Michigan Law Review

Volume 32 | Issue 4

1934

CRIMINAL LAW AND PROCEDURE-FORMER JEOPARDY-TESTS OF "SAME OFFENCE

CRIMINAL LAW AND PROCEDURE — FORMER JEOPARDY — TESTS OF "SAME OFFENCE"— The provision in the state and federal constitutions that one may not be put in jeopardy twice for the same offense is merely declaratory of the common law, and is in effect in all juris-

dictions.[1] However, there is often great difficulty in determining when offenses are the same. Several tests to determine the identity of offenses have been employed.

I.

The test most commonly used is that of Buller, J., in *Rex v. Vandercomb*,[2] that "unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second, an acquittal on the first indictment can be no bar to the second." [3] By applying the Buller test it has been held that a charge of practicing medicine without a license was not a bar to a conviction of committing an abortion;[4] that a conviction of "lewd and lascivious cohabitation" did not bar a charge of adultery;[5] that one could be punished for both breaking into a post office and stealing property therein;[6] that acquittal on a charge of murdering an unborn child did not bar a charge of using certain instruments to produce a miscarriage;[7] that rape and incest are not the same offense;[8] that acquittal on a charge of embezzlement did not bar a prosecution for forgery;[9] that bigamy and adultery are not the same offense;[10] that burglary and larceny are not the same;[11] that an attempt to open a safe with explosives and having burglar's tools in one's possession are separate offenses;[12] that larceny of cattle and receiving stolen cattle are not the same;[13] that forgery and getting money under false pretenses by issuance of the false check are distinct offenses.[14] By applying the Buller test it is clear in these cases that the two offenses of which the defendant was charged are not the same.

[1] BISHOP, CRIMINAL LAW, 9th ed., sec. 980-981.

[2] 2 Leach 708, 168 Eng. Repr. 455 (1796).

[3] Courts have stated this test in various ways in attempts to make it more explicit. People v. Defoor, 100 Cal. 150, 34 Pac. 642 (1893); State v. Price, 127 Iowa 301, 103 N. W. 195 (1905); People v. Johnson, 82 Cal. App. 411, 256 Pac. 273 (1927).

[4] People v. Johnson, 82 Cal. App. 411, 256 Pac. 273 (1927).

[5] Morey v. Commonwealth, 108 Mass. 433 (1871).

[6] Morgan v. Devine, 237 U. S. 632, 35 Sup. Ct. 712 (1915).

[7] State v. Elder, 65 Ind. 282, 32 Am. Rep. 69 (1879).

[8] Burdue v. Commonwealth, 144 Ky. 428, 138 S. W. 296 (1911); State v. Learned, 73 Kan. 328, 85 Pac. 293 (1906); Stewart v. State, 35 Tex. Cr. 174, 32 S. W. 766 (1895); People v. McCollum, 116 Cal. App. 55, 2 Pac. (2d) 432 (1931).

[9] Spears v. People, 220 Ill. 72, 77 N. E. 112, 4 L. R. A. (N. S.) 402 (1906).

[10] Swancoat v. State, 4 Tex. App. 105 (1878).

[11] State v. Montcrieffe, 165 La. 296, 115 So. 493 (1928); State v. Hackett, 47 Minn. 425, 50 N. W. 472, 28 Am. St. Rep. 380 (1891).

[12] Burch v. Commonwealth, 240 Ky. 519, 42 S. W. (2d) 714 (1931).

[13] State v. Wasinger, 133 Kan. 154, 298 Pac. 763 (1931).

[14] Binganan v. State, 181 Ark. 94, 24 S. W. (2d) 969 (1930).

But not all of the decisions have employed the Buller test. This has been particularly true in cases where by one or more acts in violation of the same provision of the criminal law a defendant affected more than one person. Although the courts should have little trouble here in applying this test, some of them have gotten themselves into difficulties by a careless examination of the facts. Thus, in *Moss v. State*[15] *D* fired four shots at *A*, killing *A* and *B*. It was held that an acquittal of the murder of *A* was a bar to a prosecution for the murder of *B*. And in *Ruffin v. State*[16] and *Spannell v. State*[17] the Georgia and Texas courts respectively on similar facts held that the first acquittal of the murder of *A* was a bar to a prosecution for the murder of *B*. But there were clearly two distinct sets of facts to be proved in these cases — those relating to the killing of *A*, and those relating to the killing of *B*. By applying Buller's test the first prosecution should not be a bar to the second, since *D* could not have been convicted on the first indictment by proof of the facts alleged in the second. On the other hand, in cases of a similar nature where the Buller test *was* employed, satisfactory results were obtained. For example, in *State v. Nash*[18] it was held that where *D* fired two shots into a crowd in order to disperse them, injuring *A* and *B*, he could be prosecuted for assault and battery on both *A* and *B*. And it was held in *Ebeling v. Morgan*[19] that where in one transaction *D* cut and opened several mail sacks, each successive mutilation constituted a separate crime for which he could be punished.

