PROSECUTING ATTORNEY	)	One charged with careless and reckless driving who paid a fine is not put in jeopardy by being subsequently charged with carrying a deadly weapon while intoxicated.
CRIMINAL LAW	)	
FORMER JEOPARDY	)	

February 12, 1941

2-17

FILED
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Mr. James L. Paul
Prosecuting Attorney
McDonald County
Pineville, Missouri

Dear Sir:

This will acknowledge receipt of your request for an opinion under date of January 18, 1941, which reads as follows:

> "I have been confronted with the following state of facts and desire your opinion before further proceeding in this case: Mr. X was arrested by the State Highway Department and was charged with operating a motor car while intoxicated.
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> "Mr. Tracy, then Prosecuting Attorney later reduced the charge to careless and reckless driving, and Mr. X. paid a fine. At the time of his original arrest, Mr. X. had in his possession in the car a certain revolver pistol. Upon assuming office I filed a charge of carrying deadly weapons while intoxicated. Since filing that charge I have read certain cases among which are: State vs. Selby, 90 Mo. 302, 2 SW 468, and also the case State v. Toombs, 34 S.W. 2, P. 61.

> "In view of these cases I am wondering whether or not I have sufficient grounds to base the suit upon, as I have interpreted these cases to mean that where it has been a conviction upon one cause of action and certain elements were necessary in that cause, and the same elements are also necessary in the second cause, that the plea of former jeopardy would be a bar to further prosecution."

In answering your request we shall not consider the fact that this Defendant was originally charged with operating a motor car while intoxicated, for reason that this charge was later reduced to a charge for careless and reckless driving for which the said defendant paid a fine. So for the premises in this case we shall assume that the defendant was formerly charged with careless and reckless driving.

Now, the question: Would a charge of carrying a deadly weapon while intoxicated be subject to a plea of former jeopardy? The evidence of the carrying of the concealed weapon relates back to the time of the former arrest. At that time he had in his possession in the car a revolver. Section 23 of Article II of the Constitution of Missouri prohibits any person being put in jeopardy and reads as follows:

> "That no person shall be compelled to testify against himself in a criminal cause, nor shall any person, after being once acquitted by a jury, be again, for the same offense, put in jeopardy of life or liberty; but if the jury to which the question of his guilt or innocence is submitted fail to render a verdict, the court before which

> the trial is had may, in its discretion, discharge the jury and commit or bail the prisoner for trial at the next term of court, or, if the state of business will permit, at the same term; and if judgment be arrested after a verdict of guilty on a defective indictment, or if judgment on a verdict of guilty be reversed for error in law, nothing herein contained shall prevent a new trial of the prisoner on a proper indictment, or according to correct principles of law."

Amendment V to the Constitution of the United States prohibits any person for the same offense to be put in jeopardy, and reads as follows:

> "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

The statutory provisions regarding jeopardy are found in Sections 4846, 4847 and 4848, R. S. Missouri, 1939, and read as follows:

> "When the defendant shall be acquitted or convicted upon any indictment, he shall not thereafter be tried or convicted of a different degree of the same offense, nor for an attempt to commit the offense charged in the indictment, or any degree thereof, or any offense necessarily included therein, provided he could have been legally convicted of such degree of offense, or attempt to commit the same, under the first indictment."
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> "When a defendant shall have been acquitted of a criminal charge upon trial, on the ground of variance between the indictment and the proof, or upon any exceptions to the form or substance of the indictment, or where he shall be convicted, but the judgment shall for any cause be arrested, he may be tried and convicted on a subsequent indictment for the same offense, or any degree thereof, or of an attempt to commit such offense."
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> "When a defendant shall have been acquitted upon a trial, on the merits and facts, and not on any ground stated in the last section, he may plead such acquittal in bar to any subsequent accusation for the same offense, notwithstanding any defect in form or substance in the indictment upon which such acquittal was had."

