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Successive Criminal Trials in the State Courts as a Due Process Problem - Hoag v. New Jersey and Ciucci v. Illinois

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Comments and Casenotes

Successive Criminal Trials In The State Courts As A Due Process Problem

Hoag v. New Jersey[1] and *Ciucci v. Illinois*[2]

In the *Hoag* case, the defendant was indicted and tried for the robbery of three persons in a bar. For some reason,[3] a fourth and fifth victim were not included in the indictments. The defendant was acquitted of the charges, then subsequently indicted and tried for the robbery of the fourth victim. On substantially the same evidence as at the first trial, defendant was convicted. He appealed, claiming among other things,[4] that the second trial constituted a denial of due process of law under the Fourteenth Amendment of the United States Constitution. The conviction was affirmed by the Supreme Court of New Jersey in a four to three decision.[5] The United States Supreme Court granted *certiorari*,[6] and in affirming the conviction, *held* that defendant's conviction by the state court at the second trial was not:

> ". . . so arbitrary or lacking in justification that it amounted to a denial of those concepts constituting 'the very essence of a scheme of ordered justice, which is due process'."[7]

Mr. Chief Justice Warren dissented.[8] Mr. Justice Douglas,

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[1] 356 U.S. 464 (1958).

[2] 356 U.S. 571 (1958).

[3] State v. Hoag, 21 N.J. 496, 122 A. 2d 628 (1956), *dis. op.* 634. The dissenting opinion, 635, observed that:

> "The county prosecutor was at a loss on the oral argument to explain the omission at the outset to return an indictment for the robbery of [the fourth victim] . . . ." (Bracketed material added).

[4] The defendant's case was built around the doctrine of collateral estoppel, *infra*, *circa* p. 129 *et seq.*

[5] *Supra*, n. 3.

[6] 352 U.S. 907 (1956).

[7] Hoag v. State, 356 U.S. 464, 470 (1958).

[8] Mr. Chief Justice Warren dissenting, *supra*, n. 1, *dis. op.* 473, 477, said:

> "The verdict was in petitioners favor. The trial was free of error. To convict petitioner by litigating this issue again before 12 different jurors is to employ a procedure that fails to meet the standard required by the Fourteenth Amendment."

with whom Mr. Justice Black concurred, also dissented.[9] Mr. Justice Brennan did not take part.[10]

In the *Ciucci* case, it was charged that within a matter of minutes the defendant shot and killed his wife and three children, and set fire to their house. He was indicted and tried for the murder of his wife. At the trial evidence of all four deaths was introduced by the prosecution, and the defendant was convicted and given a twenty year prison sentenced to forty-five years in prison. The prosecution of one of the children, again introducing evidence as to all of the crimes. This time the defendant was convicted and sentenced to forty-five years in prison. The prosecution again indicted and tried the defendant for the murder of still another of the children, and the defendant was convicted and sentenced to death. He appealed, claiming that the successive trials by the state court was a violation of due process clause, and that certain inflamatory newspaper articles which had been circulated between his trials made it impossible for him to receive a fair trial. The Supreme Court of Illinois affirmed the conviction.[11] The United States Supreme Court granted *certiorari*,[12] and *per curiam*, affirmed the conviction, holding that the successive trials in the state courts were not a violation of the due process requirement.[13] Mr. Justice Douglas, with whom Mr. Chief Justice Warren and Mr. Justice Brennan concurred, dissented.[14]

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[9] In his dissent, Mr. Justice Douglas said. *supra*, n. 1, 477, 480:
"Hoag was once made to 'run the gantlet' on whether he was present when the violence and putting in fear occurred. Having once run that gantlet successfully, he may not be compelled to run it again."

[10] Mr. Justice Brennan was one of the dissenting justices in the state court trial. State v. Hoag, 21 N.J. 496, 122 A. 2d 628, 633 (1956).

[11] People v. Ciucci, 8 Ill. 2d 619, 137 N.E. 2d 40 (1956).

[12] 353 U.S. 982 (1957).

