North Dakota Law Review

Volume 73 | Number 4 Article 5

1997

Former Jeopardy - Multiple Punishments - Prohibition of Muliple Proceedings or Punishments: A Drunk Driver's Trivial Constitutional Defense

Kari C. Stonelake Hopkins

FORMER JEOPARDY—MULTIPLE PUNISHMENTS—PROHIBITION OF MULTIPLE PROCEEDINGS OR PUNISHMENTS: A DRUNK DRIVER'S TRIVIAL CONSTITUTIONAL DEFENSE

State v. Jacobson, 545 N.W.2d 152 (N.D. 1996)

I. FACTS

Sheila A. Barnes was arrested by North Dakota Highway Patrolman Matt Brown on March 19, 1995, for driving under the influence of intoxicating liquor in violation of North Dakota Century Code section 39-08-01.[1] Bruce C. Jacobson was arrested by Officer Jay Gruebele of the Jamestown, North Dakota Police Department on April 7, 1995, for the same offense.[2] After their arrests, Jacobson and Barnes requested administrative hearings pursuant to North Dakota Century Code section 39-20-04.1.[3] The administrative hearing officer suspended Barnes' driver's license for 365 days because it was her second offense within five years.[4] Jacobson's driver's license was suspended for two years because it was his third offense within five years.[5] Prior to their individual trials, both defendants moved to dismiss the criminal charges based on the assertion that their federal and state constitutional double jeopardy rights had been violated.[6]

The district courts granted the defendants' motions to dismiss, and the state appealed.[7] The cases were consolidated for the purposes of oral argument and settlement.[8] The issue presented on appeal was whether North Dakota's statutory and constitutional double jeopardy provisions demand a different interpretation than the federal Double Jeopardy Clause for an alleged drunk driver facing criminal prosecution following an administrative driver's license suspension.[9] The North Dakota Supreme Court reversed the district courts' decisions and *held* that the

---

1. Appellant's Brief-Barnes at 2, State v. Jacobson, 545 N.W.2d 152 (N.D. 1996) (No. 95-0302); *see also* N.D. CENT. CODE § 39-08-01 (Supp. 1997) (discussing criminal punishment for driving under the influence of alcohol).

2. Appellant's Brief-Jacobson at 2, *Jacobson* (No. 95-0259).

3. Appellant's Brief-Barnes at 3, *Jacobson* (No. 95-0259); Appellant's Brief-Jacobson at 3, *Jacobson* (No. 95-0302); *see also* N.D. CENT. CODE § 39-20-04.1 (Supp. 1997) (discussing administrative sanctions for driving or being in "actual physical control" of a motor vehicle while under the influence of alcohol).

4. Appellant's Brief-Barnes at 3, *Jacobson* (No. 95-0302).

5. Appellant's Brief-Jacobson at 3, *Jacobson* (No. 95-0259).

6. *Id.*; *see also* Appellant's Brief-Barnes at 3, *Jacobson* (No. 95-0302).

7. Appellant's Brief-Barnes at 3, *Jacobson* (No. 95-0302); Appellant's Brief-Jacobson at 3, *Jacobson* (No. 95-0302).

8. State v. Jacobson, 545 N.W.2d 152, 152 (N.D. 1996).

9. *Id.* at 152-53.

state double jeopardy clause does not require an interpretation different than that of the United States Constitution.[10]

II. LEGAL BACKGROUND

Alleged drunk drivers have argued that administrative sanctions, coupled with criminal prosecution, constitute a violation of their double jeopardy rights.[11] Defendants rely on the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution to validate a federal constitutional claim.[12] Defendants also argue in the alternative that individual state constitutions should provide greater double jeopardy protection than the United States Constitution for alleged drunk drivers.[13]

A. FEDERAL DOUBLE JEOPARDY PROTECTION

The Double Jeopardy Clause contained in the Fifth Amendment of the United States Constitution dictates that no citizen's life shall be put in jeopardy more than once for the same offense.[14] The United States Supreme Court has interpreted the Double Jeopardy Clause as providing protection against three specific abuses: first, a second prosecution for the same offense after acquittal; second, a second prosecution for the same offense after conviction; and third, multiple punishments for the same offense.[15]

An alleged drunk driver arguing against criminal prosecution subsequent to an administrative sanction often relies on the Double Jeopardy Clause's protection against multiple punishments for the same offense.[16]

---

10. *Id.* at 153. The court determined that the framers of the state constitution did not intend broader protection for defendants than that provided by the Double Jeopardy Clause of the Fifth Amendment. *Id.* (citing City of Fargo v. Hector, 534 N.W.2d 821, 823 (N.D. 1995)).

11. *See id.* (discussing the proposed violation of double jeopardy rights when a defendant is criminally prosecuted following an administrative sanction); *see also* State v. Zimmerman, 539 N.W.2d 49, 51 (N.D. 1995) (arguing that administrative sanctions should be considered punishment for the purpose of double jeopardy analysis).

12. *See, e.g., Zimmerman*, 539 N.W.2d at 52.

13. *Jacobson*, 545 N.W.2d at 153.

