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Criminal Law: Estoppel as Bar to Plea of Former Jeopardy

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courts, however, refuse to take any action on an excessive sentence until the valid portion has been served.[17]

When a court merely cuts off the excessive portion of the sentence or defers action until the valid portion has been served, the maximum sentence always follows without regard for the particular facts in the case. On the other hand, when the cause is remanded to the trial court, that court may in its discretion pronounce a valid sentence based on a first-hand acquaintance with the merits. In remanding the cause in the instant case, the Florida Court adhered to a sound course followed consistently in the past[18] and now regarded as the well-settled rule in this jurisdiction.[19]

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CRIMINAL LAW: ESTOPPEL AS BAR TO PLEA OF FORMER JEOPARDY

State v. Bentley, 81 So.2d 750 (Fla. 1955)

Defendants were charged with larceny of a cow. In presenting its case, the state proved that the subject of the larceny was a bull. Defendants moved for a directed verdict based on a material variance between allegation and proof. The motion was granted and a new information was filed charging defendants with larceny of a bull. Defendants' motion to quash, based on a plea of former jeopardy, was granted and the state appealed. HELD, having asserted an alleged material variance at the former trial, defendants are estopped from pleading former jeopardy on the ground that the variance in the first trial was actually immaterial. Order reversed.

The Florida Supreme Court first applied the doctrine of estoppel

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[17]*E.g.*, State v. Maher, 164 Minn. 289, 204 N.W. 955 (1925); State v. Hooker, 183 N.C. 763, 111 S.E. 351 (1922); Commonwealth *ex rel.* Ciampoli v. Heston, 292 Pa. 501, 141 Atl. 287 (1928); *In re* Taylor, 7 S.D. 382, 64 N.W. 253 (1895); *In re* Blystone, 75 Wash. 286, 134 Pac. 827 (1913).

[18]Coleman v. State, 140 Fla. 772, 193 So. 84 (1940); *In re* Camp, 92 Fla. 185, 109 So. 445 (1926); Faison v. Vestal, 71 Fla. 562, 71 So. 759 (1916); Porter v. State, 62 Fla. 79, 56 So. 406 (1911).

[19]Collingsworth v. Mayo, 77 So.2d 843 (Fla. 1955).

to a plea of former jeopardy in *State v. Cootner*,[1] an arson case in which the defendant won a directed verdict on the first trial because of a variance between the allegation and proof of ownership of the property burned. The trial court granted defendant's motion to quash the second information. On appeal, the Court held that a subsequent trial would not constitute double jeopardy, since the new information, with a correct allegation of ownership, charged a different crime; a conviction on the first trial would have been reversed on appeal. The Court further stated[2] that one who asserts the materiality of a variance as a defense is estopped on a later trial under a new information from pleading that the variance on the first trial was actually immaterial.

An entirely different situation is presented when the first trial might result in a conviction that could be upheld on appeal. Such a case was *Driggers v. State*,[3] in which the defendant was acquitted of larceny of a cow and was subsequently tried for the identical act under a charge of larceny of a calf. In reversing the conviction the Florida Supreme Court held that "an acquittal . . . on a charge of the larceny of an animal of a certain species from a named owner . . . will bar a second prosecution for the larceny of the same animal, described in some other way . . . ."[4]

The instant case also involved a situation in which a conviction on the first trial could have been sustained on appeal. The trial judge apparently overlooked the holding in *Driggers v. State* when he directed a verdict for defendants; but, relying on this decision, he subsequently quashed the second information. On appeal the Court distinguished the *Driggers* case on the ground that in that case the defendant did not undertake to establish the materiality of the variance. But in permitting a second trial for the same offense, the Supreme Court relied on the authority of two Florida cases in which the variance at the first trial was actually material.[5]

This decision will give rise to questions as to what positive action by a defendant will call the estoppel doctrine into play. The trial judge, for example, may instruct the jury on his own motion that the defendant should be acquitted because of a material variance or he

[1]60 So.2d 734 (Fla. 1952).

[2]*Id.* at 737.

[3]137 Fla. 182, 188 So. 118 (1939).

[4]*Id.* at 188, 188 So. at 121.

[5]State v. Cootner, 60 So.2d 734 (Fla. 1952); State v. Anders, 59 So.2d 776 (Fla. 1952).

may choose to rely on a similar instruction submitted by defendant. Should this distinction be decisive in determining whether the defendant is in jeopardy on a subsequent trial?

The obvious guilt of the accused, together with the unappealable error of the trial judge in directing a verdict on an immaterial variance, is perhaps the real basis of the instant holding. Since the defendant could have been validly convicted on the first trial, however, he was certainly in jeopardy at the subsequent trial. In view of the fact that constitutional rights are at stake, the use of estoppel to circumvent a jeopardy situation is dangerous precedent.

YOUNG J. SIMMONS

CRIMINAL LAW: FLORIDA'S LEGAL LOTTERIES

Opinion of the Attorney General 055-289 (Oct. 31, 1955)

A national soap company mailed to persons in Florida free entry blanks upon which the recipients wrote their names and addresses. The blanks were then returned to the soap company, which held a drawing and awarded prizes to those whose names were drawn. A Florida supermarket advertised that it would award duplicate prizes to the winners whose blanks had been stamped at the supermarket. Does either of these schemes violate Florida's lottery laws?[1] The Attorney General held that the manufacturer was not conducting a lottery but that the supermarket was.[2]

The opinion of the Attorney General listed three elements of a lottery: prize, chance, and consideration. There was no consideration moving to the soap manufacturer, the opinion said, but the financial benefits accruing to the operator of the supermarket in attracting a large group of participants to its store constituted consideration.

Decisions of the Florida Supreme Court indicate that neither of these schemes violates Florida's lottery laws. In addition to the three essential elements named by the Attorney General,[3] the Florida Supreme Court has named a fourth — widespread effect. This require-

[1]FLA. CONST. art. III, §23 (1885); FLA. STAT. §849.09 (1953).

[2]Op. Att'y Gen. Fla. 055-289 (Oct. 31, 1955).

[3]*E.g.*, Op. Att'y Gen. Fla. 055-251 (Sept. 29, 1955); REP. ATT'Y GEN. FLA. 660-75 (1954).