South Carolina Law Review

Volume 48 | Issue 2 Article 8

Winter 1997

McMullin's Double Jeopardy Protection May Be a Casualty of South Carolina's War on Drug

Travis Dayhuff

STUDENT WORKS

MCMULLIN'S DOUBLE JEOPARDY PROTECTION MAY BE A CASUALTY OF SOUTH CAROLINA'S WAR ON DRUGS

In *McMullin v. South Carolina Department of Revenue & Taxation*[1] the South Carolina Supreme Court held that a controlled substance tax assessed against a previously convicted drug dealer does not violate the Double Jeopardy Clause. The South Carolina tax statute at issue in *McMullin* was the Marijuana and Controlled Substance Tax Act (CSTA),[2] which was enacted by the legislature in 1993.

The CSTA provides that drug dealers become subject to a tax immediately upon their acquisition or possession of marijuana or other controlled substance.[3] A "dealer"[4] in possession is taxed at the rate of $3.50 per gram of marijuana, $200 dollars per gram of controlled substance, and $2,000 per fifty dosage units of a controlled substance not sold by weight.[5] The CSTA requires that drug dealers pay these taxes, and in return, the state is obligated to provide each dealer with official tax stamps that must be affixed to the illegal drugs.[6]

If a dealer is found in possession of illegal drugs without the official stamps, the CSTA authorizes the state to collect any previously unpaid taxes and impose an additional one-hundred percent tax penalty upon the dealer.[7] Further, dealers who fail to affix the official stamps to drugs in their possession are guilty of a misdemeanor that carries a sentence of not more than five years or a fine of not more than ten thousand dollars, or both.[8]

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1. ___ S.C. ___, 469 S.E.2d 600 (1996).
2. S.C. CODE ANN. §§ 12-21-5010 to -6050 (Law. Co-op. Supp. 1996).
3. *See id.* § 12-21-6020.
4. The statute defines "dealer" as:
   [A] person who in violation of the laws of this State manufactures, produces, ships, transports, or imports into South Carolina or in any manner acquires or possesses more than forty-two and one-half grams of marijuana, or seven or more grams of a controlled substance, or ten or more dosage units of a controlled substance which is not sold by weight.

Id. § 12-21-5020(3).
5. *See id.* § 12-21-5090.
6. *See id.* § 12-21-6010(A).
7. *See id.* § 12-21-6000(A).
8. *See id.* § 12-21-6000(B).

South Carolina's CSTA is by no means a novel drug-fighting statute. Numerous other states have enacted substantially similar tax statutes aimed at drug dealers in possession of illegal narcotics.[9] The apparent purpose of these controlled substances tax statutes is to further the "war on drugs" by hitting drug dealers in the pocket-book, while also allowing states to collect revenue from the extremely profitable black-market drug trade.[10]

South Carolina's CSTA deserves attention because courts in other jurisdictions have held that controlled substances tax statutes like our CSTA constitute a punishment for double jeopardy purposes.[11] That is, individuals first punished in a state criminal proceeding and afterward assessed a controlled substance tax have successfully claimed that they have been unconstitutionally punished twice for the same offense. Such multiple punishment, it is argued, denies a defendant the double jeopardy protection provided by both the federal[12] and state constitutions.[13] The South Carolina Supreme Court addressed precisely these double jeopardy concerns in *McMullin v. South Carolina Department of Revenue & Taxation.*[14]

On February 5, 1994, Anderson County sheriff's deputies arrested Demetric S. McMullin for possession of 197 grams of cocaine and 23 grams of crack cocaine. McMullin was subsequently charged and convicted in the Anderson County Court of General Sessions for criminal possession and