14. U.S. CONST. amend. V. In a landmark decision, the Supreme Court ruled that the Double Jeopardy Clause of the Fifth Amendment was intended to apply solely to the federal government. *See* Palko v. Connecticut, 302 U.S. 319, 322-23 (1937) (discussing the necessity of independent state and federal double jeopardy analysis). However, the Supreme Court later overruled *Palko* and concluded that the Double Jeopardy Clause should apply to the states via the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784, 794 (1969). The Supreme Court found that the "fundamental ideal" of constitutional history necessitates application of the Fifth Amendment to the states via the Fourteenth Amendment. *Id.*

15. United States v. Halper, 490 U.S. 435, 440 (1989) (citing North Carolina v. Pearce, 395 U.S. 711, 717 (1969)).

16. *See generally* LAWRENCE TAYLOR, DRUNK DRIVING DEFENSE § 2.0.2, at 147-53 (3d. ed. 1991 & Supp. 1994) (discussing the application of the double jeopardy clause in the defense of a drunk driver); Stephanie Ann Miyoshi, *Is the DUI Double-Jeopardy Defense D.O.A.?*, 29 LOY. L. REV. 1273, 1274 (1996) (commenting on a national trend of DUI defense attorneys arguing that their clients'

The clause, however, does not prohibit multiple punishments in every instance.[17] The United States Supreme Court held in *Blockburger v. United States*[18] that double jeopardy protection applies only in cases where a defendant is being prosecuted for the same criminal act under two different statutes, which contain identical factors to be proven.[19] The *Blockburger* test mandates that double jeopardy rights are not violated if one of the two statutory provisions contains a necessary element not included in the other.[20]

When claiming a violation of state or federal double jeopardy rights, alleged drunk drivers rely on three United States Supreme Court cases which apply the *Blockburger* test.[21] *United States v. Halper*,[22] *Austin v. United States*,[23] and *Department of Revenue v. Kurth Ranch*[24] are the Supreme Court cases commonly referred to as the double jeopardy trilogy.[25]

In *Halper*, the Court ruled for the first time that a civil sanction may constitute punishment, thus implicating the protections of the Double Jeopardy Clause.[26] Halper was convicted of sixty-five counts of violating the criminal false claims statute after submitting false Medicare claims.[27] He was sentenced to imprisonment for two years and fined $5,000.[28] The government then brought a civil action against Halper for the alleged violation of the False Claims Act and demanded that he pay more than $130,000 for his sixty-five violations of the Act.[29] The Court held that the Double Jeopardy Clause protects defendants who have already been criminally prosecuted from being subjected to a non-remedial civil sanction intended to be a deterrent or retribution.[30]

---

double jeopardy rights have been violated).

17. *But see* CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 59 (15th ed. 1993) (noting that the prosecution of the same offense under two different statutes constitutes double jeopardy).

18. 284 U.S. 299 (1932).

19. Blockburger v. United States, 284 U.S. 299, 304 (1932); *see also* TAYLOR, *supra* note 16, at 149-50 (explaining the *Blockburger* analysis and its application to a drunk driver's constitutional argument).

20. *Blockburger*, 284 U.S. at 304.

21. *See* Jennifer E. Dayok, *Administrative Driver's License Suspension: A Remedial Tool That is Not in Jeopardy*, 45 AM. U. L. REV. 1151, 1161 (1996) (noting that there is a trilogy of Supreme Court cases pertinent to double jeopardy analysis).

22. 490 U.S. 435 (1989).

23. 509 U.S. 602 (1993).

24. 114 S. Ct. 1937 (1994).

25. *See* Dayok, *supra* note 21, at 1161 (detailing the influence and composition of the trilogy).

26. *Halper*, 490 U.S. at 448-49.

27. *Id.* at 437.

28. *Id.*

29. *Id.* (citing 31 U.S.C. § 3729 to 3731 (1983 & Supp. 1997)).

30. *Id.* at 448-49. The Court discussed the necessity of allowing a defendant who has been criminally prosecuted to demand an accounting of the government's damages and costs to ascertain whether the civil penalty sought constitutes a second punishment. *Id.* at 449-50.

In *Austin*, the Supreme Court clarified *Halper* by addressing the punitive intent of civil forfeitures.[31] Austin pled guilty to one count of cocaine possession with intent to deliver and was sentenced to imprisonment for seven years.[32] Pursuant to federal civil forfeiture statutes, the government then commenced a forfeiture action of Austin's business and mobile home.[33] Throughout the decision the Court relied on its analysis in *Halper*, and concluded that the legislative history of *in rem* forfeiture indicates a punitive intent on the part of the United States Congress.[34] Thus, the Supreme Court held that *in rem* civil forfeiture is subject to the limitations of the Excessive Fines Clause, but the Court said nothing about how the punitive intent affected Double Jeopardy concerns.[35]

In *Kurth Ranch*, the Supreme Court considered whether a Montana tax for the possession of illegal drugs constitutes double jeopardy when the tax followed the criminal prosecution and punishment of defendants convicted of illegal drug possession.[36] After six individuals were prosecuted for drug possession pursuant to Montana's Dangerous Drug Act,[37] the Montana Department of Revenue ordered them to pay approximately $900,000 pursuant to Montana's dangerous drug act.[38] On appeal, the Court concluded that the drug tax was punishment for two reasons.[39] First, the tax was conditioned upon the commission of the crime which activated the tax obligation itself.[40] Second, the overall purpose of the high tax rate was to serve as a deterrent.[41] Thus, the excessive tax was punishment for the purpose of double jeopardy analysis.[42]

---

31. Austin v. United States, 509 U.S. 602, 610, 619 (1993).

32. *Id.* at 604.

33. *Id.* The United States Code provides for the forfeiture of conveyances and real property used in the facilitation of drug possession and distribution, but provides an "innocent owner" exception. 21 U.S.C. § 881(a)(7) (Supp. 1997). The issue before the Court in *Austin* was whether the Excessive Fines Clause of the Eighth Amendment applied to the *in rem* civil forfeiture proposed by the government. *Austin*, 509 U.S. at 604 (citing U.S. CONST. amend. VIII).

34. *Id.* at 620.

35. *Id.* at 622.

36. Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937, 1941 (1994).

37. MONT. CODE ANN. §§ 15-25-101 to -123 (1987) (repealed 1995). The Act authorized collection of a tax on the possession and storage of dangerous drugs after appropriate state and federal forfeitures had been satisfied. *Id.*

38. *Kurth Ranch*, 114 S. Ct. at 1942. *See* Ronald K. Sittler, *Enlarging the Sargasso Sea of Double Jeopardy: Department of Revenue v. Kurth Ranch*, 17 WHITTIER L. REV. 477, 478-80 (1996) (discussing the underlying facts of the prosecution of the Kurth family pursuant to Montana's Dangerous Drug Tax Act).

