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## Double Jeopardy

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significance."<sup>74</sup> Accordingly, a trial court cannot declare a mistrial simply because a delay would be inconvenient.

The *Stanley* court referred to double jeopardy protection under both the Federal and New York State Constitutions.<sup>75</sup> Both prohibit retrial for the same crime unless there is manifest necessity for the mistrial.<sup>76</sup> New York has codified some of these principles in Criminal Procedure Law section 280.10(3).<sup>77</sup> Under section 280.10(3) the trial judge must declare a mistrial under certain circumstances.<sup>78</sup>

## CRIMINAL COURT

### NEW YORK CITY

People v. Frank<sup>79</sup>  
(decided September 11, 1995)

The defendant moved for a dismissal claiming that the temporary suspension of his driver's license, due to his alleged refusal to submit to a chemical test, constituted double jeopardy in violation of both the New York State<sup>80</sup> and Federal

74. *Id.*

75. *Stanley v. Justices of the Supreme Court*, 625 N.Y.S.2d 622, 622 (App. Div. 2d Dep't 1995).

76. *Michael*, 48 N.Y.2d at 9, 394 N.E.2d at 1138, 420 N.Y.S.2d at 375.

77. N.Y. CRIM. PROC. LAW § 280.10(3) (McKinney 1993).

78. N.Y. CRIM. PROC. LAW § 280.10(3). Section 280.10(3) provides in pertinent part:

At any time during the trial, the court must declare a mistrial and order a new trial of the indictment under the following circumstances:

. . . .

3. Upon motion of either party or upon the court's own motion, when it is physically impossible to proceed with the trial in conformity with law.

*Id.*

79. 631 N.Y.S.2d 1014 (Crim. Ct. New York County 1995).

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

Constitutions.<sup>81</sup> The Criminal Court of the City of New York found that the suspension of the defendant's driver's license was neither punishment nor was it imposed in a separate proceeding and, therefore, did not establish double jeopardy.<sup>82</sup>

On December 2, 1994, Frank was arrested and charged with operating a motor vehicle while intoxicated pursuant to section 1192(3) of the New York Vehicle and Traffic Law [hereinafter VTL],<sup>83</sup> operating a motor vehicle while impaired by drugs pursuant to section 1192(4) of the VTL,<sup>84</sup> and unlawful possession of marijuana pursuant to section 221.05 of the Penal Law.<sup>85</sup> The defendant was arraigned on December 3, 1994, and the court temporarily suspended his driver's license pending prosecution based upon his alleged refusal to submit to a chemical test pursuant to section 1194(2)<sup>86</sup> of the VTL.<sup>87</sup> The defendant moved for a dismissal on the basis that the continued prosecution constituted a double jeopardy violation.

81. *Frank*, 631 N.Y.S.2d at 1015; U.S. CONST. amend. V. The Fifth Amendment 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.*

82. *Frank*, 631 N.Y.S.2d at 1018.

83. 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.*

84. N.Y. VEH. & TRAF. LAW § 1192(4) (McKinney Supp. 1996). Section 1192(4) provides: "Driving while ability impaired by drugs. No person shall operate a motor vehicle while the person's ability to operate such a motor vehicle is impaired by the use of a drug as defined in this chapter." *Id.*

85. *Frank*, 631 N.Y.S.2d at 1015. *See* N.Y. PENAL LAW § 221.05 (McKinney 1989). This section provides in relevant part: "A person is guilty of unlawful possession of marihuana when he knowingly and unlawfully possesses marihuana." *Id.*

86. N.Y. VEH. & TRAF. LAW § 1194(2) (McKinney Supp. 1996).

87. *Frank*, 631 N.Y.S.2d at 1015. N.Y. VEH. & TRAF. LAW § 1194(2) (McKinney Supp. 1996). Section 1194(2) provides in relevant part:

Any person who operates a motor vehicle in this state shall be deemed to have given consent to a chemical test of one or more of the following: breath, blood, urine, or saliva, for the purpose of determining the alcoholic and/or drug content of the blood provided that such test is administered by or at the direction of a police officer . . .

*Id.*

In *Blockburger v. United States*,<sup>88</sup> the Supreme Court set forth a test to ascertain what would constitute the “same offense” for double jeopardy purposes.<sup>89</sup> The Court stated that the test “to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not.”<sup>90</sup>

Subsequently, in *Grady v. Corbin*,<sup>91</sup> the Court modified the principles set forth in *Blockburger*. In *Grady*, the Court articulated the “same conduct” test, holding that successive prosecutions would be barred if the second prosecution required relitigation of the factual issues already resolved in the first prosecution, and the government would be required to prove conduct that constituted an offense for which the defendant had already been prosecuted.<sup>92</sup> However, in *United States v. Dixon*,<sup>93</sup> the Court overruled the *Grady* “same conduct” test and reinstated the test in *Blockburger* as the applicable standard to be

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88. 284 U.S. 299 (1932). In *Blockburger*, the United States Supreme Court held that two sales of morphine not from the original package, the second having been initiated after the first was complete, were separate and distinct offenses under a narcotics statute. *Id.* at 301. The Court noted that although the buyer and seller remained the same, time had elapsed between the first and second transactions. *Id.* The legislative intent underlying the statute was explored by the Court so that it could determine whether “each provision requires proof of an additional fact which the other does not.” *Id.* at 304.