Corpus Juris, in stating the general principle that even when two offenses are nominally the same, a conviction of one will not be a bar to the other if they are substantially different, said:

> "* * * Even where two offenses are nominally the same, if they are substantially different, a conviction of one will not be a bar to a prosecution in the other. Nor is a putting in jeopardy for one act a bar to a prosecution for a separate and distinct act, merely because they are so closely connected in point of time that it is impossible to separate the evidence relating to them on the trial for the one of them first had."

We find in Bishop on Criminal Law, Volume 1, 9th Ed., page 775, Section 1051, the rule as to when offenses are the same, as follows:

> "Just principle seems to sustain the following: They are not the same when (1) the two indictments are so diverse as to preclude the same evidence from maintaining both; or when (2) the evidence to the first and that to the second relate to different transactions, whatever be the words of the respective allegations; or when (3) each indictment sets out an offense differing in all its elements from that in the other, though both relate to one transaction, -- a proposition of which the exact limits are difficult to define; or when (4) some technical variance precludes a conviction on the first indictment, but does not appear on the second. On the other side, (5) the offences are the same whenever evidence adequate to the one indictment will equally sustain the other. Moreover, (6) if the two indictments set out like offences and relate to one transaction, yet if one contains more of criminal charge than the other, but upon it there

> could be a conviction for what is embraced in the other, the offences, though of different names are, within our constitutional guaranty, the same."

Also, in Section 1060 of Volume 1 of Bishop on Criminal Law, page 785, same offenses are interpreted in the following language:

> "* * * 'a fundamental rule of law that out of the same facts a series of charges shall not be preferred.' To give our constitutional provision the force evidently intended, and to render it effectual, 'the same offence' must be interpreted as equivalent to the same criminal act. Judicial utterances have even gone apparently to the extent that there can be only one punishment for one criminal transaction. But this is carrying the rule, at least according to the greater number of the authorities, too far the other way." (Underscoring ours).

In Volume 8 of Blashfield's Cyclopedia of Automobile Law and Practice, Section 5494, pages 244-5, the rule is given as to when the same facts constitute two or more offenses and one will not bar a conviction of the other, and reads in part as follows:

> "* * * When the same facts constitute two or more offenses, wherein the lesser is not necessarily involved in the greater, and when the facts necessary to convict on a second prosecution would not necessarily have convicted on the first, then the first prosecution will not be a bar to the second, although the offenses were both committed at the same time and by the same act. * * * *"

It has been held in this state that the stealing of goods of more than one at the same time and place only constitutes one charge. State v. Citius, 56 S. W. (2d) 72, l. c. 74. Also, State v. Bockman, 124 S. W. (2d) 1025, l. c. 1206.

It has been held in a number of foreign cases that a conviction of assault with intent to murder does not bar a prosecution for carrying a pistol. In Brown v. State, 37 So. 408 (Supreme Court of Ala.) a special plea of former conviction was filed by the defendant showing that the defendant was indicted of assault with intent to murder and convicted of an assault and battery with a weapon. The plea of former conviction stated that the offense now charged was the same and based upon the same act and the same testimony would support both charges. The State demurred on the ground that said plea on its face showed distinct and separate offenses and said demurrer was sustained by the court. The court, in upholding the action of the lower court on appeal, said:

> "The demurrer to the defendant's plea of former conviction was properly sustained."

In Richardson v. State, 30 So. 650 (Supreme Court of Miss.) the defendant was acquitted of assault and battery with intent to kill and murder one Henrietta Pierce. The grand jury subsequently returned an indictment against the defendant charging him with force and arms unlawfully, feloniously and intentionally pointing a pistol toward Henrietta Pierce, and did then and there and while so intentionally pointing said pistol willfully and feloniously discharged same and injure. The defendant filed a plea of autrefois acquit. The District Attorney demurred and the lower court sustained the demurrer. In upholding the action of the lower court on appeal, the Supreme Court said:

> "The previous acquittal on an indictment for assault and battery with intent to kill and murder is no bar to this indictment for pointing a gun, etc. Granted that it would have been a bar if the previous acquittal had been on a charge of murder or manslaughter, this would have been because of the express provision of Code 969 and it does not apply to assault and battery."