39. *Kurth Ranch*, 114 S. Ct. at 1947.

40. *Id.*

41. *Id.* at 1947-48.

42. *Id.* at 1948. The Court noted that the government's reliance on *Halper* was inappropriate. *Id.* The nature of the Montana tax was fundamentally different from civil penalties and should not have been treated as such. *Id.*; *see also* Sittler, *supra* note 38, at 518 (commenting on the Supreme

Most recently, in *United States v. Ursery*,[43] the Court determined it was necessary to clarify the double jeopardy trilogy.[44] The Court discussed the nature of civil forfeitures in relation to double jeopardy analysis.[45] The Ninth Circuit Court of Appeals and the Sixth Circuit Court of Appeals had held that the Double Jeopardy Clause prohibits the government from criminally punishing a defendant and then forfeiting his or her property in a separate civil proceeding.[46] The Supreme Court, however, decided that the circuit courts had misinterpreted precedent established in the double jeopardy trilogy.[47] The Court noted that reliance on the trilogy was inappropriate because *Halper* involved a civil penalty rather than a civil forfeiture, *Kurth Ranch* addressed tax statutes, and *Austin* did not involve the Double Jeopardy Clause at all.[48] Thus, the Court concluded that precedent that analyzed the application of the Double Jeopardy Clause is not applicable with reference to civil forfeitures.[49]

The Court further noted that defendants who argue a violation of their double jeopardy rights by a civil forfeiture must rely on well-defined precedent.[50] The Court used a two-part test to determine whether a civil forfeiture constitutes punishment for the purpose of double jeopardy.[51] First, the Court considered the intent of the

---

Court's failure to recognize the substantial financial burden placed on state and local governments in waging the war on illegal drugs when the Court struck down the Montana Drug Tax without any reference to these costs).

43. 116 S. Ct. 2135 (1996).

44. United States v. Ursery, 116 S. Ct. 2135, 2143-44 (1996).

45. *Id.* at 2142.

46. *Id.* at 2139. The Ninth Circuit partially relied on the Sixth Circuit's decision when deciding that civil forfeitures are punishment for the purpose of the Double Jeopardy Clause. *Id.* In the Sixth Circuit case, the government instituted civil forfeiture proceedings against the house where the defendant grew marijuana. *Id.* at 2138-39. He was indicted and convicted of manufacturing marijuana and sentenced to 63 months in prison. *Id.* at 2139. The Court of Appeals for the Sixth Circuit relied on Supreme Court precedent with the understanding that any civil forfeiture was punishment. *Id.* Thus, the court dismissed defendant's conviction because his double jeopardy rights had been violated. *Id.* The Ninth Circuit also dismissed defendants' convictions on the basis of a double jeopardy violation. *Id.* Defendants were convicted of conspiracy to manufacture methamphetamines and money laundering charges. *Id.* Before defendants' criminal trial, the government commenced a civil forfeiture action to obtain the property used in relation to the criminal charges. *Id.* The court relied on the Sixth Circuit's analysis in deciding that the civil forfeiture was punishment and dismissed the forfeiture action on the basis of double jeopardy. *Id.*

47. *Id.* at 2144.

48. *Id.* at 2147 (citing *Halper*, 490 U.S. at 436; *Austin*, 509 U.S. at 622 n.14; *Kurth Ranch*, 114 S. Ct. at 1498).

49. *Id.*; *see also* United States v. Imngren, 98 F.3d 811, 815 (4th Cir. 1996) (recognizing that a district court's reliance on the trilogy of United States Supreme Court cases is inappropriate when determining whether the suspension of a motorist's driving privileges is remedial or punitive).

50. *See Ursery*, 116 S. Ct. at 2147 (relying on United States v. One Assortment of 89 Firearms, 465 U.S. 354, 363 (1993), One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 235 (1972) and Various Items of Personal Property v. United States, 282 U.S. 577, 578 (1931)).

51. *See Id.* at 2142; *see also Imngren*, 98 F.3d at 815 (discussing the application of the two-part analysis outlined in *Ursery*).

legislature.[52] Second, if the court determines the intent of the legislature was remedial, it must ascertain whether the remedial intent is outweighed by a practical punitive purpose and effect.[53] After applying the two-part test to the facts in *Ursery*, the Court held that *in rem* civil forfeitures do not constitute punishment for the purpose of the Double Jeopardy Clause.[54]

B. NORTH DAKOTA STATUTORY LAW GOVERNING THE REGULATION OF DRUNK DRIVING

In response to the increasing number of fatalities caused by drunk drivers on American highways, state legislatures have enacted tougher laws to help fight the drunk driving problem.[55] North Dakota has developed two primary methods of combating drunk driving.[56] First, the license of an alleged drunk driver is suspended temporarily to remove him or her from the highway.[57] Second, a person suspected of driving drunk is criminally prosecuted to punish and deter.[58] Despite some indication that the combination of laws is reducing the number of alcohol-related accidents and fatalities, there is some uncertainty

---

52. *Ursery*, 116 S. Ct. at 2142. The plain language of an administrative statute often indicates whether the government intended the regulation to be remedial or punitive. *See Imngren*, 98 F.3d at 815. In *Imngren*, the court determined that the government's stated purpose in support of the one year suspension of a motorist's driver's license for driving under the influence of alcohol included concern for "safe and efficient movement of personnel and vehicles," and the "reduction of traffic deaths, injuries, and property damage from traffic accidents." *Id.*

53. *See Ursery*, 116 S. Ct. at 2142. The Fourth Circuit Court of Appeals has decided that the suspension of a motorist's driver's license for a year is not so punitive as to outweigh the stated remedial intent of the government. *Imngren*, 98 F.3d at 816. The defendants argued that the one year suspension of their driving privileges was punitive because the purpose was deterrence. *Id.* The court dismissed the defendants' argument by relying the Supreme Court's rationale in *Ursery*, that deterrence may serve civil as well as criminal goals. *Id.* (citing Bennis v. Michigan, 116 S. Ct. 994, 1000 (1996)).