89. *Id.*

90. *Id.*

91. 495 U.S. 508 (1990) *overruled by* United States v. Dixon, 113 S. Ct. 2849 (1993). In *Grady*, the defendant was issued two traffic tickets for driving while intoxicated and for failure to keep to the right of the median. *Id.* at 511. The defendant’s automobile accident resulted in one fatality and an injury to another. *Id.* The defendant pled guilty to the traffic offenses. *Id.* at 513. Following his indictment for reckless manslaughter, the defendant claimed that this subsequent prosecution was for the same offense for which he had already pled guilty and, thus, constitutionally barred on double jeopardy grounds. *Id.* at 513-14.

92. *Id.* at 521.

93. 113 S. Ct. 2849 (1993).

used to determine the constitutionality of successive prosecutions.<sup>94</sup>

Notwithstanding the principles of *Blockburger*, Frank's counsel argued that the continued criminal prosecution of the defendant subsequent to the suspension of his driver's license pending prosecution established a violation of double jeopardy.<sup>95</sup> The court disagreed, finding no double jeopardy violation. The court stated that the suspension of the defendant's license was not punishment and was not imposed at a separate proceeding.<sup>96</sup>

In *Barnes v. Tofany*,<sup>97</sup> the New York Court of Appeals held that the suspension of the defendant's driver's license pending prosecution and the subsequent suspension pursuant to defendant's conviction for driving while impaired did not violate double jeopardy.<sup>98</sup> The court explained that the initial suspension pending prosecution was "not necessarily punitive, but [was] a procedure provided by the Legislature for the protection of the traveling public."<sup>99</sup> The court stated that "suspension or revocation of the privilege of operating a motor vehicle is essentially civil in nature."<sup>100</sup>

Additionally, in *People v. Craft*,<sup>101</sup> the defendant was arrested for driving while intoxicated, and argued that the failure to give Miranda warnings prior to the administration of a blood test constituted both a violation of his right to counsel and his right against self-incrimination.<sup>102</sup> The court rejected the defendant's

94. *Id.* at 2857. *People v. Frank*, 631 N.Y.S.2d 1014, 1016 (Crim. Ct. New York County 1995).

95. *Id.* See *Department of Revenue of Montana v. Kurth Ranch*, 114 S. Ct. 1937 (1994); *United States v. Halper*, 490 U.S. 435 (1989).

96. *Frank*, 631 N.Y.S.2d at 1016. "[W]hile the *Blockburger* test compels a finding that the 'offenses' are indeed similar, this court finds that the suspension of defendant's license was neither punishment nor imposed in a separate proceeding and that therefore this prosecution does not violate the Double Jeopardy Clause." *Id.*

97. 27 N.Y.2d 74, 261 N.E.2d 617, 313 N.Y.S.2d 690 (1970).

98. *Id.* at 77, 261 N.E.2d at 619, 313 N.Y.S.2d at 693.

99. *Id.*

100. *Id.* at 78, 261 N.E.2d at 619, 313 N.Y.S.2d at 693.

101. 28 N.Y.2d 273, 270 N.E.2d 297, 321 N.Y.S.2d 566 (1971).

102. *Id.* at 275-76, 270 N.E.2d at 298, 321 N.Y.S.2d at 567-68.

argument and explained that section 1194 of the VTL was designed to enable the law enforcement officials to effectively deal with the problem of drunken drivers by immediate revocation of their driver's licenses.<sup>103</sup>

Thus, the court in *Frank* concluded that the primary purpose of a driver's license suspension was remedial rather than punitive.<sup>104</sup> A review of the legislative history surrounding the sanction confirmed the remedial purpose of the suspension pending prosecution.<sup>105</sup> Consequently, the court in *Frank* concluded that the initial suspension of defendant's driver's license at his arraignment was not punishment and, therefore, did not trigger double jeopardy.<sup>106</sup>

In analyzing the facts of *Frank*, the court utilized the *Blockburger* test to determine the constitutionality of successive prosecutions. The determination of whether two offenses are the same for double jeopardy purposes is based upon whether either offense requires proof of a fact which the other does not.<sup>107</sup> Although the *Blockburger* test had been violated, the defendant failed to demonstrate that he was subjected to multiple punishments imposed at a separate proceeding.<sup>108</sup> Therefore, the court concluded that the defendant was provided no greater protection under the New York State Double Jeopardy Clause than he would have received under the Double Jeopardy Clause of the Federal Constitution.<sup>109</sup>

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103. *Id.* at 278, 270 N.E.2d at 300, 321 N.Y.S.2d at 569.

104. *People v. Frank*, 631 N.Y.S.2d 1014, 1017 (Crim. Ct. New York County 1995).

105. *Id.*

106. *Id.* at 1017-18.

107. *See supra* text accompanying note 90.

108. *Frank*, 631 N.Y.S.2d at 1017.

109. *Id.*