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Double Jeopardy, Supreme Court, Appellate Term Second Judicial Department: People v. Steele

In sum, as the Fifth Amendment of the United States Constitution protects against being tried twice for the same offense, the Supreme Court in *Ashe v. Swenson*[228] also found that the doctrine of collateral estoppel is "embodied in the Fifth Amendment guarantee against double jeopardy."[229] A defendant may avail himself of this doctrine if he proves that the issues involved have, necessarily been determined in his favor in a prior trial.[230] Similarly, in addition to its constitutional protections, New York State has statutes[231] prohibiting a party from being tried separately for two offenses based on the same transaction unless the elements of each charge are substantially different and distinguishable,[232] and contrary verdicts would be consistent.[233] In *Quamina*, since there existed "substantially different elements" in each count, the court found no double jeopardy violation.[234]

SUPREME COURT, APPELLATE TERM

SECOND JUDICIAL DEPARTMENT

People v. Steele[235]
(decided April 4, 1997)

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third degree when . . . he possess any explosive incendiary bomb, bombshell, firearm, silencer, machine-gun or any other firearm or weapon simulating a machine-gun and which is adaptable for such use." *Id.*

[228] Ashe v. Swenson, 397 U.S. 436 (1970).

[229] *Id.* at 445.

[230] *See* People v. Acevedo, 69 N.Y.2d 478, 485, 508 N.E.2d 665, 669, 515 N.Y.S.2d. 753, 758 (1987). *See also* People v. Goodman, 69 N.Y.2d 32, 37, 503 N.E.2d 996, 999, 571 N.Y.S.2d 565, 568 (1986); People v. Berkowitz, 50 N.Y.2d 333, 344, 406 N.E.2d 783, 788-89, 428 N.Y.S.2d 927, 932 (1980); People v. LoCicero, 14 N.Y.2d 374, 380, 200 N.E.2d 622, 625, 251 N.Y.S.2d 953, 957 (1964).

[231] *See* N.Y. CRIM. PROC. LAW § 40.20, *supra* note 136. *See also* N.Y. CRIM. PROC. LAW § 310.70, *supra* note 3.

[232] *See* N.Y. CRIM. PROC. LAW § 40.20 (2) (a-b) *supra* note 136.

[233] *See* N.Y. CRIM. PROC. LAW § 310.70 (2) (a) *supra* note 136.

[234] People v. Quamina, 653 N.Y.S.2d at 612 (2d Dep't 1997).

[235] 172 Misc. 2d 860, 661 N.Y.S.2d 908 (Sup. Ct. App. T. 2d Dep't 1997).

The People appealed the lower court's dismissal of charges stemming from defendant's prosecution under sections 1192(2) and (3)[236] of the New York State Vehicle and Traffic Law [hereinafter "VTL"] following the court's suspension of defendant's license pursuant to VTL § 1193(2)(e)(7).[237] The lower court stated that prosecution under VTL §§ 1192(2) and (3) amounted to "multiple punishments for the same offense."[238] Additionally, the court stated that with the VTL § 1192(2) charge dismissed, the doctrine of collateral estoppel and New York Criminal Procedure Law [hereinafter "CPL"] § 40.40(1)[239]

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[236] N.Y. VEH. & TRAF. LAW §§ 1192(2), 1192(3) (McKinney 1996). Section 1192(2) provides:

> Driving while intoxicated; per se. No person shall operate a motor vehicle while such person has .10 of one percent or more by weight of alcohol in the person's blood as shown by chemical analysis of such person's blood, breath, urine or saliva, made pursuant to the provisions of section eleven hundred ninety-four of this article.

Id. Section 1192(3) provides: "Driving while intoxicated. No person shall operate a motor vehicle while in an intoxicated condition." *Id.*

[237] *Steele*, 172 Misc. 2d at 861, 661 N.Y.S.2d at 909. *See* N.Y. VEH & TRAF. LAW 1193(2) (McKinney 1996). Section 1193(2)(e)(7) provides for the suspension of a person's driver's license pending prosecution for driving with an excessive blood alcohol content and states:

> A court shall suspend a driver's license, pending prosecution, of any person charged with a violation of subdivision two or three of section eleven hundred ninety two of this article who, at the time of arrest, is alleged to have had .10 on one percent or more by weight of alcohol in such driver's blood as shown by chemical analysis of blood, breath, urine or saliva, made pursuant to subdivision two or three of section eleven-hundred ninety-four of this article.

Id.

