

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
OCTOBER SESSION, 1993

FILED

February 1, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE)
)
 Appellant,)
)
)
)
 v.)
)
)
 JEFFERSON PENNINGTON)
)
 Appellee.)

No. 01C01-9307-PB-00219
Davidson County
Hon. James R. Everett, Jr., Judge
(Dismissal of DUI - State appeal)

For the Appellee:

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For the Appellant:

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Attorney General of Tennessee

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OPINION FILED: _____

AFFIRMED

C. Creed McGinley,
Special Judge

OPINION

The defendant, Jefferson C. Pennington, was charged in a two count indictment with the offenses of driving under the influence and driving on a suspended or revoked drivers license. The defendant filed a motion to dismiss the indictment on grounds of double jeopardy. This motion was sustained by the trial court. The State of Tennessee has appealed this dismissal as a matter of right. In this appeal, the state presents a singular issue for review: Whether the defendant's being held in jail under a local policy for twelve (12) hours after arrest, prior to being allowed to post bail, would support a dismissal of the charges against him on grounds of double jeopardy. We find no error and affirm the judgment of the trial court.

On August 13, 1991, the defendant was arrested for driving under the influence of an intoxicant and for driving on a suspended or revoked driver's license by officers from the Nashville-Davidson County Metropolitan Police Department. At the time of his arrest the defendant refused to take a breath alcohol test. Because the defendant refused to submit to a breath alcohol test, the committing magistrate, pursuant to a policy promulgated by the general sessions judges of Davidson County, placed a "twelve hour hold" on the defendant. The defendant was not permitted to be admitted to bail based upon this policy and was committed to the custody of the Davidson County Sheriff's Department. The defendant was finally permitted to post bail and be released to the custody of his attorney approximately ten and one half (10½) hours after arrest.

It was stipulated by the parties at the hearing on the defendant's motion to dismiss that the Davidson County night commissioners had in effect a policy to put a twelve (12) hour hold on any DUI suspect who had refused to take a breath alcohol test before that person could be admitted to bail. It was also stipulated that this policy was to keep DUI suspects off the road during this period of time. Other proof was developed during the hearing that led to the trial court's findings in the Order of Dismissal dated February 8, 1993. The court made a specific finding based upon evidence presented during the hearing that at the time of his arrest the defendant had three (3) citizens who were not impaired and were prepared to take custody of the

defendant upon his being admitted to bail. The trial court granted the defendant's motion to dismiss and executed two (2) Orders of Dismissal. One order was a very general order dismissing the indictment on grounds of double jeopardy, signed by the trial judge on February 11, 1993. The trial court also entered an Order of Dismissal containing specific findings of fact and conclusions of law prepared by the defendant's attorney and executed by the court on February 8, 1993.

The defendant's argument is that the twelve (12) hour holding period qualified as punishment for the offense and thus would prohibit further trial and sentence on double jeopardy principles. The defendant relies upon a line of cases which stand for the proposition that civil forfeiture proceedings, if punitive rather than remedial, may preclude subsequent criminal prosecution. See Austin v. United States, ____ U.S. ____, 113 S. Ct. 2801 (1993); United States v. Halper, 490 U.S. 435 (1989). See also United States v. Ursery, (59 FED.3d 568 (6th Circuit 1995)). The rationale is that if a civil forfeiture provision can be so punitive as to bar subsequent criminal prosecution, then certainly a post arrest holding period, if punitive in nature, should bar subsequent criminal prosecution on the same grounds.

The double jeopardy guarantees of the Fifth Amendment to the United States Constitution and Art. I, § 10 of the Tennessee Constitution protect individuals against a second prosecution for the same offense after either acquittal or conviction. Ohio v. Johnson, 467 U.S. 493, 81 L. Ed. 2d 425, 104 S. Ct. 2536 (1984). Moreover, the safeguards noted also protect against the imposition of multiple punishments for the same offense. North Carolina v. Pearce, 395 U.S. 711, 717, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969); see State v. Black, 524 S.W.2d 913 (Tenn. 1975).

