CRIMINAL LAW REVISION COMMISSION
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CRIMINAL PROCEDURE

PART I. GENERAL PROVISIONS

ARTICLE 1. PRELIMINARY

Former Jeopardy

Preliminary Draft No. 3; December 1971

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Subcommittee No. 1

ARTICLE 1. PRELIMINARY

Former Jeopardy

Preliminary Draft No. 3; December 1971

Section 1. Former jeopardy; definitions. As used in this Article, unless the context requires otherwise:

Existing Law
ORS 132.560 (2)
Or Const., Art. I, s. 12
135.890

(1) "Conduct" and "offense" have the meaning provided for those terms in sections 7 and 65, chapter 743, Oregon Laws 1971.

(2) When the same conduct or criminal episode violates two or more statutory provisions, each such violation constitutes a separate and distinct offense.

(3) When the same conduct or criminal episode, though violating only one statutory provision, results in death, injury, loss or other consequences of two or more victims, and the result is an element of the offense defined, there are as many offenses as there are victims.

(4) "Criminal episode" means continuous and uninterrupted conduct that establishes at least one offense and is so joined in time, place and circumstances that such conduct is directed to the accomplishment of a single criminal objective.

(5) A person is "prosecuted for an offense" when he is charged therewith by an indictment, information or complaint filed in any court of this state or in any court of any political subdivision of this state, or of any jurisdiction within the United States, and when the action either:

(a) Terminates in a conviction upon a plea of guilty; or

(b) Proceeds to the trial stage and the jury is impaneled and sworn; or

(c) Proceeds to the trial stage when a judge is the trier of fact and the first witness is sworn.

(6) There is an "acquittal" if the prosecution results in a finding of not guilty by the trier of fact or in a determination that there is insufficient evidence to warrant a conviction.

COMMENTARY

A. Summary

Section 1 defines five different terms involved with former jeopardy. The definitions make clear what constitutes a single and distinct offense and what constitutes a criminal episode.

Subsection (1) incorporates the Oregon Criminal Code of 1971 definition of "conduct" and "offense." The purpose of mentioning these terms in regard to former jeopardy is to give them the same meaning within the context of former jeopardy as for other criminal matters. See page 3, infra.

Subsection (2) makes conduct that violates two or more statutes a separate offense for each statute so violated.

Subsection (3) makes a separate offense, also, for each victim who is injured or killed as a result of a single course of criminal conduct.

Subsection (4) defines "criminal episode." The purpose of this definition is to identify the conduct(of a person) which may only be prosecuted once. Although this conduct may violate several statutes, each offense that relates to the same criminal conduct or "criminal episode" may be joined in one trial. Failure to join will prevent further prosecution for offenses stemming from the same criminal episode. This definition is further amplified by the provisions in section 3.

Subsection (5) defines "prosecuted for an offense" which is another term for jeopardy. Jeopardy will attach when the first witness is sworn when the judge is the trier of fact. In jury trials jeopardy will attach when the jury is impaneled and sworn.

Subsection (6) defines an "acquittal." There must be either a finding of not guilty by the trier of fact or a determination that there is insufficient evidence to support a conviction.

B. Derivation

Subsection (1) is derived from the Oregon Criminal Code of 1971, sections 7 and 65.

Subsections (2) and (3) are based on New York Criminal Procedure Law (NYCPL) section 40.10.

Subsection (4) is based in part on NYCPL s. 40.10, language from State v. Huennekens, 245 Or 150, 420 P2d 384 (1966), and Proposed Texas Penal Code s. 3.01.

Subsection (5) is based in part on NYCPL s. 40.30 (1) and United States v. Jorn, 400 US 470 (1970).

Subsection (6) is based on the Model Penal Code s. 1.08 (1) (POD, 1962).

C. Relationship to Existing Law

The Oregon Constitution provides in Article I, section 12, that "no person shall be put in jeopardy twice for the same offense . . . . " The definitions in this section illuminate what is meant by "offense" and "jeopardy."

The Oregon Criminal Code of 1971, chapter 743, Oregon Laws 1971, defines the terms "conduct" and "offense" as follows:

> "Section 7. (4) 'Conduct' means an act or omission and its accompanying mental state."
>
> "Section 65. An offense is conduct for which a sentence to a term of imprisonment or to a fine is provided by any law of this state or by any law or ordinance of a political subdivision of this state. An offense is either a crime or a violation."

There are no Oregon statutes that define the terms "criminal episode," "prosecuted for an offense" or "acquittal." ORS 132.560 (2) allows a joinder of counts and charges stemming from the same transaction but does not define "transaction."

The effect of this section will be to clarify an apparent conflict between cases that find only one offense when property belonging to several people is stolen versus the situation in which there is a crime against persons and each victim represents a separate offense.

The definition of "criminal episode" recognizes that a single course of criminal conduct can create different harms and violate different statutes but still be closely related in time, place and circumstances.

The criterion of a single criminal objective is substituted for the evidentiary test set out in Preliminary Draft No. 2. The evidentiary test proved unsatisfactory to the Commission because it might necessitate the joinder of several distinct crimes (time wise) because they had the same modus operandi. For instance, if a person committed five robberies in five different towns and during five different weeks but used the same modus operandi, it could be argued that all five crimes would have to be joined under the wording of the second draft. The crimes would have to be joined because the evidence of the modus operandi of one would be relevant and admissible with the evidence of the other offenses. This is not the intended result of the second draft. The intent is that these five offenses may be tried separately because there is a difference in time and place and the conduct is not continuous.