54. *Ursery*, 116 S. Ct. at 2142. The Supreme Court overruled the decisions of the Sixth Circuit Court of Appeals and the Ninth Circuit Court of Appeals. *Id.* at 2143; *see also* United States v. Brophil, 96 F.3d 31, 32 (2nd Cir. 1996) (relying on *Ursery*, the Second Circuit Court of Appeals held that prosecution for the manufacture of marijuana following civil *in rem* forfeiture of the defendant's property did not constitute double jeopardy); United States v. $87,118.00 in U.S. Currency, 95 F.3d 511, 515 (7th Cir. 1996) (relying on the analysis in *Ursery*, the Fourth Circuit Court of Appeals dismissed the double jeopardy argument advanced by Appellee, which was supported by his contention that seizing currency pursuant to his arrest for drug importation constituted punishment).

55. *See generally* Dayok, *supra* note 21, at 1152-53 (discussing the positive impact of an administrative driver's license suspension); David G. Dargatis, *Put Down That Drink!: The Double Jeopardy Drunk Driving Defense is Not Going to Save You*, 81 IOWA L. REV. 775, 779-80 (1996) (discussing the passage of the Drunk Driving Prevention Act of 1988, which is an Act passed by Congress to attempt to reduce the number of alcohol-related traffic accidents and fatalities).

56. *See, e.g.*, State v. Zimmerman, 539 N.W.2d 49, 51 (N.D. 1995) (discussing the motivation behind the enactment of stiffer penalties for driving drunk).

57. *Id.*; *see also* N.D. CENT. CODE § 39-20-04.1 (Supp. 1995).

58. N.D. CENT. CODE § 39-08-01 (Supp. 1995).

surrounding the future of administrative license suspensions.[59]

1. Administrative Sanctions for Driving Under the Influence

Administrative sanctions for driving or being in physical control of a motor vehicle while under the influence of alcohol can be imposed in addition to the criminal penalty requirements.[60] If a driver refuses to submit to a chemical test, the law enforcement officer may immediately take possession of his or her driver's license and issue a temporary permit valid for twenty-five days.[61]

A defendant may request an administrative hearing within a ten-day time period after receiving a temporary operator's permit before the suspension, revocation, or denial of a license.[62] Regardless of whether the defendant participates in the hearing, his or her driver's license is suspended by the administrative director for ninety-one days for the first offense.[63] A person's driver's license can be suspended for up to two years depending on the number of prior violations.[64]

2. Criminal Punishment for Driving Under the Influence

In 1923, the North Dakota Legislature made it a crime to operate a motor vehicle when under the influence of alcohol.[65] The punishment for such an offense was initially subject to judicial discretion.[66] The present statutory law mandates a penalty for persons operating a motor

---

59. *See generally* Carlos F. Ramirez, *Administrative License Suspensions, Criminal Prosecution and the Double Jeopardy Clause*, 23 FORDHAM L. REV. 923, 953 (1996) (considering the double jeopardy argument in relation to administrative sanctions imposed by state governments).

60. § 39-20-04.1.

61. N.D. CENT. CODE § 39-20-04 (Supp. 1995).

62. N.D. CENT. CODE § 39-20-05(1) (Supp. 1995).

63. § 39-20-04.1(1)(a).

64. § 39-20-04.1(1)(c). If a person's license has been suspended or revoked at least twice previously within the proceeding five years, his or her license will be suspended for two years. *Id.* If the person's license has been suspended or revoked once before in the proceeding five years, his or her license will be suspended for 365 days. § 39-20-04.1(1)(b).

65. *See* State v. Zimmerman, 539 N.W.2d 49, 51 (N.D. 1995) (discussing the history of state laws enacted to attack the drunk driving problem); *see also* 1923 N.D. Laws 254 §§ 1-2 (discussing the legislative history which made it a crime to drive under the influence of alcohol).

66. 1923 N.D. Laws 254 §§ 1-2. The initial crime contained the two following sections:

> a. That any person who shall operate a motor vehicle while such person is in an intoxicated condition, shall be guilty of a misdemeanor.
>
> b. Any person violating the provisions of Section 1 of this act shall be punishable by a fine of not less than $25.00 nor more than $500.00, or by imprisonment in a county jail for a period not exceeding one year, or by both such fine and imprisonment. Provided, that the Court in sentencing any person for a violation of this Act, may suspend any sentence of imprisonment or any part thereof, and make its order that the person so sentenced shall be precluded from driving any automobile within this State for a period of not to exceed two years.

Id.

vehicle under the influence of alcohol or any other controlled substance.[67] A person "may not drive or be in actual physical control" of a motor vehicle if his or her blood alcohol concentration is ten one-hundredths of one percent (.010%) by weight at the time of a chemical test administered within two hours after the alleged offense.[68] The statute dictates specific penalties depending on the number of previous violations, if any.[69]

To assist in the implementation of the statutory penalties, the North Dakota Legislature adopted the Implied Consent Act in 1959.[70] The current version of this Act mandates that any person operating a motor vehicle on a highway in North Dakota is considered to have consented to a blood alcohol concentration chemical test.[71] If a person refuses such a test, his or her license is suspended for up to three years.[72]

C. DEVELOPMENT OF NORTH DAKOTA DOUBLE JEOPARDY CASE LAW

Since the implementation of administrative sanctions, alleged drunk drivers in North Dakota have argued that criminal prosecution following an administrative sanction violates their state and federal double jeopardy rights.[73] The North Dakota Supreme Court has interpreted the state double jeopardy clause analogously to the federal constitutional provision.[74] Thus, the North Dakota Supreme Court applies the *Blockburger* test to the state double jeopardy clause as well.[75]

Furthermore, the North Dakota Supreme Court continues to rely on United States Supreme Court precedent, including the well-established

---

67. N.D. CENT. CODE § 39-08-01 (Supp. 1995).

68. § 39-08-01(1)(a); *see also* City of Bismarck v. Preston, 374 N.W.2d 602, 603-04 (N.D. 1985) (mandating that the blood-alcohol test must be properly administered to preserve the admissibility of the test results into evidence).