There are, however, also cases where different courts, applying the Buller test to virtually the same facts, have arrived at contradictory results. Thus, in some jurisdictions the manufacture and possession of liquor have been held to be separate offenses,[20] whereas in others they have been held to be the same.[21] The cases show the limited validity of this test, since they may be distinguished according to whether the defendant was charged first with the manufacture or first with the possession. If the first prosecution is for manufacture, a prosecution for the possession will be barred, since an essential fact to be proved in an indictment for the manufacture of liquor is the possession; whereas on a charge of possession of liquor it certainly is not essential to

[15] 16 Ala. App. 34, 75 So. 179 (1917).
[16] 29 Ga. App. 214, 114 S. E. 581 (1922).
[17] 83 Tex. Cr. 418, 203 S. W. 357 (1918).
[18] 86 N. C. 650, 41 Am. Rep. 472 (1882).
[19] 237 U. S. 625, 35 Sup. Ct. 710, 59 L. ed. 1151 (1915).
[20] Gordon v. State, 127 Miss. 396, 90 So. 95, 18 A. L. R. 1150 (1921); People v. Painetti, (Cal. App. 1929) 282 Pac. 1013.
[21] Goetz v. United States, (C. C. A. 5th, 1930) 39 F. (2d) 903; Murray v. State, (Okla. Cr. 1931) 2 Pac. (2d) 287; Hayes v. State, 43 Okla. Cr. 85, 277 Pac. 954 (1929).

prove the manufacture of the same liquor. The courts are in the same dilemma in cases involving charges for possession and transportation of liquor.[22]

2.

The court in *Roberts v. State*[23] tried to obviate this difficulty by applying the "same transaction" test, viz., "that the plea of autre fois acquit or convict is sufficient whenever the proof shows the second case to be the same transaction with the first." This test is well established in Georgia[24] and Tennessee,[25] and has been used in at least one Oklahoma case.[26] By applying this test it is easy to uphold the plea of former jeopardy, but it is hard to see how the plea will ever fail when one is charged with two offenses arising out of the same act. Thus, if this test had been used, the plea of former jeopardy should have been sustained in all the cases cited above. The Tennessee court was confronted with this difficulty in *Smith v. State*[27] where *D* in driving while drunk killed one child and injured another at the same time. He was indicted on three counts: (1) for manslaughter, (2) for assault and battery, (3) for driving while drunk. The court held that manslaughter and driving while drunk were separate offenses, but that assault and battery and manslaughter were of the same transaction. The court said that it was applying the "same transaction" test; it cited with approval the earlier Tennessee case of *Dowdy v. State*[28] where the same court held that a conviction for public drunkenness barred a conviction for driving on the highway while intoxicated, and yet held that the manslaughter and driving while drunk were not of the same transaction.

3.

Albeit the Tennessee court in the *Smith* case attempted to apply the "same transaction" test, it indicated another more sensible one. The court said:

> "The criminal intent present is an imputed disregard of the safety of all persons who might lie in the way of the recklessly

[22] Phillips v. State, 109 Tex. Cr. 523, 4 S. W. (2d) 1056 (1928); Doherty v. State, 114 Tex. Cr. 192, 24 S. W. (2d) 60 (1930); United States v. One Oldsmobile Coupe, (D. C. Idaho 1927) 22 F. (2d) 441.

[23] 14 Ga. 8 (1853).

[24] Blair v. State, 81 Ga. 628, 7 S. E. 855 (1888); Gulley, alias Bridges v. State, 116 Ga. 527, 42 S. E. 790 (1902); Harris v. State, 43 Ga. App. 485, 159 S. E. 603 (1931).

[25] Smith v. State, 159 Tenn. 674, 21 S. W. (2d) 400 (1929); Dowdy v. State, 158 Tenn. 364, 13 S. W. (2d) 794 (1929).

[26] Worley v. State, 42 Okla. Cr. 240, 275 Pac. 399 (1929).

[27] 159 Tenn. 674, 21 S. W. (2d) 400 (1929).

[28] 158 Tenn. 364, 13 S. W. (2d) 794 (1929).

and unlawfully driven automobile, and no act or intent can be charged against the plaintiff in error as affecting either of the two injured boys to the exclusion of the other. The plaintiff in error was guilty of a single unlawful act with a single criminal intent, and therefore can only be punished for a single offense or crime."

