

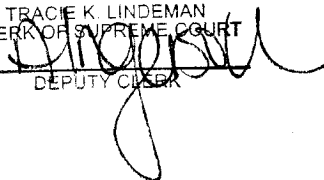
IN THE SUPREME COURT OF THE STATE OF NEVADA

TRACEY A. SEAY,  
Petitioner,  
vs.  
THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF  
CLARK; AND THE HONORABLE  
MICHAEL VILLANI, DISTRICT  
JUDGE,  
Respondents,  
and  
THE STATE OF NEVADA,  
Real Party in Interest.

No. 64261

FILED

NOV 14 2013

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER GRANTING PETITION*

This original petition for a writ of mandamus or probation seeks an order requiring the district court to vacate a trial date and dismiss a criminal charge on double jeopardy grounds.

The State brought two separate prosecutions against petitioner Tracey Seay after he was arrested on suspicion of driving under the influence: (1) a prosecution for misdemeanor DUI in the municipal court and (2) a prosecution for felony DUI in the justice court. Seay pleaded no contest to the misdemeanor DUI charge in the municipal court and was convicted and sentenced. Seay then appeared in the justice court and moved to dismiss the felony DUI charge on double jeopardy grounds. The justice court denied Seay's motion, the district court upheld the justice court's ruling on appeal, and we denied the original petition for a writ of habeas corpus that followed.

The justice court found probable cause to bind Seay over for trial in the district court, where Seay filed a motion to dismiss the felony DUI count on double jeopardy grounds. Relying on our resolution of Seay's habeas petition, the district court denied the motion. Seay subsequently filed the instant petition, and the State provided an answer at our direction.

Seay argues that the district court is in violation of the double jeopardy clauses of the United States and Nevada constitutions by allowing the State to proceed with a DUI prosecution after the municipal court convicted him of that very offense, and he asks us to reconsider our prior decision in this matter. The State responds that (1) this court has already rejected Seay's double jeopardy claim in the order denying his habeas petition, (2) the Double Jeopardy Clause does not bar a subsequent prosecution when the court that heard the first offense lacked jurisdiction to hear all of the offenses, and (3) a defendant cannot avoid prosecution for a more serious offense by pleading guilty to a lesser offense.

#### *Availability of writ relief*

We have original jurisdiction to issue writs of mandamus and prohibition. Nev. Const. art. 6, § 4. A writ of prohibition is the proper remedy to restrain a district court from exercising a judicial function without or in excess of its jurisdiction. NRS 34.320. We have stated that a writ of prohibition will issue to preclude a trial that would violate the Double Jeopardy Clause. *Glover v. Eighth Judicial Dist. Court*, 125 Nev. 691, 701, 220 P.3d 684, 692 (2009).

#### *The Double Jeopardy Clause*

The Double Jeopardy Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."

U.S. Const. amend V. This protection is guaranteed by the Nevada Constitution. Nev. Const. art. 1, § 8(1). “The Double Jeopardy Clause protects against three abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.” *Jackson v. State*, 128 Nev. \_\_\_, \_\_\_, 291 P.3d 1274, 1278 (2012), *cert. denied*, 571 U.S. \_\_\_, 81 U.S.L.W. 3518 (2013). This case involves the second abuse: a second prosecution for the same offense after conviction.

*Seay’s misdemeanor conviction bars prosecution of the felony offense*

Seay argues that the Double Jeopardy Clause prohibits the State from prosecuting the felony DUI offense and asserts that our prior ruling in this case, concluding that he was not entitled to relief because he had not yet been convicted of the felony DUI offense, was erroneous. *See Seay v. Eighth Judicial Dist. Court*, Docket No. 58021 (Order Denying Petition, May 10, 2011). “[T]he doctrine of the law of the case is not absolute, and we have the discretion to revisit the wisdom of our legal conclusions if we determine that such action is warranted.” *Bejarano State*, 122 Nev. 1066, 1074, 146 P.3d 265, 271 (2006); *see Tien Fu Hsu v. County of Clark*, 123 Nev. 625, 630, 173 P.3d 724, 728-29 (2007). We conclude that our prior decision was clearly erroneous and revisit that decision in this order.

