Tape 24 - Side 2

OREGON CRIMINAL LAW REVISION COMMISSION

Subcommittee No. 1

October 14, 1971

Minutes

Members Present: Mr. Robert Chandler, Chairman
Representative George F. Cole
Attorney General Lee Johnson

Excused: Senator John Burns
Mr. Bruce Spaulding

Staff Present: Mr. Donald L. Paillette, Project Director
Mr. Bert Gustafson, Research Counsel

Others Present: Herbert M. Schwab, Chief Judge, Court of Appeals
Edward H. Howell, Associate Justice, Supreme Court
Mr. Scott Parker, Chief Criminal Deputy District Attorney, Clackamas County
Mr. John Moore, Lane County Deputy District Attorney
Mr. Gene Murphy, Lane County District Attorney's Office

Agenda: Former Jeopardy, Preliminary Draft No. 1; September 1971

The meeting was called to order by Chairman Robert Chandler at 1 p.m. in Room 315 Capitol Building, Salem.

The minutes of the meeting of Subcommittee No. 1 on September 13, 1971 were approved subject to changes on page 2, paragraph 2, and page 10, paragraph 2, where Chairman Chandler was inadvertently referred to as "Chairman Spaulding."

Mr. Paillette explained that although Attorney General Lee Johnson was not a member of Subcommittee No. 1, he was filling in for Senator Burns at today's meeting in order that a quorum would be present. He also noted that Judge Herbert M. Schwab was attending in his capacity as an ex-officio member of the Commission.

FORMER JEOPARDY; PRELIMINARY DRAFT NO. 1; SEPTEMBER 1971

Mr. Paillette advised that the draft on Former Jeopardy could have been considered with the substantive code but the Commission had decided to place it in the procedural part of the code as a part of Article 1, Preliminary Provisions.

Mr. Gustafson, Reporter for the Former Jeopardy draft, explained that the draft attempted to clarify the allowable unit of prosecution and to protect the liberties of the defendant. It was based primarily on Article 1, section 12 of the Oregon Constitution, the Fifth Amendment of the U. S. Constitution, the New York Criminal Procedure Law and the Model Penal Code.

Mr. Gustafson reported that the first section of the draft dealt with definitions which would later be used in sections 2 and 3. The second section refers to when the previous prosecution is a bar. Section 3 considers when a previous prosecution would not be a bar. Mr. Gustafson said this was accomplished in the Model Penal Code in five sections and that the draft attempts to cut this down to two main sections so that the law on double jeopardy would be easier to define. Section 4 contains proceedings that are not an acquittal. Mr. Gustafson said this section could have been under section 3, but for clarity it was inserted as a separate section.

Section 1. Former jeopardy; definitions. This section, Mr. Gustafson explained, has a two-prong approach, one an "offense" and the other a "criminal episode", this procedure being adopted by the New York Criminal Procedure Law which states that when an act violates more than one statute, each violation was a separate offense. This draft, he commented, avoids the problem of defining "same offense" to mean "same transaction." The definition of "criminal episode" in subsection (4) referred to events that were connected in time, place and circumstances.

Section 2. Previous prosecution; when a bar to second prosecution. Mr. Gustafson said this section sets forth four different situations wherein a previous prosecution would be a bar to a second prosecution.

Judge Schwab noted that subsection (2) of section 2 states that except as provided in sections 3 and 4, "no person shall be separately prosecuted for two or more offenses based upon the same criminal episode." He asked if this provision was intended to bar separate counts in the same trial. Mr. Paillette replied that it was not so intended.

In reply to a question by Mr. Johnson concerning joinder of offenses, Mr. Paillette said that while this draft would have an effect on joinder, section 2 referred only to separate trials. Mr. Gustafson added that subsection (2) made joinder compulsory rather than permissive, subject to the exceptions in section 3.

Mr. Johnson requested a clarification of the term "appropriate prosecutor" as used in subsection (2) and was told by Mr. Gustafson that this language was taken from the Model Penal Code and meant that if a person committed an offense in County A, the district attorney of that county would be the "appropriate prosecutor." Mr. Paillette

added that the last clause of subsection (2) required the offenses to be within the jurisdiction of a single court. If they are not within the jurisdiction of a single court, the subsection would not then be a bar to another prosecution.