69. § 39-08-01(4). A person convicted of his or her first offense is subject to a fine of at least $250 and is ordered to participate in an appropriate addiction evaluation. § 39-08-01(4)(a). A second offense within a five year time period mandates that the convicted serve at least four days in jail or perform 10 days community service, pay a minimum fine of $500, and attend another addiction evaluation. § 39-08-01(4)(b). For a third offense within a five year time period, the convicted person is imprisoned at least 60 days, fined $1000, and ordered once again to participate in an appropriate licensed addiction treatment program. § 39-08-01(4)(c). A fourth offense within seven years mandates that the defendant pay a $1000 fine and serve 180 days in jail. § 39-08-01(4)(d).

70. N.D. CENT. CODE § 39-20-01 (Supp. 1995); *see also* 1959 N.D. Laws 286 (providing for suspension of a person's license to drive upon refusal to submit to a chemical test).

71. § 39-20-01.

72. *Id.* The chemical tests can be administered to determine the alcohol or drug content of the blood. *Id.* The urine, blood, saliva, and breath can be assessed for the purpose of evaluation. *Id.*

73. *See* State v. Zimmerman, 539 N.W.2d 49, 53 (N.D. 1995). In response, the North Dakota Supreme Court has recognized the necessity for an initial period of jeopardy which has terminated before a defendant can allege a subsequent violation of his or her double jeopardy protection. State v. Allesi, 216 N.W.2d 805, 813 (N.D. 1974). Generally, a defendant is not put in jeopardy until he or she is put on trial before a jury or a judge. *Id.*

74. *See* City of Fargo v. Hector, 534 N.W.2d 821, 823 (N.D. 1995).

75. *Id.* at 824.

trilogy of double jeopardy cases,[76] to dictate the scope of state double jeopardy protection.[77] However, North Dakota defendants have argued for an independent evaluation of the state's constitutional provision in an attempt to establish greater double jeopardy protection under state law.[78]

In *State v. Sinner*,[79] the North Dakota Supreme Court ruled for the first time that an administrative driver's license suspension is not punishment for the purpose of federal double jeopardy analysis.[80] Subsequent decisions by the court have further clarified the *Sinner* decision.[81]

In *State v. Zimmerman*,[82] the defendants claimed that their federal double jeopardy rights had been violated.[83] The defendants asserted that North Dakota precedent[84] was no longer applicable because of the trilogy of United States Supreme Court cases.[85] The court disagreed with the defendants' reliance on the trilogy, however, and concluded that the defendants' federal double jeopardy rights had not been violated.[86] However, the court left open the possibility that a defendant's state double jeopardy rights may be violated when he or she is criminally prosecuted following an administrative suspension of his or her driver's license.[87]

III. CASE ANALYSIS

The North Dakota Supreme Court further clarified double jeopardy precedent in *State v. Jacobson*.[88] The court considered for the

---

76. *See* Department of Revenue v. Kurth Ranch,114 S. Ct. 1937, 1947 (1994) (concluding that the Montana drug tax was punishment); Austin v. United States, 509 U.S. 602, 620 (1993) (concluding that the legislative history of *in rem* forfeiture illustrated a remedial intent of Congress); United States v. Halper, 490 U.S. 435, 448-49 (1989) (ruling that a civil sanction may constitute punishment protected by the Double Jeopardy Clause).

77. *See Zimmerman*, 539 N.W.2d at 52-6 (discussing a trilogy of recent Supreme Court cases relevant to the analysis of double jeopardy rights).

78. *See, e.g.*, State v. Jacobson, 545 N.W.2d 152, 153 (N.D. 1996) (arguing for an individual analysis of the state constitution's double jeopardy clause).

79. 207 N.W.2d 495 (N.D. 1973).

80. *See* State v. Sinner, 207 N.W.2d 495, 501 (N.D. 1973).

81. *See Zimmerman*, 539 N.W.2d at 52; Pladson v. Hjelle, 368 N.W.2d 508, 511 (N.D. 1985) (deciding that the Implied Consent Act does not violate due process requirements).

82. 539 N.W.2d 49 (N.D. 1995).

83. *Zimmerman*, 539 N.W.2d at 50.

84. *Id.* (citing *Sinner*, 207 N.W.2d at 501 (ruling that double jeopardy rights were not violated when a defendant was criminally prosecuted for driving under the influence after an administrative suspension of his license)).

85. *See id.* at 53 (citing Department of Revenue v. Kurth Ranch, 114 S. Ct. 1937, 1947 (1994), Austin v. United States, 509 U.S. 602, 620 (1993), and United States v. Halper, 490 U.S. 435, 448-49 (1989)); *see also id.* at 52-6 (explaining the importance of the trilogy to double jeopardy analysis).

86. *See id.* at 53 (distinguishing the analysis in the trilogy from a drunk driver's double jeopardy argument).

87. *Id.*

88. State v. Jacobson, 545 N.W.2d 152, 153 (N.D. 1996).

first time whether an alleged drunk driver's state double jeopardy rights are violated when he or she is subjected to criminal prosecution following an administrative driver's license suspension.[89] The court extended the rationale of *Zimmerman* and concluded that neither federal nor state double jeopardy provisions are violated by criminal prosecution subsequent to the issuance of an administrative sanction.[90]

Justice Neumann, writing for the court, began by noting the double jeopardy precedent established in *Zimmerman*.[91] Relying on *Zimmerman*, the court dismissed the federal constitutional arguments advanced by the defendants.[92] The court concluded that criminal prosecution following an administrative sanction is not a violation of the Fifth Amendment.[93]