The parties do not dispute that misdemeanor DUI is a lesser included offense of felony DUI for double jeopardy purposes. The felony DUI offense in question cannot be committed without committing the lesser offense of misdemeanor DUI. NRS 484C.110 establishes the elements that give rise to a DUI offense. The only difference between misdemeanor DUI and felony DUI lies in the criminal penalties and

punishments under NRS 484C.400 and NRS 484C.410. The only additional element in Seay's felony DUI charge is the existence of a prior felony DUI conviction. *See Blockburger v. United States*, 284 U.S. 299, 304 (1932); *Estes v. State*, 122 Nev. 1123, 1143, 146 P.3d 1114, 1127 (2006) ("Nevada utilizes the *Blockburger* test to determine whether separate offenses exist for double jeopardy purposes.").

The prosecution of the greater offense is prohibited after a conviction for a lesser offense. *See Ohio v. Johnson*, 467 U.S. 493, 501 (1984) ("[T]he Double Jeopardy Clause prohibits prosecution of a defendant for a greater offense when he has already been tried and acquitted or convicted on the lesser included offense."); *Illinois v. Vitale*, 447 U.S. 410, 421 (1980) ("[A] conviction on a lesser-included offense bars subsequent trial on the greater offense."); *Brown v. Ohio*, 432 U.S. 161, 169 (1977) ("Whatever the sequence may be, the Fifth Amendment forbids successive prosecution and cumulative punishment for a greater and lesser included offense."). As Seay has already been convicted of misdemeanor DUI, we conclude that the Double Jeopardy Clause bars the State from prosecuting him for felony DUI.

*A jurisdictional exception does not apply*

The State argues that a jurisdictional exception to the Double Jeopardy Clause permits its continued prosecution of Seay for felony DUI. The State relies on *Diaz v. United States*, 223 U.S. 442 (1912), to support its argument that a jurisdictional exception applies to these facts. We conclude that *Diaz* is distinguishable from this case. In *Diaz*, the Philippine justice court only had jurisdiction to hear and convict the defendant of assault and battery but had no power to hear a homicide charge, which was filed after the first prosecution when the victim died.

223 U.S. at 444. The Court held that the Philippine Civil Government Act provisions against double jeopardy did not apply for multiple reasons: (1) the offenses were distinct both in law and fact, (2) it was only possible to put the accused in jeopardy for homicide after the homicide has been committed (after the victim died), and (3) the justice of the peace did not have jurisdiction to try the defendant for homicide. *Id.* at 448-49.

Here, the municipal court had full power and authority to convict and sentence Seay on the misdemeanor charge of DUI. Seay was not charged with two distinct offenses. The facts giving rise to the misdemeanor DUI and felony DUI arose from the same incident. The only difference between the charges is that the Clark County District Attorney seeks a punishment enhancement because Seay had a prior felony DUI conviction on his record. Unlike the homicide charge in *Diaz*, the felony DUI charge was already pending in justice court when Seay entered his no contest plea in the municipal court. Given that the municipal court had jurisdiction to hear the only charge alleged against Seay in that court, and Seay's misdemeanor DUI and felony DUI were not separate offenses under the *Blockburger* test, the jurisdictional exception discussed in *Diaz* does not apply.

Because the justice court and municipal courts derive their authority from the State of Nevada, they are not separate sovereigns for double jeopardy purposes and may not both punish Seay for the same offense. *See Waller v. Florida*, 397 U.S. 387, 394-95 (1970) (political subdivisions of a state are not separate sovereigns for double jeopardy purposes). Therefore, the municipal court's adjudication of the misdemeanor DUI offense precludes the State from prosecuting Seay for the felony DUI offense. *See State v. Witcher*, 737 So. 2d 584, 586 (Fla.

