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Double Jeopardy: People v. Latham

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DOUBLE JEOPARDY

N.Y. CONST. art. I. § 6:

No person shall be subject to be twice put in jeopardy for the same offense . . . .

U.S. CONST. amend. V:

No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb . . . .

COURT OF APPEALS

People v. Latham[199]
(decided February 10, 1994)

The defendant claimed that his conviction of attempted murder, and his subsequent indictment of murder in the second degree when the victim died, violated his right against double jeopardy pursuant to the Constitutions of New York[200] and the United States,[201] and New York Criminal Procedure Law (C.P.L.).[202] The New York Court of Appeals found that "the 'delayed death' exemption from New York's statutory protection against double jeopardy[203] . . . extends to the offense of attempted

199. 1994 WL 35556, at *1 (N.Y. Feb. 10, 1994).

200. N.Y. CONST. art. 1, § 6. Article 1, § 6 of the New York Constitution provides in part: "No person shall be subject to be twice put in jeopardy for the same offense . . . ." *Id.*

201. 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.*

202. N.Y. CRIM. PROC. LAW § 40.20(1) (McKinney 1992). Section 40.20(1) states: "A person may not be twice prosecuted for the same offense." *Id.*

203. N.Y. CRIM. PROC. LAW § 40.20(2)(d) (McKinney 1992). Section 40.20(2)(d) of the New York Criminal Procedure Law states:

> A person may not be separately prosecuted for two offenses based upon the same act or criminal transaction unless . . . [o]ne of the offenses is assault or some other offense resulting in physical injury to a person, and the other offense is one of homicide based upon the death of such

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murder . . . ."[204] Consequently, the court upheld the defendant's conviction of attempted murder and reinstated the indictment of murder in the second degree by finding no violation of either the State or Federal Constitutions.[205]

On May 18, 1990, the defendant, Ronald Latham, strangled and stabbed his estranged girlfriend.[206] The victim was found several hours later near death, and following surgery, suffered a stroke.[207] The victim was left virtually paralyzed and required life support.[208]

On January 9, 1991, Latham pled guilty to attempted murder in the second degree, in full satisfaction of his indictment for attempted murder and attempted assault.[209] The defendant was sentenced to 7 1/2 to 22 1/2 years in prison.[210] Although a report from the victim's physician indicated that he was unable to determine if the victim would ever recover, the issue regarding further prosecution if the victim died was never raised.[211] Seven weeks later, the victim died of her injuries and Latham was indicted for intentional murder and committed a murder with depraved indifference.[212]

Claiming that his second indictment was barred by the state and federal constitutional prohibition against double jeopardy, the defendant moved to dismiss the indictment.[213] The defendant's motion to dismiss was granted by the trial court.[214] The appellate

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> person from the same physical injury, and such death occurs after the prosecution for the assault or other non-homicide offense . . . .

Id.

204. *Latham*, 1994 WL 35556, at *1.
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.*
214. *Id.*

division reversed the trial court's order and reinstated the indictment.[215]

The court of appeals first responded to the defendant's statutory claim, because the enactment of C.P.L. section 40.20 was a legislative attempt to afford the defendant greater protection against double jeopardy than the Federal Constitution.[216] Under the Federal Constitution, only separate prosecutions arising out of the "same offense" constitute double jeopardy.[217] In *Blockburger v. United States*,[218] the Court, in devising a test to ascertain what would constitute the "same offense" for double jeopardy purposes, held that determining whether there are two offenses or one centers on "whether each provision requires proof of an additional fact which the other does not."[219]

In broadening the federal criteria for determining whether a person has been previously prosecuted for an offense, the New York Legislature enumerated six exemptions[220] to successive prosecutions which would receive no statutory protections.[221] In *Latham*, the court focused its attention on C.P.L. section 40.20(2)(d), since the People claimed that the defendant's murder indictment was permissible within this so called "delayed death" exemption.[222] The "delayed death" exemption permits subsequent prosecution of a defendant for a homicidal offense to a victim, after the defendant has already been prosecuted for a

215. People v. Latham, 188 A.D.2d 5, 594 N.Y.S.2d 429 (3d Dep't 1993).

216. *Latham*, 1994 WL 35556, at *2.

