IN THE SUPREME COURT OF GUAM

PEOPLE OF GUAM,
Plaintiff-Appellant,

v.

JESSE QUICHOCHO MANILA,
Defendant-Appellee.

OPINION

Filed: February 21, 2005

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Supreme Court Case No.: CRA03-005
Superior Court Case No.: CM0754-01

Appeal from the Superior Court of Guam
Argued and submitted on October 13, 2003
Hagåtña, Guam

Appearing for Plaintiff-Appellant:
James J. Casey, *Esq*., AAG
Office of the Attorney General
Prosecution Division
Suite 2-200E, Judicial Ctr. Bldg.
120 W. O'Brien Dr.
Hagåtña, Guam 96910

Appearing for Defendant-Appellee:
Thomas J. Fisher, *Esq*.
Associated Defense Advocates, P.C.
194 Hernan Cortes Ave., Ste. 213
Hagåtña, Guam 96910

BEFORE: F. PHILIP CARBULLIDO, Chief Justice; FRANCES M. TYDINGCO-GATEWOOD, Associate Justice; ROBERT J. TORRES, JR., Associate Justice.

TYDINGCO-GATEWOOD, J.:

[1] The Plaintiff-Appellant, People of Guam ("People"), appeal the dismissal of the underlying criminal case against the Defendant-Appellee, Jesse Quichocho Manila ("Manila"), on double jeopardy grounds. The facts giving rise to the charges against Manila in the instant case, Driving While Under the Influence of Alcohol, Driving While Under the Influence of Alcohol (B.A.C.), and Reckless Driving, were considered by the Superior Court ("revocation court") in a prior probation revocation proceeding relating to a DUI conviction previously entered against Manila. The trial court in the present case held that the probation revocation court had already punished Manila for the offenses charged in the present case, and that further prosecution would violate Manila's rights against double jeopardy. We hold that the trial court correctly found that the prosecution for the DUI charges in the instant proceeding was barred under the double jeopardy clause, but erred in dismissing the prosecution for the Reckless Driving charge. We affirm the lower court's decision in part and reverse it in part.

I.

[2] On June 16, 2000, Manila pled guilty to Driving While Under the Influence of Alcohol (B.A.C.) and Reckless Driving with Injuries, both misdemeanors, in Superior Court Case No. CF470-97 ("First DUI case"). As part of the plea, Manila was sentenced as a first time DUI offender, and received two years probation.[1] As a condition of Manila's probation, Manila was

[1] Under Title 16 GCA § 18104, courts are required to punish first-time offenders to a mandatory minimum of 48 hours' imprisonment (with a maximum not to exceed one year), and a minimum fine of $1,000 (with a maximum not to exceed $5,000). Title 16 GCA § 18104 (2002). Under 16 GCA § 18102, a person guilty of a DUI may also be sentenced as permitted by law for a misdemeanor. Title 16 GCA § 18102(g)(2) (2002). Title 9 GCA § 80.64 governs the terms of probation, and provides that the maximum probation term for misdemeanors is two years. Title 9 GCA § 80.64(a) (1998).

instructed to refrain from consuming alcohol and from violating the laws of Guam during the two-year probationary period.

[3] On October 8, 2001, during the probationary period, Manila was charged with DUI, DUI (B.A.C.), and Reckless Driving in the underlying case, Superior Court Case No. CM754-01 ("Second DUI case").

[4] One week later, the People filed a motion to revoke Manila's probation in the First DUI case. The motion was based on the People's contention that the charges in the Second DUI case amounted to a violation of the two aforementioned conditions of probation. The trial court conducted a probation revocation hearing, and ultimately found that Manila violated his probation in two respects:

> (1) "[Manila] violated the law by *Driving Under the Influence of Alcohol* on October 8"; and
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> (2) "[Manila consumed] alcohol during the term of his probation."

Appellant's Excerpts of Record ("ER"), Tab. 4, p. 4 (Disision Yan Otden[2], Feb. 20, 2003) (emphasis in original). The revocation court consequently imposed punishment for the second DUI and sentenced Manila to seven days imprisonment in accordance with the statutory minimum for second DUI offenders.[3]

[5] Manila thereafter filed a motion to dismiss the Second DUI case, arguing that prosecution of the case was precluded under the double jeopardy clause. On February 20, 2003, the lower court issued a *Disision Yan Oten* ("Decision and Order") granting Manila's motion to dismiss. In the order, the court found that by proceeding with the Second DUI case, Manila may face multiple punishments for the offense for which he was already punished during the probation revocation

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[2] Decision and Order.

[3] Neither Manila nor the People challenged the revocation court's order. A challenge made by either party during the revocation proceeding may have averted the double jeopardy question at issue in the present case. The failure to previously contest the revocation court's decision does not, however, affect our holding today.

proceeding for the First DUI case. Appellant's ER, Tab 4, pp. 6-7 (*Disision Yan Otden*, Feb. 20, 2003). The People thereafter filed the instant appeal.

II.

[6] We have jurisdiction over the People's appeal pursuant to 48 U.S.C. § 1424-1(a)(2), Title 7 GCA § 3107(b) (2004), and Title 8 GCA § 130.20(a)(5) (1996) which permits an appeal by the Government from "[a]n order or judgment dismissing or otherwise terminating the action before the defendant has been placed in jeopardy or where the defendant has waived jeopardy." 8 GCA § 130.20(a)(5).[4]

III.

