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## Constitutional Law-Double Jeopardy- Misdemeanor Conviction at Preliminary Hearing Held a Bar ta Subsequent Felony Prosecution Upon Double Jeopardy Principlus

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**Constitutional Law—Double Jeopardy—MISDEMEANOR CONVICTION AT PRELIMINARY HEARING HELD A BAR TO SUBSEQUENT FELONY PROSECUTION UPON DOUBLE JEOPARDY PRINCIPLES—*Rouzie v. Commonwealth*, 215 Va. 174, 207 S.E.2d 854 (1974).**

The Virginia Constitution provides: "That in criminal prosecutions a man . . . shall not . . . be put twice in jeopardy for the same offense."<sup>1</sup> This prohibition against double jeopardy is also embodied in the United States Constitution,<sup>2</sup> as well as having been established at common law.<sup>3</sup> However, what constitutes the same offense<sup>4</sup> has proven to be a source of difficulty when applied to a particular case.<sup>5</sup>

Such difficulty was encountered in *Rouzie v. Commonwealth*,<sup>6</sup> where the defendants had been brought before the district court<sup>7</sup> for a preliminary

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1. VA. CONST. art. I, § 8. This provision was originally incorporated in art. I, § 8 of the 1902 Constitution. See VA. CODE ANN. § 19.1-257 (Repl. Vol. 1960) (acquittal by jury on the merits is a bar to further prosecution for the same offense).

2. U.S. CONST. amend. V. See also *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1874). "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense." *Id.* at 168.

3. 4 W. BLACKSTONE, COMMENTARIES \*335. See *Jones v. Commonwealth*, 61 Va. (20 Gratt.) 848, 854 (1871), where the court stated that the common law maxim, as it exists in Virginia, extended to all criminal cases. See generally J. SIGLER, DOUBLE JEOPARDY 1-34 (1969), wherein it is noted that the basic concept of double jeopardy was known to the Greeks and Romans. He finds that COKE'S INSTITUTES and BLACKSTONE'S COMMENTARIES were influential in introducing double jeopardy concepts into colonial America.

4. The "spirit and purpose" behind the double jeopardy doctrine has been to guarantee the accused immunity from a second prosecution for the same offense. *Commonwealth v. Perrow*, 124 Va. 805, 815, 97 S.E. 820, 823 (1919). See *Green v. United States*, 355 U.S. 184, 187 (1957), which stated that the United States Constitutional prohibition against double jeopardy was designed to protect the individual from the "hazards of trial" and "possible conviction" more than once for the same offense. See also *Benton v. Maryland*, 395 U.S. 784 (1969), where the double jeopardy clause of the fifth amendment was held to apply to the states through the due process clause of the fourteenth amendment.

5. At common law, the plea of *autrefois convict* (former conviction) invoked the double jeopardy bar where the subsequent prosecution was for the "identical act and crime." 4 W. BLACKSTONE, COMMENTARIES \*336. In order to determine if an offense was the same, in law and fact, a test for identity of offenses was developed in *The King v. Vandercomb & Abbott*, 168 Eng. Rep. 455 (K.B. 1796). Thus offenses were identical if the "proof of the facts" would have sustained convictions under both indictments. In most American jurisdictions this test is used, although it is sometimes known as the "same evidence" rule. See *Morgan v. Devine*, 237 U.S. 632, 641 (1915). See generally 1 WHARTON'S CRIMINAL LAW AND PROCEDURE § 144 (R. Anderson ed. 1957); 12 CORNELL L.Q. 212 (1926-27).

6. 215 Va. 174, 207 S.E.2d 854 (1974).