[13] The Court said, *supra* n. 2, 573:
"The five members of the Court who join in this opinion are in agreement that upon the record as it stands no violation of due process has been shown. The State was constitutionally entitled to prosecute these individual offenses singly at separate trials, and to utilize therein all relevant evidence, in the absence of proof establishing that such a course of action entailed fundamental unfairness. . . . MR. JUSTICE FRANKFURTER and MR. JUSTICE HARLAN, although believing that the matters set forth in the . . . newspaper articles might, if established, require a ruling that fundamental unfairness existed here, concur in the affirmance of the judgment because this material, not being part of the record, and not having been considered by the state courts, may not be considered here."

[14] Mr. Justice Douglas said, *supra*, n. 2, *dis. op.* 573, 575:
". . . by using the same evidence in multiple trials the State continued its relentless prosecutions until it got the result it wanted. It in effect tried the accused for four murders three consecutive times, massing in each trial the horrible details of each of the four deaths.

Mr. Justice Black concurred in the dissent.[15]

The instant cases present two principal questions: *first,* did the state's conduct in either case amount to double jeopardy, and if so, was it that *kind* of double jeopardy as might violate the due process clause of the Fourteenth Amendment; *secondly,* even if double jeopardy was not present in either case, did the state's re-trials constitute a violation of the due process clause.

As to the first question, presented more strongly in the *Hoag* case, the defendant relied to a very great degree on the doctrine of collateral estoppel[16] to bar the state from trying him a second time on the basis of the same evidence that the state had used at the first trial.[17] Collateral estoppel is a variation of the doctrine of *res judicata,*[18] and is closely related to double jeopardy. The difference between the two seems to be that while double jeopardy is applicable to *persons,* collateral estoppel applies to *causes of action.*[19] Hoag's argument ran that since his acquittal at the first trial had to be based on the belief of the jury that he had not been present at the scene of the robbery, the state is estopped from again litigating the issue of his presence. The state court considered this doctrine, but found that it was impossible to determine the basis for the jury's acquittal at the first trial, and for this reason the doctrine of collateral estoppel could not be used as a bar to the second trial, because the jury may well have based their first acquittal on another ground. The Supreme Court adopted

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This is an unseemly and oppressive use of a criminal trial that violates the concept of due process contained in the Fourteenth Amendment, whatever its ultimate scope is taken to be."

[15] Mr. Justice Black concurred in the dissent "on the ground that the Fourteenth Amendment bars a state from placing a defendant twice in jeopardy for the same offense." *Ibid.,* 575.

[16] RESTATEMENT, JUDGMENTS (1942) §68 (1):
"Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action, ..."

[17] And see generaly, Comment, *Criminal Law-Double Jeopardy and Res Judicata as Applied to Successive Prosecutions for Offenses Against Multiple Victims of Robbery [New Jersey],* 14 Wash. and Lee L. Rev. 80 (1957). This was a comment on the state court decision in the Hoag case, *supra* n. 3, and contains an analysis of the doctrine of collateral estoppel.

[18] *Supra,* ns. 16-17; and see Scott, *Collateral Estoppel By Judgment,* 56 Harv. L. Rev. 1, 10 (1942).

[19] See Lugar, *Criminal Law, Double Jeopardy And Res Judicata,* 39 Iowa L. Rev. 317, 329 *et seq* (1954), citing the Maryland Court of Appeals opinion in State v. Coblentz, 169 Md. 159, 180 A. 266 (1935).

this interpretation in affirming the conviction,[20] after pointing out that even if the state had been barred by the doctrine of collateral estoppel, that there had never been a determination by the Court that the doctrine was a Constitutional requirement.[21] Mr. Chief Justice Warren pointed out what seems to be a valid objection to this reasoning in his dissent, saying:

> "The only *contested* issue was whether the petitioner was one of the robbers. The proof of the elements of the crime of robbery was overwhelming and was not challenged. The suggestion that the jury might have acquitted because of a failure of proof that property was taken from the victims is simply unrealistic. The guarantee of a constitutional right should not be denied by such an artificial approach. The first jury's verdict of acquittal is merely an illusion of justice if its legal significance is not a determination that there was at least a reasonable doubt whether petitioner was present at the scene of the robbery."[22]

According to the weight of authority,[23] the majority of the Court was correct in adopting the state court's construction of its robbery statute,[24] and holding that each of the robberies was a separate offense. This would seem to preclude any forceful argument that the second trial was double jeopardy *per se;* however, it also appears Mr. Chief Justice Warren's objection to the refusal of the court to apply the doctrine of collateral estoppel has merit. It must be remembered that in both of the trials in the *Hoag* case,