[7] In its Decision and Order granting Manila's motion to dismiss, the trial court relied heavily on the fact that in the earlier decision revoking Manila's probation, the revocation court found that Manila committed the offense of Driving Under the Influence, which itself was a violation of the probation conditions relating to compliance with Guam laws and the consumption of alcohol. Furthermore, the revocation court made the following determination:

[4] Section 130.20(a) provides in pertinent part:

> (a) An appeal may be taken by the government from any of the following:
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> . . .
>
> (5) An order or judgment dismissing or otherwise terminating the action before the defendant has been placed in jeopardy or where the defendant has waived jeopardy.

Title 8 GCA § 130.20(a).

Jurisdiction under section 130.20(a)(5) exists where two requirements are present: "(1) [a]n order or judgment dismissing the action; and (2) [t]hat such order or judgment must issue before jeopardy has attached or jeopardy must have been waived." *People v. San Nicolas*, 1999 Guam 19, ¶ 6.

The lower court's order dismissing CM0754-01 is a "dismissal" of the "action," thereby satisfying the first requirement for jurisdiction under section 130.20(a)(5). Furthermore, "[j]eopardy attaches only in a criminal proceeding when the jury is empanelled and sworn, or in a bench trial when the court begins to hear evidence." *United States v. Bizzell*, 921 F.2d 263, 266 (10th Cir. 1990) (citations omitted). Neither event has occurred in the underlying case. Thus, jeopardy has not "attached." Accordingly, this court has jurisdiction over the instant appeal under section 130.20(a)(5).

> In this matter, the Court has determined and found that the Defendant as [sic] *Driving Under the Influence of Alcohol*, an offense against the laws of Guam, on or about October 8, 2001. . . . The Court notes this violation of the law is the Defendant's second DUI offense within a five year period. By invoking swift *imposition of punishment for this second offense*, the best interests of the people are served. In revoking his probation, the Court has re-sentenced and imposed general punishment against the Defendant as a second DUI offender. *The Court has imposed this punishment in a swift and expeditious manner without the Defendant having to be tried for the second offense. Irregardless of the pace the Defendant's current case (CM754-01) takes, he has been punished for the offenses he has been charged with in that case.* The ends of justice and the best interest of the people have been served because this proceeding has been swift and expeditious and its punishment has been ordered.

Appellant's ER, Tab. 4, p. 4 (*Disision Yan Otden*, Feb. 20, 2003) (quoting the Decision and Order revoking Manila's probation) (emphasis added).

[8] Referencing the language of the revocation order, above, the lower court in the present case[5] concluded that because the revocation court had "in a prior proceeding . . . found the [d]efendant guilty of the crime he is charged with in this action and has likewise punished him for commission of the offense, [then] [a]llowing the present action against him to continue will violate his Double Jeopardy rights under the Organic Act of Guam." Appellant's ER, Tab. 4, p. 7 (*Disision Yan Otden*, Feb. 20, 2003).

[9] In determining whether the lower court erred in dismissing the instant prosecution, we must first outline the principles governing the double jeopardy analysis.

A. Double Jeopardy Principles and the Probation Revocation Hearing.

[10] The grant of a motion to dismiss on double jeopardy grounds is reviewed *de novo*. *See People v. Florida*, Crim. No. CR96-00060A, 1997 WL 209044, at *6 (D. Guam App. Div. Apr. 21, 1997); *People v. San Nicolas*, 2001 Guam 4, ¶ 8 ("A double jeopardy claim is a question of law reviewed *de novo* . . . .") (citation omitted).

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[5] The same Superior Court judge presided over Manila's probation revocation and the present Second DUI case.

[11] "The Double Jeopardy Clause of the Fifth Amendment of the United States Constitution provides that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb.'" *San Nicolas*, 2001 Guam 4 at ¶ 8 (quoting U.S. CONST. amend V). Section 1421b(u) of the Organic Act of Guam extends the Fifth Amendment's Double Jeopardy Clause to Guam. *See* 48 U.S.C. § 1421b(u) (WEST, WESTLAW through P.L. 108-468). "The Bill of Rights of the Organic Act of Guam similarly provides that '[n]o persons shall be subject for the same offense to be twice put in jeopardy of punishment . . . .'" *San Nicolas*, 2001 Guam 4 at ¶ 8 (quoting 48 U.S.C. § 1421b(d) (1950)). The double jeopardy clause under both the United States Constitution and the Organic Act prohibit successive prosecutions as well as successive punishment for the same crime. *Id*. at ¶¶ 8-9; *see also People v. Palisoc*, 2002 Guam 9, ¶ 35 ("The Double Jeopardy clause, made applicable to Guam through the Organic Act, precludes courts from imposing multiple punishments for the same offense.").

[12] The People argue that a probation revocation hearing is not a criminal prosecution and is not intended to punish the defendant for the criminal action which forms the basis of the revocation. Rather, the People contend, the revocation proceeding concerns the crime for which probation was imposed, and the sentence imposed upon the revocation of probation is for that earlier crime. Therefore, the prohibition against double jeopardy cannot bar later prosecution for a criminal act which also formed the basis of a probation revocation.

