Florida Law Review

Volume 2 | Issue 2 Article 4

January 1949

Criminal Law: Double Jeopardy in Florida

William P. Owen

Robert M. Johnson

CRIMINAL LAW: DOUBLE JEOPARDY IN FLORIDA

Our constitutional protection against double jeopardy, or former jeopardy, as it is sometimes called, is contained in the words: "No person shall be subject to be twice put in jeopardy for the same offense."[1] This principle emanates from the common law.[2] In early times it was devised to prevent overzealous prosecuting attorneys from harassing a defendant by further prosecution for an offense of which he had already been acquitted or convicted. It is embodied in substantially the same form in the constitutions of the great majority of states. The Legislature of the State of Florida further emphasized the provision by enacting it as a statute in 1891.[3]

I. When Legal Jeopardy Attaches

In a criminal case the accused is put in jeopardy when both of two conditions are satisfied: (1) he is placed on trial in a court of competent jurisdiction upon an indictment or information legally sufficient to sustain a judgment of conviction, and (2) a jury is duly impaneled to try and determine the issue.[4] A fortiori, he is placed in jeopardy when the jury returns its verdict, regardless of whether judgment is entered thereon;[5] this is true even when the accused has not been arraigned and there has been a failure to plead to the indictment or information.[6] At common law, if any evidence had been offered at the trial, the court could not discharge the jury until it had rendered its verdict, except in a case of urgent necessity such as serious illness of a juror during the trial. Today, however, the jury may be discharged before the verdict and after the members have been sworn in if the court in the exercise of its sound discretion feels that it is manifestly necessary to do so. Should the court discharge the jury for any reason legally insufficient, without absolute necessity and without the consent of the accused, such discharge is equivalent to an acquittal and may be pleaded as a bar to any subsequent indictment or information for

[1] Fla. Const. Decl. of Rights §12.

[2] Rex v. Vandercomb, 2 Leach 708, 168 Eng. Rep. 455 (1796).

[3] Fla. Laws 1891, c. 4055, §7, now Fla. Stat. §910.11 (1941).

[4] State *ex rel.* Alcala v. Grayson, 156 Fla. 435, 23 So.2d 484 (1945); Burnes v. State, 89 Fla. 494, 104 So. 783 (1925).

[5] Potter v. State, 91 Fla. 938, 109 So. 91 (1926).

[6] State *ex rel.* Ryan v. McNeill, 141 Fla. 304, 193 So. 67 (1940). *Contra:* McLeod v. State, 128 Fla. 35, 174 So. 466 (1937).

the same offense.[7] The cause sufficient to create the necessity for discharge of the jury falls under one of two main categories, namely:

(1) legal compulsion upon the court to discharge the jury before it is able to reach a verdict, as, for example, in the familiar instance of the "hung jury."[8]

(2) conduct of the accused rendering proper investigation of the case beyond the power of the jury, whether occasioned by misconduct or by physical inability to attend the trial.[9]

Following the general principle that a civil proceeding does not constitute jeopardy sufficient to bar a subsequent criminal prosecution for the same acts, a proceeding in equity to suppress, by way of an injunction, conduct that also constitutes a crime will not bar the subsequent criminal prosecution;[10] nor will the annulment of the judgment in a criminal case upon a writ of error coram nobis prevent a further trial upon the merits, because the proceedings under such a writ are civil in nature;[11] nor will an award of punitive or exemplary damages in a civil action for tort prevent a subsequent prosecution for the substantive crime committed through such tortious conduct.[12] A mistrial will not constitute jeopardy unless it is arbitrarily or capriciously ordered by the court;[13] nor will an entry of nolle prosequi, following a mistrial by reason of the jury's inability to agree, constitute jeopardy.[14] When a new trial is granted at the instance of the accused after a conviction of one of the lesser degrees of the crime charged in the indictment or information the accused stands charged upon the new trial with the crime for which he was previously convicted, just as though no previous trial had been held. Jeopardy ceases to exist when the court grants a motion for new trial, because there is no appeal available to the prosecution.[15]

---

[7]State *ex rel.* Dato v. Himes, 134 Fla. 675, 184 So. 244 (1938).

[8]FLA. STAT. §919.21(2) (1941); White v. State, 63 Fla. 49, 59 So. 17 (1912).

[9]FLA. STAT. §§54.22, 919.21(3) (1941); Fails v. State, 60 Fla. 8, 53 So. 612 (1910).

[10]Pompano Horse Club v. State, 93 Fla. 415, 111 So. 801 (1927).

