



1995

Double Jeopardy

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Recommended Citation

(1995) "Double Jeopardy," *Touro Law Review*. Vol. 11 : No. 3 , Article 15.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol11/iss3/15>

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that his plea would end all criminal prosecutions resulting from his conduct.⁴⁹

New York has long recognized that a state is free, as a matter of its own law, to impose greater protection to defendants than those that the Supreme Court holds to be necessary under federal constitutional standards. New York has done just that in the constitutional realm of double jeopardy. For example, New York Criminal Procedure Law, provides greater protection than that afforded a defendant under both State and Federal Constitutions, which simply require the prohibition against double jeopardy for "the same offense."⁵⁰ However, in the context of the facts enunciated in *Latham*, Criminal Procedure Law section 40.20(2)(d) legislatively articulates that under federal and state constitutional analysis, the death of an injured person is the principal element of homicide. This element creates a separate offense from attempted murder and permits successive prosecutions without subjecting the defendant to double jeopardy. Therefore, under the facts enunciated in *Latham*, New York statutory law provides no greater protection against double jeopardy as defined by state and federal constitutional law.

SUPREME COURT

NIAGARA COUNTY

People v. LaDolce⁵¹
(decided September 15, 1994)

Defendant challenged her potential retrial for a depraved murder charge, during pretrial proceedings, claiming that the

49. *Id.*

50. *Id.*

51. 162 Misc. 2d 348, 616 N.Y.S.2d 897 (Sup. Ct. Niagara County 1994).

relitigation was barred by both the state⁵² and federal⁵³ constitutional prohibitions against double jeopardy.⁵⁴ The court held that the retrial of the second count would be in violation of both the State and Federal Constitutions since the jury was not properly instructed to render verdicts on the two inconsistent counts of intentional murder and depraved heart murder.⁵⁵ The court explained that a guilty verdict of intentional murder manifests a not guilty verdict of depraved murder.⁵⁶

Defendant was originally indicted for two counts of murder in the second degree,⁵⁷ and was tried before the Niagara County Court, where the trial resulted in a hung jury.⁵⁸ Subsequently, she was retried and found guilty of intentional murder, but no verdict was rendered on the depraved murder charge.⁵⁹ On appeal of that conviction, the appellate division reversed and remanded for a new trial.⁶⁰ During the pretrial proceedings, the

52. N.Y. CONST. art. I, § 6. Article 1, section 6 provides in pertinent part: “No person shall be subject to be twice put in jeopardy for the same offense” *Id.*

53. U.S. CONST. amend. V. The Fifth Amendment states: “No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb.” *Id.*

54. *LaDolce*, 162 Misc. 2d at 350, 616 N.Y.S.2d at 898.

55. *Id.*

56. *Id.* at 351, 616 N.Y.S.2d at 899.

57. See N.Y. PENAL LAW § 125.25 (1)(2) (McKinney 1987). The statute provides in pertinent part:

A person is guilty of murder in the second degree when:

1. With intent to cause the death of another person, he causes the death of such person or of a third person;
2. Under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person

Id.

58. *LaDolce*, 162 Misc. 2d at 349, 616 N.Y.S.2d at 897.

59. *Id.*

60. *LaDolce*, 196 A.D.2d 49, 57, 607 N.Y.S.2d 523, 528 (4th Dep’t 1994), *remanded*, 162 Misc. 2d 348, 616 N.Y.S.2d 897 (Sup. Ct. Niagara County 1994). In *LaDolce*, the defendant was charged with killing Chester Stawiasz, who was found buried in a concrete slab in the basement of a house, which the defendant had shared with her boyfriend and his son. *Id.* at 51, 607 N.Y.S.2d at 524. Defendant claimed she had seen her boyfriend and his son

defendant moved to dismiss the depraved murder charge, claiming it was barred by double jeopardy provision. In response, the New York Supreme Court, Niagara County, issued an oral decision ruling that the retrial of the depraved murder charge would place the defendant in double jeopardy, which was followed with this written decision.⁶¹