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9. The following are just a sample of the many state statutes: Alabama's Drugs and Controlled Substances Excise Tax, ALA. CODE §§ 40-17A-1 to -16 (Supp. 1994); Kansas's Marijuana and Controlled Substances Tax Act, KAN. STAT. ANN. §§ 79-5201 to -12 (1994); Maine's Illegal Drug Tax, ME. REV. STAT. ANN. tit. 36 §§ 4433 to -6 (West 1994); Nebraska's Marijuana and Controlled Substances Tax, NEB. REV. STAT. §§ 77-4301 to -16 (1993); and Texas's Controlled Substances Tax, TEX. TAX CODE ANN. §§ 159.001 to .301 (West Supp. 1995). *See* Clifft v. Indiana Dep't of State Revenue, 660 N.E.2d 310, 314 n.2 (Ind. 1995).

10. Because South Carolina does not preserve legislative commentary, no record exists enunciating the CSTA's purpose. Connecticut does preserve legislative discussion, however, and has enacted a controlled substances tax statute substantially similar to the CSTA. A Connecticut legislator saw his state's version of a CSTA as a means of "double-whacking the offender [dealer]. You're getting him with the jail term and you're getting him with any fines that he may incur through civil . . . offenses. You're then getting him with the tax that 'he would have to pay' if he was selling this substance." Covelli v. Commissioner of Revenue Servs., 668 A.2d 699, 708 (Conn. 1995) (quoting legislative history).

11. For a more comprehensive explanation of double jeopardy law, see William S. McAninch, *Unfolding The Law of Double Jeopardy*, 44 S.C. L. REV. 411 (1993).

12. The Fifth Amendment of the United States Constitution provides: "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb . . . ." U.S. CONST. amend. V.

13. For example, the South Carolina Constitution's double jeopardy clause provides that "[n]o person shall be subject for the same offense to be twice put in jeopardy of life or liberty." S.C. CONST. art. I, § 12.

14. ___ S.C. ___, 469 S.E.2d 600 (1996).

distribution of illegal narcotics.[15] Exercising the authority granted by the CSTA, the South Carolina Department of Revenue (DOR) notified McMullin that he owed the state $105,207.50 in taxes, penalties, and interest levied upon the illegal drugs.[16]

McMullin challenged the DOR's CSTA assessment in circuit court[17] claiming that it violated his constitutional rights by placing him twice in jeopardy for the possession of illegal narcotics. More precisely, McMullin claimed that because the DOR's tax assessment occurred *after* the state had subjected him to a criminal penalty, the CSTA assessment violated his constitutional right to avoid multiple punishments for a single offense.[18] For support, McMullin relied primarily on *Department of Revenue of Montana v. Kurth Ranch*.[19]

In *Kurth Ranch*, the respondents were arrested for possession of marijuana after law enforcement officers raided their farm. The Kurths pleaded guilty to drug charges in their criminal proceeding and were assessed criminal penalties accordingly. Later, the state of Montana, in a separate proceeding, imposed a $900,000 tax upon the respondents for their possession of illegal narcotics. The Kurths claimed that the tax was a second punishment that violated the Double Jeopardy Clause.[20] The United States Supreme Court agreed.[21]

Acting Associate Justice Chandler, writing for the majority,[22] distinguished the non-punitive CSTA from the punitive Montana statute implicated in *Kurth Ranch*. The court concluded that the Montana statute violated the Double Jeopardy Clause because it contained two "unusual features,"[23] both with an "unmistakable punitive character"[24] that most tax statutes, including the CSTA, do not contain.[25] First, the Montana statute assessed its tax only on a party previously convicted in a criminal proceeding for possession of illegal narcotics.[26] Second, the Montana tax was unusual in that the taxpayer

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15. *See id.* at 601.

16. *See id.* Initially, McMullin was notified that he owed $21,239.13. He later received a notice of assessment for $105,207.50. *See id.*

17. Granting a request by McMullin and the DOR, the South Carolina Supreme Court agreed to hear the case under its original jurisdiction. *See id.* at ___, 469 S.E.2d at 602.

18. *See id.*

19. 511 U.S. 767 (1994).