The court refused to interpret the state double jeopardy clause differently than the federal Double Jeopardy Clause.[94] The hesitancy to overrule precedent prompted the dismissal of the defendants' interpretation of the state's statutory and constitutional double jeopardy provisions.[95] The court noted two earlier decisions, *State v. Allesi*[96] and *City of Fargo v. Hector*,[97] to support the conclusion that the state clause should not be interpreted differently than the federal constitutional provision.[98]

Chief Justice VandeWalle, concurring specially, agreed with the defendants' assertion that under certain circumstances the state constitution may demand an interpretation different from that of the United States Constitution.[99] Justice VandeWalle noted that although several appellate courts have decided the issue,[100] the United States Supreme

---

89. *Id.*; *see also* Brief of the Appellee-Jacobson at 18, *Jacobson* (N.D. 1996) (No. 95-0259). Defendants argued that the court should follow the rationale of earlier case law and provide heightened protection to alleged drunk drivers facing criminal prosecution following an administrative driver's license suspension. *Id.*

90. *Jacobson*, 545 N.W.2d at 153.

91. *Id.* (citing *Zimmerman*, 539 N.W.2d at 56 (holding that an administrative sanction does not constitute punishment for the purpose of double jeopardy analysis)).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. 216 N.W.2d 805 (N.D. 1974).

97. 534 N.W.2d 821 (N.D. 1995).

98. *Jacobson*, 545 N.W.2d at 153 (citing City of Fargo v. Hector, 534 N.W.2d 821, 823 (N.D. 1995) (deciding that double jeopardy rights were not violated because the defendant was not punished twice for the same offense), and State v. Allesi, 216 N.W.2d 805, 817-18 (N.D. 1974) (noting that the Double Jeopardy Clause of the Fifth Amendment is applicable to the states via the Fourteenth Amendment)).

99. *See id.* (VandeWalle, C.J., concurring specially).

100. *Id.* (citing State v. Zerkel, 900 P.2d 744, 758 (Alaska Ct. App. 1995) (concluding that administrative sanctions are remedial, not punitive sanctions for the purpose of double jeopardy analysis), Davidson v. MacKinnon, 656 So. 2d 223, 225 (Fla. Cir. Ct. 1995) (concluding that "enhancing safe driving on the public highways" is the remedial purpose of administrative sanctions), and State v. Higa,

Court has yet to decide whether a violation of the Double Jeopardy Clause will be an applicable defense for an alleged drunk driver.[101]

Also relevant to the Justice VandeWalle's analysis was his reliance on the passive *Zimmerman* decision.[102] Justice VandeWalle agreed that state administrative sanctions relating to drunk driving statutes are not punitive.[103] Justice VandeWalle dismissed any incidental punitive affect of the sanction as being subordinate to the remedial intent.[104] Justice VandeWalle also addressed the history of the state constitution and concluded that the framers did not intend for the double jeopardy protection to prohibit practical administrative sanctions.[105]

Justice Meschke's concurrence also relied on *Zimmerman*,[106] and the history of the state constitution.[107] Justice Meschke agreed with the dissent in that the state constitution should be interpreted separately from the United States Constitution.[108] However, an independent analysis did not mandate a different conclusion in the case at hand.[109]

Justice Meschke further noted that the United States Supreme Court had yet to determine at what point civil forfeitures and monetary sanctions following criminal prosecution will invoke federal double jeopardy protection.[110] Justice Meschke acknowledged that Justice Levine's well-reasoned dissent may provide the court with guidance when considering double jeopardy protection in relation to those particular issues in the future.[111]

---

897 P.2d 928, 933 (Haw. 1995) (holding that Hawaii's administrative sanctions were not punitive, but remedial in nature; therefore, they were not applicable to the double jeopardy argument)).

101. *Jacobson*, 545 N.W.2d at 153.

102. *See id.* (citing State v. Zimmerman, 539 N.W.2d 49, 55-56 (N.D. 1995) (noting the court's discussion about the remedial purpose of administrative driver's license suspensions despite any incidental punitive affect)).

103. *Id.* at 154. Chief Justice VandeWalle specifically disagreed with Justice Levine's analysis in her dissent concluding that administrative license suspensions are punishment. *Id.*

104. *See id.* Chief Justice VandeWalle noted that the "realistic" approach taken in the dissent supports the conclusion that administrative sanctions are remedial, not punitive because the priority is to remove drunk drivers from the state's roads. *Id.*

105. *Id.* A practical look the framers' intent persuaded the Chief Justice that "suspension of the license to drive of a convicted drunk driver for the safety of the public was not what they had intended to prevent." *Id.*

106. *See Zimmerman*, 539 N.W.2d at 49 (determining that despite the trilogy, the administrative suspension of an alleged drunk driver's license is remedial in nature).

107. *See Jacobson*, 545 N.W.2d at 154 (Meschke, J., concurring) (discussing the remedial nature of a convicted drunk driver's loss of a driver's license).

108. *See id.*

109. *Id.* Justice Meschke agreed with the dissent that the state constitution provides more protection than the United States Constitution in some instances. *Id.*

110. *Id.* at 155 (Meschke, J., concurring); *see also* United States v. Ursery, 116 S. Ct. 2135, 2142 (1996) (discussing the application of a two-part test to determine whether a civil forfeiture is punishment for the purpose of double jeopardy analysis).

111. *Jacobson*, 545 N.W.2d at 155. Justice Meschke addressed the Supreme Court's most recent decision at that time concerning the punitive nature of civil forfeitures. *Id.*; *see also Ursery*, 116 S. Ct. at 2142 (concluding that not all civil forfeitures should be considered punishment).

