



STATE OF KANSAS

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January 13, 1986

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ATTORNEY GENERAL OPINION NO. 86- 4

Douglas Lancaster  
City Prosecutor  
City of Fairway  
Suite 1000, One Glenwood Place  
9300 Metcalf  
Overland Park, Kansas 66212

Re: Crimes and Punishments -- Kansas Criminal Code;  
Preliminary -- Effect of Former Prosecution

Synopsis: Under the provisions of K.S.A. 21-3108(4)(c), a second prosecution in a municipal court is not barred by the Double Jeopardy Clause of the Fifth Amendment, after a trial de novo is dismissed at the district court level. A defendant who elects to be tried de novo is in the same position as a convicted defendant who successfully appeals. Both Kansas law and United States Supreme Court decisions provide that such circumstances clearly allow a successive trial. As a result, the case may be re-prosecuted in municipal court, for the defendant's election to exercise his right to a de novo trial has the effect of wiping out the earlier judgment. Cited herein: K.S.A. 21-3108; 22-3609.

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Dear Mr. Lancaster:

As prosecutor for the City of Fairway, you request our opinion on a question of double jeopardy which has arisen in the Municipal Court of the City of Fairway. Specifically, you inquire whether, under the facts of the case, a second

prosecution in the municipal court is barred by K.S.A. 21-3108. You state that the defendant was charged with a violation of a municipal ordinance in the lower court, and was found guilty. On appeal to the Johnson County District Court pursuant to the provisions of K.S.A. 22-3609, defendant's motion to dismiss was sustained. You inform us that the district court refused to reinstate the case, and that no appeal was taken in light of the Kansas Supreme Court decision of City of Wichita v. Horechans, 184 Kan. 297 (1959), by which the district court appeared to have the necessary discretion to dismiss the case. The case was then refiled in municipal court, and defense counsel now asserts that a second prosecution of the case is barred under K.S.A. 21-3108.

K.S.A. 21-3108 deals with the effect of a former prosecution, and states:

"(4) A prosecution is not barred under this section:

. . . .

"(c) If subsequent proceedings resulted in the invalidation, setting aside, reversal or vacating of the conviction, unless the defendant was adjudged not guilty."

Thus, under this statute, a second prosecution is not barred by the Double Jeopardy Clause of the Fifth Amendment, if the effect of subsequent proceedings is to invalidate, set aside, reverse or vacate the earlier conviction. Defense counsel appears to argue that because his client has been placed once in jeopardy and convicted, the city may not retry him in municipal court after his trial de novo was dismissed. We cannot agree with this argument. In our opinion, a defendant who elects to be tried de novo is in the same position as a convicted defendant who successfully appeals. Under these circumstances, it long has been clear that the State may reprosecute if the verdict is reversed, set aside, etc. United States v. Ball, 163 U.S. 662, 41 L.Ed 300, 16 S.Ct. 1192 (1896).

In the case at hand, defendant's election to exercise his right to a trial de novo had the effect of reversing or setting aside his original conviction; as a result, the requirements for a second prosecution under K.S.A. 21-3108(4)(c) were met. This reprosecution must necessarily

take place in the municipal court, since the district court dismissed the case for failure to prosecute and refused to reinstate it. Although the case has already been tried in the lower court, we find a successive trial is not barred by the Double Jeopardy Clause, because the effect of the defendant's election to exercise his right to a de novo trial was to wipe out the earlier judgment in the municipal court. Thus, any new prosecution of defendant will not place him in jeopardy a second time for the same offense.

Although no Kansas cases have been found addressing the issue of whether the Double Jeopardy Clause bars retrial in a municipal court after a trial de novo is dismissed, several United States Supreme Court cases are relevant. In Justices of Boston Municipal Court v. Lydon, 463 U.S. \_\_\_\_\_, 80 L.Ed.2d 311, 104 S.Ct. \_\_\_\_\_ (1984), the Supreme Court reversed the First Circuit Court of Appeals. That court had agreed with the federal district court that the trial de novo of respondent Lydon, pursuant to Massachusetts' "two-tiered" system for trying minor crimes, would violate his right not to be placed twice in jeopardy for the same crime. The Supreme Court relied on its earlier decision in Ludwig v. Massachusetts, 427 U.S. 618, 49 L.Ed.2d 732, 96 S.Ct. 2781 (1976), stating:

"'A defendant who elects to be tried de novo in Massachusetts is in no different position than is a convicted defendant who successfully appeals on the basis of the trial record and gains a reversal of his conviction and a remand of his case for a new trial. Under these circumstances, it long has been clear that the State may re prosecute. United States v. Ball, 163 U.S. 662, 41 L.Ed.300, 16 S.Ct. 1192 (1896).' 427 U.S. at 631-32." 80 L.Ed.2d at 322.

Thus, the Ludwig decision was dispositive of the double jeopardy issue in the Lydon case. The court concluded that a successive trial for a defendant who elects to be tried de novo is not barred by the Double Jeopardy Clause of the Fifth Amendment. Following this reasoning, we find a re prosecution in municipal court, after defendant has chosen to proceed in a trial de novo in the district court, violates no constitutional guarantees.