217. U.S. CONST. amend. V.

218. 284 U.S. 299 (1932). Blockburger was charged with five counts of sale of narcotics. *Id.* at 299-300. There were several successive sales involved, all to the same purchaser. *Id.* The defendant claimed that such successive sales constituted a single offense. *Id.*

219. *Blockburger*, 284 U.S. at 304 (citation omitted). The Court adopted the language: "A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." (quoting Morey v. Commonwealth, 108 Mass. 433, 434 (1871)).

220. N.Y. CRIM. PROC. LAW § 40.20(2)(a)-(f) (McKinney 1992).

221. *Latham*, 1994 WL 35556, at *2.

222. *Id.*

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non homicidal offense based on that victim's physical injury.[223] The People maintained that attempted murder is a non homicide offense, and as such, a subsequent prosecution for murder is within the boundaries allowable under the exemption.[224]

The court of appeals agreed that the prosecution must proceed based on the victim's present condition, but where death follows, "it is also in society's interest that the homicide be redressed."[225] Eleven years earlier, the court of appeals, in *People v. Rivera*,[226] observed that subsequent death to an assault is a supervening fact expressly permitting a second prosecution within the interpretation of the statute.[227]

In refining its definition of a "non-homicide offense," as it is used in the exemption, the court noted the definition of homicide in the New York Penal Law as "conduct causing the death of a person."[228] When there is no death, there is no homicide, thus "attempted murder, which fails to cause the death of a person, is thus by definition a 'non-homicide' offense."[229]

In holding that there was no statutory claim available to the defendant, the court next reviewed his state and federal constitutional claims.[230] The defendant asserted that under *Grady v. Corbin*,[231] his subsequent prosecution was barred, in that the

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223. *Id.*; *see also* N.Y. CRIM. PROC. LAW § 40.20(2)(d).

224. *Latham*, 1994 WL 35556, at *2.

225. *Id.*

226. 60 N.Y. 2d. 110, 456 N.E.2d 492, 468 N.Y.S.2d 601 (1983).

227. *Id* at 115, 456 N.E.2d at 495, 468 N.Y.S.2d at 604. (holding that charging the defendant with murder in which the death occurred after the first conviction for assault did not place the defendant in of double jeopardy).

228. *Latham*, 1994 WL 35556, at *2; N.Y. PENAL LAW § 125.00 (McKinney 1987).

229. *Latham*, 1994 WL 35556, at *2.

230. *Id.*

231. 495 U.S. 508 (1990), *overruled by*, United States v. Dixon, 113 S. Ct. 2849 (1993). The defendant, Corbin, was issued two traffic tickets for driving while intoxicated and for failure to keep to the right of the median. *Id.* at 511. The automobile accident resulted in one fatality and injury to another. *Id.* Corbin pled guilty to the traffic offenses. *Id.* at 513. Following his indictment for reckless manslaughter, Corbin claimed that this subsequent prosecution was for the same offense, for which he had already pled guilty and was thus constitutionally barred on double jeopardy grounds. *Id.* at 513-14.

Blockburger test is not the only standard for determining the impermissibility of successive prosecutions.[232] The *Grady* Court articulated the "same *conduct*" test, holding that successive prosecutions will be barred where the second prosecution requires relitigation of the *factual* issues already resolved in the first prosecution, and the government will be required to prove *conduct* that constitutes an offense for which the defendant has already been prosecuted.[233]

The court of appeals, in *Latham*, pointed out that the recent United States Supreme Court decision of *United States v. Dixon*,[234] overruled the *Grady* "same conduct" test and reinstated the holding in *Blockburger* as the sole test needed to determine the constitutionality of successive prosecutions.[235] The Court in *Dixon*, although hesitant to reconsider precedent, felt that the rule of *Grady* was poorly articulated and unworkable.[236] Furthermore, they observed that the result in *Grady* was based on "less than accurate historical analysis," and lacked factual constitutional basis.[237] *Dixon* concluded that subsequent prosecutions do not have to satisfy the "same conduct" test.[238]