7. The preliminary hearing was held in the Municipal Court of the City of Chesapeake. Effective July 1, 1973, the designation "municipal court" is deemed to refer to a general district court, which is a court not of record. VA. CODE ANN. § 16.1-69.5 (Cum. Supp. 1974).

hearing on felony warrants. That court found a lack of probable cause as to the felony charged. Having the jurisdiction to try the defendants for misdemeanors *only*,<sup>8</sup> the court convicted each of simple assault.<sup>9</sup> Approximately one week later the defendants were indicted and subsequently convicted<sup>10</sup> in the circuit court for the felony of malicious wounding with intent to maim, disfigure, disable or kill.<sup>11</sup> On appeal the Supreme Court of Virginia, in an opinion by Justice Carrico, held that the subsequent felony prosecution of each defendant was barred by principles of double jeopardy.<sup>12</sup>

If the defendants had been originally indicted by the grand jury on the felony charge, and the subsequent trial in the circuit court produced a conviction of a lesser included misdemeanor,<sup>13</sup> it is clear that double jeop-

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8. *Id.* § 19.1-106. Under this section, at a preliminary hearing before a court *not* of record, the accused may be discharged if sufficient cause is lacking for charging him with the offense alleged; or if sufficient cause *only* is present to charge the accused with an offense over which the court has jurisdiction, then he may be tried; or if sufficient cause to charge the accused with an offense over which the court has no jurisdiction, then his case is certified to the court of record having such jurisdiction. See *Williams v. Commonwealth*, 208 Va. 724, 160 S.E.2d 781 (1968).

VA. SUP. CT. (CRIM.) R. 3A:5(b)(2) provides that a court *not* of record has jurisdiction to try the accused only for a misdemeanor at a preliminary hearing on a felony charge.

9. Both defendants were fined \$100.00, with a six month jail sentence suspended. 215 Va. at 175, 207 S.E.2d at 855.

In Virginia, it is settled law that jeopardy means danger of conviction. *Rosser v. Commonwealth*, 159 Va. 1028, 167 S.E. 257 (1933). Therefore, an accused has been placed in jeopardy when he has been indicted, arraigned, pleaded, and the jury impaneled; or if tried by the court, when the court has begun to hear the evidence. However, the court must have competent jurisdiction to try the offense charged. *Id.*

10. VA. CODE ANN. § 17-123 (Cum. Supp. 1974), authorizes the jurisdiction of circuit courts, *i.e.*, courts of record, over felonies and misdemeanors.

11. *Id.* § 18.1-65 (Repl. Vol. 1960), defines the felony offense of malicious wounding.

The defendants were sentenced to one year in the penitentiary, with all but thirty days suspended, and placed on indefinite probation. 215 Va. at 175, 207 S.E.2d at 855.

12. 215 Va. at 179, 207 S.E.2d at 858. The circuit court had overruled the defendants' motions to quash the indictments on the grounds that the felony prosecutions were not barred by the misdemeanor convictions.

The proper method of raising a double jeopardy question in Virginia is by the special plea of *autrefois convict* (former conviction) or *autrefois acquit* (former acquittal). *Royals v. City of Hampton*, 201 Va. 552, 111 S.E.2d 795 (1960). The special plea must be in writing, "setting forth all the facts and circumstances necessary to identify the offense and the accused." *Reaves v. Commonwealth*, 192 Va. 443, 445, 65 S.E.2d 559, 560-61 (1951).

13. A lesser included offense contains the same elements which constitute part of the greater offense. See *Ashby v. Commonwealth*, 208 Va. 443, 445, 158 S.E.2d 657, 658 (1968). Thus a conviction of the misdemeanor of assault operates as an acquittal of the felony of malicious wounding. See *Canada v. Commonwealth*, 63 Va. (22 Gratt.) 899 (1872).

ardly would have barred another prosecution for the same crime.<sup>14</sup> Simple assault is a lesser included misdemeanor within the felony of malicious wounding.<sup>15</sup> Because of this, the defendants in *Rouzie* argued that the subsequent felony prosecutions in the circuit court had placed them in danger of conviction for either the greater included felony, or the same misdemeanor for which they had been previously convicted.<sup>16</sup> Therefore, the constitutional guarantees against being placed twice in jeopardy for the same offense barred the felony prosecutions.<sup>17</sup> The Commonwealth contended that jeopardy never attached because the defendants were never in danger of a greater included felony conviction in the district court,<sup>18</sup> as that court lacked jurisdiction.<sup>19</sup>

