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Supreme Court Queens County

these earlier decisions, the court found that there was no showing of bad faith intent.[143]

In comparing the federal and state cases referred to by the *May* court, the federal case explicitly stated the general rule for retrial and two exceptions and the state court construed the second exception on a case to case basis. In applying the second exception, which allows for the preclusion of a retrial in some circumstances involving misconduct by a prosecutor, the Appellate Division, Second Department has construed it to require a showing of bad faith intent.[144]

SUPREME COURT

QUEENS COUNTY

People v. Gerstner[145]
(decided February 2, 1996)

Defendant moved to dismiss felony charges arising out of violations of Sections 1192(2)[146] and 1192(3)[147] of New York

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143. *Id.*

144. *See Copeland*, 127 A.D.2d at 846, 511 N.Y.S.2d at 949; *See also Mitchell*, 197 A.D.2d at 709, 602 N.Y.S.2d at 924.

145. 168 Misc. 2d 495, 638 N.Y.S.2d 559 (Sup. Ct. Monroe County 1996).

146. N.Y. VEH. & TRAF. LAW § 1192(2) (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 per cent 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.

147. N.Y. VEH. & TRAF. LAW § 1192(3) (McKinney Supp. 1996). Section 1192(3) provides: "Driving while intoxicated. No person shall operate a motor vehicle while in an intoxicated condition." *Id.*

State Vehicle and Traffic Law [hereinafter "VTL"].[148] Defendant argued that the mandatory suspension of his driver's license under Section 1193(2)(e)(7) of the VTL rose to the level of a punishment that, coupled with felony charges, constituted "successive prosecutions and potential multiple punishments for the same crimes"[149] and therefore, subjected him to double jeopardy in violation of the United States Constitution,[150] the New York State Constitution[151] and New York Criminal Procedure Law Article 40.[152] The court, relying on a "myriad of legal pronouncements" and a plain reading of the statute, held that "suspension pending prosecution pursuant to VTL § 1193(2)(e)(7) [w]as not a separate proceeding, and . . . since it was the legislature's manifest intent that, in addition to a suspension pending prosecution, one could be punished following a conviction under VTL § 1192(2) or (3), the [d]efendant's double jeopardy rights [were] not violated."[153]

On February 25, 1995, the defendant, Gerard J. Gerstner, was arrested for driving while intoxicated in violation of sections 1192(2) and 1192(3) of the VTL.[154] Thereafter, the defendant was arraigned and his license suspended in accordance with the provisions of § 1193(2)(e)(7) of the VTL.[155] These provisions of

148. *Gerstner*, 168 Misc. 2d at 496, 638 N.Y.S.2d at 560.

149. *Id.*

150. U.S. CONST. amend. V. This provision provides in pertinent part: "[n]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." *Id.*

151. N.Y. CONST. art. I sec. 6. This section provides in pertinent part: "No person shall be subject to be twice put in jeopardy for the same offense . . . ." *Id.*

152. *Gerstner*, 168 Misc. 2d at 496, 638 N.Y.S.2d at 560. *See* N.Y. CRIM. PROC. LAW § 40.20(1) (McKinney 1986). Section 40.20(1) provides in pertinent part: "A person may not be twice prosecuted for the same offense." *Id.*

153. *Gerstner*, 168 Misc. 2d at 500-01, 638 N.Y.S.2d at 562-63.

154. *Id.* at 496, 638 N.Y.S.2d at 560. *See* N.Y. VEH. & TRAF. LAW § 1192(2); .N.Y. VEH. & TRAF. LAW § 1192(3).

155. *Id.* N.Y. VEH. & TRAF. LAW § 1193(2)(e)(7) (McKinney 1996). This section provides for the suspension of one's driver's license pending prosecution for driving with an excessive blood alcohol content and states:

the VTL, taken together, mandate the suspension of a defendant's license upon arraignment while a subsequent prosecution is pending where there is "reasonable cause to believe that, based upon a chemical analysis, the defendant's blood alcohol content was at least .10 of one percent."[156]

The court began its analysis by recognizing that protections against double jeopardy include the prohibition of "a second trial or prosecution for the same offense following either an acquittal or a conviction, while additionally precluding multiple punishments."[157] In order to determine whether, taken together, defendant's driver's license suspension and prosecution of the driving while intoxicated offenses violated double jeopardy, the

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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 of 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.