20. *See id.* at 771-75.

21. *See id.* at 783.

22. *McMullin*, ___ S.C. at ___, 469 S.E.2d at 603. Acting Associate Justice Chandler was joined by Justices Toal, Moore, and Walker. *See id.*

23. *Id.* at 602.

24. *Id.*

25. *See id.*

26. *See id.*

was forced to pay a tax on goods that he no longer possessed.[27] The court explained that the CSTA tax, in contrast, is imposed regardless of whether the taxpayer has been arrested for possession of a controlled substance. The *McMullin* court also noted that the CSTA assessment "is based on actual possession."[28]

The South Carolina Supreme Court's effort to distinguish the CSTA from the Montana Drug Tax is unpersuasive and fails to solve the double jeopardy problems inherent in the application of the CSTA. As a result, the *McMullin* decision would probably not survive an appeal to the United States Supreme Court. Essentially, all the *McMullin* court did was articulate a very narrow view of the *Kurth Ranch* holding in an effort to characterize the CSTA as non-punitive.

The *McMullin* court's rather limited approach becomes more evident upon close examination of the *Kurth Ranch* holding. The *Kurth Ranch* Court began its analysis by recalling that the Constitution's Double Jeopardy Clause traditionally has protected a defendant from "a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense."[29] Tax statutes like the CSTA and the Montana Dangerous Drug Tax Act fall under the third category. That is, although these taxes are collected under the guise of civil action, they may well be punitive in character—a second punishment invalid under the Constitution.

To demonstrate that point, the *Kurth Ranch* Court cited and explained *United States v. Halper*.[30] Irwin Halper was in the business of providing health care services for Medicare recipients. After discovering sixty-five false claims for federal reimbursement, the government successfully prosecuted Mr. Halper under authority of a federal criminal false-claim statute.[31] Thereafter, the government attempted a civil suit against Mr. Halper under the civil False Claims Act.[32] Ultimately, the *Halper* Court held that "a defendant who already has been punished in a criminal prosecution may not be subjected to an additional civil sanction to the extent that the second sanction may not fairly be characterized as remedial, but only as a deterrent or retribution."[33] The *Halper* Court found that for a civil sanction assessed by the state in a second proceeding to escape double jeopardy scrutiny as a punishment and instead be

27. *See id.*

28. *Id.* at 602-03 (citing S.C. CODE ANN. §§ 12-21-5020, -5090, and -6020(B) (Law. Co-op. Supp. 1996)).

29. Department of Revenue v. Kurth Ranch, 511 U.S. 767, 769 n.1 (1994). The majority included Justices Stevens, Blackmun, Kennedy, Souter, and Ginsburg.

30. 490 U.S. 435 (1989).

31. *See id.* at 437 (citing 18 U.S.C. § 287 (1994)).

32. *See id.* at 438 (citing 31 U.S.C. §§ 3729-3731 (1994)).

33. *Id.* at 448-49, *quoted in Kurth Ranch*, 511 U.S. at 777.

classified as remedial, it must bear some rational relation to the goal of compensating the government for the costs and losses sustained by the government in prosecuting the particular defendant.[34]

The *Kurth Ranch* Court cited *Halper* for the proposition that a "legislature's description of a statute as civil does not foreclose the possibility that it has a punitive character."[35] Thus, a legislative label is not dispositive for double jeopardy analysis. Courts must look past such labels and examine the substance of a statute to see if there is an unacceptable punitive character. As the *Kurth Ranch* majority noted, "there comes a time in the extension of the penalizing features of [a] so-called tax when it loses its character as such and becomes a mere penalty with characteristics of regulation and punishment."[36]

Justice Stevens, writing for the *Kurth Ranch* majority, cited six punitive features exhibited by Montana's drug tax that indicated it was not a normal, revenue-gathering tax but instead, was a punitive measure subject to the constraints of the Double Jeopardy Clause.[37] The Court found the extremely high rate of taxation[38] and the obvious deterrent purpose of the tax were two features consistent with a punitive characterization.[39]