An excellent statement of the philosophy and social policy behind the double jeopardy concept is found in a Comment, 65 Yale L J 339, 341 (1956), which in part states:

> "The prohibition against double jeopardy found in the federal and most state constitutions represents two distinct policies: that no person should be punished more than once for the same offense, and that no one should be harassed by successive prosecutions for a single wrongful act or activity. The ban on multiple punishment imposes a limitation on judicial interpretation of substantive criminal law. It forbids penalizing an accused more severely than the law provides, through the device of finding that he has committed

several violations of substantive law where only one exists. The restriction on multiple prosecutions, on the other hand, is designed to implement several procedural objectives. One of these is protection of both the defendant and the public from the expense of prolonged and unnecessary litigation due to the retrial of previously adjudicated issues, or to the use of several proceedings to try questions of fact and law that logically make up a single case. Another objective is to safeguard the accused from the excessive harassment and stigma of repeated criminal prosecutions. Furthermore, once acquitted or convicted of crime for his conduct in a particular transaction, a defendant should be able to consider the matter closed and plan his life ahead without the threat of subsequent prosecution and possible imprisonment for the same conduct. These three principal objectives - economy, time and money, avoidance of unnecessary harassment and stigma, and psychological security - are expressed in the maxim that no one shall be twice vexed for the same cause."

Jeopardy has traditionally attached when the jury was impaneled and sworn or when the court is the trier of fact, when the prosecution begins its case. This rule has been followed by the United States Supreme Court in the following cases:

United States v. Jorn, 400 US 470 (1970).

Downun v. United States, 372 US 734 (1963).

Green v. United States, 355 US 184 (1957).

Wade v. Hunter, 336 US 684 (1949).

Kepner v. United States, 195 US 100 (1904).

Until recently the federal standards of double jeopardy were not applicable to the states. However, in Benton v. Maryland, 395 US 784 (1969), the Supreme Court applied the federal double jeopardy standard to state proceedings by asserting that the due process clause of the Fourteenth Amendment incorporated the Fifth Amendment protection against double jeopardy. Therefore, the guidelines announced in Jorn, Downun, Green, Wade and Kepner are now constitutionally required in all state criminal proceedings.

The change to Preliminary Draft No. 1 was made by the subcommittee to conform Preliminary Draft No. 2 to constitutional limits.

Subsection (5) also sets out a guideline in respect to prosecutions by different sovereignties. Under the present draft if a person commits an offense against the federal government and an offense against the state government, both offenses must be joined if they are within the same criminal episode. For instance, if a person unlawfully takes money from a federally protected bank and kills the municipal policeman during his escape, these two offenses are within the same criminal episode and must be joined in one prosecution. The draft recognizes through the words "...or of any jurisdiction within the United States...." that a subsequent prosecution growing out of the same criminal episode would constitute double jeopardy.

Cases

United States v. Jorn, 400 US 470 (1970), held that when the first jury was dismissed, so that the first witness could consult with an attorney regarding self-incrimination, a subsequent trial would constitute double jeopardy. " . . . A defendant is placed in jeopardy in a criminal proceeding once the defendant is put to trial before the trier of the facts, whether the trier be a jury or a judge."

Downun v. United States, 372 US 734 (1963), held that jeopardy attaches when the jury is impaneled and sworn. The original trial judge dismissed the jury before any evidence was presented because the prosecution failed to locate the principal witness. The second trial was barred because jeopardy was not properly annulled in the first trial.

Green v. United States, 355 US 184, 188 (1957). "This court, as well as most others, has taken the position that a defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent, he cannot be tried again."

State v. Weitzel, 157 Or 334, 69 P2d 958 (1937). Rape and sodomy are separate and distinct offenses even though they occur in close proximity, timewise, to each other.

Cases (continued)

State v. Gratz, 254 Or 474, 461 P2d 829 (1969). Generally in a crime against persons, each victim represents a separate crime, whereas only one crime is committed if the crime is only against the property of several persons.

State v. Huennekens, 245 Or 150, 420 P2d 384 (1966). For charges to be joined they must be concatenated in time, place and circumstances so that the evidence of one charge would be relevant and admissible with evidence of other charges. (This holding construed ORS 132.560 regarding permissive joinder of charges.)

State v. Buck, 239 Or 577, 398 P2d 176 (1965). Defendant not placed in jeopardy when proceeding extended only to commencement of juror number one on voir dire.

In Re Tice, 32 Or 179, 49 P 1038 (1897). Jeopardy attaches when jury is impaneled and sworn.

See also:

State v. McCormack, 8 Or 236 (1880).

State v. Stewart, 11 Or 52, 238, 4 P 128 (1883).

State v. Clark, 46 Or 140, 80 P 101 (1905).

State v. Nodine, 121 Or 567, 256 P 387 (1927).

State v. McDonald, 231 Or 48, 365 P2d 494 (1962).

State v. George, 253 Or 459, 455 P2d 609 (1969).

State v. Molatore, 91 Adv Sh 259, _____Or App _____(1970).

State v. Woolard, 92 Adv Sh 789, _____ Or _____ (1971).

Section 2. Previous prosecution; when a bar to second prosecution. Except as provided in sections 3 and 4 of this Article:

Existing Law
ORS 135.900

(1) No person shall be prosecuted twice for the same offense.

(2) No person shall be separately prosecuted for two or more offenses based upon the same criminal episode, if the several offenses are reasonably known to the appropriate prosecutor at the time of commencement of the first prosecution and establish proper venue in a single court.