[11]Chambers v. State, 117 Fla. 642, 158 So. 153 (1934), *rev'd on other grounds,* 309 U. S. 227 (1940); *cf.* 2 U. OF FLA. L. REV. 131 (1949).

[12]Smith v. Bagwell, 19 Fla. 117 (1882).

[13]Smith v. State, 40 Fla. 203, 23 So. 854 (1898).

[14]Smith v. State, 135 Fla. 835, 186 So. 203 (1939); Gibson v. State, 26 Fla. 109, 7 So. 376 (1890).

[15]McLeod v. State, 128 Fla. 35, 174 So. 466 (1937); see FLA. STAT. §920.09 (1941). In upholding a state statute which permitted an appeal by the prosecution in a criminal case, the United States Supreme Court, while ruling that the double jeopardy clause, U. S. CONST. AMEND. V, is inapplicable to the states, cautioned that such procedure is limited by the due process clause, U. S. CONST. AMEND. XIV Palko v. Connecticut, 302 U. S. 319 (1937).

II. The Plea

The right of one charged with the commission of a criminal offense to the protection of the former jeopardy clause of the Florida Constitution[16] must be specifically pleaded, and the supporting facts must be proved.[17] In other words, there must be a timely assertion of the claim by the accused, with such allegations as are sufficient to show, if proved by him or admitted by the prosecution, that the constitutional provision is about to be, or is being, violated. While it is generally stated that a plea of former conviction must set out the former judgment and allege that it is in full force and effect and unreversed,[18] this is not required in a plea of former acquittal, as the verdict of acquittal is final and cannot be reversed on appeal without placing the accused in jeopardy twice.[19] A plea of former jeopardy, when properly and sufficiently pleaded, can be traversed or demurred to, but a motion to strike is improper and will not be entertained by the court.[20] The plea must contain sufficient grounds, or the court may treat it as frivolous or a nullity; no demurrer or traverse is necessary to dispose of such a plea.[21]

A plea of "not guilty," which is a plea in bar, is a waiver of the right to make a plea in abatement in a criminal case,[22] unless the defendant is able to obtain leave of court to withdraw his first plea. By so doing he can then interpose a plea in abatement based on former jeopardy;[23] this plea must be disposed of before the defendant can make a plea in bar. There is an exception to this rule, however. If upon a new trial the accused pleads "not guilty" to an indictment again charging the same offense, when the fact is that he was acquitted of such charge on the former trial by virtue of a conviction of a lesser degree thereof, he may subsequently make a motion in arrest of judgment on the ground of former acquittal; and the motion will be granted by the court when such facts appear on the record, because the entire proceeding constitutes one record.[24]

---

[16]Fla. Const. Decl. of Rights §12.

[17]*Ibid.*; Potter v. State, 91 Fla. 938, 109 So. 91 (1926); Strobbar v. State, 55 Fla. 167, 47 So. 4 (1908); O'Brien v. State, 55 Fla. 146, 47 So. 11 (1908).

[18]O'Brien v. State, 55 Fla. 146, 47 So. 11 (1908).

[19]Potter v. State, 91 Fla. 938, 109 So. 91 (1926).

[20]Johnson v. State, 27 Fla. 245, 9 So. 208 (1891).

[21]Ellis v. State, 25 Fla. 702, 6 So. 768 (1889).

[22]Walker v. State, 93 Fla. 1069, 113 So. 96 (1927).

[23]Haddock v. State, 141 Fla. 132, 192 So. 802 (1939).

[24]Golding v. State, 31 Fla. 262, 12 So. 525 (1893).

By obtaining release under a writ of habeas corpus on the ground that the former conviction rested on an invalid indictment, information or charge, the accused succeeds in having such judgment of conviction set aside and nullified; therefore he cannot subsequently plead former jeopardy to a second prosecution for the same crime.[25] In asserting a defense based on former jeopardy, the writ of prohibition is not the proper method, since former jeopardy is a defensive matter and presents a question that can readily be raised by a proper plea in the trial court.[26]

III. Tests of the Identity of Offenses

In England in 1796 a test of double jeopardy was formulated.[27] By this test an acquittal is no bar unless conviction on the first indictment could have been obtained by proof of the facts contained in the second. This "same evidence" test has received wide recognition in this country and is applied frequently by the federal courts,[28] although a minority of states follow the "same transaction" test and hold that a prosecution for one offense bars a subsequent prosecution for another offense when both result from a single transaction.[29]

To sustain a plea of former jeopardy in Florida, each of four prerequisites must be met by the two indictments or informations:

(1) identity as regards the victims and as regards those accused;
(2) identity of jurisdictions;
(3) identity of acts and circumstances occasioning the alleged offense; and
(4) identity of offenses charged, speaking broadly and in a loose sense.[30]

The first of these requirements needs no clarification, as a recent case has demonstrated. The accused had killed two boys at the same time, by the same act, and was tried in a separate criminal case for each death. After being acquitted on the first indictment and later convicted on the second, he appealed on the ground of former jeopardy. Although he was

[25]State v. Drumbright, 116 Fla. 496, 156 So. 721 (1934).