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." In Benton v. Maryland, 395 U.S. 784, 23 L.Ed.2d 707, 89 S.Ct. 2056 (1969), the Supreme Court held that this guarantee is applicable to the states through the Fourteenth Amendment. Supreme Court cases have recognized three separate guarantees embodied in the Double Jeopardy Clause: It protects against a second prosecution for the same offense after acquittal, against a second prosecution for the same offense after conviction, and against multiple punishments for the same offense. Illinois v. Vitale, 447 U.S. 410, 65 L.Ed.2d 228, 100 S.Ct. 2260 (1980). However, the Double Jeopardy Clause is not an absolute bar to successive trials. The general rule is that the clause does not bar reprosecution of a defendant whose conviction is overturned on appeal. United States v. Ball, supra. As noted earlier in this opinion, the Ludwig case placed a defendant who elects to be tried de novo in the same position as a convicted defendant who successfully appeals; thus, the Double Jeopardy Clause also does not bar reprosecution of a defendant who chooses a trial de novo.

Further, in Price v. Georgia, 398 U.S. 323, 26 L.Ed. 300, 90 S.Ct. 1757 (1970), the Supreme Court recognized that the concept of "continuing jeopardy" is implicit in the Ball rule permitting retrial after reversal of a conviction. See also Breed v. Jones, 421 U.S. 519, 44 L.Ed.2d 346, 95 S.Ct. 1779 (1975). That principle "has application where criminal proceedings against an accused have not run their full course." Id., at 326, 26 L.Ed.2d 300, 90 S.Ct. 1757. Interests supporting the continuing jeopardy principle involve fairness to society, lack of finality, and limited waiver. Price v. Georgia, 398 U.S. at 329, N.4, 26 L.Ed.2d 300, 90 S.Ct. 1757.

We concur with the Supreme Court that acquittals, unlike convictions, terminate the right to further proceedings. However, the City of Fairway is not attempting to convict a defendant after acquittal. Rather, it is trying to reprosecute a defendant who is in the same position as one whose conviction has been overturned on appeal. In our opinion, jeopardy was not terminated with the appeal, but rather continued at the district court level. In the words of the court of appeals dissent in the Lydon case (which the Supreme Court noted with approval):

"While technically [the defendant] is  
"tried again," the second state proceeding

can be regarded as but an enlarged, fact-sensitive part of a single, continuous course of judicial proceedings during which, sooner or later, a defendant receives more--rather than less--of the process normally extended to criminal defendants in this nation.' 698 F.2d, at 12 (Campell, J., dissenting)."

Thus, defendant was never placed twice in jeopardy. Further, we note that the defendant was in jeopardy at the municipal court level in only a theoretical sense. In the words of the Lydon court:

"Although technically 'jeopardy' under the Double Jeopardy Clause entails the 'potential or risk of trial and conviction, not punishment,' Price v. Georgia, 398 U.S., at 329, 26 L.Ed.2d 300, 90 S Ct 1757, it is worthy of note that virtually nothing can happen to a defendant at a first-tier trial that he cannot avoid. He has an absolute right to obtain the de novo trial, and he need not allege error at the first-tier trial to do so. Once the right to de novo trial is exercised, the judgment at the bench trial is 'wiped out.' Mann v. Commonwealth, 359 Mass 661 (1971)." 80 L.Ed.2d at 326.

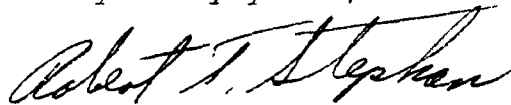
Therefore, the fact that the defendant had an absolute right to obtain the de novo trial meant he was never really placed in jeopardy twice. No matter what the outcome of the lower court decision, defendant was guaranteed an automatic new trial in the district court.

We believe the two-tiered system affords benefits to defendants which are unavailable in traditional court systems. In the Kansas system, a defendant is given two opportunities to be acquitted on the facts. If he is acquitted at the first trial, he cannot be retried. See Ludwig v. Massachusetts, supra. If convicted, he may then choose to invoke his right to trial de novo and once again put the prosecution to its proof. In return, the prosecution should be guaranteed the opportunity to retry the case, once the defendant's request for a de novo trial is granted. If the district court dismisses the case and refuses to

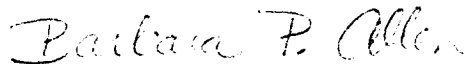
reinstate it, the prosecutor is free to refile the case in the municipal court.

In conclusion, under the provisions of K.S.A. 21-3108(4)(c), a second prosecution in a municipal court is not barred by the Double Jeopardy Clause of the Fifth Amendment, after a trial de novo is dismissed at the district court level. A defendant who elects to be tried de novo is in the same position as a convicted defendant who successfully appeals. Both Kansas law and United States Supreme Court decisions provide that such circumstances clearly allow a successive trial. As a result, the case may be reprosecuted in municipal court, for the defendant's election to exercise his right to a de novo trial has the effect of wiping out the earlier judgment.

Very truly yours,



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RTS:JSS:BPA:crw