Since all punishable crimes involve the two elements of wrongful act and wrongful intent, it would seem essential in order to determine when two offenses are the same to inquire whether in both the act and the intent were the same.[29] This "act-intent" test will explain a wider range of decisions than will either of the two tests previously mentioned, but it also would obtain results different than those achieved by the Buller and "same transaction" tests. Thus, in the *Moss* and *Ruffin* and *Spannell* cases there was by this test but one act, the shooting, and one intent, the intent to kill *A*. Hence, we would say that the offenses of which *D* was charged were the same. The Buller test, however, would obtain a different result. And when applied to the case of *State v. Nash* (where defendant fired into a crowd, injuring *A* and *B*), it makes the holding of the court (based on the Buller test) appear unjustified, since in that case it appears that there was but one intent, yet it was held that *D* could be prosecuted for assault and battery on each of the two people injured. The intent necessary to sustain a charge of criminal assault is merely reckless disregard of the consequences,[30] hence *D* can hardly be said to have intended to injure both *A* and *B*. Nor can the decision in *Ebeling v. Morgan* (the mail sack case) be sustained by this test, since it seems that *D* in that case had only the one intent to seize the contents of the various mail sacks which he mutilated. However, the court in that case said that the legislature must have intended that each successive mutilation should be a distinct offense, and the case may be explained on that ground. And in *Smith v. State* (the drunken driver case) it would obtain a different result than that arrived at by the application of the "same transaction" test; there were but one intent and one act, hence there was but one offense.

This "act-intent" test does not, however, prove very effective in cases where the defendant has violated two provisions of the liquor statutes.[31] But here there is doubt whether liability for violation of a statute requires any intent at all except the intent to do the act.[32]

Hence, it seems that after our examination of the most commonly used tests we are no further than when we started. Our question, what is the same offense, is still unanswered. Our feeling is shared by the

[29] 22 MICH. L. REV. 142 (1923).
[30] State v. Schutte, 87 N. J. L. 15, 88 N. J. L. 396, 93 Atl. 112 (1916).
[31] See notes 20, 21, 22, supra.
[32] 22 MICH. L. REV. 142 (1923).

Oregon Supreme Court which, after examining the tests to determine when offenses are the same, says:[33]

> "The question is not so much whether the defendant has been tried for the same act, or whether the facts alleged in the secónd indictment would have warranted a conviction on the first, as it is whether he has been put in jeopardy for the same offense, or some part or constituent element thereof, and the rules to be found in the books are only means for determination of that question."

The Oregon court finds itself, apparently, in the same dilemma as the writer, and without proposing any tests in order to determine the identity of offenses merely queries the sameness of the offense in the particular case.

4.

Since none of the tests employed have proved adequate, and since their use has resulted in confusion, the American Law Institute has undertaken a remedy. In its tentative draft on Administration of the Criminal Law it provides that "Two prosecutions are for the same offense when they are for violations of the same provisions of the criminal law and when the facts on which they are based are the same." [34] It will be noted that the provision is in the conjunctive; it requires that for an offense in one charge to be the same as that alleged in another charge the two must not only be in violation of the same provision of the criminal law, but also the facts on which they are based must be the same. Under this test it appears that all courts would agree when offenses are the same. Thus, all courts would agree that a prosecution for the manufacture of liquor would be no bar to a prosecution for the possession of liquor, since under the American Law Institute test the power to prosecute depends on whether the act is the same and whether there is a violation of more than one provision of the criminal law. Thus the inconsistency which arose through the application of the Buller test, in which the result depended on whether the first prosecution was for manufacture or for possession, would under the American Law Institute test be obviated. Clearly, there is a violation of two provisions of the criminal law, and it may be that the act is not the same. Similarly, the Tennessee court,[35] which found it impossible to separate two offenses arising from the same act, would have to decide that an assault and battery of *A* and a manslaughter of *B* are separate offenses, and the Alabama, Georgia, and Texas courts,[36] which were

[33] State v. Howe, 27 Ore. 138, 44 Pac. 672 (1895).

[34] Am. L. Inst. Rest. Administration of the Criminal Law, Tentative Draft No. 2, sec. 5, p. 9.

[35] Smith v. State, 159 Tenn. 674, 21 S. W. (2d) 400 (1929).

[36] Moss v. State, 16 Ala. App. 34, 75 So. 179 (1917); Ruffin v. State, 29 Ga.

unable to separate the killing of *A* from the killing of *B*, would agree that the murder of *A* and the murder of *B* are separate offenses.[37]

Further it would seem that the Institute's test is more adequate than the proposed "act-intent" test for the reason that its application will not involve the determination of any such difficult fact questions as the defendant's motive, as required under the "act-intent" test, and no confusion will arise in cases where there have been violations of two statutes, where intent may not be required.

The courts have apparently gotten themselves into their present state of confusion through their endeavors to be just and in their desire not to convict a second time under certain circumstances. One simple test is proposed by this provision of the American Law Institute, and with the subsequent sections the reason for the confusion is gone, since these contain provisions prohibiting two prosecutions in certain cases where, though the offenses are not the same, sound considerations of policy forbid a second prosecution. Hence, the Institute's proposal should prove a valuable addition to the criminal law.

W. I. R.

App. 214, 114 S. E. 581 (1922); Spannell v. State, 83 Tex. Cr. 418, 203 S. W. 357 (1918).

[37] In this situation *D* had violated the same provision of the criminal law, but the facts on which the prosecutions were based were not the same, since in each prosecution it is necessary to prove the death of another party. The act of the defendant is the same in each—i.e., shooting the gun, but the facts are different in that different people are killed.