[238] *Steele*, 172 Misc. 2d at 861, 661 N.Y.S.2d at 909.

[239] N.Y. CRIM. PROC. LAW § 40.40(1) (McKinney 1992). Section 40.40(1) provides in pertinent part:

> Where two or more offenses are joinable in a single accusatory instrument against a person by reason of being based upon the same criminal transaction . . . such person may not, under circumstances prescribed in this section, be separately prosecuted for such offenses even though such

barred prosecuting the defendant on the remaining VTL § 1192(3) charge.[240] On appeal the Supreme Court, Appellate Term, found that even though VTL §§ 1192(2) and 1193(2)(e)(7) constitute the same offense with regard to double jeopardy concerns, they do not constitute separate prosecutions.[241] Further, the court also found that §§ 1192(3) and 1193(2)(e)(7) do not constitute the same offense for purposes of double jeopardy and consequently, such prosecution "was not barred by the doctrine of collateral estoppel or CPL § 40.40(1)."[242]

In finding that the double jeopardy rights granted by the United States Constitution[243] and the New York State Constitution[244] were not violated, the court referred to its own decision in *People v. Conrad*.[245] In *Conrad*, the court found that prosecution of a violation of VTL § 1192(2) was not precluded by the preliminary license suspension mandated by VTL § 1192(2)(e)(7) because the "purpose and effect" of the suspension was as "a remedial sanction"[246] and did not qualify as a separate prosecution.[247] With no finding of a separate prosecution for the same offense, the court thus held that prosecution of a VTL § 1192(3) violation was

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> separate prosecutions are not otherwise barred by any other section of this article.

Id.

[240] *Steele*, 172 Misc. 2d at 861, 661 N.Y.S.2d at 909.

[241] *Id.* at 861, 661 N.Y.S.2d at 909.

[242] *Id.*

[243] U.S. CONST. amend. V. The Fifth Amendment provides in pertinent part: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ." *Id.*

[244] N.Y. CONST. art. I, § 6. This section provides in pertinent part: "[N]o person shall be subject to be twice put in jeopardy for the same offense . . . ." *Id.*

[245] 169 Misc. 2d 1066, 654 N.Y.S.2d 226 (Sup. Ct. App. T. 2d Dep't 1997). In *Conrad*, defendant was charged with the violation of VTL §§ 1192 and (3). *Id.* at 1067, 654 N.Y.S.2d at 227. Pursuant to VTL § 1193 (2)(e)(7), defendant's driver's license was suspended, and thereafter, the lower court dismissed the remaining charges holding that any such further prosecution would amount to multiple punishments for the same offense. *Id.*

[246] *Id.* at 1068, 654 N.Y.S.2d at 226.

[247] *Id.* The court reasoned that the operation of § 1192(2) and § 1193(2)(e)(7) are part of the same prosecution. *Id.*

not barred by the preliminary license suspension under VTL § 1193(2)(e)(7).[248]

Turning to the lower court's application of the doctrine of collateral estoppel, the Appellate Term relied on the United States Supreme Court's decision in *Blockburger v. United States,*[249] to define what constitutes the "same offense" for purposes of double jeopardy concerns.[250] In *Blockburger,* defendant was convicted of three counts of unlawful narcotics distributions[251] in violation of the Harrison Narcotics Act.[252] In his petition to the Court, defendant contended that the two sales charged in the second and third counts "as having been made to the same person" should have been considered a single offense.[253] The Court summarily rejected this argument stating that in deciding whether or not an act is violative of two "distinct statutory provisions" a court must ask "whether each provision requires proof of an additional fact which the other does not."[254] The *Steele* court, with the federal standard of defining a single offense

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[248] *Id.* at 1071, 654 N.Y.S.2d at 230.

[249] 284 U.S. 299 (1932). In *Blockburger,* the indictment contained a total of five counts upon which the jury rendered a verdict against the defendant on the second, third, and fifth counts. *Id.* at 300-01. The second count alleged that defendant had sold ten grains of a narcotic substance on a specific day with the third count alleging that defendant had made another unlawful sale to the same buyer the following day. *Id.* The Court sentenced defendant to a prison term of five years on each count (with the terms to run consecutively) and, in addition, fined defendant a total of $6,000. *Id.*

[250] People v. Steele, 172 Misc. 2d 860, 861, 661 N.Y.S.2d 908, 909 (Sup. Ct. App. T. 2d Dep't 1997).

[251] *Blockburger*, 284 U.S. at 304.