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[20] Hoag v. New Jersey, 356 U.S. 464, 471 (1958). The court said:
"The state court simply ruled that petitioners previous acquittal did not give rise to such an (collateral) estoppel because 'the trial of the first three indictments involved several questions, not just [petitioners] identity, and there is no way of knowing upon which question the jury's verdict turned.' * * * Possessing no such corrective power over state courts as we do over the federal courts . . . we would not be justified in substituting a different view as to the basis of the jury's verdict." [Parenthetical material supplied].

[21] *Ibid.*, 471. The court said:
"Despite it's wide employment we entertain grave doubts whether collateral estoppel can be regarded as a constitutional requirement. Certainly this Court has never so held."

[22] Hoag v. State, 356 U.S. 464 (1958), *dis. op.* 473, 476.

[23] While the question is a fairly rare one, in view of the usual procedure of the state to prosecute for only one offense, a vast majority of the courts that have passed on the question have held that the robbery of several persons at the same time constitutes separate offenses. See Comment, *supra*, n. 17, 84, fn. 23, and the authorities assembled therein.

[24] N.J.S.A. 2A, §141-1.

all of the witnesses testified in exactly the same manner at the second trial as at the first, and it is difficult to find a rational basis for the first jury's acquittal if they had believed that the defendant was present at the scene of the crimes.

The landmark case in this general area is still *Palko v. Connecticut*,[25] where the Court held that the second trial of the defendant for murder was permissible under the Connecticut statute[26] allowing the state a right of appeal in a criminal case. The Court felt that errors in the first trial, prejudicial to the state, allowed the state to re-try the defendant without violating the due process clause, and affirmed the second conviction resulting in the death sentence.

In *Brock v. North Carolina*,[27] the trial court granted the state's motion for a mistrial when two of the state's key witnesses refused to testify at the defendant's trial on the ground that their testimony would prejudice appeals that the witnesses had taken from criminal convictions that had been entered against them. The Supreme Court affirmed the conviction at the second trial, over the defendant's double jeopardy objection. Outside of these two cases there is a surprising lack of authority on this precise point.[28]

While holding that the due process clause of the Fourteenth Amendment, as applied to the states, does not embrace the double jeopardy prohibition of the Fifth Amendment, the *Palko* case implies that there *may* be circumstances where the repeated jeopardy will be of such character that it violates the fundamental concepts of liberty and justice that are implicit in the due process clause. There Mr. Justice Cardozo said:

> "Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'? . . . The answer surely must be 'no.' What the answer would have to be if the state were per-

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[25] 302 U.S. 319 (1937).

[26] 3 GEN. STATS. CONN. (1949) §8812.

[27] 344 U.S. 424 (1953).

[28] Annotation, 2 L. Ed. 2020 (1958).

> mitted after a trial free from error to try the accused over again or to bring another case against him, we have no occasion to consider."[29]

Accepting the thesis of Mr. Chief Justice Warren, which seems to be the more logical approach, a forceful argument can be made that sustaining Hoag's second conviction by rejecting the idea of collateral estoppel was the kind of fundamental unfairness that should be barred by the broad scope of the due process clause. Following this reasoning, it would seem that the query of the *Palko* case has been partially answered in that after an error free trial in the state court, the state is free to try a defendant again, using all the same evidence, as long as the second trial can be based on a technically separate violation of a statute. Whether or not the doctrine of collateral estoppel should be an element of the due process, it would seem that the Court's refusal to apply the doctrine in the *Hoag* case was, as the dissent observed, "artificial".