The Court also found that the Montana tax's being conditioned on the commission of a crime was indicative of a "penal and prohibitory intent."[40] People arrested for possession of illegal drugs composed the "entire class of taxpayers subject to the Montana tax."[41]

For its fourth factor, the Court noted that Montana's tax applied to an activity completely forbidden by law. There were, therefore, no offsetting governmental purposes to support the activity (and thus the tax) like jobs, revenue, and consumer demand.[42] Moreover, the tax could be collected equally well by increasing the fine imposed during the criminal proceeding.[43]

Fifth, the Court found that a tax purporting to be a property assessment "has an unmistakable punitive character" when imposed upon a criminal for

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34. *Halper*, 490 U.S. at 449.

35. *Kurth Ranch*, 511 U.S. at 777.

36. *Id.* at 779 (quoting A. Magnano Co. v. Hamilton, 292 U.S. 40, 46 (1934)). The Court also took care to point out that although a tax had never been found to violate the Double Jeopardy Clause, the possibility that one might was expressly recognized in *Helvering v. Mitchell*, 303 U.S. 391 (1938). *See Kurth Ranch*, 511 U.S. at 779 n.16.

37. *See Kurth Ranch*, 511 U.S. at 780-83.

38. Montana proposed to tax the Kurths' marijuana at a rate of one hundred dollars per ounce. *See id.* at 780 n.17.

39. *See id.* at 780. However, the Court noted: "[T]hese features, in and of themselves, do not necessarily render the tax punitive." *Id.* at 781.

40. *Id.* (quoting United States v. Constantine, 296 U.S. 287, 295 (1935)).

41. *Id.* at 782.

42. *See id.* The Court drew a comparison between a tax on drugs and a tax on alcohol and tobacco.

43. *See id.*

goods that he never legally possessed and no longer actually possesses.[44] The Montana tax was assessed after a criminal conviction; therefore, the defendants' illegal drugs had been confiscated and presumably destroyed by the time the tax was imposed.[45]

The sixth and final feature the Court considered in making the determination that Montana's drug tax was a second punishment subject to the Double Jeopardy Clause was that the tax failed the remedial-measure test set out in *Halper*. The Court acknowledged that the *Halper* test should not strictly apply to cases in which the Court is scrutinizing a tax and not a civil penalty.[46] Perhaps more to show the tax's punitive character than to disprove a legitimate revenue goal, the Court applied the *Halper* test anyway.[47] Justice Stevens concluded that the Montana drug tax bore no reasonable relation to the cost of investigation, apprehension, and prosecution of the defendants.[48] One rather stinging description of the Montana tax sums up the *Kurth Ranch* holding: "Taken as a whole this drug tax is a concoction of anomalies, too far-removed in crucial respects from a standard tax assessment to escape characterization as punishment for the purposes of Double Jeopardy analysis."[49]

As noted in Chief Justice Finney's *McMullin* dissent, the South Carolina Supreme Court distinguished the CSTA from the Montana statute by relying on only two of the features enunciated in *Kurth Ranch*.[50] Specifically, the *McMullin* majority found that the CSTA, unlike the Montana drug tax, is imposed regardless of whether the taxpayer/dealer has been arrested. Also, the CSTA is "based on actual possession."[51]

The *McMullin* decision stands on shaky constitutional ground because of this narrow application of the *Kurth Ranch* holding. The CSTA undeniably exhibits the first and second punitive features highlighted by the Supreme Court in *Kurth Ranch*. The CSTA, like the Montana drug tax, is an exorbitantly high rate of tax assessed for an obvious deterrent purpose.[52] Although there is no explicit legislative history to this effect, South Carolina legislators

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44. *Id.* at 783.