(3) If a person is prosecuted for an offense consisting of different degrees, the conviction or acquittal resulting therefrom is a bar to a later prosecution for the same offense, for any inferior degree of the offense, for an attempt to commit the offense or for an offense necessarily included therein. A finding of guilty of a lesser included offense is an acquittal of the greater inclusive offense, although the judgment of conviction is subsequently reversed or set aside.

COMMENTARY

A. Summary

Section 2 is the operative section that explains when a former prosecution will be a bar to another prosecution.

Subsection (1) reiterates the specific constitutional prohibition against double jeopardy.

Subsection (2) sets forth the policy that there should not be unnecessary separate trials stemming from conduct which constitutes more than one offense. This policy is further amplified by exceptions in section 3.

Subsection (3) restricts multiple prosecution for lesser included offenses and attempts of the offense charged. Protection is also afforded the defendant when his conviction is reversed because this acts as an acquittal of that specific offense.

Subsection (4) of Preliminary Draft No. 1 was deleted by the subcommittee because it believed that it was unnecessary in light of the Oregon Criminal Code of 1971 definition of "offense." The definition of offense, along with the definition of criminal episode, should have the effect of barring dual prosecutions by different levels of government, i.e., the state and a municipality.

B. Derivation

Subsection (1) is based upon Oregon Constitution, Article I, section 12, and New York Criminal Procedure Law (NYCPL) section 40.20 (1).

Subsection (2) is based upon NYCPL section 40.20 (2), Waller v. Florida, 397 US 387 (1970), and Ashe v. Swenson, 397 US 436 (1970), and MPC s. 1.07 (2).

Subsection (3) is derived from ORS 135.900, MPC s. 108 (1) (POD, 1962), State v. Steeves, 29 Or 85, 43 P 947 (1896), and Benton v. Maryland, 395 US 784 (1969).

C. Relationship to Existing Law

Section 2 sets forth the specific situations that act as a bar to subsequent prosecutions. However, these situations are affected subject to the exceptions in section 3.

A minor change in drafting makes clear that the exceptions in sections 3 and 4 apply to all the subsections. As formulated in Preliminary Draft No. 2, the exceptions would not apply to a subsequent trial for the same offense. Since this is not the law nor the intent of the draft, the change was included in Preliminary Draft No. 3.

In 1969 the United States Supreme Court held that the double jeopardy clause in the United States Constitution is "fundamental to the American scheme of justice" and the same constitutional standards apply against both the state and federal government. Benton v. Maryland, 395 US 784 (1969). Double jeopardy is now a federal constitutional issue which is being examined continually. As a general policy measure, any state codification of double jeopardy must, at minimum, conform to the United States Supreme Court's current interpretation. The Oregon draft proposal follows this policy.

Subsection (1) restates the double jeopardy provision of the Oregon Constitution. It should be noted that this draft does not attempt to "torture" the words "same offense" into the meaning, "same transaction." To do so would overturn many Oregon cases. Instead, the draft follows the cases concerning "same offense" but expands compulsory joinder of related offenses in subsection (2).

Subsection (2) states the general policy that a person shall not be unnecessarily subject to multiple trials. Generally this idea has been attached to the double jeopardy clause under the so-called "same transaction" test. As mentioned above, the same transaction test in effect tortures the words "same offense." Here, the consideration of fair trial and due process of law should be ample basis for restricting separate trials for the same criminal episode.

In a recent case, State v. Elliott, 93 Adv Sh 447, ___ Or App ___ (1971), the Court of Appeals held that a prosecution for negligent homicide ten months after the death and accident, and subsequent to a prosecution and conviction for drunk driving, did not constitute double jeopardy. The court applied the "required evidence" approach and reasoned that conviction of negligent homicide would not necessitate a finding of driving while intoxicated. The "required evidence" approach to the "same evidence" test holds that offenses are "the same" if the elements of one are sufficiently similar to the elements of another.

When the defendant was prosecuted for drunk driving, the district attorney knew that a person had been killed as a result of the defendant's driving. Section 2, subsection (2), is aimed directly at this type of situation. In a case like Elliott, the prosecutor would be required to join both offenses, drunk driving and negligent homicide, in one prosecution because the offenses were joined in time, place and circumstances, and the conduct was continuous and uninterrupted. The single criminal objective would be the drunk driving.

Subsection (2) places two protections for the prosecutor. The first is that the offenses must be known to the prosecutor. The purpose of this is to prevent the accused from concealing his total criminal activity within a criminal episode from the prosecutor and then asserting double jeopardy if the prosecutor should later discover and proceed against the remaining offenses.

The subcommittee and the Commission discussed the problem of the amount of knowledge that would be necessary on the part of the prosecutor. This raises a difficult

issue in that the prosecutor may not have sufficient evidence to prosecute but still have knowledge that the offense exists. This would place the prosecutor in the dilemma of waiting for more evidence before he proceeded against the accused or foregoing the offense that he lacks sufficient evidence on. The Commission approved subsection (2) with the direction to the staff that the next draft include the extent of the knowledge and who would make the determination.

The modifying adverb, "reasonably," is therefore inserted before the word "known" to accomplish the above two objects. Hopefully, this would give the courts the power to determine if under the circumstances the district attorney should or should not have included the offense in the criminal episode and hence in the former prosecution.

The latter portion of subsection (2) is also changed because the Commission pointed out that the circuit court has jurisdiction over the entire state. Therefore the prosecutor in one county would necessarily have to be aware of offenses that occurred in several counties if the criminal episode covered more than one county. To avoid this problem, the third draft uses the concept of venue to delineate the extent of the knowledge required of the prosecutor. This concept is also in line with the original intent of the sub-committee in that it thought the criminal episode should be limited to the area of one circuit court, or a county.