In another concurrence, Justice Sandstrom dismissed the validity of Justice Levine's dissent in regard to its constitutional analysis.[112] Justice Sandstrom stated that the intent of North Dakota's double jeopardy provision was to prevent the state from doing what the federal government was prohibited from doing.[113] In support of his conclusion, Justice Sandstrom reasoned that the state's constitutional history[114] indicated strong evidence that North Dakota relied on other state constitutions when writing the state's own double jeopardy provision.[115] Citing the supreme court's analysis in *Zimmerman*, Justice Sandstrom rejected the defendants' reliance on the recent trilogy of United States Supreme Court decisions.[116]

Justice Levine dissented from the court's decision because she believed that an alleged drunk driver's state double jeopardy protection is violated when he or she is criminally prosecuted following an administrative license suspension.[117] Justice Levine was convinced by the defendants' reasoning that it was time to abandon the court's precedent.[118]

In *Allesi*, the court rejected the argument that the state double jeopardy provision should be interpreted differently than the Fifth Amendment.[119] Justice Levine disagreed with this decision and argued for the necessity of independent state analysis.[120] Justice Levine noted several other decisions[121] where the court granted greater protection than the federal government.[122]

Justice Levine also maintained that the court should consider the source of guidance to the delegates of the North Dakota Constitutional

---

112. *Jacobson*, 545 N.W.2d at 155 (Sandstrom, J., concurring).

113. *Id.*

114. *Id.* (citing Hon. Herbert L. Meschke & Lawrence D. Spears, *Digging for Roots: The North Dakota Constitution and the Thayer Correspondence*, 65 N.D. L. REV. 343, 346-47 (1989) (discussing the Constitutional Celebration Committee's efforts to search for documentation identifying the sources of the North Dakota Constitution) and Model *Constitution (Peddrick Draft #2, 1889)*, 65 N.D. L. REV. 415, 422 (1989) (discussing the history of the North Dakota Constitution and its double jeopardy protection)).

115. Jacobson, 545 N.W.2d at 155 (Sandstrom, J., concurring).

116. *Id.* at 156; Zimmerman, 539 N.W.2d at 52-56.

117. *Jacobson*, 545 N.W.2d at 156 (Levine, J., dissenting).

118. *Id.*

119. *Id.* at 157 (Levine, J., dissenting) (citing State v. Allesi, 216 N.W.2d 805, 817-18 (N.D. 1973) (noting that "the *Allesi* decision was unsupported by authority or reasoning, and deserves no further adherence")).

120. *Id.* at 156.

121. *Id.* at 157 (citing In re Adoption of K.A.S., 499 N.W.2d 558, 566 (N.D. 1993) (affording broader state rights in relation to termination of parental rights), Grand Forks-Traill Water Users, Inc. v. Hjelle, 413 N.W.2d 344, 348 (N.D. 1987) (addressing the defendant's argument that North Dakota's eminent domain statutes were unconstitutional because of an equal protection violation), and State v. Orr, 375 N.W.2d 171, 177 (N.D. 1985) (discussing whether the state constitution permitted a conviction rendered without counsel relevant to a subsequent offense)).

122. *Id.*

Convention.[123] Justice Levine noted that the South Dakota Constitution and the "Williams Constitution" guided the North Dakota delegates.[124] Furthermore, the state's constitutional history, coupled with the court's rulings prior to the *Allesi* decision,[125] established a pattern of providing significant double jeopardy protection for North Dakota's citizens.[126]

Justice Levine argued for individual interpretation of the state constitution.[127] In support of that argument, Justice Levine discussed the court's decision to assess state jury trial rights separately from federal rights.[128] Equating jury trial rights with double jeopardy protection, Justice Levine maintained that precedent demanded a separate interpretation.[129]

Justice Levine also relied on the constitutional precedent of other states in her analysis.[130] Justice Levine commented that Montana has refused to apply the *Blockburger* test and instead relies on the "same transaction" test to determine whether double jeopardy protection is violated.[131]

Further, the Oregon Supreme Court has held that the issue of constitutional interpretation is one of federalism and should be decided as such.[132] Based on these factors, Justice Levine reasoned that the court's reliance on the North Dakota Constitution should lead to the conclusion that criminal prosecution of a drunk driver following an administrative sanction is double jeopardy.[133]

Justice Levine requested a "realistic" look at the nature of the administrative driver's license suspension.[134] Justice Levine contended that all North Dakota citizens would recognize a driver's license suspension as punishment because of the practical impact of the suspension.[135]

---

123. *Id.*

124. *Id.*

125. *Id.* at 158. (citing State v. Nierenberg, 80 N.W.2d 104, 108 (N.D. 1956) (concluding that the defendant's argument of former jeopardy and res judicata could not be sustained when the defendant was subjected to perjury charges as a result of an earlier prosecution) and State v. Simpson, 50 N.W.2d 661, 667 (N.D. 1951) (addressing the defendant's claim that being prosecuted under state law following city prosecution constituted double jeopardy)).

126. *Id.*

127. *Id.* at 159.

128. *Id.* at 157 (citing City of Bismarck v. Altevogt, 353 N.W.2d 760, 765 (N.D. 1984)).

129. *See id.*

130. *Id.*

131. *Id.* at 159 (citing Benton v. Maryland, 395 U.S. 784, 794 (1969) (holding that the "same transaction" test refers to double jeopardy analysis in which the pivotal question is whether the charges stem from the same transaction)).

132. *Id.* at 160 (citing State v. Kennedy, 666 P.2d 1316, 1323 (Or. 1983) (explaining the individual nature of state constitutions)).

133. *Id.* at 161.

134. *Id.*

135. *See id.* Justice Levine discussed the practical need for automobile transportation in a state which does not provide mass transportation in the majority of its cities. *Id.*

Justice Levine also discussed the fact that after a defendant's license is suspended, he or she is required to pay a reinstatement fee to regain his or her license, unlike one who has had his or her license suspended for something other than driving drunk.[136]

Relying on the legislative history,[137] Justice Levine maintained that the administrative sanctions are punishment and were intended to be so despite any stated remedial purpose.[138] Justice Levine concluded that a violation of the state's double jeopardy clause occurs when a person is punished twice for driving under the influence.[139]

IV. IMPACT

The North Dakota Supreme Court has left little precedent to support the seemingly routine state and federal double jeopardy argument.[140] Since the *Jacobson* decision, the supreme court has continued to reject this popular defense.[141] The supreme court's position is well-supported and consistent with controlling federal precedent.[142]Nationally, the emerging trend discourages the double jeopardy defense.[143] Several states have rejected the drunk driver's reliance on the double jeopardy clause to protect him or her from criminal punishment.[144] Considering the national trend and the well-reasoned case law, absent a contrary ruling by the United States Supreme Court, the North Dakota Supreme Court will not likely reverse its decision.[145]

---

136. *Id.*

137. *Id.* (citing 1983 N.D. Laws 415). Justice Levine illustrated the punitive intent of the sanctions by relating comments made by legislators. *See id.*

138. *Id.*

139. *Id.*

140. *See id.* at 152-53.