Mr. Johnson was concerned with a situation where a judge might arbitrarily grant a motion to acquit after the state had put on its case and the state would thereby be denied its right of appeal. Under present law, he said, the state has a right of appeal on any pretrial motion but he had never been convinced that the state should not have a right of appeal up to the time when the defense started to put on its case.

Judge Schwab pointed out that in State v. Molatore, 91 Adv Sh 259, _____ Or App ____ (1970), the defendant was acquitted on a charge of sale of narcotics and the court held that this was not a bar to a later indictment and trial for a charge of possession.

Mr. Gustafson commented that the words "substantially different harm or evil" as used in subsection (4) of section 3 would determine the extent of the joinder. Mr. Paillette also called attention to the first clause of subsection (4) of section 3 - "When the former prosecution was for an offense which required proof of a fact not required in the subsequent prosecution...." In the fact situation cited by Judge Schwab the proof of sale would require different facts from proof of possession.

After further discussion, Judge Schwab indicated he was satisfied that the draft answered the Molatore problem in subsection (2) of section 2 whereby the district attorney would not be required to charge the defendant with two separate counts in one trial.

Mr. Johnson said he felt the situation in the Molatore case should have been double jeopardy. As a matter of policy he would be more favorable to making that double jeopardy and he would rather see a broader transactional concept provided that the state at least could have a right of appeal, and perhaps limit it to the right of appeal and retrial.

At this point in the meeting Justice Howell arrived and Chairman Chandler stated, for the record, that he was equally free, with Judge Schwab, to comment and question during the meeting.

Chairman Chandler reported a statement made by a judge which, in essence, said that deciding criminal matters on motion before the first witness was sworn was a made-to-order way for judges without courage to decide things.

Mr. Johnson said the judge could arbitrarily dismiss a case on a question of law prior to the time the defendant put on his case.

Judge Schwab disagreed with Mr. Johnson on this point. He commented that if double jeopardy means when risk attaches in an adversary proceeding, it certainly attaches at the time of the state's first witness. The big leap forward for the state was its right to appeal from pretrial motions. He then stated before he would vote on this, if he were a voting member, he would want to know what other courts, including the U. S. Supreme Court, have said about jeopardy as a constitutional matter.

Mr. Johnson agreed with Judge Schwab and asked the staff to review the area of what the other states are doing and what is the status of the law as to what time double jeopardy attaches.

Mr. Paillette stated that the Oregon case law follows majority rule, which is that jeopardy attaches when the jury is impaneled and sworn.

Judge Schwab then asked if jeopardy could be defined by statute - to say it doesn't attach until the case has been reviewed on appeal, or if there is some point at which the courts have said that, as a matter of constitutional law regardless of the statutes, jeopardy has attached when the proceedings have reached a certain state.

Subsection (2) of section 2, Mr. Gustafson stated, in essence requires a joinder of all offenses based upon the same criminal episode, and that this subsection is the most important of the entire draft.

Mr. Moore questioned the language "several offenses are known to the appropriate prosecutor". He said he has difficulty with the concept of trying to base statutory rules on what is known to the prosecutor. This may not appear to be a problem except in a larger prosecutor's office, where he did not feel the district attorney would ever know.

Judge Schwab stated a case where a man, driving while intoxicated, killed a woman. He was prosecuted for drunken driving and six months later for negligent homicide. He asked if this subsection would require that he be prosecuted in the same trial on both counts, as one relates to the condition in which he was driving, and the other to the manner in which he was driving.

Mr. Gustafson replied that if a prosecutor claims there is a substantially different evil, he would not have to join because the language in subsection (2) of section 2 states "Except as provided in sections 3 and 4 of this Article, no person shall be separately

prosecuted for two or more offenses based upon the same criminal episode...." If the prosecutor confirms that it is the same harm and evil, then the counts must be joined.

Another case reported by Judge Schwab involved breaking and entering in which a woman was beaten. The defendant was charged with burglary and assault with a dangerous weapon. Judge Schwab asked if section 2 would require prosecution of separate counts in one trial, or if this would be a "substantial difference" and require two trials.

