

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

City of Toledo
Appellee

Court of Appeals No. L-12-1003
Trial Court No. TRC-11-06000

v.

Shawn Levi
Appellant

DECISION AND JUDGMENT
Decided: January 11, 2013

* * * * *

David L. Toska, Chief Prosecuting Attorney, and J. Scott Kunzler,
Assistant Prosecuting Attorney, for appellee.

Henry Schaefer, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} Appellant, Shawn Levi, appeals from a judgment of the Toledo Municipal Court in which he was convicted and sentenced on an amended charge of reckless operation of a motor vehicle following a vacated administrative license suspension (“ALS”). He claims that the trial court erred in denying his motion to dismiss the original charges on grounds of double jeopardy. We affirm the trial court’s judgment.

{¶ 2} On March 19, 2011, appellant was involved in a single car accident when the Oldsmobile Cutlass he was driving struck a median guardrail on the Anthony Wayne Trail in Toledo, Ohio. The responding Toledo police officer detected an odor of alcohol, administered a field sobriety test, and determined that appellant was impaired. Appellant was arrested and charged with failure to control, as well as driving while under the influence of alcohol (“DUI”) in violation of Toledo Municipal Code 333.01(a). Appellant consented to a breath-alcohol test and registered below the prohibited concentration level at .038. Nevertheless, the arresting officer seized appellant’s driver’s license, and completed the necessary report to effectuate an ALS under R.C. 4511.191.

{¶ 3} At his initial appearance on March 24, 2011, appellant challenged the propriety of the ALS pursuant to R.C. 4511.197(C)(4), arguing that the statute does not authorize a license suspension where the person arrested for DUI consents to be tested and tests below the prohibited alcohol concentration level. The trial court immediately vacated the ALS and ordered appellant’s license restored at no cost. On July 22, 2011, appellant filed a motion to dismiss the criminal charges pending against him on double jeopardy grounds. In his motion, appellant argued that the state is barred from proceeding against him on the criminal charges because he had already been punished by the wrongfully imposed ALS. After his motion was denied, appellant entered a plea of no contest to a negotiated charge of reckless operation. On December 29, 2011, a judgment of conviction and sentence was entered on that charge.

{¶ 4} Appellant now appeals the trial court’s judgment, asserting a single assignment of error:

The court erred (sic) in denying Defendant’s motion to dismiss for double jeopardy due to the punitive nature of the wrongfully applied administrative license suspension.

{¶ 5} If we understand appellant correctly, he is not suggesting that an ALS imposed pursuant to R.C. 4511.191 inherently or necessarily constitutes criminal punishment for double jeopardy purposes. Instead, he is arguing that the ALS was punitive in this case because it was *not* “lawfully imposed, in accord with R.C. 4511.191.” Specifically, appellant contends that the arresting officer acted “illegally” in suspending his driver’s license after he consented to a breath-alcohol test and registered “well below the legal limit of 0.08.” Appellant then reasons, “Because the ALS was not imposed lawfully, it could not have served the remedial goal of the General Assembly. Given that the ALS was not remedial in nature, it must have been punitive.” And since the ALS was punitive in this case, a further sentence on the underlying criminal charge constitutes double jeopardy. We find that appellant’s argument, though creative, is entirely misdirected.

{¶ 6} The Double Jeopardy Clauses of the Ohio and United States Constitutions prohibit, among other things, multiple criminal punishments for the same offense. *State v. Uskert*, 85 Ohio St.3d 593, 595, 597, 709 N.E.2d 1200 (1999); *Hudson v. United States*, 522 U.S. 93, 99, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997). Double jeopardy can be

implicated by a prior civil sanction that is so punitive, either in purpose or effect, as to negate its statutory remedial denomination. *United States v. Ward*, 448 U.S. 242, 248-249, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980). *See also State v. Martello*, 97 Ohio St.3d 398, 2002-Ohio-6661, 780 N.E.2d 250, ¶ 20. In considering the character of an ALS imposed pursuant to R.C. 4511.191, the Ohio Supreme Court determined that ALS sanctions do not constitute “punishment” for double jeopardy purposes, unless they are continued beyond the point of sentencing on the underlying DUI charge. *State v. Gustafson*, 76 Ohio St.3d 425, 440, 668 N.E.2d 435 (1996). At that point, explained the court, an ALS no longer “serves the remedial purpose of providing interim protection of the public during the period of time required to obtain full and fair adjudication of the driver’s guilt or innocence of criminal drunk driving.” *Id.*