The New York Supreme Court noted that an analysis of whether or not defendant could be retried on both charges of intentional and depraved heart murder must begin with an examination of New York's Criminal Procedure Law on inconsistent counts.⁶² The court began by stating that the New York Criminal Procedure Law requires a court to direct the jury if an indictment concerns two inconsistent counts.⁶³ Moreover, the *LaDolce* court relied on the New York Court of Appeals'

carrying kettles of water to the bathroom, where she heard the victim complain of the hot water. *Id.* at 51, 607 N.Y.S.2d at 525. The defendant assumed the victim was supposedly scalded with hot water, and as a result, suffered a heart attack, despite efforts to revive him. *Id.* Next, she insisted that the two of them left for work, and when they returned, they all decided to bury his body. *Id.* Although defendant made the initial report to the police, her boyfriend and his son entered into a deal with the prosecution. *Id.* at 52, 607 N.Y.S.2d at 525. As prosecution witnesses, their testimony revealed that the defendant beat the victim with an oversized drumstick for a period of two days. Because of their testimony, the defendant was eventually convicted for intentional murder. *Id.*

61. *LaDolce*, 162 Misc. 2d at 349, 616 N.Y.S.2d at 898.

62. *Id.* See N.Y. CRM. PROC. LAW § 300.30(5) (McKinney 1993). Section 300.30(5) provides: "Inconsistent counts.' Two counts are 'inconsistent' when guilt of the offense charged in one necessarily negates guilt of the offense charged in the other." *Id.*

63. N.Y. CRM. PROC. LAW § 300.40(5) (McKinney 1993). Section 300.40(5) provides in pertinent part:

If an indictment contains two inconsistent counts, the court must submit at least one thereof. If a verdict of guilty upon either would be supported by legally sufficient trial evidence, the court may submit both counts in the alternative and authorize the jury to convict upon one or the other depending on its findings of fact. In such case, the court must direct the jury that if it renders a verdict of guilty upon one such count, it must render a verdict of not guilty upon the other.

Id.

decision in *People v. Gallagher*,⁶⁴ which held that intentional murder and depraved mind murder are in fact inconsistent counts.⁶⁵ However, the *LaDolce* court noted that the trial court did not charge the jury in accordance with the New York statute.⁶⁶ Instead, the jury was erroneously instructed that once they arrive at a guilty verdict, under either count, they were not to consider the other count.⁶⁷ Therefore, the *LaDolce* court concluded that the jury was improperly instructed, since the guilty verdict of intentional murder would have led to a not guilty verdict of depraved heart murder and “retrial of the latter would be unquestionably barred by constitutional principles of double jeopardy.”⁶⁸

In response, the People relied on *People v. Jackson*,⁶⁹ in which the New York Court of Appeals held that a second count can be

64. 69 N.Y.2d 525, 528, 508 N.E.2d 909, 909, 516 N.Y.S.2d 174, 175, (1987) (holding that “both counts may be submitted to the jury, but only in the alternative”).

65. *Id.* at 528, 508 N.E.2d at 909, 516 N.Y.S.2d at 175. In *Gallagher*, the defendant had shot and killed a fellow police officer after an all-night celebration. *Id.* He was charged in a single indictment with two counts of murder in the second degree, intentional and depraved mind murder. *Id.* at 528, 508 N.E.2d at 910, 516 N.Y.S.2d at 175. The trial judge allowed the additional charge of manslaughter, despite defense counsel’s objection that the judge should charge the jury in the alternative. *Id.* at 528-29, 508 N.E.2d at 910, 516 N.Y.S.2d at 175. Still, the judge allowed the charge to be made in a way that the jury could return two guilty verdicts. *Id.* The appellate division upheld the lower court’s action, but modified the judgment so that the defendant would not be punished twice for the same crime. *Id.* However, the court of appeals held it was error not to charge the two counts in the alternative, and reversed the conviction and ordered a new trial. *Id.* “[I]ntentional murder and depraved heart murder—are inconsistent counts.” *Id.* at 529, 508 N.E.2d at 910, 516 N.Y.S.2d at 175.

66. *LaDolce*, 162 Misc. 2d at 350, 616 N.Y.S.2d at 898.

67. *Id.* at 349, 616 N.Y.S.2d at 898.

68. *Id.* at 350, 616 N.Y.S.2d at 898.