The second question, *i.e.* does the state's conduct, in subjecting a defendant to successive criminal trials based on substantially the same evidence, constitute a violation of the due process clause, creates another doubt in the instant cases, especially in the *Ciucci* case. The *Palko* decision sets out the doctrine that a state will not be allowed to harass a defendant with multiple trials.[30] Upon this reasoning there seem to be grounds in the *Ciucci* case for believing that this harassment and wearing out was the intent of the state. Of course the state has a necessarily wide lati-

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[29] Palko v. Connecticut, 302 U.S. 319, 328 (1937). While it might appear that the *Palko* and *Brock* decisions go much further in permitting states to stage repeated trials than the subject cases, in that in *Palko* and *Brock* the retrials were for the identical offenses involved at the first trial while the offenses in the subject cases were at least technically separate, such an appearance is illusory. The subject cases involve complete and error-free first trials. Palko's first trial involved errors and produced no final judgment, the second trial being awarded on the State's appeal. Brock's first trial was never completed. In such cases of an abortive or error-ridden first trial, the second trial is in some circumstances regarded as raising no problem of jeopardy at all, because jeopardy is not regarded as having attached at the first proceeding. The circumstances under which jeopardy is regarded as attaching prior to the termination of the first proceeding vary from state to state. See MODEL PENAL CODE (Tent. Draft No. 5, 1956) §1.09 and comment.

[30] *Ibid.*, 328 where the court said:

> "The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from the corrosion of substantial legal error."

tude in the administration of its own criminal law,[31] but applying the harassment idea of the *Palko* case to the facts of the *Ciucci* case, it appears that the prosecution was unwilling to accept the verdict and sentence of the first or second juries, and that the state continued to use the separate crimes to obtain the desired result. It seems that here is a clear situation where the state set out to obtain the death penalty, and, using the same evidence in all three trials, finally obtained that end.

If there be a solution to the troublesome problems raised by the instant cases, it would seem that it must come from the states.[32] The Supreme Court apparently felt that the desirability of leaving the states free to administer their own criminal justice was not out-weighed by the argument in the *Hoag* case of collateral estoppel, nor in the *Ciucci* case by the multiple trials to which the defendant was subjected. In the application of such an inexact standard as the due process clause, there are almost certain to be

[31] Carter v. Illinois, 329 U.S. 173, 175 (1946):

"But the Due Process Clause has never been perverted so as to force upon the forty-eight States a uniform code of criminal procedure. Except for the limited scope of the federal criminal code, the prosecution of crime is a matter for the individual States."

[32] One solution offered is that set forth by the MODEL PENAL CODE (Tent. Draft No. 5, 1956). The CODE sets out the following suggested rules in §1.08 (2) (3):

"(2) Requirement of Single Prosecution. Except as provided in paragraph (3) of this Section, if a person is charged with two or more offenses and the charges are known to the proper officer of the police or prosecution and within the jurisdiction of a single court, they must be prosecuted in a single prosecution when:

(a) the offenses are based on the same conduct; or

(b) the offenses are based on a series of acts or omissions motivated by a purpose to accomplish a single criminal objective, and necessary or incidental to the accomplishment of that objective; or

(c) the offenses are based on a series of acts or omissions motivated by a common purpose or plan and which result in the repeated commission of the same offense or affect the same person or the same persons or the same property thereof.

(3) Relief from Required Joinder. When a person is charged with two or more offenses, the Court may order any such charge to be tried separately, if it is satisfied that justice so requires."

It is interesting to note that the original decision in the state court in the Hoag case is mentioned in the note to §1.08, *ibid.*, p. 35, and is set forth as the sort of situation that the MODEL PENAL CODE provisions were meant to correct. The objection to the adoption of provisions of this sort seems to be that where the state has no right of appeal in a criminal case, its administration of criminal justice might be hampered because when the jury acquits the defendant of the multiple charges because of errors committed at the trial, the state would then have no further proceedings open to it on any of the charges. However, despite the validity of this objection, it seems that some manner of uniformity is desirable.

differences of opinion, not only among writers[33] and individuals, but also on the Court.

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[33] There were two law review articles written on the Hoag case after it had been decided in the state court, and the writers disagreed in their conclusions. See Comment, *supra*, n. 17, 88 where the writer says:

"One reason, if not on authority, it seems . . . the defense of double jeopardy should have been upheld in the principal case."

Cf., Note, 25 Fordham L. Rev. 531, 535 (1956) where the writer said: "The instant decision would appear to be sound." And also see note. *Constitutional Law — Successive Prosecutions of Same Defendant by State for Crimes Arising Out of Same Occurrence Do Not Violate Fourteenth Amendment*, 107 U. of Pa. L. Rev. 109 (1958), where the writer severely criticizes the decision in the Ciucci case.