Woodroe v. State, 96 S. W. 30 (Court of Criminal Appeals, Texas), the appellant was convicted of unlawfully carrying a pistol and fined $25.00. The appellant claimed that the court committed error in striking out her plea of former acquittal. Such plea of former acquittal set up the fact that she had previously been acquitted of an assault with intent to murder and that was the very occasion when she had the pistol for which she is now being tried. The court held that that was no bar to this prosecution.

In Nichols v. State, 40 S. W. 502 (Court of Criminal Appeals, Texas), the defendant was charged with carrying on and about his person a pistol and fined $25.00. The defendant had formerly been charged and convicted of disturbing the peace and displaying a deadly weapon. The defendant plead not guilty as he was formerly convicted against the latter charge. The court said:

> "Appellant was charged with carrying on and about his person a pistol, and fined and in the sum of $25, and appeals.
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> "In addition to his plea of not guilty, appellant filed a plea of former conviction, in which he states that he had been previously convicted of a disturbance of the peace, by going near a private residence, and displaying a deadly weapon, and further alleging that it was the same trans-

> action as that charged in the information in this case. So far as this bill is concerned, it may be conceded that the proof in the former case was in substance that appellant was traveling along the road, and passing near the residence of one Ray; that Ray's dog barked at him, and, after going a short distance, appellant returned, and fired the pistol at the dog, and, in doing so, fired towards the residence of Ray, it being but a few steps away. For this display of the pistol and disturbing people at Ray's house, appellant was convicted in the justice court, under a complaint charging him with going near the private residence of another, and rudely displaying his pistol, under article 334 of the Penal Code of 1895. On the trial the court instructed the jury 'that the plea of former conviction offered by the defendant was stricken out by the court, and, in making up your verdict in this cause, you will not consider the same.' etc. This was not error. The offenses were different. Appellant was riding along the road, carrying the pistol with him before he reached the place where the shooting occured, and carried it on beyond that point. Our statute has made these offenses different prescribing different punishments; and the offense of carrying the pistol was complete before it was displayed and fired. Without entering into a discussion of the question we refer to Wheelock v. State (Tex. Cr. App.) 38 S. W. 182, and Burns v. State, Id. 204."

In the case of State v. Garcia, 200 N. W. 201 (Supreme Court of Iowa), the court approvingly quoted from their decision in the case of State v. Broderick, 191 Iowa, 717, 719, 183 N. W. 310, 311. At l. c. 202, as follows:

"We said in State v. Broderick, 191 Iowa, 717, 719, 183 N. W. 310 311:

"'The "same evidence test" is not infallible, but may be accepted as true only in a general sense. While the difference of evidence conclusively establishes the distinctness of the accusations, it does not follow e converso that two indictments are identical in their accusations, although the same evidence may be legally competent and sufficient to sustain each; because two crimes may be committed in the course of one and the same transaction.'"

In Collier v. State, 69 S. E. 29 (Court of Appeals of Georgia) the court held that a former conviction for being drunk and disorderly on a public highway would not be good in bar of a prosecution for firing such a pistol on a public highway on the Sabbath Day. This is true, although the defendant will have been convicted of being drunk and disorderly on the highway when he fired the pistol. The offenses are separate and distinct. The evidence necessary to convict of the first offense would not be sufficient to convict of the second.

In State v. Burgess, 268 Mo. 407, l. c. 420, the court held that the evidence disclosing that the defendant was found guilty of making away with, securing with intent to embezzle Three Hundred ($300.00) Dollars entrusted to him for investment in March, will not authorize a discharge upon a plea of former jeopardy when put upon trial for making away with, securing with the intent to embezzle Four Hundred Fifty ($450.00) Dollars entrusted to him by the same person for the same purpose in the previous decision, and the court further held that where there were two distinct offenses, conviction of one is no bar to prosecution for the other, although it involves the same testimony. In so holding, the court said:

> "It is also urged that defendant should be discharged because the facts which were testified to on behalf of the State in this case were likewise offered in evidence in the trial of another charge against defendant.
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> "We have carefully examined both the record and the plea, without lengthening the opinion with a statement of the disclosures, it is our opinion that the defendant has not been in former jeopardy on this charge, and that upon the showing made he was not entitled to his discharge on that ground. * * * * * *"

In State v. Page, 58 S. W. (2d) 293, l. c. 295, 296, the defendant had been indicted and acquitted on a charge of forging a deed. In the case at bar the defendant was charged with having forged a certification of purported acknowledgement to the deed. By written plea in bar filed before the trial and also by evidence offered at the trial in the instant case, the defendant interposed the acquittal under the first indictment as a bar to his further prosecution under the second, which plea the court overruled. In holding the two offenses separate and distinct and involving different actions, the court said:

> "* * * If there was evidence in the trial under indictment No. 278 tending to show that defendant had falsely certified an acknowledgment to the deed therein charged to have been forged, it could only have been competent, if at all, as it might bear upon the question of the alleged forgery of the deed. The two offenses are separate and distinct, involving different actions. One is the forgery of the deed which might be committed by any person. The other is the

> false certification of a purported acknowledgment to the deed, which could be committed only by a person authorized to take and certify acknowledgments, acting in his official capacity. The deed might be forged though not acknowledged at all, and there might be a false certificate of acknowledgment to a genuine deed in violation of section 4180.
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> "It follows that the charge in indictment No. 278 of forging the deed did not, as appellant contends it did, include the offense or act denounced by section 4180 upon which the indictment in the instant case was based, and appellant could not have been convicted under the first indictment of the offense charged in the second. Neither would the same evidence nor the same character of evidence have sustained both charges."

In the case of State v. Shelby, 90 Mo. 302, l. c. 306-7, the defendant was indicted in one count for carrying about his person a deadly weapon when under the influence of intoxicating drink and in the other for carrying concealed a deadly weapon. The evidence in this case disclosed that the defendant was a guest of a hotel; that he took a pistol from his coat pocket where it was concealed and laid it upon his lap while sitting at a table in the dining room; and that at the time the defendant was under the influence of intoxicating drink. The court, in holding that the defendant was not guilty of two distinct offenses, said:

> "* * * Carrying a deadly weapon is an element common to both offences charged in the indictment; and there is proof of but one carrying, and that at the same time and place. By the verdict the carrying of the weapon is first attached to the

> fact that the defendant was under the influence of intoxicating drink and made one offence. The same carrying is then attached to the fact of concealment and made another offence. Now all these elements existed at one and the same time. They constituted but one misdemeanor. The fact that defendant took the pistol out and laid it upon his lap, but furnishes the proof of his guilt, and in no just sense can it be said the defendant was guilty of two distinct offences. The state, under the evidence, could take a verdict of guilty for one offence, but not for both."

We contend there is a distinction between the facts in the above case and the instant case. In the above case, as stated by the court, the carrying of a deadly weapon was an element common to both offenses charged and the proof was of but one carrying at the same time and place. In the instant case the defendant was charged and paid a fine for careless and reckless driving and the charge now pending is one of carrying a deadly weapon while intoxicated. There is no element common to both of these cases. In the former charge there was no element of carrying a deadly weapon or of being intoxicated and in the latter charge there is no element of careless and reckless driving. Therefore, no element of either constitutes a part of the other offense. We contend that the mere fact that both crimes were committed at the same time and place is not, of itself, sufficient to sustain the charge of former jeopardy.

In State v. Toombs, 34 S. W. (2d) 61, the Supreme Court of Missouri, Division No. 2, went to some length in laying down the general principle of former jeopardy in this state. In this case, at l. c. 66, the court quotes with approval 16 Corpus Juris, Section 445, page 265, and reads as follows:

> "'A test almost universally applied to determine the identity of the offenses is to ascertain the identity, in character and effect, of the evidence in both cases. If the evidence which is necessary to support the second indictment was admissible under the former, was related to the same crime, and was sufficient if believed by the jury to have warranted a conviction of that crime, the offenses are identical, and a plea of former conviction or acquittal is a bar. But if the facts which will convict on the second prosecution would not necessarily have convicted on the first, then the first will not be a bar to the second, although the offenses charged may have been committed in the same transaction.' 16 C. J. Sec. 445, p. 265."