{¶ 7} Certainly, the suspension of appellant’s driver’s license in this case did not serve the remedial purpose of the statute. It was, in fact, imposed in violation of the statute. Under the statute, an arresting officer is given the authority to initiate an ALS only when the ostensibly impaired motorist refuses to take a requested chemical test or takes the test and registers above the legal limit. R.C. 4511.191(B)(1) and (C)(1). Here, appellant took the requested breath-alcohol test and registered an alcohol concentration of thirty-eight-thousandths of one gram of alcohol per 210 liters of breath, which is less than half the prohibited level of eight-hundredths of one gram set forth in R.C. 4511.19(A)(1)(d) and Toledo Municipal Code 333.01(a)(1)(D). The arresting officer had no authority to effectuate an ALS.

{¶ 8} But, redressing an unauthorized suspension or deprivation of a driver's license in violation of the statute is a function of due process, not the Double Jeopardy Clause. Ohio courts have invariably considered errors in the initial imposition or review of an ALS as potential due process violations affecting only the continuation of the ALS, and not the underlying criminal charge. *State v. Gibson*, 144 Ohio Misc.2d 18, 2007-Ohio-6069, 877 N.E.2d 1053 (M.C.) (failure to provide timely post-deprivation hearing deprives defendant of due process as related to the ALS, but does not constitute jeopardy for purposes of the OMVI charge); *Columbus v. Rose*, 10th Dist. No. 06AP-579, 2007-Ohio-499 (holding that trial court "improperly conflated" civil and criminal aspects of statutory framework in dismissing OMVI charge for untimely ALS review); *State ex rel. Igoe v. Grogan*, 8th Dist. No. 73383, 1997 WL 781798 (Dec. 18, 1997) (trial court must conduct ALS review hearing "in order to avoid constitutional due process violations"); *State v. Boone*, 5th Dist. No. 96 CA 1, 1996 WL 753140 (Dec. 26, 1996) (state trooper's issuance of ALS before receiving results of defendant's urine test is a due process violation with respect to the ALS); *Mayfield Heights v. Buckner*, 8th Dist. No. 69221, 1996 WL 563624 (Oct. 3, 1996) (four and one-half month delay of ALS hearing held to violate due process, but subsequent prosecution and sentence for DUI did not constitute double jeopardy); *State v. Henry*, 66 Ohio Misc.2d 57, 642 N.E.2d 1174 (M.C.1994) (applying principles of due process in terminating an unauthorized ALS imposed by the arresting officer).

{¶ 9} There is some limited authority for the proposition that jeopardy can attach when an ALS is improperly permitted to continue beyond the post-suspension hearing. *See State v. Kilbarger*, 5th Dist. No. 98-CA-31, 1999 WL 333125, *5 (Apr. 28, 1999) (Hoffman, J., dissenting in part) (finding that continued recognition of an ALS subsequent to post-suspension review hearing should have barred punishment on the underlying criminal charge, where defendant succeeded at that hearing in having the breath-alcohol test suppressed). *See also Gustafson*, 76 Ohio St.3d at 446, 668 N.E.2d 435 (Douglas, J, concurring) (“any continuance of the initial appearance, that was not requested or waived by the defendant, would, in my opinion, punish the defendant and trigger double jeopardy protection”). We decline to address that issue, however, since the ALS in this case was promptly terminated by the trial court at appellant’s initial appearance, which occurred within five days of his arrest.

{¶ 10} Based on the foregoing, we find that an improper or unauthorized implementation of an ALS by the arresting officer, which is promptly vacated by the trial court at defendant’s initial appearance, does not constitute punishment for double jeopardy purposes and, therefore, does not preclude subsequent prosecution and sentence on the underlying criminal charge.

{¶ 11} Accordingly, appellant’s sole assignment of error is not well-taken,

{¶ 12} The judgment of the Toledo Municipal Court is affirmed. Costs are assessed against appellant pursuant to App.R. 24(A).

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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