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**DISTRICT COURT OF NEW YORK
NASSAU COUNTY**

People v. Yaghoubi¹
(decided October 6, 2005)

Yaghoubi, a defense witness in an unrelated criminal case, was ruled to have committed criminal contempt in June 2002.² Again, in May 2003, Yaghoubi was charged by the People with one count of criminal contempt in the second degree.³ Yaghoubi motioned to dismiss the second contempt charge contending that, pursuant to section 40.20 of the New York Criminal Procedure Law, the second prosecution was barred by constitutionally protected double jeopardy principles.⁴ Prior to filing opposition to the motion, the People moved to vacate the original contempt order contending that it was jurisdictionally defective because of a lack of notice.⁵ The county court agreed and granted the People's motion.⁶ Therefore, because the former prosecution was vacated and nullified, this court held that the subsequent contempt prosecution did not violate the Double Jeopardy Clause of the United States Constitution

¹ 802 N.Y.S.2d 913 (N.Y. Dist. Ct. 2005).

² *Id.* at 914.

³ *Id.* As distinguished from the first charge of criminal contempt, the People charged Yaghoubi under Penal Law §215.50(3). *Id.*

⁴ *Id.*; N.Y. CRIM. PROC. LAW § 40.20 (Consol. 2004) states in pertinent part: “[a] person may not be twice prosecuted for the same offense . . . [or] be separately prosecuted for two offenses based upon the same act or criminal transaction”

⁵ *Yaghoubi*, 802 N.Y.S.2d at 914.

⁶ *Id.*

or the New York Constitution as set forth in Article 40 of the Criminal Procedure Law.⁷

On June 19, 2002, Yaghoubi testified in the criminal matter of *People v. Kevin Hart* as a witness for the defense.⁸ Toward the conclusion of the day, the prosecution was not finished cross-examining Yaghoubi.⁹ Thus, Yaghoubi was directed by Honorable Donald DeRiggi to return to court the next day.¹⁰ However, Yaghoubi never appeared and Judge DeRiggi “summarily granted the People’s oral application to hold the defendant in contempt and ordered his arrest.”¹¹ Additionally, on May 14, 2003, the People charged Yaghoubi under a different criminal contempt statute.¹² Then, on February 28, 2005, Yaghoubi motioned to dismiss the second contempt charge asserting double jeopardy protections as codified in section 40.20.¹³ In seeking to defeat Yaghoubi’s motion, the People moved to vacate the former contempt order issued by Judge DeRiggi because Yaghoubi was neither given notice nor an opportunity to be heard on the matter.¹⁴ In response to the People’s motion, Judge Berkowitz vacated Judge DeRiggi’s contempt order. Subsequently, the People filed opposition to Yaghoubi’s motion to

⁷ *Id.* at 917. See U.S. CONST. amend. V stating, in pertinent part: “nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb”; N.Y. CONST. art. I, § 6 stating, in pertinent part: “No person shall be subject to be twice put in jeopardy for the same offense.”

⁸ *Yaghoubi*, 802 N.Y.S.2d at 914.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* While the judge did rule that Yaghoubi was in contempt, Judge DeRiggi did not specify which law was violated. *Id.*

¹² *Id.*

¹³ *Yaghoubi*, 802 N.Y.S.2d at 914.

¹⁴ *Id.*

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dismiss.¹⁵

The issue before this court was “whether the Double Jeopardy Clause pursuant to the Federal and State Constitutions and N.Y. statutory framework prohibit the prosecution of [Yaghoubi] for Criminal Contempt” when a previous contempt order from the same offense was vacated and nullified.¹⁶ From the outset of the analysis, the court recognized that the legislature codified New York’s double jeopardy protections in Article 40.¹⁷ The court interpreted Article 40 as “expand[ing] the protections afforded by the state and federal constitutions.”¹⁸ Specifically, under section 40.20 “[a] person may not be twice prosecuted for the same offense . . . [or] be separately prosecuted for two offenses based upon the same act or criminal transaction”¹⁹ Moreover, the statute defines a prosecution as an action that either “(1) terminates in a conviction upon a plea of guilty; (2) proceeds to the trial stage and a jury has been impaneled and sworn or, (3) in the case of a trial by the court without a jury, a witness is sworn.”²⁰