If the criminal episode should cover more than one county then the rules of venue will determine whether or not the prosecutor will be required to join the extra-county offenses.

By adopting this proposal there will be two effects. First, our system of justice will be fairer and more efficient; and second, the Oregon case law will not be completely overturned.

Oregon does allow joinder of offenses that are related in ORS 132.560 (2). However, the draft goes one step further and makes the joinder compulsory instead of permissive, subject to the exceptions in section 3.

Subsection (3) restates existing Oregon law, ORS 135.900, which would be repealed and is supported by Oregon cases:

State v. Steeves, 29 Or 85, 43 P 947 (1896).

State v. Unsworth, 240 Or 453, 402 P2d 507 (1965).

Price v. Georgia, 398 US 323 (1970).

Subsection (3) does not include solicitation or conspiracy. However, the provisions of section 64, chapter 743, Oregon Laws 1971, prohibit conviction for more than one offense out of solicitation, attempt and conspiracy. Therefore, the inclusion of solicitation and conspiracy is unnecessary.

Cases

State v. Sly, 4 Or 278 (1871).
Violation of ordinance and violation of state statute are not identical offenses and person can be tried and convicted of both.

State v. McCormack, 8 Or 236 (1880).
When a man has done a criminal thing, the prosecutor may carve an offense out of the transaction as he can, yet he must cut only once.

State v. Stewart, 11 Or 52, 238, 4 P 128 (1883).
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.

State v. Clark, 46 Or 140, 80 P 101 (1905).
In larceny cases the stealing of property from different owners at the same time and place constitutes but one larceny.

Harlow v. Clow, 110 Or 257, 223 P 541 (1924).
Same act may constitute an offense against the state and a municipality. (10 cases cited at 264.)

Barnett v. Gladden, 237 Or 76, 390 P2d 614 (1964), cert den, 379 US 947.
Upheld dual prosecution by city and state courts.

State v. George, 253 Or 459, 455 P2d 609 (1969).
Collateral estoppel prevents relitigation of the same issue between the same parties.

State v. Gratz, 254 Or 474, 461 P2d 829 (1969).
Allows joinder of two counts of robbery, each against different victims. Generally in crimes against persons, each victim represents a separate crime, whereas only one crime is committed if the crime is only against the property of several persons.

State v. Molatore, 91 Adv Sh 259, ___ Or App ___ (1970).
Proof of selling requires proof of different facts than proof of possession. Therefore acquittal of a charge for selling is not the basis for a plea of double jeopardy on a charge of possessing narcotics.

State v. Woolard, 92 Adv Sh 789, ___ Or ___ (1971).
A person cannot be convicted and sentenced of both burglary and larceny stemming from one act.

State v. Miller, 92 Adv Sh 963, ___ Or App ___, 484 P2d 1132, Sup Ct review denied (1971).
Where defendant was convicted of violation of municipal ordinance making it a violation to carry a concealable weapon, subsequent state prosecution for being a felon in possession of a weapon is not double jeopardy. The two convictions required proof of different facts and were aimed at preventing two different evils.

See also:

State v. Howe, 27 Or 138, 44 P 648 (1899).

State v. Steeves, 29 Or 85, 43 P 947 (1896).

State v. Magone, 33 Or 570, 56 P 648 (1899).

State v. Smith, 101 Or 127, 199 P 194 (1921).

Miller v. Hansen, 126 Or 297, 269 P 864 (1928).

Claypool v. McCauley, 131 Or 371, 283 P 751 (1929).

State v. McDonald, 231 Or 48, 365 P2d 494 (1962).

State v. Mayes, 245 Or 179, 421 P2d 385 (1966).

State v. Brown, 93 Adv Sh 444, ___ Or App ___ (1971).

Section 3. Previous prosecution; when not a bar to subsequent prosecution. A previous prosecution is not a bar to a subsequent prosecution when the previous prosecution was properly terminated under any of the following circumstances:

Existing Law
ORS 134.140 (2) 134.150 135.890 136.810 136.820

(1) The defendant consents to the termination or waives, by motion, by an appeal upon judgment of conviction, or otherwise, his right to object to termination.

(2) The trial court finds that a termination, other than by judgment of acquittal, is necessary because:

(a) It is physically impossible to proceed with the trial in conformity with law; or

(b) There is a legal defect in the proceeding that would make any judgment entered upon a verdict reversible as a matter of law; or

(c) Prejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without injustice to either the defendant or the state; or

(d) The jury is unable to agree upon a verdict; or

(e) False statements of a juror on voir dire prevent a fair trial.

(3) When the former prosecution occurred in a court which lacked jurisdiction over the defendant or the offense.

(4) When the subsequent prosecution was for an offense which was not consummated when the former prosecution began.

COMMENTARY

A. Summary

Section 3 lists four situations in which a previous prosecution will not bar another prosecution.

Subsection (1) states that a defendant may waive the bar of previous prosecution by consent or voluntary action.

Subsection (2) lists five instances where the termination of a previous prosecution is necessary in order to maintain justice. Satisfaction of any of these will prevent a bar from arising.

Subsection (3) prevents the defendant from asserting a previous prosecution of a court that lacked jurisdiction as a bar.

Subsection (4) allows a separate trial when a more severe harm occurs after the prosecution commenced.

B. Derivation

Subsections (1) and (2) are derived from MPC s. 1.08 (4) (POD, 1962). See also ORS 17.330, 17.345, 135.890 and 136.810 et seq.

