

I Object!

– James Eckert, Esq.

Statutory Double Jeopardy

While somewhat rare, Statutory Double Jeopardy can have surprisingly good results in certain cases. For example, this morning I had a leave conference with a Court of Appeals Judge about dismissing an entire indictment because the defendant had pled to related traffic infractions in another court. I will lose, but under not-so-different circumstances I might have prevailed, but there is one very dangerous pitfall for trial attorneys.

Constitutional Double Jeopardy is designed to prevent someone from being tried twice for the exact same offense, but frankly it sucks at doing that. Statutory Double Jeopardy is designed to prevent someone from being tried for two related offenses, if he has a really good lawyer.

In my case, Judge Pigott said this morning, "the defendant loaded up his car with cases of beer and then drove off and led the police on a chase". Technically this was untrue. The victim was a drive-thru store, so the store's employees loaded the cases of beer into the defendant's car while he sat behind the wheel. Completely different fact pattern. He did, however, drive away without paying and led the police on a chase and was DWI and so on. He was charged with traffic infractions in one town and felonies in another. He pled to the local traffic charges, then argued that the indictment had to be dismissed under CPL 40.40(2).

CPL 40.40(2) says that if a defendant is charged with one of two or more "joinable offenses", and is not charged with other such offenses, and he goes to trial or pleads guilty, he cannot be prosecuted for the ones which were not charged. The term "joinable offenses" is very broad, and so can easily lead to a basis for claiming that a plea of guilty to minor offenses can prevent prosecution on greater offenses (as was once done often in DWI/homicide cases, until the statute was specifically amended to prevent the practice).

I can't cover all of the permutations in this space, when a plea will bar further prosecution, what are the risks involved in pleading guilty - even to traffic infractions - where identity might be established on a more serious crime. However, I can tell you of the serious pitfall which rendered my discussion with Judge Pigott, um, more or less academic. A plea of guilty forfeits any claim that prosecution on the charge your client is pleading guilty to was barred by statutory double jeopardy. Raising the issue and then appealing after a plea won't do it. The only way to 'preserve' the issue for appeal is to bring an Article 78 seeking to prohibit prosecution. So keep statutory double jeopardy in mind whenever you see multiple prosecutions for related offenses, and that there are strange rules for getting this issue to an appellate court.