[13] We agree that probation revocation proceedings "are not new criminal prosecutions but, rather, [are] continuations of the original prosecutions which resulted in probation . . . ." *Hardy v. United States*, 578 A.2d 178, 181 (D.C. 1990); s*ee Johnson v. United States*, 763 A.2d 707, 711 (D.C. 2000); *State v. Chase*, 588 A.2d 120, 122 (R.I. 1991) ("It is a well-established proposition that a probation-revocation hearing is not part of a criminal prosecution and therefore does not give rise to the full panoply of rights that are due a defendant at trial."); *State v. Brunet*, 806 A.2d 1007, 1011

(Vt. 2002) ("[I]t is universally acknowledged that a revocation proceeding is not essentially 'criminal' in nature . . . ."). This court has previously recognized that a probation revocation hearing is not a criminal prosecution. *People v. Angoco*, 1998 Guam 10, ¶ 8 ("*Because a revocation hearing is not a formal criminal prosecution*, traditional rules of evidence do not apply, and conventional substitutes for live testimony, including affidavits, depositions, letters and other documentary evidence are admissible.") (emphasis added).[6] "The goal of a revocation hearing is not to decide guilt or innocence, but to determine whether the defendant remains a good risk for probation." *Brunet*, 806 A.2d at 1011; *Chase*, 588 A.2d at 122 ("The sole purpose of the [probation revocation] hearing is to determine whether the defendant has breached a condition of the existing probation, not to convict a defendant for a new criminal offense.").

[14] Furthermore, courts agree that probation revocation proceedings "are not designed to punish a defendant for violation of a criminal law." *Jones v. United States*, 669 A.2d 724, 727 (D.C. 1995) (quoting *Hardy v. United States*, 578 A.2d 178, 181 (D.C. 1990)). As stated earlier, "[t]he purpose of a revocation hearing is to determine whether the defendant is a good risk for continued probation and not to punish him for a new criminal offense." " *State v. McDowell*, 699 A.2d 987, 989 (Conn. 1997). "Any sentence imposed as a result of revocation is not premised on the new criminal charges, but derives exclusively from the original sentence on the earlier offense." *Brunet*, 806 A.2d at 1011.

[15] Because revocation proceedings are not new criminal prosecutions, and do not punish the defendant for the criminal actions committed while on probation, "double jeopardy does not attach at a revocation hearing to bar a trial of the new criminal charges." *Id.*; *see also Hardy*, 578 A.2d at 181 ("[J]eopardy does not attach in probation . . . revocation proceedings."); *Thomas v. State*, 845

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[6] The *Angoco* court discussed the characteristics of probation revocation hearings in the context of the defendant's claim that his due process rights were violated when the trial court revoked his probation. *People v. Angoco*, 1998 Guam 10, ¶¶ 7-8.

So. 2d 751, 753 (Miss. Ct. App. 2003) ("[A] petition to revoke probation or to revoke suspension of a sentence is not a criminal case and not a trial on the merits of the case. Therefore, double jeopardy protection does not apply to such hearings."); *Johnson*, 763 A.2d at 711 ("[A] probation revocation hearing cannot be the basis for a claim of . . . multiple prosecution . . . ."). Thus, "[t]he same actions by a probationer can lead to direct punishment and can also constitute the basis on which his probation for a prior offense is revoked." *United States v. Redd*, 759 F.2d 699, 701 (9th Cir. 1985).

[16] The application of the above-mentioned principles is dependent, however, upon the underlying premise that in revoking probation, the revocation court limited the imposition of its sentence to the crime for which probation was imposed. The People contend that such was the case here. The People assert that during the revocation proceeding in the First DUI case, the revocation court *did not* impose a punishment for the offenses charged in the Second DUI case. We disagree with this contention in light of the statements expressed by the revocation court, which reflect that the revocation court was apparently sentencing Manila for the offenses charged in the Second DUI case. The revocation court specifically stated that it was invoking "swift . . . punishment and for this second offense," and that the punishment was being imposed "in a swift and expeditious manner without the [d]efendant having to be tried for the second offense." Appellant's ER, Tab. 4, p. 4 (*Disision Yan Otden*, Feb. 20, 2003) (quoting *Disision Yan Otden* revoking Manila's probation). The revocation court further stated that "[i]rregardless of the pace the Defendant's current case (CM754-01) takes, he has been punished for the offenses he has been charged with in that case." Appellant's ER, Tab. 4, p. 4 (*Disision Yan Otden*, Feb. 20, 2003) (quoting *Disision Yan Otden* revoking Manila's probation).

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[17] Unlike the cases cited by the People wherein the defendant was sentenced for the underlying crime for which probation was imposed, the problem present in the case *sub judice* lies in the fact that in revoking probation, the revocation court explicitly stated that it was punishing Manila for the offenses committed while Manila was on probation and which are charged in the Second DUI case. The question, therefore, is what effect the revocation court's actions have on the prosecution of the underlying Second DUI case.