Subsection (3) is based on NYCPL s. 40.30 (2) (a) and MPC s. 1.11 (1) (POD, 1962).

Subsection (4) is taken from MPC s. 1.10 (1) (POD, 1962).

C. Relationship to Existing Law

Section 3 contains exceptions to section 2. In effect, section 3 allows certain situations to prevent jeopardy from attaching or if jeopardy has attached, to properly annul jeopardy.

Subsection (1) restates Oregon law that jeopardy may be annulled upon consent or motion of defendant. ORS 136.820 states the effect of granting a motion in arrest of judgment is to place defendant in the same situation in which he was before the indictment. State v. Fowler, 225 Or 201, 357 P2d 279 (1960), holds there was no former jeopardy where defendant's motion for arrest in judgment was granted with subsequent trial and conviction.

The words "by an appeal upon judgment of conviction" are added to subsection (1) to specify that if the defendant appeals from a conviction, a subsequent prosecution is allowed. A suggestion was made by the Commission that the words "when reversed and remanded" be placed in the subsection. These words make the subsection awkward, and the same purpose will be accomplished with the suggested new language.

Subsection (2) in part follows the provisions in ORS 17.330 and ORS 17.345. ORS 17.330 allows for discharge of the jury after a failure to agree after an expiration of a proper period of time. ORS 17.345 allows discharge of a jury if one juror disappears after the verdict is decided but before it is announced in open court. These statutes are incorporated into the criminal procedure code by ORS 136.330.

ORS 135.890 establishes three grounds for annulling jeopardy: first, a variance between indictment and proof; second, an indictment demurred to on form or substance; and third, discharge for want of prosecution. State v. Jones, 240 Or 546, 402 P2d 738 (1965), upheld the grounds for annulling jeopardy as contained in ORS 135.890. Jones went even further and stated that if jeopardy is properly annulled for any reason, the proceedings stand upon the same footing as if the defendant had never been in jeopardy.

In subsection (2) (b) the words "not attributable to the state" were deleted from Preliminary Draft No. 1. Benton v. Maryland, 395 US 784 (1969), appeared to prohibit an annulment of jeopardy based on a defect caused by the state. However, this point was not clearly articulated in Benton; therefore, the subcommittee thought the matter should be left for future judicial clarification.

Subsection (2) will have the effect of further defining "any reason" which was used in the Jones case. If "any reason" is not properly defined, the possibilities of injustice may arise. ORS 134.150 allows for dismissal by the court on its own motion or motion of the district attorney and in furtherance of justice.

The words "other than by judgment of acquittal" are placed in subsection (2) instead of at the beginning of section 3 for clarity.

Subsection (3) was partially amended by deleting the portion protecting the state from a defendant procuring a prosecution for a lesser offense than could have been charged under the facts of the case. Representatives of the Oregon District Attorneys' Association said they thought this provision was not needed in light of the definitions of "criminal episode" and "offense." The subcommittee agreed and the provision was deleted.

Subsection (4) is new to Oregon law. It is necessary to prevent injustice under the compulsory joinder aspects of section 2 and the definition of "criminal episode." The Commission amended out the portion allowing a severance of offenses if the statutes violated in a criminal episode were intended to prevent a substantially different harm or evil. The Commission thought this exception to the criminal episode theory was too broad.

This recognizes the problem of when the harm occurs after a prosecution for the same criminal episode. When a defendant is prosecuted for reckless driving and later the victim of the accident dies, this subsection will allow the prosecution for negligent homicide.

Cases

State v. Shaffer, 23 Or 555, 32 P 545 (1893).
If a jury cannot agree on a verdict after a reasonable period for discussion and reflection and the judge is satisfied with the truth of the jury's declaration, then the jury can be discharged and the defendant tried anew.
Also State v. Richie, 144 Or 430, 25 P2d 156 (1933).
State v. Paquin, 229 Or 555, 368 P2d 85 (1962).

Ex Parte Tice, 32 Or 179, 49 P 1038 (1897).
Where a jury was dismissed on Sunday after failure to agree, this was improper because the court had no jurisdiction to act on Sunday. Therefore jeopardy was not properly annulled.

State v. Chandler, 128 Or 204, 274 P 303 (1929). It is improper to discharge a jury, that cannot agree on a verdict, outside the presence of the defendant.

An improper or unwarranted discharge of a jury in a felony case has the legal effect of acquittal.

State v. Reinhart, 26 Or 466, 38 P 822 (1894). Jeopardy does not attach if dismissal occurs before any trial and is done in the furtherance of justice.

See also:

State v. Fowler, 225 Or 201, 357 P2d 279 (1960).

State v. Jones, 240 Or 546, 402 P2d 738 (1965).

Section 4. Proceedings not constituting acquittal. The following proceedings will not constitute an acquittal of the same offense:

Existing Law
ORS 135.890

(1) If the defendant was formerly acquitted on the ground of a variance between the indictment, information or complaint and the proof; or

(2) If the indictment, information or complaint was:

(a) Dismissed upon a demurrer to its form or substance; or

(b) Dismissed upon any pre-trial motion; or

(c) Discharged for want of prosecution without a judgment of acquittal.

COMMENTARY

A. Summary

Section 4 sets forth three more situations where it is proper to annul jeopardy.

B. Derivation

The section is derived entirely from ORS 135.890.

C. Relationship to Existing Law

The new section is taken from ORS 135.890. The words "or in bar of another prosecution" are surplusage under section 2 of this Article. Adequate definition of what constitutes a bar of another prosecution is stated in section 2. Also the word "crime" has been changed to "offense" to conform with the Article.

