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DEC 2 1985

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Courts - Crimes and Offenses -
Fines

Nolle prosequi does not absolve
defendant from further prosecu-
tion.

Dear Mr. Collins:

You have forwarded to this office the resolution of the Board of Commissioners of the City of Mobile in which the opinion of this office is requested respecting the following questions:

- "1. If a person has been arrested and charged in the District Court of Mobile County for theft in the second degree, of property valued at more than \$25.00 taken from or in a building where the property is sold or stored (shoplifting), a class C felony, can the District Attorney nol prosee the State Court case and have the case transferred to the Mobile Municipal Court on a reduced charge of theft in the third degree, shoplifting, a misdemeanor in violation of the Mobile City Ordinance?
- "2. In other words, can a second count be added in the District Court during the course of plea bargaining,

to change the charge from theft in the second degree to theft in the third degree, and nol prosee the state case, and have the defendant prosecuted on the reduced charge of violation of the City ordinance (shoplifting) in Mobile Municipal Court, without causing a dismissal of the City charge?

- "3. If such a procedure were followed, would the City, instead of the State, receive the resulting increased percentage of the fine and court costs imposed?"

Observing that municipal courts have jurisdiction over violations of municipal ordinances, which in most instances are in the nature of misdemeanors as defined by state statutes, we note that the first two questions set forth in the resolution are actually one question and may be paraphrased as follows:

If a state statute defines an offense as a felony and a municipal ordinance proscribes the same offense, may the prosecutor during the course of plea bargaining nol. pros. the state felony charge and have the defendant prosecuted on the municipal charge, without risking dismissal or reversal as a violation of the double jeopardy clause of the fifth amendment to the U.S. Constitution or Section 9 of the 1901 Alabama Constitution?

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." This clause forbids a second prosecution for the same offense after acquittal or conviction. U. S. v. Ball, 163 U.S. 662, 41 L.Ed. 300, 16 S.Ct. 1192 (1896); Re Nielsen, 131 U.S. 176, 33 L.Ed. 118, 9 S.Ct. 672 (1889) (The accused may, of course, be retried for the same offense after obtaining a reversal of a prior conviction, U.S. v. Ball, supra). In the case of Benton v. Maryland, 395 U.S. 784, 23 L.Ed.2d 707, 89 S.Ct. 2056 (1969) the guarantee of the U.S.

Constitutional amendment was held enforceable against the states through the Fourteenth Amendment.

In answering the questions posed, we must first consider the effect of a nolle prosequi upon a subsequent prosecution based upon the same act or transaction from which the original prosecution arose. Citing Waller v. Florida, 25 L.Ed.2d 435, the Alabama Supreme Court observed, in Ex parte Heath, 435 So.2d 904 (Cert. granted as Heath v. Alabama, U.S. Supreme Ct., March 1985, argued, Oct. 1985): "For instance, a state and a municipal subdivision of the same state cannot bring successive prosecutions for offenses arising out of the same conduct."

However, it is established as a rule of law that, in Alabama, jeopardy attaches only when a jury has been charged with the trial of a defendant, i.e., when the jury is empanelled and sworn, and the defendant has pled to the indictment which has been read to the jury. Boswell v. State, 290 Ala. 349, 276 So.2d 592 (1973), cert. denied, 414 U.S. 1118, 94 S.Ct. 855, 38 L.Ed.2d 747 (1974). In Simpson v. State, 354 So.2d 317 (1978), the Alabama Court of Appeals, citing Boswell and other cases, quoted with approval Whitaker v. State, 21 Ala.App. 114, 105 So. 433 (1925) as follows:

"...When a nol. pros. is entered before the defendant has been placed in jeopardy, its only effect is to end that particular prosecution, and does not absolve defendant from liability to further prosecution for the same offense...."
(emphasis supplied)

Whitaker, supra, at 434; Simpson, supra, at 321. This is the current state of the law in Alabama.

In view of the foregoing, the answer to your questions is affirmative, the district attorney can nol. pros. a state case without risking a dismissal of the municipal case on a plea of former or double jeopardy.

Your third question is answered by simply observing that the fine or court costs taxed in such a case would be distributed as any fine or court costs levied in the court in which the matter is tried.

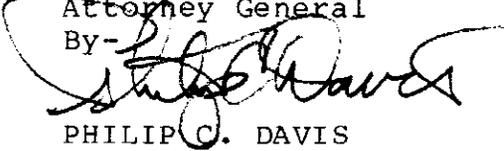
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I trust the foregoing answers the Board's questions. If this office can be of further service to you or the Board in this or any other matter, please let us know.

Yours very truly,

CHARLES A. GRADDICK
Attorney General

By-



PHILIP C. DAVIS
Assistant Attorney General

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