The court in *Rouzie* dismissed the Commonwealth's jurisdictional argu-

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14. *Ashby v. Commonwealth*, 208 Va. 443, 158 S.E.2d 657 (1968). When an accused person is convicted of a lesser included offense, it is deemed an acquittal of the greater offense charged. *Lane v. Commonwealth*, 190 Va. 58, 55 S.E.2d 450 (1949); *Stuart v. Commonwealth*, 69 Va. (28 Gratt.) 950 (1877); VA. CODE ANN. § 19.1-249 (Repl. Vol. 1960). See *Harris v. State*, 193 Ga. 109, 17 S.E.2d 573 (1941); *King v. State*, 216 Tenn. 215, 391 S.W.2d 637 (1965). See generally J. CHITTY, CRIMINAL LAW \*455, for earlier common law precedent.

Note that when an accused appeals from a conviction, he waives his former jeopardy to former prosecution for the same offense of which convicted.

15. Under the Maiming Act, VA. CODE ANN. § 18.1-65 (Repl. Vol. 1960), the defendants could have been found guilty of "any felony or misdemeanor substantially charged" within the indictment; the included offenses being malicious wounding, unlawful wounding and simple assault. *Banner v. Commonwealth*, 204 Va. 640, 133 S.E.2d 305 (1963); *Spradlin v. Commonwealth*, 195 Va. 523, 79 S.E.2d 443 (1954); *Canada v. Commonwealth*, 63 Va. (22 Gratt.) 899 (1872).

16. See note 10 *supra* for the authority of the circuit court to convict for both felonies and misdemeanors. See also VA. CODE ANN. § 19.1-251 (Repl. Vol. 1960) (conviction of lesser offenses under certain indictments); VA. SUP. CT. (CRIM.) R. 3A:24 (accused may be found guilty of any offense substantially charged).

17. The constitutional provision for the double jeopardy doctrine applies to all criminal cases, felonies and misdemeanors. *Commonwealth v. Perrow*, 124 Va. 805, 97 S.E. 820 (1919). For an exception concerning state revenue laws see VA. CODE ANN. § 19.1-257 (Repl. Vol. 1960).

18. Conviction of a lesser included offense, in a court lacking jurisdiction over the greater offense, does not bar a subsequent prosecution for the greater offense. *Bennett v. State*, 229 Md. 208, 182 A.2d 815 (1962); *State v. Birchead*, 256 N.C. 494, 124 S.E.2d 838 (1962). Cf. *State v. Barnette*, 158 Me. 117, 179 A.2d 800 (1962) (offenses separate and distinct). *But see Diaz v. United States*, 223 U.S. 442 (1912).

19. Generally, a preliminary hearing is not a trial, and does not put the defendant in danger of any conviction. Thus a dismissal for lack of probable cause does not bar a subsequent proceeding. *United States ex rel. Rutz v. Levy*, 268 U.S. 390 (1925). See note 9 *supra*. However, the effect of VA. CODE ANN. § 19.1-106 (Cum. Supp. 1974), is to place the defendant in danger of conviction if the preliminary hearing court finds probable cause to charge and try for a misdemeanor over which it has jurisdiction.

ment,<sup>20</sup> and recognized that double jeopardy would bar the subsequent prosecutions for the identical act and crime, both in law and fact.<sup>21</sup> By applying the "proof of facts" test<sup>22</sup> of identity of offenses, the court concluded that the defendants had been convicted of two inseverable offenses.<sup>23</sup> Because the defendants were placed in jeopardy as to the lesser included misdemeanor at the preliminary hearing,<sup>24</sup> the subsequent felony prosecutions were barred.