[26]State *ex rel.* Johnson v. Anderson, 37 So.2d 910 (Fla. 1948); State v. Drumbright, 116 Fla. 496, 156 So. 721 (1934).

[27]Rex v. Vandercomb, 2 Leach 708, 168 Eng. Rep. 455 (1796).

[28]Gavieres v. United States, 220 U. S. 338 (1911).

[29]Gunter v. State, 111 Ala. 23, 20 So. 632 (1896); Clem v. State, 42 Ind. 420, 13 Am. Rep. 369 (1873); State v. Speedling, 199 Iowa 1218, 201 N. W. 561 (1925).

[30]State v. Bowden, 154 Fla. 511, 18 So.2d 478 (1944); King v. State, 145 Fla. 286,

convicted of one offense, the victims were not identical; and the Supreme Court, in holding that double jeopardy did not exist, quite properly described the two trials as separate.[31]

As to the second essential, a prosecution for violation of the laws of one jurisdiction does not constitute a bar to a subsequent prosecution for the violation of the laws of another jurisdiction, even though the other prerequisites to former jeopardy are present.[32]

The third requirement is also readily understood and is well established, in spite of a misleading dictum contained in a recent opinion.[33] There is no question that the same legal offense committed in the same jurisdiction by the same accused against the same victim nevertheless constitutes two crimes if committed at different times or by different acts.[34]

The fourth prerequisite occasions little difficulty in instances of qualitatively different offenses, as, for example, rape and burglary, or even breaking and entering with intent to commit grand larceny and being an accessory before the fact to grand larceny;[35] but complications do arise when the earlier and later offenses charged lie within a category of crime divided into degrees, such as murder.[36] For example, suppose that an indictment is returned charging a person with murder in the second degree. Should the jury return a verdict acquitting the accused, that verdict would act as an acquittal of murder in the second or any greater degree, but the state could subsequently prosecute him for any lesser degree of crime in the same category.[37] Conversely, a verdict of guilty would bar a subsequent prosecution for murder in the second or any lesser degree of murder.[38] In other words, it definitely can be stated that an acquittal embraces the same or a greater degree, while conviction includes the same or a lesser, provided the offenses charged are in the same category.

---

199 So. 38 (1940).

[31]McHugh v. State, 36 So.2d 786 (Fla. 1948).

[32]Hunt v. Jacksonville, 34 Fla. 504, 16 So. 398 (1894).

[33]McHugh v. State, 36 So.2d 786 (Fla. 1948).

[34]Albritton v. State, 137 Fla. 20, 187 So. 601 (1939); *cf.* Taylor v. State, 138 Fla. 762, 190 So. 262 (1939).

[35]*Ex parte* Clarkson, 72 Fla. 220, 72 So. 675 (1916); *accord,* Blockburger v. United States, 284 U. S. 299 (1932) (federal law); *see* Thomas v. State, 74 Fla. 200, 206, 76 So. 780, 782 (1917); *cf.* State v. Bacom, 159 Fla. 54, 30 So.2d 744 (1947); Bacom v. State, 39 So.2d 794 (Fla. 1949).

[36]FLA. STAT. §782.04 (1941).

[37]King v. State, 145 Fla. 286, 199 So. 38 (1940); *see* Pottinger v. State, 122 Fla. 405, 407, 165 So. 276, 277 (1936).

[38]McLeod v. State, 128 Fla. 35, 174 So. 466 (1937).

Furthermore, in reaching a decision as to former jeopardy, one must consider not merely the crime of which the accused was convicted but also that with which he was charged. If, for example, the indictment or information charges murder in the second degree and the accused is convicted of third degree murder, this verdict necessarily constitutes an acquittal of murder in the second degree because the jury had to pass on the accusation; the result is that he would be twice placed in jeopardy for the same offense if subsequently prosecuted for second degree murder.[39]

It can also logically be contended, inasmuch as Section 919.14 of Florida Statutes 1941 provides that the judge is to charge the jury that it may return a verdict of guilty of any lesser degree of the crime charged, that an acquittal in Florida is an acquittal of all such lesser degrees and bars a subsequent prosecution for any of them.