[18] Manila argues that the revocation court's actions in sentencing him for the Second DUI precludes prosecution for the same offenses in the underlying matter. Specifically, Manila argues that under the United States Supreme Court case of *United States v. Dixon*, 509 U.S. 688, 113 S. Ct. 2849 (1993), the double jeopardy protection prohibits a subsequent prosecution when the subject of the first case and the subject of the second prosecution "cannot survive the same elements analysis of *Blockburger v. United States*, 52 S. Ct. 80 (1932)." Appellee's Brief, p. 4 (July 12, 2003). He contends that the revocation of his probation was based on the court's finding that he committed a Second DUI, and that he was punished for that Second DUI. Manila maintains that "[b]ecause there are no elements which exist in the allegation of DUI litigated at the revocation hearing which do not exist in the pendent misdemeanor, *Blockburger* requires dismissal." Appellee's Brief, p. 4 (July 12, 2003).

[19] Essentially, Manila argues that the revocation court sentenced him for the Second DUI, and not merely for the underlying crime for which probation was imposed (i.e., the First DUI). Therefore, in accordance with *Dixon* and *Blockburger*, he cannot now be prosecuted for the Second DUI. The lower court apparently relied on *Dixon* in deciding to grant Manila's motion to dismiss. We agree that *Blockburger* precludes prosecution for the Second DUI, but not precisely under the authority of *Dixon*.

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1. *United States v. Dixon*

[20] In *Dixon*, the defendant (Dixon)[7] was released on bond on a murder charge. *United States v. Dixon*, 509 U.S. at 691, 113 S. Ct. at 2853. A condition of his release was that he not commit any further crimes. *Id*. While on pre-trial release, he was arrested and indicted for possession with the intent to distribute cocaine. *Id*. Based on the cocaine charge, the defendant was found guilty of criminal contempt for violating the terms of his release, and was sentenced to prison. *Id*., 509 U.S. at 691-92, 113 S. Ct. at 2853. The defendant thereafter moved to dismiss the cocaine charge arguing that punishment for the charge would violate the double jeopardy clause. *Id*. The trial court granted the motion and the United States Supreme Court affirmed. The Court found that "criminal contempt, at least the sort enforced through nonsummary proceedings, is 'a crime in the ordinary sense.'" *Id*., 509 U.S. at 696, 113 S. Ct. at 2856 (citation omitted). The majority of the Court found that because the defendant was punished in the contempt proceedings for the cocaine possession, he could not be punished for the same offense in a later criminal proceeding. *Id*. 509 U.S. at 700, 113 S. Ct. at 2858 (J. Scalia, delivering the opinion with J. Kennedy joining, and with J. White, J. Stevens and J. Souter concurring in result). Whether the contempt proceeding punished the defendant for the same offense as the criminal prosecution was determined by using the same-elements test announced in *Blockburger v. United States*. *Id*. Under *Blockburger*, the question is whether "each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution." *Id*., 509 U.S. at 696, 113 S. Ct. at 2856. A majority of the *Dixon* Court found that because the defendant was punished in the prior criminal contempt proceeding, the double jeopardy clause barred later prosecution for the cocaine offense. *Id*., 509 U.S. at 690, 113 S. Ct. at 2853.

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[7] The *Dixon* case involved two defendants, Alvin J. Dixon and Michael Foster.

[21] The People argue that *Dixon* is inapplicable under the circumstances of this case. We recognize that courts have consistently found that *Dixon* does not control in situations where the defendant's prior punishment was the result of a probation revocation. In *United States v. Woods*, 127 F.3d 990 (11th Cir. 1997), the Eleventh Circuit offered a succinct explanation for this result. In *Woods*, the court pointed out that in *Dixon*, the "prosecution and conviction for criminal contempt [wa]s punishment for the conduct constituting contempt of court, not for any underlying crime," and that "[i]n *Dixon*, there was no underlying crime to punish." *Woods*, 127 F.3d at 992. The court stated that by contrast, "the punishment imposed in the form of probation revocation, . . . [i]s part of [the] original sentence and thus constituted punishment for the crime underlying that sentence." *Id*. Accordingly, the court held consistently with "every other circuit to have addressed this precise claim in the context of *Dixon*," that "subsequent prosecution for the criminal conduct committed while on probation constitutes prosecution for an entirely new offense and is not precluded by the Double Jeopardy Clause." *Id.* (citing cases from the Seventh, Fourth, and Ninth Circuits).

[22] Under normal circumstances, *Dixon* would not influence a double jeopardy analysis where the prior punishment was imposed upon the revocation of probation. *See also United States v. Soto-Olivas*, 44 F.3d 788, 792 (9th Cir.) ("Nothing in *Dixon* contradicts our holding in this case. A prosecution for criminal contempt, unlike revocation of supervised release, is punishment for the act constituting contempt of court, not for any underlying crime."), *cert. denied* 515 U.S. 1127, 115 S. Ct. 2289 (1995); *United States v. Woodrup*, 86 F.3d 359, 363 (4th Cir.), *cert. denied*, 519 U.S. 944, 117 S. Ct. 332 (1996). The *Blockburger* analysis was employed in *Dixon* precisely because the contempt proceeding under the facts of *Dixon* was designed to punish the defendant for the conduct that constituted the contempt. The present case is akin to the circumstances of *Dixon* because, here, the revocation court punished Manila for the conduct which resulted in the probation revocation, and not simply the crime for which Manila's probation was imposed. Consistent with *Dixon*, if Manila

was punished during the revocation proceeding for the criminal conduct committed while on probation, further prosecution for the crimes charged in the instant case would be barred under the double jeopardy clause if the crime for which Manila was previously punished is the "same offense" as those charged in the underlying proceeding as determined under the *Blockburger* test. What sets the instant case apart from *Dixon*, however, is that in *Dixon*, there was no irregularity with the initial contempt proceeding in which the defendant was prosecuted and punished. Specifically, there was no question in *Dixon* that jeopardy attached during the first proceeding, that is, the criminal contempt proceeding. This distinction is important.