In an attempt to avoid double jeopardy, the Commonwealth asserted that upon return of the felony indictments the prior misdemeanor convictions were merged into the felony, rendering those convictions null and void.<sup>25</sup> It is true that where the original prosecution proceeded under a felony indictment, a conviction of the felony offense would cause all lesser included offenses to merge into it.<sup>26</sup> However, the Commonwealth sought to apply the merger theory where convictions of the lesser included misdemeanor were already obtained. In so doing, *Murphy v. Commonwealth*<sup>27</sup> and *Burford v. Commonwealth*<sup>28</sup> were relied upon.

20. The jurisdictional distinctions are ignored by those courts interpreting double jeopardy principles broadly, thus giving greater substantive effect to the rights of the accused. See *State v. Purdin*, 206 Iowa 1058, 221 N.W. 562 (1928); *State v. Berry*, 41 N.J. 547, 197 A.2d 687 (1964). Cf. *Waller v. Florida*, 397 U.S. 387, *reh. denied*, 398 U.S. 914 (1970). See generally Annot., 4 A.L.R.3d 874 (1965).

21. Double jeopardy applies "only to a second prosecution for the identical act and crime both in law and fact for which the first prosecution was instituted." *Henson v. Commonwealth*, 165 Va. 829, 832, 183 S.E. 438, 439 (1936).

In *Rouzie*, the Commonwealth conceded that both convictions were based upon the identical acts of the defendants. 215 Va. at 176, 207 S.E.2d at 856.

22. Offenses are identical where the proof of facts necessary to obtain a conviction of one offense would also have sustained conviction of the other offense. *Miles v. Commonwealth*, 205 Va. 462, 138 S.E.2d 22 (1964); *Henson v. Commonwealth*, 165 Va. 829, 183 S.E. 438 (1936). See *Jones v. Commonwealth*, 208 Va. 370, 157 S.E.2d 907 (1967) (same evidence test). See also note 5 *supra*.

23. The court noted that the defendants had been convicted of both greater and lesser degrees of the same offense. 215 Va. at 177, 207 S.E.2d at 856.

However, two or more distinct and separate offenses may arise out of one act, and both may be lawfully punished. Thus the identity of the offenses, whether the same or distinct, is the important factor in determining a double jeopardy bar. See *Comer v. Commonwealth*, 211 Va. 246, 176 S.E.2d 432 (1970); *Lawrence v. Commonwealth*, 181 Va. 582, 26 S.E.2d 54 (1943). But see VA. CODE ANN. § 19.1-259 (Repl. Vol. 1960) (if the same act violates two or more statutes, conviction under one statute bars any proceedings under the others).

24. VA. CODE ANN. § 19.1-106 (Cum. Supp. 1974). See note 8 *supra*.

25. 215 Va. at 177, 207 S.E.2d at 856.

26. *Lee v. Commonwealth*, 135 Va. 572, 576, 115 S.E. 671, 672 (1923); *Canada v. Commonwealth*, 63 Va. (22 Gratt.) 899, 905 (1872). See *State v. Johnson*, 112 Ohio App. 124, 165 N.E.2d 814 (Ct. App. 1960).

27. 64 Va. (23 Gratt.) 960 (1873).

28. 179 Va. 752, 20 S.E.2d 509 (1942). In *Burford*, the defendant had been tried and

In *Murphy*, the accused was convicted by a justice of the peace for simple assault, and was subsequently indicted and convicted by the county court for felonious assault. The court held the misdemeanor conviction void, because the justice of the peace lacked jurisdiction<sup>29</sup> over an offense that was "in fact" felonious.<sup>30</sup> In dictum it was stated that even if the accused had been convicted of the misdemeanor in a "court having jurisdiction of such an offense generally,"<sup>31</sup> the conviction would not have barred a subsequent felony prosecution. In such a case the misdemeanor was considered so "essentially distinct" that upon the felony indictment the misdemeanor "merged in the felony."<sup>32</sup>

*Rouzie* declined to follow this holding or rationale because of a statutory change,<sup>33</sup> and an erroneous application of the doctrine of separate and distinct offenses.<sup>34</sup> But *Rouzie* need not be predicated solely upon the basis

acquitted at a preliminary hearing on the misdemeanor of assault. Later, he was indicted and convicted of felonious assault arising out of the same act. The court, in holding that a double jeopardy plea had been properly overruled, adopted the dictum in *Murphy* concerning merger as settled law.