156. *Gerstner*, 168 Misc. 2d at 496, 638 N.Y.S.2d at 560.

157. *Id. See also* Schiro v. Farley, 510 U.S. 222, 229-30 (1994) (holding that the sentencing phase of a single prosecution for murder, after a jury acquitted defendant of intentional murder, could not amount to a successive prosecution in violation of double jeopardy and, therefore, the use, for sentencing purposes, of the intentional murder aggravating circumstance was not prohibited); Jones v. Thomas, 491 U.S. 376, 386-87 (1989) (finding that where a state court fully vindicated a defendant's double jeopardy rights by commuting the shorter of defendant's two consecutive sentences, one for felony robbery and the other for felony murder, his subsequent confinement pursuant to the longer, felony murder sentence, with credit for time already served did not amount to double jeopardy); North Carolina v. Pearce, 395 U.S. 711, 723-24 (1969) (determining that neither the Double Jeopardy provision nor the Equal Protection Clause bars imposition of "a more severe sentence upon re-conviction" of a defendant who has had his original conviction set aside at his own behest); People v. Sailor, 65 N.Y.2d 224, 236, 480 N.E.2d 701, 710, 491 N.Y.S.2d 112, 121 (1985) (holding that "second persistent felony hearing was constitutionally permissible . . . and constitutional double jeopardy requirements did not bar a second felony offender proceeding after a failure of proof in the second persistent felony proceeding") (citations omitted).

court needed to answer two basic questions.[158] First, whether the suspension and prosecution constituted a single criminal action so as not to subject defendant to successive prosecutions and, second, whether the driver's license suspension under the provisions of VTL § 1193(2)(e)(7) was remedial in nature.[159]

In order to certify the first question in the affirmative, the court reasoned that "the required proof for conviction under Vehicle and Traffic Law § 1192(2) [wa]s indistinguishable from that which serve[d] as the basis for suspension of [Gerstner]'s driver's license pursuant to Vehicle and Traffic Law § 1193(2)(e)(7)."[160] Therefore, the court, utilizing the double jeopardy analysis applied in *Grady v. Corbin*[161] and *United States v. Dixon*,[162]

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158. *Gerstner*, 168 Misc. 2d at 497, 638 N.Y.S.2d at 560.

159. *Id.*

160. *Id.*

161. 495 U.S. 508 (1990). In *Grady*, defendant was an operator of one of three motor vehicles which was involved in a fatal motor vehicle accident. *Id* at 511. At the time of the accident the defendant's blood alcohol level was .19, nearly twice the legal limit. *Id.* While he was in the hospital receiving treatment for his own injuries, defendant was served with two traffic summonses which charged, driving while intoxicated, a misdemeanor, and failing to keep right of the median. *Id.* Both charges cited violations of the applicable sections of the Vehicle and Traffic Law. *Id.* Defendant pled guilty to both charges in traffic court and a minimum sentence of a $350 fine with a six-month license suspension was imposed by the presiding judge. *Id.* at 513. However, at no time during the pendency of these proceedings was the court informed, either by the defendant or the Assistant District Attorney, that the accident involved a fatality. *Id.* at 512-13. Subsequently, a grand jury indicted and charged defendant with "reckless manslaughter, second-degree vehicular manslaughter, [ ] criminally negligent homicide . . . [,] third-degree reckless assault . . . [,] and driving while intoxicated." *Id.* at 513. The defendant sought to dismiss the indictment on grounds of "statutory and constitutional double jeopardy." *Id.* at 514. The Supreme Court affirmed the New York Court of Appeals ruling and barred all of the counts because each "violate[d] the Double Jeopardy Clause of the Fifth Amendment pursuant to the *Blockburger* Test." *Id.* at 514. *See* Blockburger v. United States, 284 U.S. 299, 304 (1932). The "Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Id.* at 521. Thus, under the *Blockburger* Test, "[i]f application of [the] test reveals that the

found that "[s]ince identical statutory elements control[led] . . . the two provisions constitute[d] the 'same offense.'"[163] However, the court's inquiry, for double jeopardy purposes, did not end here but rather extended to the second more difficult question: whether the driver's license suspension under the provisions of VTL § 1193(2)(e)(7) was remedial in nature.[164]