[23] As with any double jeopardy claim, in determining whether a double jeopardy violation exists, the court must first determine whether jeopardy has previously attached. *See State v. Corrado*, 915 P.2d 1121, 1124 (Wash. Ct. App. 1996). "[A]n accused must suffer jeopardy before he can suffer double jeopardy." *Serfass v. United States*, 420 U.S. 377, 393, 95 S. Ct. 1055, 1065 (1975). Once it is found that jeopardy has attached, courts employ the same-elements test of *Blockburger* to determine whether the two offenses are the same offense for double jeopardy purposes. *Corrado*, 915 P.2d at 1126 (determining that the same elements test of *Blockburger* only applies after it is first determined that "jeopardy has attached and terminated"); *see also Harris v. State*, 617 A.2d 610, 616 (Md. Ct. Spec. App. 1992) ("Double jeopardy is not an automatic defense--the court must determine whether a prior jeopardy did occur and whether the offenses in question constitute the same offense.").

[24] In *Dixon*, because there was no issue as to whether jeopardy attached in the first criminal contempt proceeding, the Court employed the *Blockburger* analysis to determine whether the later prosecution for the cocaine charge was barred under the double jeopardy clause. In the present case, by contrast, the revocation court committed error in sentencing Manila for the criminal conduct committed while on probation. *See* Title 9 GCA § 80.66(b) (1998) (providing that upon revoking

probation, the lower court may "impose on the offender any sentence that might have been imposed originally for the crime of which he was convicted"). The resolution of the question we confront in the instant case depends upon whether the revocation court's error in sentencing Manila for the Second DUI case bars further prosecution for those crimes. This question was not answered in *Dixon*; therefore, *Dixon* does not control the analysis of the double jeopardy claim in the instant case. We must instead turn to other relevant principles of double jeopardy law in reviewing the lower court's decision dismissing the underlying criminal case.

[25] The parties here offer different conclusions based upon the revocation court's error. The People dismiss the error as inconsequential, while Manila seizes upon this error as affecting his rights in the underlying prosecution. While the parties recognize that the revocation court erred in sentencing Manila for the criminal conduct committed while on probation, they fail to identify the reason the lower court's error should be treated in the divergent manners advanced. We find that the present effect of the revocation court's action in punishing Manila is dependent upon the basic question underlying any double jeopardy analysis; specifically, whether jeopardy attached during the revocation proceeding as to the criminal conduct which Manila was punished during that proceeding.

2. Whether Jeopardy Attached at the Revocation Hearing: Jurisdiction of the Revocation Court.

[26] Here, Manila was punished for the second DUI offense and served the sentence. The question is whether jeopardy attached during the revocation proceeding as to that criminal conduct. It is well established that "[j]eopardy . . . can only attach when a court acts in a manner within its jurisdiction and authority." *Peppers v. State*, 696 So. 2d 444, 445 (Fla. Dist. Ct. App. 1997); *see also People v. Superior Court (Marks)*, 820 P.2d 613, 615 (Cal. 1991) ("Both the history of the Double Jeopardy Clause and its terms demonstrate that it does not come into play until a proceeding begins before a trier having jurisdiction to try the question of guilt or innocence of the accused.")

(citation and quotation marks omitted). "[U]nder the jurisdictional exception to the bar of former jeopardy, [a] party who has been tried and convicted by a court not having jurisdiction of the offense cannot plead prior jeopardy if subsequently indicted for the same offense in a court having jurisdiction thereof." *State v. Perkins*, 580 S.E.2d 523, 525-26 (Ga. 2003) (quotation marks omitted) (citation omitted). In other words, "[t]he prohibition does not apply where there is a lack of fundamental jurisdiction . . . . [but] [t]he double jeopardy clause does however bar retrial of a defendant where the original court had fundamental jurisdiction over the cause but acted in excess of jurisdiction." *People v. Malveaux*, 59 Cal. Rptr. 2d 371, 379-380 (Cal. Ct. App. 1996).

[27] The jurisdictional exception to the double jeopardy rule has been codified in Guam at least with regard to multiple prosecutions. Title 9 GCA § 1.30 provides: "A prosecution is not a bar within the meaning of §§ 1.24, 1.26 and 1.28 under . . . the following circumstances: (a) The former prosecution was before a court which lacked jurisdiction over the defendant or the offense tried in that court." Title 9 GCA § 1.30 (1996). The comment to Title 9 GCA § 1.30 further explains that there is no bar to prosecution where the "court before which the prior proceeding was held lacks jurisdiction over the defendant or the offense." 9 GCA § 1.30 cmt. While section 1.30(a) speaks to prior prosecutions, the jurisdictional exception codified therein should similarly apply to the situation in the present case where the claim of former jeopardy is based on prior punishment. We hold, consistent with section 1.30(a), that where a defendant is punished or sentenced in a proceeding over which the trial court lacked jurisdiction over the defendant or the offense, later prosecution for the offense is not barred by the double jeopardy clause. Conversely, if the defendant is punished or sentenced in a proceeding over which the court possessed fundamental jurisdiction, later prosecution for the offense is prohibited under the double jeopardy clause. In light of these principles, the question in this case, therefore, is whether the revocation court had fundamental

jurisdiction during the revocation proceeding so as to preclude further prosecution in the instant case. We find that it did.