Still another principle is that an intervening change in the result of the acts, occurring after the first conviction, opens the door to a second prosecution based on the same acts and circumstances, though for a higher degree of crime.[40] For example, a conviction of assault in a justice of the peace court has been held not to bar a prosecution for manslaughter in the circuit court upon the death of the victim following the first trial, even though the second indictment was based on the same acts and circumstances.[41] In an analogous situation, when there were no intervening facts, it was held that a justice of the peace court did not have jurisdiction of the felony charged in the circuit court, with the result that the prosecution for the lower degree of the same offense in the justice of the peace court did not constitute a bar to the subsequent prosecution for felony.[42] In such situations the courts are prone to permit the second prosecution because of the opportunity presented to the defendant for obtaining a fraudulent conviction in the first trial.[43]

Finally, does a conviction of the crime charged bar a second prosecution in the same court for a greater degree of offense in the same cate-

---

[39]*E.g.*, Haddock v. State, 141 Fla. 132, 192 So. 802 (1939); McLeod v. State, *supra* note 39; West v. State, 55 Fla. 200, 46 So. 93 (1908); Johnson v. State, 27 Fla. 245, 9 So. 208 (1891).

[40]Sanford v. State, 74 Fla. 393, 78 So. 340 (1918).

[41]*See* Southworth v. State, 98 Fla. 1184, 125 So. 345 (1929).

[42]Alford v. State, 25 Fla. 852, 6 So. 857 (1889).

[43]State v. Reed, 26 Conn. 201 (1857); Commonwealth v. Alderman, 4 Mass. 477 (1808); State v. Little, 1 N. H. 257 (1818); State v. Lowry, 1 Swan 34, 31 Tenn. 40 (1851).

gory when no new factual result intervenes? Logically it should not, since the more serious offense has been neither passed on nor charged. As against this there is the practical consideration that the state can choose whatever accusation it wishes to make; and, having elected with all the facts available, it should not be permitted to try the accused again merely because of an inept choice. The reasoning in the various opinions implies that the former view prevails in Florida, since they constantly refer to the offense first charged when limiting the scope of a subsequent prosecution,[44] although Florida dicta and general textual material strongly support the latter position.[45] In many of the more thickly populated states such a situation has been squarely presented and decided according to the general rule that when the facts constitute but one offense, even though it is susceptible of division into parts, a series of prosecutions cannot be carved therefrom. Most states follow this latter view.[46] It is submitted that Florida courts should apply it if and when such a problem presents itself, with the qualification that the former trial must not have been obtained fraudulently on an inadequate information or indictment resulting from what is popularly known as "fixing" the public prosecutor.

IV. Conclusion

The protection afforded against double jeopardy is embodied in our Constitution in the short and inornate sentence, "No man shall be subject to be twice put in jeopardy for the same offense." These few words guarantee one of the most valuable rights of every citizen. The elasticity of

---

[44]Boswell v. State, 20 Fla. 869 (1884); *see* State v. Febre, 156 Fla. 149, 151, 23 So.2d 270, 271 (1945); Faulkner v. State, 146 Fla. 769, 770, 1 So.2d 857 (1941); Albritton v. State, 137 Fla. 20, 25, 187 So. 601, 603 (1939); State v. Lewis, 118 Fla. 910, 913, 160 So. 485, 486 (1935); West v. State, 55 Fla. 200, 205, 46 So. 93, 95 (1908); Johnson v. State, 27 Fla. 245, 260, 9 So. 208, 209 (1891).

[45]*See* Sanford v. State, 75 Fla. 393, 396, 78 So. 340, 341 (1918), and texts therein cited; *cf.* Fla. Stat. §920.09 (1941), relating to new trial.

[46]Grafton v. United States, 206 U. S. 333 (1907); Powell v. State, 89 Ala. 172, 8 So. 109 (1890); Floyd v. State, 80 Ark. 94, 96 S. W. 125 (1906); People v. Defoor, 100 Cal. 150, 34 Pac. 642 (1893); Bell v. State, 103 Ga. 397, 30 S. E. 294 (1898); Territory v. Silva, 27 Hawaii 270 (1923), *overruling* Territory v. Schilling, 17 Hawaii 249 (1906); State v. Elder, 65 Ind. 282 (1879); Commonwealth v. Miller, 5 Dana 320 (Ky. 1837); State v. Cheevers, 7 La. Ann. 40 (1852); Commonwealth v. Roby, 12 Pick. 496 (Mass. 1832); State v. Wondra, 114 Minn. 457, 131 N. W. 496 (1911); State v. Snyder, 50 N. H. 150 (1870); State v. Cooper, 31 N. J. L. 361 (1833);