[252] *Id. See also* 26 U.S.C. § 692. The Harrison Narcotics Act provides:

> It shall be unlawful for any person to purchase, sell, dispense or distribute any of the aforesaid drugs [opium and other narcotics] except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be prima evidence of a violation of this section by the person in whose possession same may be found.

Id.

[253] *Blockburger,* 284 U.S at 301.

[254] *Id.* at 304.

as expressed in *Blockburger,* then addressed the standard adopted by New York that could be found in the New York Court of Appeals decision of *In Re Corbin v. Hillery.*[255] In *Corbin,* defendant was involved in a motor vehicle accident that resulted in a fatality.[256] Upon pleading guilty to a VTL § 1192(3) charge of driving while impaired, defendant moved to dismiss the remaining charges of reckless manslaughter, vehicular homicide, criminally negligent homicide, and reckless assault.[257] The county court denied defendant's motion.[258] The Court of Appeals reversed[259] and ordered the remaining charges to be dropped, stating that further prosecution after a plea of guilty to the VTL § 1192(3) amounted to a violation of double jeopardy rights.[260] The court held that in order for an act to be considered the same offense, the crimes must have "[e]ssentially the same statutory

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[255] 74 N.Y.2d 279, 543 N.E.2d 714, 545 N.Y.S.2d 71 (1989). In *Corbin,* it was alleged that defendant's car had crossed over the yellow line, colliding with two other vehicles and yielding substantial bodily injuries including one fatality. *Id.* at 282, 543 N.E.2d at 714, 545 N.Y.S.2d at 72. Tests performed on defendant after the accident yielded a .19% blood alcohol level. *Id.* at 283, 543 N.E.2d at 716, 545 N.Y.S.2d at 73. Somehow, the return date on the misdemeanor charges of operating a motor vehicle while intoxicated and driving on the wrong side of the road was changed so that the return date on those charges was two days earlier than originally scheduled. *Id.* In consequence, the District Attorney's office that later wanted to press more serious charges of reckless manslaughter and vehicular manslaughter was not present on this earlier date as it was not their night to "cover" the Town Justice Court. *Id.* With the office handling the principle case absent, defendant, with counsel, pled guilty to the two misdemeanor charges. *Id.* When the District Attorney's office later handed down an indictment charging the more serious manslaughter charges, defendant immediately moved to dismiss the indictment charging the more serious manslaughter charges, defendant immediately moved to dismiss the indictment citing double jeopardy violations. *Id.* The County Court denied defendant's petition. *Id.* at 285, 543 N.E.2d at 717, 545 N.Y.S.2d at 74. The Appellate Division dismissed the petition's Article 78 proceeding and the appeal was taken as of right on constitutional grounds, by the Court of Appeals. *Id.*

[256] *Id.* at 283, 543 N.E.2d at 715, 545 N.Y.S.2d at 72.

[257] *Id.* at 285, 543 N.E.2d at 717, 545 N.Y.S.2d at 74.

[258] *Id.*

[259] *Id.* at 283, 543 N.E.2d at 715, 545 N.Y.S.2d at 72.

[260] *Id.* at 290, 543 N.E.2d at 720, 545 N.Y.S.2d at 77.

elements or one must be a lesser included offense of the other."[261] The Court of Appeals, knowing that the prosecution was intending to use the same proof for both the original pled-to charges and the remaining more serious charges, held that the "[s]ubstantial double jeopardy problem . . . is apparent on the face of the People's pleadings here."[262]

In assessing the double jeopardy considerations under the Federal and State Constitutions, the *Steele* court applied an essentially identical test in deciding whether or not the prosecution of a single act amounted to multiple punishments for the same act.[263] The federal test employed asks whether or not each provision of a statute requires "[p]roof of an additional act which the other does not"[264] while the state standard demands that in order for an act to be considered the same offense, the crimes must have "[e]ssentially the same statutory elements or one must be a lesser included offense of the other."[265] In their basic effects, both standards afford their invokees the same level of protection.

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[261] *Id.* at 543 N.E.2d at 719, 545 N.Y.S.2d at 76.

[262] *Id.* at 543 N.E.2d at 720, 545 N.Y.S.2d at 77.

[263] People v. Steele, 172 Misc. 2d 860, 863, 661 N.Y.S.2d 908, 910 (Sup. Ct. App. T. 2d Dep't 1997).

[264] Blockburger v. United States 284 U.S. 299, 304 (1932).

[265] *Corbin,* 74 N.Y.S.2d at 289, 543 N.E.2d at 719, 545 N.Y.S.2d at 76.