B. Jurisdiction and the Bar to Further Prosecution: DUI Offenses.

[28] "A trial court has jurisdiction for purposes of double jeopardy when it has jurisdiction over the subject matter and the person of the defendant." *Parks v. State*, 410 A.2d 597, 601 (Md. 1980). There is no question that the revocation court had jurisdiction over Manila's person so the focus must be on whether the court had jurisdiction over the criminal conduct which forms the underlying charges. "[T]he kind of jurisdiction encompassed by the rule of no jurisdiction no jeopardy is 'jurisdiction in the most basic sense. It does not mean that an error in the exercise of jurisdiction permits judicial proceedings to be treated as a nullity.'" *Id.* (quoting *Block v. State*, 407 A.2d 320, 322 (Md. 1979)). For the jurisdictional exception to apply, there must have been "an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties." *Marks*, 820 P.2d at 617 (citation omitted).

[29] We re-emphasize that the revocation court clearly committed error in punishing Manila for the Second DUI upon the revocation of his probation. In imposing imprisonment upon the revocation of probation, a trial court cannot punish the defendant for the violation of probation. *See People v. Bouyer*, 769 N.E.2d 145, 149 (Ill. App. Ct. 2002); *State v. Herrera*, 588 P.2d 305, 308 (Ariz. 1978) (en banc) ("[P]unishment flowing as a result of probation being revoked is not punishment for the probationary breach, but is instead punishment on the original charge.") (quoting *State v. Pietsch*, 508 P.2d 337, 339 (Ariz. 1973). This is evident under the language of the probation statutes which provide that upon revoking probation, the lower court may "impose on the offender any sentence that might have been imposed originally *for the crime of which he was convicted*." 9 GCA § 80.66(b) (1998). The statutory language clearly indicates that sentencing upon the revocation of probation is for the original crime only, and not the crime which results in the

revocation of probation. In fact, other courts have similarly recognized that criminal action which forms the basis of a probation revocation cannot be punished through sentencing upon revocation. "After revoking probation, a trial court can *consider the crime that resulted in the revocation* and defendant's conduct during the probationary period *only as evidence of his or her rehabilitative potential*. The new sentence, however, cannot punish the defendant for anything other than the original underlying offense." *Bouyer*, 769 N.E.2d at 149 (citation omitted).

[30] Additionally, relaxed evidentiary procedures exist in revocation proceedings. Any attempt by the revocation court to punish a defendant for the crimes committed while on probation seriously compromises the various rights afforded to criminal defendants under the Organic Act and the United States Constitution, including the right of due process of law and the right to a jury trial. See *People v. Chung*, 2004 Guam 2, ¶¶ 13, 20; *Henderson v. Morgan*, 426 U.S. 637, 644-45, 96 S. Ct. 2253, 2257-58 (1976). Manila was punished here apparently without being afforded any of the well-established constitutional protections due individuals who are at risk of being deprived of their liberty. The revocation court plainly and substantially erred in this regard.

[31] Moreover, the revocation court may only revoke probation if it determines that "revocation . . . will best satisfy the ends of justice and the best interests of the public." 9 GCA § 80.66(a)(2). The existence of this lower standard of proof illustrates the distinction between revocation proceedings and criminal prosecutions where the Government bears the heavy burden of proving all elements of the criminal offense beyond a reasonable doubt, and clearly demonstrates that the lower court is not authorized to adjudge a defendant criminally guilty for the later crime, nor punish him, in a revocation proceeding. One court has aptly described the relationship between punishment for the original offense upon revocation of probation and punishment for the crime which results in the probation revocation, and the implication of this relationship on a double jeopardy analysis:

> It is clear that upon revocation of probation, sentence may be imposed for the original offense upon the conviction of which the defendant was granted probation.

> *If the act alleged to be a violation of probation constitutes another crime and sentence is to be imposed for the subsequent act, the defendant should be tried for such crime and sentence imposed under the orderly criminal processes. This does not preclude sentence on the original offense and the distinction is drawn so as to obviate any question of double jeopardy.*

People v. Deskin, 361 N.E.2d 1188, 1189 (Ill. App. Ct. 1977) (quoting *People v. White*, 235 N.E.2d 393 (Ill. App. Ct. 1968), overruled on other grounds by *People v. Jones*, 647 N.E.2d 589 (1995)) (emphasis added). The double jeopardy clause is generally not implicated in a revocation proceeding specifically because a revocation court is not authorized to punish for the criminal conduct which amounts to a violation of probation.

[32] The present case presents the unique issue of whether the revocation court's apparent punishment for the Second DUI is legally effective as punishment, and if so, the double jeopardy implications which result from the prior punishment.