Dist. Ct. App. 1999) (holding that simple DUI is a continuing offense for which only one conviction can be maintained for each episode regardless of whether a county court lacked jurisdiction over felony DUI when it accepted the defendant's plea to misdemeanor DUI); *State v. Bernert*, 100 P.3d 221, 224 (Utah Ct. App. 2004) (holding that the trial court's acceptance of a defendant's plea to the charge of misdemeanor DUI and subsequent conviction of the defendant on a felony DUI charge arising out of the same conduct violated the prohibition against double jeopardy).

*The State's actions foreclosed prosecution of the felony offense*

The State argues that pursuant to *Ohio v. Johnson*, 467 U.S. 493 (1984), Seay cannot foreclose his prosecution for a more serious crime by pleading guilty to a lesser offense. However, the *Johnson* case is distinguishable. In *Johnson*, the respondent was indicted for multiple offenses in a single charging document and was prosecuted for those offenses in a single prosecution, *see* 467 U.S. at 500 (“[T]he State is not prohibited by the Double Jeopardy Clause from charging the respondent with greater and lesser included offenses and prosecuting those offenses in a *single* trial.” (emphasis added)), whereas the State charged Seay with a greater offense and a lesser-included offense and prosecuted those offenses in two separate courts. Additionally, in *Johnson*, the respondent was trying to resolve only part of the charges pending against him, *see id.* at 501-02 (holding the *Johnson* defendant could not resolve only part of the charges against him where “efforts were directed to separate disposition of counts in the same indictment where no more than one trial of the offenses charged was ever contemplated”), whereas Seay resolved the sole charge pending against him in the municipal court. Finally, in *Johnson*, the trial court accepted the respondent's guilty pleas over the State's objection,

whereas the municipal court accepted Seay's no contest plea without objection. *See id.* at 496. We conclude that *Johnson* does not support the State's argument and the State's decision to pursue two separate prosecutions led to the foreclosure of the felony offense.


*The State had the burden to address the concurrent prosecutions*

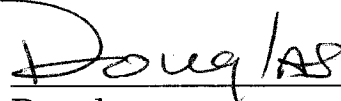
The State argues that Seay is the primary cause of his continued prosecution because he was the only one aware of both prosecutions and should have informed the municipal court of the pending felony DUI. However, Seay was under no legal obligation to speak up in municipal court. *See Rosas v. State*, 122 Nev. 1258, 1265-66, 147 P.3d 1101, 1106-07 (2006) (holding that a defendant is not required to present a defense, or evidence consistent with such defense, or to admit culpability for a lesser-included offense in order to obtain an instruction on a lesser-included offense). The Sixth Amendment requires the government to inform Seay of the nature and cause of the accusation against him, not the other way around. *See U.S. Const. amend VI* (indicating that the defendant must "be informed of the nature and cause of the accusation"). The Clark County District Attorney and Las Vegas City Attorney were the ones with the resources and power in this situation, and they were in a position to know of Seay's concurrent charges. *See Green v. United States*, 355 U.S. 184, 187 (1957) ("The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity."). We conclude that Seay was under no obligation to inform the municipal court of his pending felony DUI charge and that it is unreasonable to burden a defendant with the

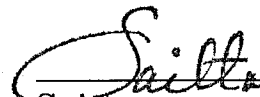
responsibility of resolving the actions of two State entities that have proceeded on a course of action that leads to a Double Jeopardy Clause violation.

For the foregoing reasons, we

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF PROHIBITION instructing the district court to dismiss the felony charge of driving under the influence of intoxicating liquor against the petitioner.

  
\_\_\_\_\_, J.  
Gibbons

  
\_\_\_\_\_, J.  
Douglas

  
\_\_\_\_\_, J.  
Saitta

cc: Hon. Michael Villani, District Judge  
Louis C. Schneider, LLC  
Attorney General/Carson City  
Clark County District Attorney  
Eighth District Court Clerk