29. Va. Acts of Assembly 1871, ch. 268, at 362, provided that justices of the peace had concurrent jurisdiction with the county courts over the misdemeanor of assault. The county courts retained jurisdiction over felonies.

30. 64 Va. (23 Gratt.) at 963. The felony charged was assault with intent to maim, disable, disfigure and kill.

It is interesting to note that an offense becomes felonious "in fact" only after proof at trial. As a justice of the peace had no authority to try a felony case, it was impossible to prove an offense felonious in such a court. Following *Murphy* a defendant could never have barred a subsequent felony prosecution for the same criminal act on which his prior misdemeanor conviction rested, as long as the felony was proved in the circuit court. See note 35 *infra*.

31. 64 Va. (23 Gratt.) at 963.

32. *Id.* *Murphy* cited *Commonwealth v. Roby*, 29 Mass. 496, 12 Pick. 496 (1832), as support for the merger theory.

In *Roby*, the defendant was convicted of the misdemeanor of assault with intent to murder. After conviction, the victim died and the defendant was tried and convicted for the felony of murder. It was held that the two offenses were of a distinct legal character, and the former conviction did not bar the subsequent prosecution. The basis of the holding was that proof of a killing was a necessary element of murder, whereas such proof was not required to sustain an assault conviction. *Id.* at 504-05, 12 Pick. at 505-06.

As noted in *Rouzie*, the merger theory was an argument advanced by the prosecutor in the *Roby* case, and was not applied by that court in reaching its decision.

33. Va. Acts of Assembly 1896, ch. 856, at 935, as amended VA. CODE ANN. § 19.1-106 (Cum. Supp. 1974). This statute authorized the conviction of a lesser included misdemeanor within a felony charge at the preliminary hearing. See note 8 *supra*.

*Rouzie* noted that the statutory change of 1896 was characterized as "slight" in *Burford v. Commonwealth*, 179 Va. 752, 20 S.E.2d 509 (1942). 215 Va. at 179, 207 S.E.2d at 857-58. See note 28 *supra*. Now, *Rouzie* makes clear the significance of a misdemeanor trial at a preliminary hearing.

34. The cases cited in notes 22-23 *supra* have recognized the doctrine of separate and

that *Murphy* was wrong.<sup>35</sup> The result in the two cases may be reconciled by observing a fundamental change in the common law. Originally, all misdemeanors were considered as legally distinct from felonies because of certain privileges<sup>36</sup> incident to a misdemeanor. Furthermore, there could be no conviction of a misdemeanor upon a felony indictment.<sup>37</sup> Where the same criminal act constituted both a misdemeanor and a felony, the misdemeanor was considered as merged into the felony.<sup>38</sup> The purpose of this merger was to maintain rigid procedural distinctions between a felony and a misdemeanor, thereby insuring that misdemeanor privileges were denied a defendant at a felony trial.<sup>39</sup> Today the technical distinctions between felonies and misdemeanors no longer exist.<sup>40</sup> Also, since an accused may be convicted of a lesser included misdemeanor substantially charged within a felony indictment,<sup>41</sup> the "doctrine of merger . . . has no reasonable basis on which to rest."<sup>42</sup>

*Rouzie* emphasizes firmly that jeopardy attaches at the preliminary hearing if the defendant is tried for a lesser included misdemeanor. Whether conviction or acquittal results,<sup>43</sup> the principles of double jeopardy

distinct offenses. By applying the test for identical offenses it is determined by the court if a second prosecution is for the same offense. If it is found that the offenses are separate and distinct, even though arising out of one act by the defendant, then both offenses may be prosecuted. See *Jones v. Commonwealth*, 208 Va. 370, 157 S.E.2d 907 (1967).