However, pursuant to section 40.30, there are four circumstances that defeat a defendant’s earlier prosecution.²¹ Specifically, section 40.30(4) provides that when a prosecution for an offense is “subsequently nullified by a court order which dismisses the accusatory instrument . . . the nullified proceedings do not bar

¹⁵ *Id.*

¹⁶ *Id.* at 915.

¹⁷ *Id.*

¹⁸ *Yaghoubi*, 802 N.Y.S.2d at 915.

¹⁹ *Id.* (citing N.Y. CRIM. PROC. LAW § 40.20).

²⁰ *Id.* at 915-16 (citing N.Y. CRIM. PROC. LAW § 40.30).

further prosecution of such offense under any new accusatory instrument obtained pursuant to such court order.”²² Pursuant to this controlling authority, the court reasoned that “[d]ouble jeopardy does not apply if a previous conviction is vacated, thereby rendering the conviction a nullity.”²³ Accordingly, the court denied Yaghoubi’s motion and held that the subsequent prosecution for criminal contempt did not violate the United States Constitution’s Double Jeopardy Clause or the New York Constitution’s double jeopardy protections as provided pursuant to Article 40.²⁴

The United States Supreme Court, in *North Carolina v. Pearce*, discussed whether the Constitution protected a defendant from receiving: (1) a harsher sentence upon retrial; or (2) no credit for the portion of the original sentence already served “[w]hen at the behest of the defendant a criminal conviction [had] been set aside and a new trial ordered.”²⁵ The *Pearce* Court presided over two cases dealing with criminal defendants whose original convictions were either reversed or set aside.²⁶ Both defendants were subsequently convicted upon retrial and received greater prison terms.²⁷ Unlike Yaghoubi, both defendants started serving time against their original convictions and, in one case, the defendant’s new sentencing did not

²¹ See *id.* at 916.

²² N.Y. CRIM. PROC. LAW § 40.30(4).

²³ *Yaghoubi*, 802 N.Y.S.2d at 916-17 (citing *DeCanzio v. Kennedy*, 415 N.Y.S.2d 513 (App. Div. 4th Dep’t 1979)).

²⁴ *Id.* at 917.

²⁵ *North Carolina v. Pearce*, 395 U.S. 711, 713 (1969), *overruled by* *Alabama v. Smith*, 490 U.S. 794 (1989) (striking the Court’s due process analysis by holding that there is “no basis for a presumption of vindictiveness where a second sentence imposed after a trial is heavier than a first sentence imposed after a guilty plea.”).

²⁶ *Id.* at 713-14.

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take into account the defendant's time served toward the original conviction.²⁸

In determining whether credit for time served on the defendant's original conviction was constitutionally required, the Court looked to the constitutional protections of the Fifth Amendment's Double Jeopardy Clause.²⁹ According to the Court, the Double Jeopardy Clause provides three separate protections.³⁰ First, "[i]t protects against a second prosecution for the same offense after acquittal."³¹ Second, "[i]t protects against a second prosecution for the same offense after conviction."³² Finally, "[i]t protects against multiple punishments for the same offense."³³ In applying the final protection, the Court reasoned that a defendant would suffer "multiple punishments for the same offense" if the original conviction was set aside and the defendant was reconvicted without receiving credit for the original time served.³⁴ Thus, the Court held that the Constitution "requires that punishment already exacted must be fully 'credited' in imposing sentence upon a new conviction for the same offense."³⁵

Next, *Pearce* turned to the issue of double jeopardy limitations on imposing a reconviction which is harsher than the

²⁷ *Id.*

²⁸ *Id.*

²⁹ *See id.* at 717-19.