The reason ORS 135.890 is included in this Article is to make clear that when a variance causes dismissal, this is not deemed an acquittal upon the merits. In that regard, section 4 allows variance as a grounds for proper annulment of jeopardy. This section applies to all offenses including misdemeanors, felonies and violations.

State v. Jones, 240 Or 546, 402 P2d 738 (1965), upholds ORS 135.890 as being a proper basis for annulment of jeopardy. See also Portland v. Stevens, 180 Or 514, 178 P2d 175 (1947).

The United States Supreme Court has granted review in Duncan v. Tennessee, 10 Cr L 4052 (No. 70-5122), (ruling below at 462 SW 2d 491) on the issue of whether a second trial will constitute double jeopardy when the first trial ended on acquittal based upon a material variance. The variance was that the proof showed the defendant used a pistol when actually he used a rifle.

The section clarifies ORS 135.890, and conforms its language to the entire draft. It enlarges upon the apparent scope of the existing statute in that it covers informations and complaints, as well as indictments.

TEXT OF REVISIONS OF OTHER STATES

Text of Model Penal Code, Proposed Official Draft, 1962

Section 1.07. Method of Prosecution When Conduct Constitutes More Than One Offense.

(1) Prosecution for Multiple Offenses; Limitation on Convictions. When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:

(a) one offense is included in the other, as defined in Subsection (4) of this Section; or

(b) one offense consists only of a conspiracy or other form of preparation to commit the other; or

(c) inconsistent findings of fact are required to establish the commission of the offenses; or

(d) the offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or

(e) the offense is defined as a continuing course of conduct and the defendant's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses.

(2) Limitation on Separate Trials for Multiple Offenses. Except as provided in Subsection (3) of this Section, a defendant shall not be subject to separate trials for multiple offenses based on the same conduct or arising from the same criminal episode, if such offenses are known to the appropriate prosecuting officer at the time of the commencement of the first trial and are within the jurisdiction of a single court.

(3) Authority of Court to Order Separate Trials. When a defendant is charged with two or more offenses based on the same conduct or arising from the same criminal episode, the Court, on application of the prosecuting attorney or of the defendant, may order any such charge to be tried separately, if it is satisfied that justice so requires.

Text of Model Penal Code, Proposed Official Draft, 1962 (Cont'd)

(4) Conviction of Included Offense Permitted. A defendant may be convicted of an offense included in an offense charged in the indictment [or the information]. An offense is so included when:

(a) it is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(b) it consists of an attempt or solicitation to commit the offense charged or to commit an offense otherwise included therein; or

(c) it differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interest or a lesser kind of culpability suffices to establish its commission.

(5) Submission of Included Offense to Jury. The Court shall not be obligated to charge the jury with respect to an included offense unless there is a rational basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense.

Section 1.08. When Prosecution Barred by Former Prosecution for the Same Offense.

When a prosecution is for a violation of the same provision of the statutes and is based upon the same facts as a former prosecution, it is barred by such former prosecution under the following circumstances:

(1) The former prosecution resulted in an acquittal.* There is an acquittal if the prosecution resulted in a finding of not guilty by the trier of fact or in a determination that there was insufficient evidence to warrant a conviction. A finding of guilty of a lesser included offense is an acquittal of the greater inclusive offense, although the conviction is subsequently set aside.

Text of Model Penal Code, Proposed Official Draft, 1962 (Cont'd)

(2) The former prosecution was terminated, after the information had been filed or the indictment found, by a final order or judgment for the defendant, which has not been set aside, reversed, or vacated and which necessarily required a determination inconsistent with a fact or a legal proposition that must be established for conviction of the offense.

(3) The former prosecution resulted in a conviction. There is a conviction if the prosecution resulted in a judgment of conviction which has not been reversed or vacated, a verdict of guilty which has not been set aside and which is capable of supporting a judgment, or a plea of guilty accepted by the Court. In the latter two cases failure to enter judgment must be for a reason other than a motion of the defendant.

(4) The former prosecution was improperly terminated. Except as provided in this Subsection, there is an improper termination of a prosecution if the termination is for reasons not amounting to an acquittal, and it takes place after the first witness is sworn but before verdict. Termination under any of the following circumstances is not improper:

(a) The defendant consents to the termination or waives, by motion to dismiss or otherwise, his right to object to the termination.

(b) The trial court finds that the termination is necessary because:

(1) it is physically impossible to proceed with the trial in conformity with law; or

(2) there is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law; or

(3) prejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without injustice to either the defendant or the State; or

(4) the jury is unable to agree upon a verdict; or

(5) false statements of a juror on voire dire prevent a fair trial.

Text of Model Penal Code, Proposed Official Draft, 1962 (Cont'd)

Section 1.09. When Prosecution Barred by Former Prosecution for Different Offense.

Although a prosecution is for a violation of a different provision of the statutes than a former prosecution or is based on different facts, it is barred by such former prosecution under the following circumstances:

(1) The former prosecution resulted in an acquittal or in a conviction as defined in Section 1.08 and the subsequent prosecution is for:

(a) any offense of which the defendant could have been convicted on the first prosecution; or

(b) any offense for which the defendant should have been tried on the first prosecution under Section 1.07, unless the Court ordered a separate trial of the charge of such offense; or

(c) the same conduct, unless (i) the offense of which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other and the law defining each of such offenses is intended to prevent a substantially different harm or evil, or (ii) the second offense was not consummated when the former trial began.