In analyzing the second question, the court recognized that the "protection afforded by the constitutional Double Jeopardy Clauses 'prohibits merely punishing twice, or attempting a second time to punish criminally for the same offense.'"[165] Although defendant argued that suspension of one's driver's license rose to the level of a punishment and therefore, the subsequent criminal prosecution constituted a second punishment, the court was not persuaded by this argument.[166] Instead the

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offenses have identical statutory elements or that one is a lesser included offense of the other, then the inquiry must cease, and the subsequent prosecution is barred." *Id.* at 516. *See Blockburger*, 284 U.S. at 304.

162.509 U.S. 688 (1993) (finding, *inter alia*, that the Double Jeopardy Clause precluded the prosecution of defendant because the individual elements of his two crimes could not be abstracted from each other. The elements of the "drug offense did not include any element[s] not contained in his previous contempt offense . . . ."). *Id.* at 698-700.

163. *Gerstner,* 168 Misc. 2d at 497, 638 N.Y.S.2d at 560.

164. *Id.*

165. *Id.* (citing Helvering v. Mitchell, 303 U.S. 391 (1938)). In *Helvering*, a monetary penalty was imposed upon defendant for income tax evasion despite defendant's acquittal on criminal charges. *Id.* at 398. The Supreme Court determined that the monetary penalty, although severe, was remedial in nature and therefore constituted a civil sanction. *Id.* at 400. Therefore, the Court stated that "in the civil enforcement of a remedial sanction there can be no double jeopardy." *Id.* at 404. *See also* People v. Daniels, 194 A.D.2d 420, 421, 598, N.Y.S.2d 790, 791 (1st Dep't 1993) (holding that a defendant's subsequent conviction of sodomy in the first degree was not barred on double jeopardy grounds where the "antecedent proceedings under Article 10 of the Family Court Act were civil in nature").

166. *Gerstner,* 168 Misc. 2d at 497, 638 N.Y.S.2d at 561. *See e.g.* State v. Gustafson, 668 N.E.2d 435 (1996) (Ohio 1996) (finding an administrative license suspension punishment in light of its deterrent purpose and retributive intent); and People v. McRobbie, 168 Misc. 2d 151, 156, 636 N.Y.S.2d 975, 979 (Justice Ct. Monroe County. 1995) (determining that defendant's suspension of his driver's license, which was closely related to criminal

court determined that under the principle of *Barnes v. Tofany*,[167] "the suspension or revocation of the privilege of operating a motor vehicle is essentially civil in nature, having as its aims chastening of the errant motorist, and more importantly, the protection of the public from such a dangerous individual."[168] However, the court recognized, utilizing the principles set forth in *United States v. Halper*[169] and its progeny, including *Department of Revenue of Montana v. Kurth Ranch*,[170] that merely labeling a sanction civil in nature as opposed to criminal was insufficient for purposes of a double jeopardy analysis.[171]

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proceeding, did not serve solely as a remedial purpose, but rather served purposes of deterrence and punishment).

167. 27 N.Y.2d 74, 261 N.E.2d 617, 313 N.Y.S.2d 690 (1970). In *Barnes*, the court of appeals upheld a subsequent mandatory sixty-day license suspension after defendant's conviction of driving while ability impaired, despite an initial discretionary sixty-day suspension. *Id.* at 77-78, 261 N.E.2d 619-20, 313 N.Y.S.2d 693-94. The court reasoned that the subsequent suspension did not violate double jeopardy because it was based on the same act. *Id.*

168. *Id.* at 78, 261 N.E.2d at 620, 313 N.Y.S.2d at 694. The court of appeals held that the administrative proceeding which suspended defendant's driving privilege was civil in nature. *Id.* at 77, 261 N.E.2d at 619, 313 N.Y.S.2d at 693. Therefore, the subsequent criminal prosecution did not violate defendant's constitutional protection against double jeopardy. *Id.*

169. 490 U.S. 435 (1989). In *Halper*, defendant was convicted of submitting sixty-five fraudulent Medicare claims and was sentenced to prison and fined $5,000. *Id.* at 437. However, subsequent to defendant's criminal conviction, the government commenced a civil action against defendant, seeking $130,000 pursuant to statute. *Id.* at 438. The Supreme Court determined that since the $130,000 bore no rational relation to the governments actual losses, which amounted to only $585, the sanction was punitive in nature and not remedial and therefore constituted a second punishment in violation of defendant's right against double jeopardy. *Id.* at 451-52.