³⁰ *Pearce*, 395 U.S. at 717.

³¹ *Id.* (citing *United States v. Ball*, 163 U.S. 662 (1896); *Green v. United States*, 355 U.S. 184 (1957)).

³² *Id.* (citing *In re Nielsen*, 131 U.S. 176 (1889)).

³³ *Id.* (citing *United States v. Benz*, 282 U.S. 304 (1931)) (additional citations omitted).

³⁴ *Id.* at 718.

³⁵ *Pearce*, 395 U.S. at 718-19.

defendant's original conviction.³⁶ The Court reflected back to Fifth Amendment precedent established in the 1960's which, like the New York State Constitution, established that the guarantee against double jeopardy "does not preclude the Government's retrying a defendant whose conviction is set aside because of an error in the proceedings leading to conviction."³⁷ Further, in retrying a defendant, courts have the power to "impose whatever sentence [that] may be legally authorized."³⁸ Given this long standing rule, the Court held that the Fifth Amendment's Double Jeopardy Clause does not prohibit reconviction following the setting aside of an original conviction nor "an absolute bar to a more severe sentence upon reconviction."³⁹ Finally, while no double jeopardy violation was found, the Court held that the lower courts violated the due process rights of each defendant by imposing harsher sentences as a punishment for the defendant's efforts in successfully setting aside their original convictions.⁴⁰

In *DeCanzio v. Kennedy*, the issue before the court was whether a criminal defendant's retrial violated the double jeopardy protections afforded under the New York Criminal Procedure Law or the state and federal constitutions.⁴¹ According to the facts, the petitioner's original murder conviction was vacated based on grounds of police misconduct and newly discovered evidence.⁴²

³⁶ *Id.* at 719.

³⁷ *Id.* at 720 (citing *United States v. Tateo*, 377 U.S. 463 (1964)).

³⁸ *Id.*

³⁹ *Id.* at 723. Also, the Court decided that the Equal Protection Clause did not bar the imposition of a more severe sentence. *Id.*

⁴⁰ *See Pearce*, 395 U.S. at 723-26.

⁴¹ *DeCanzio*, 415 N.Y.S.2d at 515.

⁴² *Id.* at 516. Two of the witnesses who testified at petitioner's murder trial recanted their

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Subsequently, a new trial was ordered and petitioner brought an Article 78 proceeding claiming that “his retrial places him twice in jeopardy.”⁴³ Petitioner argued that the exception under section 40.30(3) was not satisfied because the District Attorney issued a new indictment when the lower court specifically ordered “a new trial of the same accusatory instrument.”⁴⁴

Similar to *Yaghoubi*, the holding in *DeCanzio* turned on the applicability of section 40.30 which permits re-prosecution under specific circumstances without violating a defendant’s protection against double jeopardy.⁴⁵ The court applied section 40.30(3) because the grounds for vacating the defendant’s original conviction were based solely on newly discovered evidence.⁴⁶ The court noted that when the validity of the indictment is not in question, there is no reason to issue a new indictment.⁴⁷ Thus, pursuant to section 40.30(3), the previous order which nullified the conviction and directed a new trial of the same accusatory instrument, was proper.⁴⁸ Accordingly, the court held that the defendant’s constitutional rights prohibiting double jeopardy were not threatened as long as the retrial

testimony and one of the witnesses claimed that the Sheriff used illegal tactics to force his testimony. *See id.* at 515-16.

⁴³ *Id.* at 515 (citing U.S. CONST. amend. V; N.Y. CONST. art. I, § 6; N.Y. CRIM. PROC. LAW § 40.20) (other citations omitted).

⁴⁴ *Id.* at 519.; N.Y. CRIM. PROC. LAW § 40.30(3) states:

Despite the occurrence of proceedings specified in subdivision one, if such proceedings are subsequently nullified by a court order which restores the action to its pre-pleadings status or which directs a new trial of the same accusatory instrument, the nullified proceedings do not bar further prosecution of such offense under the same accusatory instrument.