Mr. Paillette replied that under each of Judge Schwab's reported cases the state would have an out under subsection (4) of section 3, which was written into the draft so as not to unduly limit the state from prosecution of two offenses.

Judge Schwab commented that there may be a question of a bar by virtue of a conviction of a lesser offense. Mr. Gustafson replied this was covered in subsection (3) of this section.

Mr. Johnson questioned subsection (4) of section 3. He referred to State v. Molatore, saying the draft states this would not bar the Molatore case as it is a substantially different harm or evil and he would tend to disagree with the draft.

Mr. Gustafson replied that this is the same problem as that of whether the offense is known to the prosecutor. Whether it is a substantially different harm or evil could be subject to much interpretation and he was of the opinion it would be better to allow interpretation by the judges as to what they think is a different harm or evil.

Mr. Paillette commented that a statute could not be written to pin down every possible kind of factual situation in the procedure any more than was done in the substantive code, and that there will always be questions as to whether it is a substantially different harm or evil.

Judge Schwab suggested that the subcommittee consider changing the language in subsection (2) of section 2 by inserting "or reasonably should have known" after the words "offenses are known" on line 4.

Mr. Paillette contended that this insertion would put too much of a burden on the state. He said that when a defendant raises the defense of former jeopardy, under this kind of standard he will have to make some type of showing to the court as to whether or not the state had such knowledge that it should have prosecuted him the first time for the other offense, and was of the opinion that the state is better off under the original language. Mr. Paillette referred to the proposed Texas code which states ".... evidence to establish probable guilt of the offense by which the subsequent prosecution was sought was not known to the state at the time the first prosecution commenced."

This language, Judge Schwab said, was far more encompassing than "known to the appropriate prosecutor."

Mr. Gustafson said the whole purpose of this is to prevent injustices, in that if a crime occurred that the appropriate prosecutor was unaware of, the defendant would have received a "free crime".

Chairman Chandler stated that the Model Penal Code in section 1.07 (2) contains this language as does the Illinois Criminal Code of 1961. He asked if there was any commentary in either of these. Mr. Gustafson replied the Model Penal Code does not go into the problem of whether the prosecutor knows, but possibly the Illinois Code of 1962 has annotations.

Mr. Moore commented that this was a problem area and that it would be better by far than the situation where the prosecutor is deemed to know something that occurred in a police station in a small community.

Subsection (3) of section 2, Mr. Gustafson said, is essentially the same as ORS 135.900 with the only addition being that a finding of guilt of a lesser included offense is an acquittal of the greater inclusive offense, although the judgment of conviction is subsequently reversed or set aside. In essence, this means that if a person is convicted of second degree murder, appeals and obtains a reversal, the prosecution cannot come back and charge him with first degree murder, although it can come back and again charge second degree murder.

Mr. Moore replied that the state is in this position at the present time and Mr. Gustafson said this does not change Oregon law.

Subsection (4) of section 2 concerns dual prosecution. Mr. Gustafson pointed out that this problem arose in Waller v. Florida, 397 US 387 (1970), where the defendant was prosecuted by both the city and state, one offense for mischievous conduct, the other for larceny. The U. S. Supreme Court held that this was double jeopardy, but limited its decision to the same offense. Justice Burger, in his decision, said the violation of a city ordinance for mischievous conduct was an included offense of larceny, and by making that definition, he was able to say that the decision on Waller v. Florida was limited to only the same offense. Subsection (4), Mr. Gustafson continued, goes one point further than Waller v. Florida by stating "or part of the same criminal episode" whereas Waller states "the same offense". Mr. Gustafson cited State v. Miller, 92 Adv Sh 963, ____ Or App ____ (1971), wherein an ex-felon was seized for possession of firearms and prosecuted by the city for having a concealed weapon and later by the state for being an ex-convict in possession. This deals with the problem where the city and state each prosecute when, in essence, it seems to be the same harm.