Under Virginia law, the misdemeanor of assault is included within felonious assault. See note 15 *supra*.

35. *Murphy* misapplied the doctrine of separate and distinct offenses because of its recognition of an older theory concerning the legal distinctions between felonies and misdemeanors. Even its reliance on *Commonwealth v. Roby*, 29 Mass. 496, 12 Pick. 496 (1832), was not wholly unfounded. *Roby* discussed the essential differences between felonies and misdemeanors, and seemed to indicate that the distinctions possessed vitality. However, implicit in *Roby* was the assumption that the misdemeanor of assault was not considered as a lesser included offense within the felony of murder. See note 32 *supra*.

36. Upon a trial for a misdemeanor, the defendant was entitled to full counsel, a copy of the indictment, and a special jury. *The King v. Westbeer*, 168 Eng. Rep. 108, 110 (K.B. 1739); *J. CHITTY, CRIMINAL LAW* \*251.

37. *Edens v. Commonwealth*, 142 Va. 609, 613, 128 S.E. 555, 556 (1925); *J. CHITTY, CRIMINAL LAW* \*251, 456.

38. *Williams v. State*, 205 Md. 470, 109 A.2d 89, 92 (1954) (discussion of merger). Thus the offenses were identical in fact, but legally distinct.

39. 1 *WHARTON'S CRIMINAL LAW AND PROCEDURE* § 33 (R. Anderson ed. 1957). See also *J. SIGLER, supra* note 3, at 5.

40. *Williams v. State*, 205 Md. 470, 109 A.2d 89 (1954); *Edens v. Commonwealth*, 142 Va. 609, 613, 128 S.E. 555, 556 (1925).

41. See notes 14-16 *supra*.

42. 1 *WHARTON'S CRIMINAL LAW AND PROCEDURE* § 33 (R. Anderson ed. 1957).

43. Although *Rouzie* decides only that a conviction of a lesser included misdemeanor at a

will bar the Commonwealth from seeking a subsequent prosecution for the greater felony offense arising out of the same act.<sup>44</sup> Thus the substantive effect of the constitutional guarantees against double jeopardy is extended in Virginia.

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preliminary hearing bars a subsequent prosecution on the greater felony charge, the same reasoning would seem applicable to an acquittal at the preliminary hearing. In either case, the defendant is placed in jeopardy. Also, it appears significant that the court refused to follow *Burford v. Commonwealth*, 179 Va. 752, 20 S.E.2d 509 (1942), which had held an acquittal at a preliminary hearing as no bar to the felony prosecution. See note 28 *supra*.

44. If the preliminary hearing judge finds probable cause to try the defendant for a misdemeanor, the prosecutor may enter a *nolle prosequi*, thereby halting the prosecution of that offense. Such action by the prosecutor must be taken before the trial commences in order to prevent the accused from being placed in jeopardy. See *Delph v. Slayton*, 343 F. Supp. 449, 453 (W.D. Va. 1972); *Lindsay v. Commonwealth*, 4 Va. (2 Va. Cas.) 345 (1823). Thus a subsequent felony prosecution would not be barred.

However, a *nolle prosequi* would appear to require the leave of court. *Anonymous*, 3 Va. (1 Va. Cas.) 139 (1803). Also, after jeopardy attaches, a *nolle prosequi* amounts to an acquittal unless the defendant consents, or manifest necessity is shown. *Mack v. Commonwealth*, 177 Va. 921, 927-28, 15 S.E.2d 62, 64 (1941), quoting, *Rosser v. Commonwealth*, 159 Va. 1028, 167 S.E. 257 (1933).