The Tennessee and the United States constitutional provisions against double jeopardy protect an accused from the peril of both a second punishment and a

second trial for the same offense. Whitwell v. State, 520 S.W.2d 338, 341 (Tenn. 1975).

This Court has previously been presented with a similar issue in the case

of State of Tennessee v. Richard N. Coolidge, NO. 01COI-9307-CR-00202, Davidson Co., (Tenn. Crim. App. filed March 30, 1995, at Nashville). In the Coolidge case the defendant had submitted to a blood alcohol examination, registered .18 and pursuant to policy had been held six (6) hours before being released on bail. In Coolidge the court engaged in the double jeopardy analysis but ultimately refused to find double jeopardy based upon insufficiency of record and presumptive correctness of the trial court ruling. That opinion is, however, instructive and gives some guidance.

The facts before this court are even more compelling in that the defendant was denied the right to make bail for the charges for almost twelve (12) hours, pursuant to a blanket policy, with no individualized determination of whether the defendant presented a danger to himself or others or without application of appropriate bail factors.

The determinative question would appear to be whether the pretrial detention amounts to punishment. If so, a subsequent conviction violates double jeopardy safeguards. But if the detention is merely remedial in nature, a conviction and sentence are not precluded. The case of Doe v. Norris, 751 S.W.2d 834 (Tenn. 1988), provides some guidance in making this determination:

“In determining whether the confinement involved ... is punishment ... court[s] must decide whether the confinement is imposed for the purpose of punishment or whether it is an incident of a legitimate governmental purpose. Where ... no showing of an express intent to punish is made ... “that determination generally will turn on ‘whether an alternative purpose to which [the restriction] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.’ ”

[Citations omitted] 751 S.W.2d at 839.

Although the Doe case is a due process case instead of double jeopardy certainly the language is instructive.

Generally, punishment imposed without a prior adjudication of guilt is “per se illegitimate.” Shall v. Martin, 467 U.S. 253, 272 (1984). If the state action is remedial and not intended to inflict punishment as a means of vindicating public justice, the double jeopardy clause serves as no protection. State v. Conley, 639 S.W.2d 435

(Tenn. 1982).

The initial burden is on the defendant to make a threshold showing of double jeopardy. United States v. Sinito, 723 F.2d 1250 (6th Cir. 1983), cert denied 469 U.S. 817 (1984); also United States v. Jabara, 644 F.2d 574 (6th Cir. 1981); see Dowling v. United States, 493 U.S. 342 (1990). In other words, the defendant must make an arguable showing that his pretrial detention qualified as punishment. That would depend on (1) whether the detention served an alternative purpose, and (2) whether that detention is excessive in relation to the purpose. Coolidge, supra. The state argues that the twelve (12) hour hold on any DUI suspect who has refused to take a breath alcohol test prior to admission to bail serves an alternative or remedial purpose. The purpose is ostensibly to keep intoxicated people off the road during a period of time sufficient to attain sobriety in order to protect the general public. Therefore, the state insists that the holding period is for remedial purposes and would not qualify as punishment. In this case the trial court found that there were three (3) citizens, who were unimpaired that were ready, willing and able to take custody of the defendant when admitted to bail. The court further found that the defendant was punished for refusing the breath alcohol test and that there was no legitimate governmental interest to be vindicated under the facts of this case. The record amply supports the court's finding. Common sense dictates a finding that the defendant was in fact punished by the questioned policy and deprived of his liberty without bail.

We therefore find under the particular facts of this case that the defendant's post arrest detention without prior adjudication operated as a punishment for the charged offenses and thus violated the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, as well as Article I, Section 10, of the Tennessee State Constitution. The order of the trial court dismissing the indictment on grounds of double jeopardy is therefore accordingly affirmed.

C. CREED MCGINLEY, Special Judge

CONCUR:

JOHN H. PEAY, Judge

JOSEPH M. TIPTON, Judge