(2) The former prosecution was terminated, after the information was filed or the indictment found, by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed or vacated and which acquittal, final order or judgment necessarily required a determination inconsistent with a fact which must be established for conviction of the second offense.

(3) The former prosecution was improperly terminated, as improper termination is defined in Section 1.08, and the subsequent prosecution is for an offense of which the defendant could have been convicted had the former prosecution not been improperly terminated.

Text of Model Penal Code, Proposed Official Draft, 1962 (Cont'd)

Section 1.10. Former Prosecution in Another Jurisdiction: When a Bar.

When conduct constitutes an offense within the concurrent jurisdiction of this State and of the United States or another State, a prosecution in any such other jurisdiction is a bar to a subsequent prosecution in this State under the following circumstances:

(1) The first prosecution resulted in an acquittal or in a conviction as defined in Section 1.08 and the subsequent prosecution is based on the same conduct, unless (a) the offense of which the defendant was formerly convicted or acquitted and the offense for which he is subsequently prosecuted each requires proof of a fact not required by the other and the law defining each of such offenses is intended to prevent a substantially different harm or evil or (b) the second offense was not consummated when the former trial began; or

(2) The former prosecution was terminated, after the information was filed or the indictment found, by an acquittal or by a final order or judgment for the defendant which has not been set aside, reversed or vacated and which acquittal, final order or judgment necessarily required a determination inconsistent with a fact which must be established for conviction of the offense of which the defendant is subsequently prosecuted.

Section 1.11. Former Prosecution Before Court Lacking Jurisdiction or When Fraudulently Procured by the Defendant.

A prosecution is not a bar within the meaning of Sections 1.08, 1.09 and 1.10 under any of the following circumstances:

(1) The former prosecution was before a court which lacked jurisdiction over the defendant or the offense; or

(2) The former prosecution was procured by the defendant without the knowledge of the appropriate prosecuting officer and with the purpose of avoiding the sentence which might otherwise be imposed; or

(3) The former prosecution resulted in a judgment of conviction which was held invalid in a subsequent proceeding on a writ of habeas corpus, coram nobis or similar process.

Text of Illinois Criminal Code of 1961

§ 3—3. Multiple Prosecutions for Same Act

(a) When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense.

(b) If the several offenses are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution, except as provided in Subsection (c), if they are based on the same act.

(c) When 2 or more offenses are charged as required by Subsection (b), the court in the interest of justice may order that one or more of such charges shall be tried separately. 1961, July 28, Laws 1961, p. 1983, § 3-3.

§ 3—4. Effect of Former Prosecution

(a) A prosecution is barred if the defendant was formerly prosecuted for the same offense, based upon the same facts, if such former prosecution:

(1) Resulted in either a conviction or an acquittal or in a determination that the evidence was insufficient to warrant a conviction; or

(2) Was terminated by a final order or judgment, even if entered before trial, which required a determination inconsistent with any fact or legal proposition necessary to a conviction in the subsequent prosecution; or

(3) Was terminated improperly after the jury was impaneled and sworn or, in a trial before a court without a jury, after the first witness was sworn but before findings were rendered by the trier of facts, or after a plea of guilty was accepted by the court.

A conviction of an included offense is an acquittal of the offense charged.

(b) A prosecution is barred if the defendant was formerly prosecuted for a different offense, or for the same offense based upon different facts, if such former prosecution:

(1) Resulted in either a conviction or an acquittal, and the subsequent prosecution is for an offense of which the defendant could have been convicted on the former prosecution; or was for an offense with which the defendant should have been charged on the former prosecution, as provided in Section 3—3 of this Code (unless the court ordered a separate trial of such charge); or was for an offense which involves the same conduct, unless each prosecution requires proof of a fact not required on the other prosecution, or the offense was not consummated when the former trial began; or

Text of Illinois Criminal Code of 1961 (Cont'd)

(2) Was terminated by a final order or judgment, even if entered before trial, which required a determination inconsistent with any fact necessary to a conviction in the subsequent prosecution; or

(3) Was terminated improperly under the circumstances stated in Subsection (a), and the subsequent prosecution is for an offense of which the defendant could have been convicted if the former prosecution had not been terminated improperly.

(c) A prosecution is barred if the defendant was formerly prosecuted in a District Court of the United States or in a sister State for an offense which is within the concurrent jurisdiction of this State, if such former prosecution:

(1) Resulted in either a conviction or an acquittal, and the subsequent prosecution is for the same conduct, unless each prosecution requires proof of a fact not required in the other prosecution, or the offense was not consummated when the former trial began; or

(2) Was terminated by a final order or judgment, even if entered before trial, which required a determination inconsistent with any fact necessary to a conviction in the prosecution in this State.

(d) However, a prosecution is not barred within the meaning of this Section 3—4 if the former prosecution:

(1) Was before a court which lacked jurisdiction over the defendant or the offense; or

(2) Was procured by the defendant without the knowledge of the proper prosecuting officer, and with the purpose of avoiding the sentence which otherwise might be imposed; or if subsequent proceedings resulted in the invalidation, setting aside, reversal, or vacating of the conviction, unless the defendant was thereby adjudged not guilty. 1961, July 28, Laws 1961, p. 1983, § 3–4.