In the above case the defendant was tried and convicted for violating Section 3350, R. S. Mo. 1919. The indictment charged that on or about January 17, 1928, he being president of the International Life Insurance Company, a corporation, wilfully, designedly and feloniously procured the signing of a certain false and fraudulent certificate of ownership of 3,000 shares of the capital stock of said corporation with felonious intent to issue the same, said certificate being numbered D11011. The jury assessed defendant's punishment at a fine of $1.00 and three years' imprisonment in the penitentiary. Prior to the trial of the instant case the defendant had been tried and convicted for procuring the signing with intent to issue to certificate D11009 above mentioned and sentenced to pay a fine of Three Thousand Dollars ($3,000.00), and three years' imprisonment in the penitentiary. The facts disclosed that the three certificates numbered D11009, D11010 and D11011, were issued at the same time and place and in the same manner. The defendant contended, among other things, that this case should be reversed for the reason that he had been once tried and convicted for the same offence. In passing on this matter, the court said, at l. c. 66:

"The situation here presented seems to us to meet both of the tests above quoted from R.C.L. and C.J. We are aware that in applying to concrete cases the general rules that may be said to be fairly well established, in endeavoring to determine whether in a given case there was one offense committed or several, appellate courts have reached different conclusions upon facts that, if not the same, at least appear to be of similar nature and to call for the application of the same principle. We shall make no attempt to reconcile these apparently conflicting decisions. We have found no case that seems directly in point in its facts.

"It is not in keeping with the spirit of our law that should one be twice punished for the same crime. The guaranty that no person shall for the same offense be twice put in jeopardy has always in this country been regarded as one of the most sacred rights of the individual. While courts should not so apply the principle as to defeat the design of the penal laws to protect society and prevent crime, we think no legitimate purpose of the criminal laws would be subserved by a technical construction whereby several prosecutions might be maintained and several punishments inflicted for what constitutes essentially one criminal act. It is our opinion that defendant committed but one offense for which he has been convicted and is being punished, and that his plea of former conviction should have been sustained. We think the following cases, as well as those cited above, support this conclusion: Hurst v. State, 86 Ala. 604, 6 So. 120, 11 Am.St.Rep. 79; Clem v. State, 42 Ind. 420, 13 Am.Rep. 369; Spannell v. State, 83 Tex Cr.R. 418, 203 S.W. 357, 2 A.L.R. 593."

We are of the opinion that what the court said in the case of State v. Toombs, supra, hereinabove quoted, is the well established law in this State regarding former jeopardy. However, there is a clear distinction in that case and the case at bar. In that case the defendant had been charged and convicted for procuring the signing with intent to issue of certificate D11009. He was sentenced to pay a fine of Three Thousand ($3,000.00) Dollars and three years' imprisonment in the penitentiary. The defendant was later charged and convicted with a similar crime regarding certificate #D11011 and he has appealed. The facts are that the three certificates D11009, D11010 and D11011 were all issued at the same time and place and in the same manner. The court, on appeal in the Toombs Case, supra, held the latter charge put the defendant in former jeopardy for the reason he committed but one offense. The above decision, in holding both charges constitute but one offense, follows those decisions in this state hereinabove referred to, that the stealing of goods of more than one at the same time and place constitutes only one offense. Therefore, this case is clearly distinguishable from the case at Bar.

Therefore, it is the opinion of this department that the defendant may be prosecuted for carrying concealed weapons while intoxicated even though the defendant had plead guilty to the charge of driving an automobile in a careless and reckless manner which was committed at the same time and place without being placed in jeopardy twice for the same offense.

Respectfully submitted,

APPROVED:

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ARH/rv