[33] Because the trial court is not permitted to sentence the defendant for the criminal offense which constitutes the probation violation, it is not surprising that there is scant authority for a case like the present one. In the many cases where the trial court *properly* sentenced the defendant upon the revocation of probation for the original offense, courts have easily found that the double jeopardy clause was not implicated. However, where the trial court commits an error and apparently sentences the defendant for the crime which constitutes the probation violation, there is little authority on whether the double jeopardy clause bars further prosecution or punishment. We are unfortunately working from a clean slate.

[34] While the revocation court clearly exceeded its authority in punishing Manila for the Second DUI, we nonetheless find that jeopardy attached as to the DUI crime charged in the present case. The revocation court had subject matter jurisdiction to revoke probation for the First DUI. *See* 9 GCA § 80.66. Furthermore, Manila's criminal conduct committed while on probation was properly before the revocation court for the limited purposes of determining whether Manila's probation should have been revoked and determining the punishment for the crime for which probation was

imposed. *See Bouyer*, 769 N.E.2d at 149 ("After revoking probation, a trial court can consider the crime that resulted in the revocation and defendant's conduct during the probationary period only as evidence of his or her rehabilitative potential.").

[35] Importantly, the revocation court was a court of general jurisdiction, with subject matter jurisdiction over criminal cases. *See* Title 7 GCA §§ 3101, 3105 (2004). While the revocation court clearly erred and exceeded its authority in imposing punishment for the Second DUI due to procedural deficiencies, *see* Title 8 GCA § 1.15 (2000) (stating that criminal offenses must be prosecuted by either indictment, information, or complaint), the court nonetheless had fundamental jurisdiction over the case. *See Marks*, 820 P.2d at 620 ("We therefore conclude that the trial court does not lose subject matter jurisdiction when it fails to hold a competency hearing, but rather acts in excess of jurisdiction by depriving the defendant of a fair trial. Although the judgment may be a nullity, for double jeopardy purposes the proceedings are not.") (citation omitted).

[36] Since the revocation court had fundamental jurisdiction in the revocation proceeding and generally over the offense of DUI, Manila was placed in jeopardy in being punished and serving his punishment for the second DUI offense. Because the DUI and DUI (B.A.C.) offenses charged in the underlying proceeding are the same offenses as the DUI offense for which Manila was punished during the revocation proceeding, he cannot be further prosecuted for those DUI offenses. *See People v. Palisoc*, 2002 Guam 9, ¶ 35 ("The Double Jeopardy clause, made applicable to Guam through the Organic Act, precludes courts from imposing multiple punishments for the same offense.").[8]

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[8] For purposes of the *Blockburger* analysis, the underlying DUI and DUI (B.A.C.) are the same offense. The elements of a DUI offense are found in Title 16 GCA § 18102(a), which provides:

> It is unlawful for any person, while under the influence of an alcoholic beverage or any controlled substance, or under the combined influence of an alcoholic beverage and any controlled substance, to operate or be in physical control of a motor vehicle.

16 GCA § 18102(a).

The elements for a DUI (B.A.C.) are found in 16 GCA § 18102(b) which provides:

> It is unlawful for any person, while having eight one-hundredths of one percent (0.08%) or more, by weight, of alcohol in his or her blood to operate or be in physical control of a motor vehicle.

C. Reckless Driving: Application of *Blockburger*

[37] The People contend that even assuming Manila's double jeopardy claim is accepted with regard to the DUI offenses in the underlying case, the double jeopardy prohibition does not in any event require a dismissal of Reckless Driving charge because the DUI and Reckless Driving charges are not the same offense under the *Blockburger* "same elements" test. We agree.

[38] During the revocation proceeding, the revocation court only imposed punishment for the DUI offense. The prior punishment only bars prosecution for the Reckless Driving offense if the two crimes, DUI and Reckless Driving, are the "same offense." Pursuant to *Blockburger*, two crimes are the same offense if "each provision requires proof of an additional fact which the other does not." *Palisoc*, 2002 Guam 9 at ¶ 36 (quoting *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 182 (1932)).

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16 GCA § 18102(b).

Under Title 16 GCA § 18101(a), DUI is defined as follows:

> (a) *Driving under the influence ("DUI") or while intoxicated* means any person driving a vehicle under the influence of an alcoholic beverage or a controlled substance or a combination thereof, when as a result of consuming such alcoholic beverage or controlled substance or the combination thereof, his or her physical or mental abilities are impaired to such a degree that he or she no longer has the ability to drive a vehicle with the caution characteristics of a sober person of ordinary prudence, under the same or similar circumstance, and includes any person operating or in actual physical control of a motor vehicle who has eight one-hundredths of one percent (0.08%) or more, by weight, of alcohol in his or her blood.

Title 16 GCA § 18101(a) (2002). Under section 18101, a finding that a person has a 0.08% blood alcohol content equates to a finding that the person is driving under the influence of alcohol.