⁴⁵ *DeCanzio*, 415 N.Y.S.2d at 519-20.

⁴⁶ *Id.*

⁴⁷ *Id.* at 520.

proceeds upon the original indictment.⁴⁹

In *Kelly v. Bruhn*, one issue dealt with whether a retrial on the same accusatory principle was prohibited by statutory and constitutional protections against double jeopardy when the original ruling was reversed.⁵⁰ The petitioner was convicted of sodomy in the third degree after being on trial for multiple charges of sexual abuse and sodomy with a fifteen year old girl.⁵¹ On appeal, the court found that one of the earlier rulings required reversal and a new trial.⁵² Subsequently, the petitioner sought dismissal based on double jeopardy grounds.⁵³ The Appellate Court responded by denying petitioners motion, and similar to *DeCanzio*, petitioner commenced a Civil Practice Law and Rules Article 78 action seeking to bar the retrial.⁵⁴

First, the court addressed petitioner's contention that the retrial was barred by New York's Criminal Procedure Law which provides state protection of a defendant's right against double jeopardy.⁵⁵ The court swiftly rejected this argument holding that section 40.30(3) allowed the court to order a retrial under the same accusatory instrument because the original prosecution was

⁴⁸ *Id.*

⁴⁹ *Id.* at 515.

⁵⁰ *Kelly v. Bruhn*, 771 N.Y.S.2d 561, 562 (App. Div. 3d Dep't 2004). The petitioner also argued that the retrial was prohibited on collateral estoppel grounds. *Id.*

⁵¹ *Id.*

⁵² *Id.* (citing *People v. Kelly*, 732 N.Y.S.2d 484 (App. Div. 3d Dep't 2001)).

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Kelly*, 771 N.Y.S.2d at 562. Petitioner invoked section 40.20(2) of the CPL which provides that "[a] person may not be separately prosecuted for two offenses based upon the same act or criminal transaction . . ." N.Y. CRIM. PROC. LAW § 40.20(2).

effectively nullified.⁵⁶ Similarly, the court found no merit to petitioner's claim that the "retrial [was] barred by constitutional double jeopardy principles."⁵⁷ The court reasoned that "[s]uch principles do not prevent successive prosecution of two offenses arising out of the same transaction where . . . 'each of the offenses contains an element which the other does not.'"⁵⁸ Thus, petitioner was unsuccessful in preventing a retrial of the sodomy charges against him.⁵⁹

It is clear that the language of the Double Jeopardy Clause of the United States Constitution and the New York State Constitution are almost identical.⁶⁰ However, New York differs from the federal government in that New York codified the scope of its Double Jeopardy Clause into Article 40, thereby providing an expanded interpretation of the protections afforded by the clause's non-descriptive language.⁶¹ However, as evidenced in *Pearce*, the reach of the Fifth Amendment's protections seems to be in agreement with New York's double jeopardy protections. This suggests that with regard to the instant issue, the only difference between the double jeopardy protections of the state and federal constitutions are those of format and procedure, not substance or interpretation. Thus, pursuant to the Fifth Amendment and Article 40 of New York's Criminal Procedure Law, a defendant cannot assert a double jeopardy defense

⁵⁶ *Kelly*, 771 N.Y.S.2d at 562 (citing N.Y. CRIM. PROC. LAW § 40.30(3)).

⁵⁷ *Id.* at 563.

⁵⁸ *Id.* (citing *People v. Wood*, 719 N.Y.S.2d 639 (2000)) (additional citations omitted).

⁵⁹ *Id.* at 563.

⁶⁰ *See supra* note 7.

⁶¹ *Yaghoubi*, 802 N.Y.S.2d at 915.

when the re-prosecution at issue is subsequent to a court order that vacated and nullified the corresponding original prosecution.

David Schoenhaar

DUE PROCESS

United States Constitution Amendment XIV:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law

New York Constitution article I, section 6:

No person shall be deprived of life, liberty or property without due process of law.