45. *See id.*

46. "[T]ax statutes serve a purpose quite different from civil penalties, and *Halper*'s method of determining whether the exaction was remedial or punitive 'simply does not work in the case of a tax statute.'" *Id.* at 784 (quoting Rehnquist, C.J., dissenting opinion).

47. *See id.*

48. *See id.*

49. *Id.* at 783.

50. McMullin v. South Carolina Dep't of Revenue & Taxation, ___ S.C. ___, ___, 469 S.E.2d 600, 603 (1996) (Finney, C.J., dissenting).

51. *Id.* at 602.

52. The CSTA's tax on marijuana (approximately $98 per ounce) and other controlled substances (approximately $5600 per ounce), *see* S.C. CODE ANN. § 12-21-5090 (Law. Co-op. Supp. 1995), is as high as the tax imposed in Montana. *See supra* note 38.

probably intended the CSTA to have a significant deterrent effect.[53] The CSTA also exhibits the third punitive feature identified by the Supreme Court—it is "conditioned on the commission of a crime."[54] All dealers subject to the CSTA have *by definition*[55] violated the state criminal drug possession statute. Moreover, like the Montana drug tax, the vast majority of taxpayers subject to the CSTA will pay the tax only after they have been convicted in a criminal proceeding. The fact that the CSTA provides drug dealers with a feasible way to pay the drug tax without being arrested is most likely a distinction without a difference.[56] For the vast majority of taxpayers the end result under the Montana drug tax and the CSTA will be the same—the tax will be assessed and paid only after the taxpayer is arrested and convicted for criminal possession of narcotics. And assuming that the vast majority of those subjected to a CSTA assessment will have already been convicted of criminal possession, the result of a CSTA assessment, like its punitive Montana counterpart, will be a tax "on goods that the taxpayer neither owns nor possesses when the tax is imposed."[57]

In view of *Kurth Ranch*'s fourth factor, the logic of *McMullin* is further diminished. Drug possession is just as illegal in South Carolina as it is in Montana. Thus, there are no governmental initiatives to be served by a revenue approach that cannot be equally well served by a simple increase in the applicable criminal penalties.[58]

Finally, an application of the *Halper* analysis, questionable as it may be, categorizes the CSTA as a purely punitive measure. That is, South Carolina could make no showing that its exorbitant tax assessment bears any rational relation to compensating the state for the expense of prosecuting McMullin.

Appellate courts in a number of states have had the opportunity to apply the *Kurth Ranch* holding to their own controlled substances tax statutes (which are virtually identical to South Carolina's CSTA). However, no clear majority rule has emerged. Some state appellate courts have distinguished their tax statutes from the Montana drug tax in much the same way as the South

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53. The *McMullin* majority admitted as much. *McMullin*, ___ S.C. at ___ n.4, 469 S.E.2d at 603 n.4.

54. *Kurth Ranch*, 511 U.S. at 781.

55. *See supra* note 4.

56. Section 12-21-6040 provides that dealers can confidentially pay the CSTA tax to the South Carolina Tax Commission. The commissioner collecting the tax from the dealer cannot use any facts or information acquired about the dealer to prosecute the dealer in a criminal proceeding. *See* S.C. CODE ANN. § 12-21-6040 (Law. Co-op. Supp. 1996).

57. *Kurth Ranch*, 511 U.S. at 783.

58. *See id.* at 782.

Carolina Supreme Court did in *McMullin*.[59] Others have agreed with *Kurth Ranch* and found that their tax statutes violate the Double Jeopardy Clause.[60]

Stennett v. Texas[61] and *Ward v. Texas*.[62] are two cases cited by Chief Justice Finney that may provide the best indication of whether *McMullin* and other cases like it could withstand an appeal to the United States Supreme Court. These Texas cases would be especially relevant to a review of South Carolina's decision because the Texas "Controlled Substances Tax" is virtually identical to the CSTA.[63]

The state of Texas arrested defendants Ward and Stennett for possession of marijuana. Accordingly, the state assessed a $109,546.50 tax upon defendant Ward,[64] and a $49,070 tax upon defendant Stennett[65] under Texas's Controlled Substances Tax. When formal criminal prosecution began, both defendants filed for a writ of habeas corpus claiming that the state had already punished them for possession of marijuana by the imposition of the possession tax and that they could not be subject to second punishments in the criminal forum.[66] In separate proceedings, the Texas Court of Appeals held that the defendants' claims that the criminal proceedings would violate the Double Jeopardy Clause were incorrect.