141. *See* State v. Storbakken, 552 N.W.2d 78, 81 (N.D. 1996) (citing *Zimmerman* and *Jacobson*, the North Dakota Supreme Court dismissed the defendant's double jeopardy argument because his license was not suspended during an administrative hearing); State v. Barth, 545 N.W.2d 162, 163 (N.D. 1996) (attempting to distinguish *Zimmerman* because defendant's driver's license was suspended for one year, even though he was only convicted of reckless driving after a second offense); State v. Kvislen, 544 N.W.2d 876, 877 (N.D. 1996) (declining to interpret punishment differently than federal law).

142. *See, e.g.*, Edward J. Kelley, *Double Jeopardy and Drunk Driving: Imposing Civil and Criminal Sanctions for the Same Offense*, 55 MD. L. REV. 549, 557 (1996) (discussing the Maryland Court of Appeals' decision that the suspension of a driver's license authorized by a civil statute did not constitute punishment as applied to a driver whose blood alcohol content exceeded the legal limit).

143. *See, e.g.*, Todd A. LaSala, *The Decisive Blow to the Double Jeopardy Defense in Kansas Drunk Driving Prosecutions: State v. Mertz*, 44 U. KAN. L. REV. 1009, 1024 (1996) (commenting that as of August 1996, every court at the appellate level, with the exception of Ohio, has held that administrative license suspension is not "punishment" for double jeopardy purposes).

144. *See, e.g.*, Allen v. Attorney General State of Maine, 80 F.3d 569, 577 (1st Cir. 1996) (refusing to reverse the trial court's decision to not issue a writ of habeas corpus and further deciding that Maine's 90 day license suspension for operating a motor vehicle under the influence of alcohol serves the state's remedial purpose to apprehend "danger and potential harm").

145. *See* LaSala, *supra* note 142, at 1024 (discussing the appellate courts' treatment of the double jeopardy defense).

The United States Supreme Court may have an opportunity to decide the double jeopardy issue if there is an appeal from a state supreme court decision. However, a Supreme Court holding would be problematic considering the vast differences in administrative sanctions mandated by individual states for driving under the influence of alcohol.[146] Any decision affecting individual state statutes would likely be subject to severe criticism.

A framework for review of how North Dakota's civil sanctions are characterized will likely emerge from the analysis in *Jacobson* and *Ursery*.[147] Whether a civil forfeiture is a remedial sanction or punishment is determinative of the application of double jeopardy protection.[148] Since the North Dakota Supreme Court's decision in *Jacobson*, the United States Supreme Court has illustrated its hesitancy to automatically interpret civil sanctions as punishment for the purpose of double jeopardy analysis.[149] The Supreme Court has outlined a two-part test in *Ursery* for courts to ascertain whether a civil sanction is punitive in effect despite any remedial intent of the legislature.[150] If so, double jeopardy protection attaches.[151]

Furthermore, the two-part test applied in *Ursery* supports the rationale of the North Dakota Supreme Court's decision in *Jacobson*.[152] The North Dakota Supreme Court has acknowledged the remedial intent of civil sanctions imposed by the North Dakota Legislature as an attempt to decrease automobile accidents and fatalities caused by drunk drivers.[153] It is not likely that the supreme court will decide that the minor inconvenience caused by the temporary suspension of a person's driver's license privilege outweighs a legislative attempt to save human lives.[154]

---

146. *See* Dayok, *supra* note 21, at 1153 n.9 (listing the 38 statutes imposed by state legislatures which mandate automatic suspension of an individual's driver's license if he or she fails a breathalyzer test).

147. State v. Jacobson, 545 N.W.2d 152, 153 (N.D. 1996); United States v. Ursery, 116 S. Ct. 2135, 2149 (1996).

148. *See Ursery*, 116 S. Ct. at 2142.

149. *Id.*

150. *Id.*

151. *See id.*

152. *Id.*; *see also Jacobson*, 545 N.W.2d at 153.

153. *Id.* at 154 (VandeWalle, C.J., concurring specially); *see also* State v. Zimmerman, 539 N.W.2d 48-53 (N.D. 1995) (citing Kobilansky v. Liffrig, 358 N.W.2d 781, 791 (N.D. 1984) (illustrating the court's judicial notice of "the carnage caused by the drunk driver") and South Dakota v. Neville, 459 U.S. 553, 58-59 (1983) (noting the extensive documentation of the "carnage" caused by drunk drivers)).

154. The United States Supreme Court would also likely decide an alleged drunk driver's double jeopardy rights are not violated when he or she is faced with criminal prosecution following an administrative driver's license suspension. *See* United States v. Ursery, 116 S. Ct. 2135, 2142 (1996) (discussing the Supreme Court's hesitancy to interpret many civil sanctions as punishment for the purpose of double jeopardy analysis); *see also* United States v. Imngren, 98 F.3d 811, 815 (4th Cir.

The resources of an alleged drunk driver in North Dakota should be allocated in support of defenses other than double jeopardy. For future drunk drivers and their attorneys, the *Jacobson* decision should curtail the advancement of any further state and federal double jeopardy defenses in North Dakota. Double jeopardy is a trivial constitutional defense at best.

Kari C. Stonelake Hopkins

1996) (deciding that a drunk driver's reliance on the trilogy was inappropriate).