Judge Schwab commented that this was a totally different situation than merely prohibiting a person from carrying a concealed weapon - the ex-convict statute goes much further. He then inquired as to the language "or part of the same criminal episode" and asked if a jury fails to find a defendant guilty of a negligent homicide prosecution, would this be a bar to a subsequent prosecution for drunken driving on the ground that it was a part of the same episode.

Mr. Gustafson replied that subsection (4) of section 3 would answer this question, where it speaks to a "substantially different harm or evil."

Judge Schwab was of the opinion this would go back to the definition of "criminal episode" in subsection (4) of section 1 where it states "....the evidence of one offense would be relevant and admissible with evidence of the other offenses." He said that driving while intoxicated is relevant and admissible to the issue of negligent homicide, but asked if a negligent homicide acquittal under the language in subsection (4) of section 2 would bar a later prosecution for drunken driving.

Judge Howell questioned the insertion of the words "part of the same criminal episode" in the draft. Mr. Gustafson replied that it was to make it consistent in that the state now is limited to prosecuting the same criminal episode and same offense. If there is a city and state prosecution, each should follow the same rules as far as having the same criminal episode. There should not be a difference based on sovereignty.

Mr. Moore was of the opinion there was no reason for having subsection (4) in the draft, stating that all questions have been covered in subsection (4) of section 3. Mr. Gustafson said the subsection was placed in the draft to make it clear that if it would become law, the prosecution by the city and state, under these definitions, is against the legislative policy.

Chairman Chandler asked what the effect would be if subsection (4) were deleted and this line of reasoning inserted in the commentary on this section. Mr. Gustafson thought another case might come up and the court would have to interpret the statute.

In answer to Mr. Johnson's inquiry, Mr. Paillette stated that the definition of "offense" includes violations of municipal ordinances (Article 7 of the Criminal Code) and is set out on page 5 of the draft. He said a violation of a municipal ordinance is an offense within the definition of the term.

Judge Schwab asked if the doubt in subsection (4) would be resolved by deleting the words "or part of the same criminal episode." Mr. Moore replied he would be favorable to deleting the entire subsection because it has already been said that it includes "violations of municipal ordinances".

Representative Cole moved the approval of section 2 of the draft, subject to the deletion of subsection (4). The motion carried.

Chairman Chandler asked for a motion on section 1 of the draft. Representative Cole was of the opinion the subcommittee would wait until it received some case law from the Supreme Court as to when jeopardy attaches. Mr. Johnson said he wished to know the constitutional limitations and asked that further research be done by the staff on section 1 (5) (b).

Section 3. Previous prosecution; when not a bar to subsequent prosecution. Mr. Gustafson explained that section 3 contained a list of exceptions to section 2. He suggested that it would improve the language in the last line of the opening paragraph to insert "any of" after "under". The subcommittee unanimously accepted this amendment.

Mr. Gustafson advised that subsection (1) was a restatement of existing law. Mr. Johnson was of the opinion that the phrase "to dismiss" in subsection (1) was redundant and the subcommittee agreed to delete that language.

Mr. Gustafson next explained that subsection (2) of section 3 sets forth five situations where annulment of jeopardy would be proper and was a restatement of Oregon law with two exceptions. Subparagraph (b) would apply to a situation where there was a legal defect in the proceeding not attributable to the state and would make any judgment entered upon that verdict reversible as a matter of law.

Mr. Moore asked whether the subsection would apply to a mistrial occurring as a result of a mistake on the part of the prosecutor and Mr. Paillette explained that the mistrial would not be a bar if the prosecution was terminated for any of the reasons listed.

Mr. Moore questioned the use of the words "not attributable to the state". This could be interpreted, he said, to mean that if the error were attributable to the state, then it would be a bar to subsequent prosecution. In reply to this comment, Mr. Gustafson cited U.S. v. Ball, 163 US 662 (1896), which held that in an appeal the prosecutor could not assert his own error to seek reversal. This was what the language in subsection (2) (b) was attempting to say.

Mr. Paillette referred to Benton v. Maryland, 395 US 784 (1969), which held that a mistrial through a fault of the state did not result in jeopardy being annulled. In reply to further questions, he stated that if there was a legal defect not attributable to the state, jeopardy was annulled by the subsection.