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Text of New York Criminal Procedure Law

§ 40.10 Previous prosecution; definitions of terms

The following definitions are applicable to this article:

1. "Offense." An "offense" is committed whenever any conduct is performed which violates a statutory provision defining an offense; and when the same conduct or criminal transaction violates two or more such statutory provisions each such violation constitutes a separate and distinct offense. The same conduct or criminal transaction also establishes separate and distinct offenses when, though violating only one statutory provision, it results in death, injury, loss or other consequences to two or more victims, and such result is an element of the offense as defined. In such case, as many offenses are committed as there are victims.

2. "Criminal transaction" means conduct which establishes at least one offense, and which is comprised of two or more or a group of acts either (a) so closely related and connected in point of time and circumstance of commission as to constitute a single criminal incident, or (b) so closely related in criminal purpose or objective as to constitute elements or integral parts of a single criminal venture.

§ 40.20 Previous prosecution; when a bar to second prosecution

1. A person may not be twice prosecuted for the same offense.

2. A person may not be separately prosecuted for two offenses based upon the same act or criminal transaction unless:

(a) The offenses as defined have substantially different elements and the acts establishing one offense are in the main clearly distinguishable from those establishing the other; or

(b) Each of the offenses as defined contains an element which is not an element of the other, and the statutory provisions defining such offenses are designed to prevent very different kinds of harm or evil; or

(c) One of such offenses consists of criminal possession of contraband matter and the other offense is one involving the use of such contraband matter, other than a sale thereof; or

(d) One 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 person from the same physical injury, and such death occurs after a prosecution for the assault or other non-homicide offense; or

(e) Each offense involves death, injury, loss or other consequence to a different victim; or

Text of New York Criminal Procedure Law (Cont'd)

(f) One of the offenses consists of a violation of a statutory provision of another jurisdiction, which offense has been prosecuted in such other jurisdiction and has there been terminated by a court order expressly founded upon insufficiency of evidence to establish some element of such offense which is not an element of the other offense, defined by the laws of this state.

§ 40.30 Previous prosecution; what constitutes

1. Except as otherwise provided in this section, a person "is prosecuted" for an offense, within the meaning of section 40.20, when he is charged therewith by an accusatory instrument filed in a court of this state or of any jurisdiction within the United States, and when the action either:

(a) Terminates in a conviction upon a plea of guilty; or

(b) Proceeds to the trial stage and a witness is sworn.

2. Despite the occurrence of proceedings specified in subdivision one, a person is not deemed to have been prosecuted for an offense, within the meaning of section 40.20, when:

(a) Such prosecution occurred in a court which lacked jurisdiction over the defendant or the offense; or

(b) Such prosecution was for a lesser offense than could have been charged under the facts of the case, and the prosecution was procured by the defendant, without the knowledge of the appropriate prosecutor, for the purpose of avoiding prosecution for a greater offense.

3. Despite the occurrence of proceedings specified in subdivision one, if such proceedings are subsequently nullified by a court order which restores the action to its pre-pleading status or which directs a new trial of the same accusatory instrument, the nullified proceedings do not bar further prosecution of such offense under the same accusatory instrument.

4. Despite the occurrence of proceedings specified in subdivision one, if such proceedings are subsequently nullified by a court order which dismisses the accusatory instrument but authorizes the people to obtain a new accusatory instrument charging the same offense or an offense based upon the same conduct, the nullified proceedings do not bar further prosecution of such offense under any new accusatory instrument obtained pursuant to such court order or authorization.

Text of New York Criminal Procedure Law (Cont'd)

§ 40.40 Separate prosecution of jointly prosecutable offenses; when barred

1. 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, pursuant to paragraph (a) of subdivision two of section 200.20, such person may not, under circumstances prescribed in this section, be separately prosecuted for such offenses even though such separate prosecutions are not otherwise barred by any other section of this article.

2. When (a) one of two or more joinable offenses of the kind specified in subdivision one is charged in an accusatory instrument, and (b) another is not charged therein, or in any other accusatory instrument filed in the same court, despite possession by the people of evidence legally sufficient to support a conviction of the defendant for such uncharged offense, and (c) either a trial of the existing accusatory instrument is commenced or the action thereon is disposed of by a plea of guilty, any subsequent prosecution for the uncharged offense is thereby barred.

3. When (a) two or more of such offenses are charged in separate accusatory instruments filed in the same court, and (b) an application by the defendant for consolidation thereof for trial purposes, pursuant to subdivision five of section 200.20 or section 100.45, is improperly denied, the commencement of a trial of one such accusatory instrument bars any subsequent prosecution upon any of the other accusatory instruments with respect to any such offense.

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Partial Text of Proposed Texas Penal Code

Section 3.01. Chapter Definition

In this chapter, unless the context requires a different definition, "criminal episode" means all conduct, including criminal solicitation and criminal conspiracy, incident to the attempt or accomplishment of a single criminal objective, even though the harm is directed toward or inflicted upon more than one person.

§ 3.02. Compulsory Joinder of Prosecutions for Offenses Arising out of same Criminal Episode

(a) A defendant may be prosecuted in a single criminal action for all offenses arising out of the same criminal episode.

(b) The state must join in a single criminal action all offenses arising out of the same criminal episode unless:

(1) the court severs one or more of the offenses under Code of Criminal Procedure Article 36.09; or

(2) evidence to establish probable guilt of the offense for which a subsequent prosecution is sought was not known to the state at the time the former prosecution commenced; or

(3) the offenses are not within the jurisdiction of a single court and the former prosecution did not originate in a county-level or district court.

(c) If a judgment of guilt is reversed, set aside, or vacated, and new trial ordered, the state may not join in the new trial any offense required to be but not joined in the former prosecution unless evidence to establish probable guilt of that offense was not known to the state at the time the first prosecution commenced.

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