It is important to note that even under the *Grady* decision, it is unlikely the defendant's assertion in *Latham* would have been sustained. The Court in *Grady* noted that there would be an exception to the "same conduct" test when the state, although using due diligence, is unable to proceed on the more serious charge because "the additional facts necessary to sustain that charge have not occurred or have not been discovered."[239]

In analyzing the facts of *Latham* using the *Blockburger* test, the court of appeals held that the element of death distinguished the defendant's conviction for attempted murder from intentional

232. *Latham*, 1994 WL 35556, at *2.
233. *Grady*, 495 U.S. at 521.
234. 113 S. Ct. 2849 (1993).
235. *Latham*, 1994 WL 35556, at *3.
236. *Dixon*, 113 S. Ct. at 2851-52.
237. *Id.*
238. *Id.*
239. *Grady*, 495 U.S. at 516 n.7 (quoting Brown v. Ohio, 432 U.S. 161, 169 (1977)).

murder.[240] The "same offense" did not exist in the successive prosecution, and as such the subsequent prosecution would not be barred by any federal constitutional double jeopardy restraints.[241] Furthermore, since the defendant did not claim any greater protection under the New York State Constitution than under the Federal Constitution, any secondary constitutional analysis was unnecessary and both claims were rejected by the court.[242]

The defendant also maintained that the state had breached its promise against subsequent prosecution implied in the original plea bargain, and specific performance was mandated to reinstate the original agreement.[243] The *Latham* court agreed that if the intentions of the prosecutor and the defendant, at the time of the plea bargain, was to "close the matter forever," then there would have been a breach of promise.[244] This breach, therefore, would have mandated specific performance of the original bargain.[245] The court noted, however, that New York does not adhere to a *subjective* double jeopardy rule.[246] The fact that neither the People nor the defendant raised any question regarding further prosecution in the event of the victim's death, would not bar prosecution based on the defendant's presumption that his plea would end all criminal prosecutions resulting from his conduct.[247]

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240. *Latham*, 1994 WL 35556, at *3.

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id*; *see also* State v. Carpenter, 623 N.E.2d 66 (Ohio 1993). The Supreme Court of Ohio held that unless the state expressly reserves the right to file additional charges, on the record, at the time of the defendant's plea, it cannot indict the defendant for murder after the court has accepted a negotiated guilty plea to a lesser offense. *Id.* at 68; State v. Nelson, 579 A.2d 1104, 1106 (Conn. App. Ct. 1990) ("If the state were reserving a right to reprosecute [a defendant], in the event of the victim's death, it could have, and should have, said so."). *But see* State v. Thomas, 294 A.2d 57 (N.J. 1972) (indicating there may be circumstances in which the conduct of the defendant has been so dishonest as to justify the court in depriving him of the agreed to plea bargain).

246. *Latham*, 1994 WL 35556, at *3.

247. *Id.*

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, as is apparent in the New York Criminal Procedure Law, which provides greater protections than those afforded a defendant under both State and Federal Constitutions, which simply requires the prohibition against double jeopardy for "the same offense." In the context of the facts enunciated in *Latham*, C.P.L. 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. It is the element that creates a separate offense from attempted murder and permits successive prosecutions without subjecting the defendant to double jeopardy.

SUPREME COURT, APPELLATE DIVISION

SECOND DEPARTMENT

People v. Mitchell[248]
(decided October 25, 1993)

Defendant asserted that his right to be free from double jeopardy under the State[249] and Federal[250] Constitutions was violated when the court, which earlier granted the defendant's motion for a mistrial because of prosecutorial misconduct, later denied the defendant's request for a dismissal of his indictment

248. 197 A.D.2d 709, 602 N.Y.S.2d 923 (2d Dep't 1993).

249. N.Y. CONST. art I, § 6. Section 6 provides in pertinent part: "No person shall be subject to be twice put in jeopardy for the same offense . . . ." *Id.*

250. U.S. CONST. amends. V, XIV. 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.* The Fourteenth Amendment provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.*