Judge Schwab suggested that the problem under discussion could be corrected by amending the draft to state "... not attributable to

misconduct by the state..." After further discussion, Mr. Johnson moved to adopt Judge Schwab's proposal but the motion was subsequently withdrawn.

Mr. Gustafson further outlined the facts in the case of U.S. v. Ball, where Ball was tried for a murder committed by three people. Ball was acquitted; the other two defendants were convicted, appealed and obtained a reversal. On retrial all three were tried again. Mr. Ball then asserted double jeopardy. In the Benton case the defendant was charged with two crimes, i.e. burglary and larceny. He was convicted of the burglary charge and acquitted of the larceny charge. During his appeal, the State of Maryland, in another case, held that the oath to a juror concerning his belief in God was unconstitutional. This then annulled the original proceedings and Benton chose a retrial where he was convicted of both charges. He appealed from that decision asserting that his first larceny acquittal should stand and that the conviction on that charge constituted double jeopardy.

Representative Cole commented that in both cases there was an acquittal, not a termination by error. He was of the opinion that "not attributable to the state" should be deleted in subsection (2) (b).

After further discussion, Mr. Johnson withdrew his motion to amend subsection (2) (b) to state "... not attributable to misconduct by the state...." Representative Cole moved to delete "not attributable to the state" from subsection (2) (b).

Judge Schwab questioned the meaning of the subsection if that phrase were deleted. Would the draft then say that it would not be former jeopardy in a situation where the trial court terminated the proceedings because as a matter of law there was insufficient evidence. Mr. Moore commented that a judgment of acquittal would be an adjudication rather than a termination.

Mr. Paillette called attention to the definition of "prosecuted for an offense" in subsection (5) of section 1 which said that a person was prosecuted for an offense when the action either "terminates in a conviction upon a plea of guilty" or "proceeds to the trial stage". He further noted that subsection (6) of section 1 stated there was an acquittal if the prosecution resulted in a finding of not guilty or if there was insufficient evidence to warrant a conviction.

Judge Schwab suggested that "other than by judgment of acquittal" be inserted in the first paragraph of section 3 after "terminated". The paragraph would then read "... when the previous prosecution was properly terminated, other than by judgment of acquittal, under the following circumstances:" A motion was made to adopt Judge Schwab's proposal and carried unanimously.

Representative Cole renewed his motion to delete ", not attributable to the state," from subsection (2) (b).

Chairman Chandler asked if the provision would be clear, should Representative Cole's motion be adopted, that the state was not permitted to deliberately get a mistrial in order to go back and try the case over again. Mr. Paillette replied that if the trial court found a termination was necessary and if there was a legal defect in the proceedings, the section with the proposed amendment would make any judgment entered upon a verdict reversible as a matter of law.

A vote was taken on Representative Cole's motion and the motion carried.

Mr. Gustafson explained that subsection (3) of section 3 is the subsection which balances double jeopardy between the defendant and prosecutor, and included in the Model Penal Code to avoid the situation where a person may be arrested for a minor traffic offense and drunk driving, although he is aware of a greater offense relating to this, such as homicide. By pleading guilty, he is convicted of the lesser crime. This section names that conduct where the prosecution was procured by the defendant without the knowledge of the appropriate prosecutor at the time of commencement of the first prosecution for the purpose of avoiding the prosecution of the greater offense.

Judge Schwab asked Mr. Gustafson if he had ever heard of any cases where this kind of problem has arisen and that if this was something more theoretical than actual. Mr. Gustafson replied he did not know of any cases.

Mr. Paillette explained that the staff's approach has been to put these ideas before the subcommittee, not with the idea that there is necessarily a problem in Oregon but the Commission's direction to the staff was to follow the Model Penal Code. This language is in the code which cites a Connecticut statute which says "... no acquittal or conviction for any criminal offense and upon any complaint issued by the procurement....would be a bar to another complaint...." This was to avoid the possibility that the defendant might contrive, for example, to be prosecuted before a Justice of the Peace before the full story was known, plead guilty and receive a minor fine for a serious offense. Mr. Paillette added that five other cases were cited and so this problem has occurred in other states.

