeopardy purposes because "administrative revocation proceedings are [designed] to protect the public, not to punish individual drivers." Ballard, 595 P.2d at 1305.

In the year since Kurth Ranch was decided, DUI defendants across the country have, with renewed vigor, argued that their criminal prosecutions were barred because they had already been punished by having their driver's licenses revoked in administrative hearings. As defendants properly note, those arguments met with occasional success in trial courts. Br. of Appellants at 10-11. Defendants fail to acknowledge, however, that such claims have been almost universally rejected by appellate courts -- even in light of Austin and Kurth Ranch. See, e.g., State v. Savard & Greeley, 659 A.2d 1265, 1266-68 (Me. 1995); State v. Young, 530 N.W.2d 269, 277-78 (Neb. App. 1995); State v. Murray, 644 So.2d 533, 535 (Fla. App. 4 Dist. 1994); Hanson, 532 N.W.2d 598, 600-02; Higa, 897 P.2d at 932-934 (all post-Kurth Ranch cases holding that administrative driver's

license revocations are non-punitive remedial measures designed to protect the public safety).[5]

This Court should follow the majority, and more thoughtfully reasoned view, and hold that an administrative license revocation does not constitute a criminal punishment under the Double Jeopardy Clause of the Fifth Amendment. To do otherwise would be to adopt an interpretation of Halper that would have no bounds even though the Supreme Court made clear that its rule was one of reason that should result in civil sanctions being deemed punishments in only "rare" cases.

REQUEST FOR ORAL ARGUMENT AND PUBLISHED OPINION

The State respectfully asks that this Court set this case for oral argument and render its decision in a published opinion. Given the vastly different interpretations of the central cases provided by the parties, the State believes oral argument will materially assist this Court in its deliberations.

Motions to dismiss based on double jeopardy claims similar to those advanced by defendants have become virtually a matter of routine in DUI cases throughout Utah. Further proceedings in literally dozens of cases throughout the state

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[5] Only one panel of the Ohio Court of Appeals has held that administrative license revocations for driving while under the influence of alcohol constitutes a punishment for double jeopardy purposes. See State v. Gustafson, 1995 WL 387619 (Ohio App. 7th Dist.). However, another panel of the Ohio Court of Appeals has rejected that claim, State v. Miller, 1995 WL 275770 (Ohio App. 3d Dist.), as have other lower courts in Ohio, State v. Ackrouche, 650 N.E.2d 535, 537-39 (Ohio Mun. 1995); City of Cleveland v. Nutter, 646 N.E.2d 1209, 1210-12 (Ohio Mun. 1995).

have been stayed pending resolution of these appeals. Issuance of a published opinion is therefore desirable because this is a case of first impression in Utah that will have widespread application.

CONCLUSION

Based on the foregoing arguments, this Court should affirm the trial court's denials of defendants' motions to dismiss and remand the cases for trial.

RESPECTFULLY SUBMITTED this 22nd day of August, 1995.

JAN GRAHAM
Attorney General

TODD A. UTZINGER
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that two true and accurate copies of the foregoing Brief of Appellee were mailed, via first class mail, to:

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JOHN BLAIR HUTCHISON
Florence & Hutchison
818 26th Street
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this 22nd day of August, 1995.

ADDENDA

Addendum A

Orders Denying Defendants' Motions to Dismiss

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and

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Attorneys for Defendant

IN THE SECOND JUDICIAL CIRCUIT COURT OF DAVIS COUNTY

STATE OF UTAH

LAYTON CITY,	:	**ORDER DENYING DEFENDANT'S MOTION TO DISMISS**
Plaintiff,	:	
- vs -	:	Case No. 955-2647
BRET RAY ARBON,	:	Judge KRB
Defendant.	:	

Defendant's Motion to Dismiss having come before the Court for hearing on April 19, 1995, and the Court having read and considered the memoranda of each

party and having heard and considered the arguments of counsel, it is hereby ORDERED that Defendant's motion to Dismiss on the ground that this prosecution is barred by double jeopardy is DENIED.

DATED this 19 day of April, 1995.

BY THE COURT: K. Roger Bean
CIRCUIT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing Order Denying Defendant's Motion to Dismiss by mailing, postage prepaid, a copy thereof on the 19 day of April, 1995 to the following:

Susant Hunt
Layton City Prosecutor
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John Blan Hutchison

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Attorneys for Defendant

IN THE SECOND JUDICIAL CIRCUIT COURT FOR DAVIS COUNTY

LAYTON DEPARTMENT, STATE OF UTAH

SOUTH WEBER	:	
Plaintiff,	:	**ORDER DENYING MOTION TO DISMISS**
- vs -	:	Case No.
KIMBERLY SUE MILLIGAN,	:	Judge Roger Bean
Defendant.	:	

Defendant's motion to dismiss having come on regularly for hearing the 17th day of April, 1995, and the parties having argued their respective positionss and the Court being fully advised in the premises and good cause appearing therefore, NOW

South Weber v. Milligan
Order Denying Defendant's Motion to Dismiss

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss shall be and is hereby DENIED.

DATED this 21st day of April, 1995.

K. Roger Bean
CIRCUIT JUDGE

FLORENCE
AND
HUTCHISON

A
PROFESSIONAL
CORPORATION

ATTORNEYS AT
LAW

[illegible] - 25TH STREET
OGDEN, UTAH [illegible]