Courts discussing the relationship between DUI statutes which criminalize either driving while under the influence *or* driving with a specified blood alcohol content have found that such statutes merely set forth different "methods of proving the same offense." *Young v. City of Brookhaven*, 693 So. 2d 1355, 1358 (Miss. 1997). In other words, the subsections governing regular DUI and blood alcohol DUI "are not separate offenses, but are two methods of proving the same offense – driving under the influence of alcohol." *Id.* (quoting *Buckner v. City of Huntsville*, 549 So. 2d 451, 452 (Ala. 1989)); *see also Johnston v. City of Fort Smith*, 690 S.W.2d 358, 359-60 (Ark. Ct. App. 1985). Thus, the two provisions are essentially one offense, and not two separate offenses, and the double jeopardy clause bars a court from convicting or punishing a defendant for both. *See generally Hadden v. State*, 349 S.E.2d 770, 772 (Ga. Ct. App. 1986) (finding that because the two offenses were the same in law or fact, two convictions for the offenses were barred).

Because the revocation court punished Manila for the conduct of Driving Under the Influence, Manila may not be prosecuted for either the DUI or DUI (B.A.C.) offenses charged in the underlying proceeding.

[39] The offense of Reckless Driving is described as follows: "Every person who drives any vehicle upon a highway in willful or wanton disregard for the safety of persons or property is guilty of reckless driving." Title 16 GCA § 9107(a) (1996).

[40] To prove the commission of DUI, the prosecution must establish that the defendant was: (1) under the influence (defined as being impaired to a degree that "he or she no longer has the ability to drive a vehicle with the caution characteristics of a sober person of ordinary prudence"); (2) of alcohol; and (3) operating or being in physical control of a motor vehicle. Title 16 GCA §§ 18101, 18102 (2002); *see also* n. 8, *supra*. The Reckless Driving charge required proof that: (1) the defendant was driving; (2) upon a highway; and (3) "in willful or wanton disregard for the safety of others." 16 GCA § 9107(a) (1996).

[41] The DUI offense requires proof that the defendant was impaired by alcohol, while the Reckless Driving charge does not. Additionally, the Reckless Driving charge requires proof that the defendant was driving in willful or wanton disregard for others' safety, while the DUI does not require a finding of willful or wanton disregard for safety; it merely requires impairment (i.e., the inability to drive with caution of a sober person). Therefore, the two offenses required proof of a different fact than the other.

[42] Courts which have compared DUI and Reckless Driving statutes similar to ours have reached the same conclusion. *See State v. Mourning*, 664 P.2d 857, 861-62 (Kan. 1983) ("[The offenses of reckless driving and DUI] required proof of an additional element which the others did not. . . . [R]eckless driving and driving under the influence of alcohol or drugs, are neither the same offense and neither is a lesser included offense of the other.") (quoting 7A AmJur 2d, Automobiles & Highway Traffic § 389); *Ray v. State*, 563 S.W.2d 218, 220 (Tex. Crim. App. 1977) ("[C]onsidering the difference in the elements of reckless driving and D.U.I., . . . we hold that reckless driving is not a lesser included offense of D.U.I."); *see also City of Bellevue v. Redlack*, 700 P.2d 363, 367 (Wash.

Ct. App. 1985) ("Each statute requires proof of an element which is not included in the other. Driving while under the influence requires proof that the driver was under the influence of intoxicating liquor . . . and negligent driving requires proof that the driver was operating the vehicle in a negligent manner . . . .").

[43] The DUI offense and the Reckless Driving offense require proof of a different fact and they are not the same offense for double jeopardy purposes. The revocation court's imposition of punishment for the DUI offense during the revocation proceeding does not preclude the People from prosecuting Manila for Reckless Driving in this case.

IV.

[44] This case is one of first impression, and hopefully the last of its kind. The revocation court's error in punishing Manila for the Second DUI is not easily understood, nor is it favorably received. The result reached today simply serves to protect the right held by defendants who have already suffered punishment from being twice placed in jeopardy by the hands of those with jurisdiction to impose punishment upon them. We expect trial court judges to conduct revocation proceedings in accordance with statutory guidelines and with regard to the rights of defendants. We further expect all counsel to be observant of the purpose and scope of revocation proceedings. Counsel's obligations in this regard serve to prevent tactical manipulation of the charges filed during revocation proceedings, because any such conduct would be disapproved by this court with as much earnestness as our disdain of the revocation court's disregard of legal authority governing the scope of punishment which may be imposed during a revocation proceeding.

[45] Upon review of the circumstances of this case, we find that in revoking Manila's probation, the revocation court possessed jurisdiction over the offense for which probation was imposed, and could consider Manila's criminal conduct committed while on probation in determining whether

Manila's probation could be revoked. The revocation court was also a court of general jurisdiction over criminal cases. While the revocation court plainly erred and exceeded its authority in punishing Manila for the Second DUI offense charged in the underlying proceeding, the revocation court possessed fundamental jurisdiction with regard to the crime of DUI. Jeopardy therefore attached during the probation revocation proceeding with regard to the DUI offenses for which Manila is charged in this case, and double jeopardy principles preclude further prosecution of the DUI offenses charged in the instant proceeding.

[46] The double jeopardy clause does not, however, bar prosecution of the Reckless Driving offense in this case because the DUI offense for which Manila was already punished is not the same offense as the underlying Reckless Driving charge.

[47] Accordingly, we **AFFIRM** the trial court's decision dismissing the DUI charges in the underlying matter, but **REVERSE** the decision dismissing the Reckless Driving charge. We **REMAND** for further proceedings consistent with this opinion.