Mr. Johnson moved to delete the words "without the knowledge of the appropriate prosecutor at the time of commencement of the first prosecution" in subsection (3). After further discussion, Mr. Johnson withdrew his motion and moved to stike the entire subsection.

Mr. Moore was of the opinion the first part of subsection (3) which reads "When the former prosecution occurred in a court which lacked jurisdiction over the defendant or the offense" was an important part of the draft and should remain in the subsection.

Mr. Paillette stated that three separate subsections could be made out of subsection (3) because in one instance, lack of jurisdiction is discussed; another speaks to "lesser offense" and the third "without the knowledge of the appropriate prosecutor".

Mr. Johnson stated he did not see what the remainder of the subsection adds because the knowledge requirement has already been stated in section 2 (2).

Mr. Paillette remarked that it was important to spell out that jeopardy, in effect, is annulled if the court lacks jurisdiction but was in agreement to the deletion of the remainder of the subsection. He said this was intended to protect the state but the representatives from the District Attorneys' Association apparently do not feel there is a problem.

Mr. Johnson withdrew his earlier motion to delete subsection (3) and moved to amend the subsection as follows: insert a period after the word "offense" in line 2 of subsection (3) and delete the remainder of the paragraph. The motion carried.

Mr. Gustafson told the subcommittee the importance of subsection (4) is the term "substantially different harm or evil", and that the interpretation of those words will determine the real extent of a criminal episode. Although the New York Criminal Procedure Law lists specific situations, the draft does not do so because the exceptions become so numerous they substantially limit the rule.

Mr. Johnson moved the adoption of section 3, as amended.

Mr. Paillette asked to subcommittee to consider a change in subsection (4) of section 3, making the subsection into a disjunctive clause whereby only one requirement would be necessary so that in either event, there would not be double jeopardy. He said in a possession versus sales situation, there could be the required proof but perhaps not a substantially different harm or evil involved. If the state cannot show both, under the draft there is jeopardy.

Mr. Gustafson added that the effect of inserting "or" in the draft would be to allow only one hurdle for the prosecution and if "and" is kept in the draft, there would be two hurdles to pass.

Mr. Johnson was of the opinion the concept of "substantially different harm or evil" must involve some difference of fact.

After further discussion, Mr. Johnson renewed his motion to approve section 3 of the draft, as amended. The motion carried. No amendment was voted in subsection (4).

Section 4. Proceedings not constituting acquittal. Mr. Gustafson explained that section 4 was a restatement of ORS 135.890. He remarked that this section could be put under section 3 because it is a situation that, in essence, annuls jeopardy, but was placed in the draft to show that the existing law is not amended.

Mr. Johnson was of the opinion section 4 should be amended to include "any pretrial motion" and moved the language "or upon any pretrial motion" be inserted after the word "substance" in line 5. The motion carried.

Mr. Johnson moved the adoption of section 4 of the draft, as amended. The motion carried.

Mr. Cole asked, in regard to variance between the indictment and the proof, it this wouldn't be the same as a termination for insufficient evidence.

Mr. Paillette explained that the draft, when speaking about variance, is not necessarily speaking of failure of proof. Under present law there can be a failure of proof without having material variance.

Mr. Moore asked if section 4, which referred only to an indictment, was intended to include complaints and informations as well. Mr. Paillette replied that this was the terminology used in ORS 135.890 and the statutes had always referred to the variance between the indictment and proof. The subcommittee agreed that the scope of the section should be enlarged to include complaints and informations, and Mr. Johnson suggested the staff redraft section 4.

Mr. Paillette asked the subcommittee if it wished to approve section 4 in substance and the staff would draft another version for submission to the Commission. Chairman Chandler replied that Mr. Johnson's earlier motion was to approve the section in substance.

Chairman Chandler asked for a motion to approve Article 1, Former Jeopardy, Preliminary Draft No. 1, including the definitions in section 1. Mr. Johnson so moved and the motion carried.

Mr. Paillette said Preliminary Draft No. 2 will set out the original section 4 as approved as well as an alternative section.

The meeting adjourned at 3:15 p.m.

Respectfully submitted,

Norma Schnider, Clerk
Criminal Law Revision Commission