170. 511 U.S. 767 (1994) (holding that a tax statutorily imposed had to be characterized as punishment for double jeopardy analysis since it was exacted after defendant was arrested and convicted of a crime which involved the same conduct which gave rise to the tax). *See* Austin v. United States, 509 U.S. 602, 604 (1993) (applying Excessive Fines Clause of the Eighth Amendment to in-rem civil forfeiture proceedings in order to limit the government's power to punish).

171. *Gerstner*, 168 Misc. 2d at 497, 638 N.Y.S.2d at 561.

Furthermore, the court found that the language in *Halper* and *Kurth Ranch* indicated that the double jeopardy rules stated within these decisions "were not intended for general application."[172] Moreover, the court found support within these decisions for its conclusion that "such [civil] sanctions may include deterrence as its purpose, while still not being characterized as punishment, so long as the goal served by the sanctions is not disproportionate when compared to their remedial objectives."[173] Therefore, the *Gerstner* court concluded that "although a license suspension pursuant to Vehicle and Traffic Law § 1193(2(e)(7) may have a deterrent effect, its primary aim and objective is the promotion of highway safety."[174] Thus, the remedial purpose behind the suspension of defendant's driving privilege in *Gerstner* was "not overborne to the extent that it should be categorized as punishment."[175]

However, the *Gerstner* court did not end its double jeopardy analysis at this juncture, but rather argued in the alternative and determined that even if the suspension could be categorized as punishment, it could still be permissible under a double jeopardy analysis folowing the legal precedent set forth in *Halper* and *Kurth Ranch*.[176] The court found that such decisions "clearly recognize that legislatures may authorize multiple punishments for a single act within the same prosecution or proceeding."[177] However, to afford protection under double jeopardy, the "total punishment [must] not exceed that authorized by the legislature."[178] Therefore, the *Gerstner* court concluded that "if

172. *Id.*
173. *Id.* (citations omitted).
174. *Id.* at 499, 638 N.Y.S.2d at 562.
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* (citing Ohio v. Johnson, 467 U.S. 493 (1984). The *Johnson* Court stated that "[i]n contrast to the double jeopardy protection against multiple trials, the final component of double jeopardy--protection against cumulative punishments--is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature." *Id.* at 499. The Supreme Court reasoned that "the substantive power to prescribe crimes and determine punishments is vested with the legislature, [therefore,] the question

the legislature so intends, double jeopardy does not bar cumulative punishments in a single proceeding, such as a combination of a prison term plus a fine, consecutive sentences, or a prison term plus a forfeiture."[179]

The *Gerstner* court recognized the difficulties that courts within New York were having with respect to determining whether suspension of one's driving privilege and subsequent criminal prosecution occur within the same or separate proceedings.[180] Notwithstanding this difficulty, however, the *Gerstner* court, relying on a "fundamental reading of [VTL § 1192 and § 1193(2)(e)(7)]" and determined that it was the legislature's intent to provide for both the imposition of a criminal sanction subsequent to a suspension pending this prosecution.[181]

Therefore, the *Gerstner* court found that the license suspension was "imposed within the structure of a single criminal prosecution" and thus, did not subject defendant to a multiple punishment in violation of double jeopardy under either the Federal or New York State Constitutions.[182]

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under the Double Jeopardy Clause whether punishments are 'multiple' [w]as essentially one of legislative intent." *Id.* (citations omitted)).

179. *Gerstner,* 168 Misc. 2d at 500, 638 N.Y.S.2d at 562. (citing United States v. Torres, 28 F.3d 1463, 1464 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 669 (1994)).

180. *Id. See generally*, People v. McLees, 166 Misc. 2d 260, 631 N.Y.S.2d 990 (1st Dist. Ct. Suffolk County 1995) (citations omitted).

181. *Id.*

182. *Gerstner,* 168 Misc. 2d at 500, 638 N.Y.S.2d at 562.