The United States Supreme Court vacated the judgments of the Texas court and remanded the cases for further consideration in light of *Kurth Ranch*.[67] After reviewing *Kurth Ranch,* the Texas court determined that the tax assessments made against both defendants were punitive measures and that they constituted double jeopardy.[68] The court noted that even though Texas's tax was not exactly like Montana's (in particular, the Texas tax does not require arrest before a tax assessment can be made), it still contained enough of the *Kurth Ranch* elements to be considered punitive.[69]

In conclusion, although the South Carolina Supreme Court is not the only state that has held its controlled substances tax act distinguishable from the

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59. *See, e.g.*, Covelli v. Commissioner of Revenue Servs., 668 A.2d 699 (Conn. 1995); State v. Lange, 531 N.W.2d 108 (Iowa 1995); State v. Gulledge, 896 P.2d 378 (Kan. 1995); State v. Ballenger, 472 S.E.2d 572 (N.C. Ct. App. 1996).

60. *See, e.g.*, Clifft v. Indiana Dep't of State Revenue, 660 N.E.2d 310 (Ind. 1995); Desimone v. State, 904 P.2d 1 (Nev. 1995).

61. 115 S. Ct. 307 (1994).

62. 115 S. Ct. 567 (1994), *vacating* State v. Ward, 870 S.W.2d 659 (Tex. App. 1994).

63. *Compare* TEX. TAX CODE ANN. §§ 159.001 to .301 (West 1992), *with* S.C. CODE ANN. §§ 12-21-5010 to -6050 (Law. Co-op. Supp. 1996).

64. Ward v. State, 915 S.W.2d 941, 942 (Tex. App. 1996).

65. Stennett v. State, 905 S.W.2d 612, 613 (Tex. App. 1995).

66. *See id.* at 613; *Ward*, 870 S.W.2d at 660.

67. *See* Ward v. Texas, 115 S. Ct. 567 (1994); Stennett v. Texas, 115 S. Ct. 307 (1994).

68. *See Ward*, 915 S.W.2d at 946; *Stennett*, 905 S.W.2d at 615.

69. *See Ward*, 915 S.W.2d at 946; *Stennett*, 905 S.W.2d at 614-15.

punitive tax found to violate the Double Jeopardy Clause in *Kurth Ranch*, its reasoning is not persuasive. Nonetheless, it is important to understand that the CSTA is not facially violative of the Double Jeopardy Clause. The CSTA only violates the Double Jeopardy Clause when it is assessed upon a person after that person has previously been punished in a criminal proceeding. South Carolina could assess the CSTA in the same proceeding in which the dealer's criminal punishments were meted out, or the CSTA could be assessed against a dealer when no prior state punishment has occurred and no further state punishment is planned. Assessing the CSTA together with the normal criminal punishments in a single criminal proceeding would, however, make the CSTA tax susceptible to the higher burden of proof of a criminal proceeding.

If the CSTA is not amended and the state still assesses the tax in separate civil proceedings, solicitors and tax assessors in South Carolina should be aware of the possible adverse implications. If the DOR assesses the CSTA on a dealer before the solicitor has successfully prosecuted the dealer, the dealer's subsequent criminal punishment will, in spite of *McMullin*, be a second jeopardy. An appeal of the criminal conviction to the United States Supreme Court would most likely end in a victory for the defendant—a victory that might enable a drug dealer to get back on the street.

Travis Dayhuff