69. 20 N.Y.2d 440, 453, 231 N.E.2d 722, 731, 285 N.Y.S.2d 8, 20 (1967) (holding that the defendant was not placed in double jeopardy because the trial judge’s failure to instruct the jury did not seriously prejudice his rights), *cert. denied*, 391 U.S. 928 (1968).

retried without a violation of double jeopardy.⁷⁰ However, the *LaDolce* court stated that cited precedents were of no value to the case at bar.⁷¹ The court explained that *Jackson* predated New York's Criminal Procedure Law on inconsistent counts, and the charges in that case were not inherently inconsistent.⁷² The court further explained that *People v. Charles*⁷³ is of no precedential value. The *Charles* decision did not involve inconsistent counts, and when analyzing the case, the *LaDolce* court noted that the New York Court of Appeals apportioned greater significance to the fact that the jury, in *Charles*, did not consider or reach a verdict on the remaining counts.⁷⁴

However, in *LaDolce*, the jury did in fact consider both counts and even requested a read back of the charges for both intentional and depraved indifference murder.⁷⁵ The court found that the jury verdict "when viewed in the context of the trial court's charge that the first and second counts were mutually exclusive . . ." constituted a "not guilty" verdict for depraved murder.⁷⁶

Finally, the court reasoned that under both *Jackson* and *Charles*, it was possible for jurors to return guilty verdicts on all counts.⁷⁷ However, in *LaDolce*, the charges were inherently inconsistent, and thus, would be a violation of her constitutional

70. *Jackson*, 20 N.Y.2d at 451-53, 231 N.E.2d at 730-31, 285 N.Y.S.2d at 19-20. In *Jackson*, the defendant had been charged with felony murder and common law premeditated murder. *Id.*

71. *LaDolce*, 162 Misc. 2d at 350-51, 616 N.Y.S.2d at 898-99.

72. *See* *People v. Myers*, 161 A.D.2d 808, 809, 556 N.Y.S.2d 137, 138 (2d Dep't 1990) (holding that the counts of "felony murder and depraved indifference murder are not inconsistent counts . . . and the court was not required to charge them in the alternative"); *see also* *People v. Leonti*, 18 N.Y.2d 384, 391-92, 222 N.E.2d 591, 595-96, 275 N.Y.S.2d 825, 831-32 (1966) (stating that a jury could find the defendant guilty of both felony murder and common law murder), *cert. denied*, 389 U.S. 1007 (1967).

73. 78 N.Y.2d 1044, 1047, 581 N.E.2d 1336, 1338, 576 N.Y.S.2d 81, 83 (1991). In *Charles*, the court held that defendant's constitutional right against double jeopardy would not be violated where a jury did not return a verdict on the counts to be retried. *Id.*

74. *LaDolce*, 162 Misc. 2d at 350, 616 N.Y.S.2d at 899.

75. *Id.*

76. *Id.* at 350-51, 616 N.Y.S.2d at 899.

77. *Id.* at 351, 616 N.Y.S.2d at 899.

right under the Double Jeopardy Clause. Thus, the court held that to retry the defendant on the second count was violative of her right not to be placed in double jeopardy.⁷⁸

The United States Constitution has a Double Jeopardy Clause which safeguards a defendant's rights as well. This right has "from the very beginning been part of our constitutional tradition"⁷⁹ and is "clearly 'fundamental to the American scheme of justice.'"⁸⁰ Hence, the Fifth Amendment protects a criminal defendant from multiple punishments and repeated prosecutions for the same offense. Accordingly, the *LaDolce* court dismissed the second count as violative of both the New York and Federal Constitutions.⁸¹

JUSTICE COURT

SECOND JUDICIAL DEPARTMENT

People v. Hempstead Video, Inc.⁸²
(printed December 29, 1994)

Hempstead Video, Inc., retailer of "adult novelties," moved to dismiss summonses and information filed against it pursuant to a Village of Valley Stream permit requirement on the grounds that the ordinance's enactment and enforcement constituted double jeopardy,⁸³ selective prosecution,⁸⁴ and impermissible regulation

78. *Id.*

79. *Benton v. Maryland*, 395 U.S. 784, 796 (1968).

80. *Id.* (citation omitted).

81. *LaDolce*, 162 Misc. 2d at 351, 616 N.Y.S.2d at 899.

82. N.Y. L.J., Dec. 29, 1994, at 27 (Justice Ct. 2d Jud. Dep't 1994).

83. 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.*; N.Y. CONST. art. I, § 6. Section six of the New York Constitution provides in pertinent part: "No person shall be subject to be twice put in jeopardy for the same offense" *Id.*