January 1990


John M. Nunnally

Follow this and additional works at: http://scholarship.law.campbell.edu/clr

Part of the Criminal Law Commons

Recommended Citation

This Note is brought to you for free and open access by Scholarly Repository @ Campbell University School of Law. It has been accepted for inclusion in Campbell Law Review by an authorized administrator of Scholarly Repository @ Campbell University School of Law.
DOUBLE JEOPARDY—WHEN DOES JEOPARDY ATTACH IN A NON-JURY TRIAL IN NORTH CAROLINA?—State v. Brunson

INTRODUCTION

The North Carolina courts have determined when jeopardy attaches for a criminal defendant in a jury trial; however, until recently, the North Carolina Supreme Court had never squarely faced the issue of when jeopardy attaches in a bench trial. The United States Supreme Court has determined that jeopardy attaches in a bench trial when evidence or testimony is introduced. Decisions of the North Carolina Court of Appeals have set forth conflicting periods for when jeopardy might attach, and the question remained unanswered until the North Carolina Supreme Court's recent decision in State v. Brunson.

The Brunson court held that jeopardy does not attach in a bench trial until evidence or testimony has been introduced. In so holding, the court rejected previous decisions by the court of appeals that had attempted to equate the attachment of jeopardy in bench trials with that in jury trials. In reaching its decision, the North Carolina Supreme Court relied on the United States Su-

1. State v. Shuler, 293 N.C. 34, 235 S.E.2d 226 (1977). "Jeopardy attaches when a defendant in a criminal prosecution is placed on trial: (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn." Id. at 42, 235 S.E.2d at 231.

2. Serfass v. United States, 420 U.S. 377, 388 (1975). Defendant was charged with failing to submit to induction into the Armed Forces. The district court dismissed the charges. Before the court of appeals the defendant claimed double jeopardy, but the court reversed the district court and remanded the case for trial. The Supreme Court affirmed, stating that in a jury trial jeopardy attaches when a jury is impaneled and sworn and in a nonjury trial "when the court begins to hear evidence." Id.


4. 327 N.C. 244, 393 S.E.2d 860 (1990).

5. Id. at 245, 393 S.E.2d at 862.

6. Coats, 17 N.C. App. at 415, 194 S.E.2d at 371. The court asserted that jeopardy attaches when a competent trier of fact is ready to hear evidence since that is equivalent to a jury being impaneled and sworn. Id.
premie Court’s determination of this question.\(^7\) The court rejected the defendant’s contention that North Carolina intended to provide even greater protection than that provided by the United States Constitution.\(^8\)

Under Brunson, clear guidelines now exist for all parties involved in criminal trials regarding exactly when jeopardy attaches in a nonjury trial in North Carolina.\(^9\) This Note will analyze the court’s decision. First, this Note will present the facts that were before the Brunson court. Second, this Note will discuss the history of double jeopardy and the conflicting views of when it attaches in a bench trial. Third, this Note will analyze the Brunson decision and its effect on criminal procedure in North Carolina. Finally, this Note concludes that although the time period adopted by the court is correct, the court’s reasoning was inconsistent.

**The Case**

On May 5, 1987, a highway patrol officer charged Michael Lloyd Brunson with impaired driving\(^10\) and leaving the scene of an accident.\(^11\) Brunson’s trial was scheduled for July 20, 1987.\(^12\) Brunson appeared in court without an attorney because his attorney had another trial that day.\(^13\) The assistant district attorney called the morning calendar and asked how the defendants intended to plead.\(^14\) Brunson told the district attorney that he intended to plead “not guilty” and requested a continuance because his lawyer was not present.\(^15\) Judge Chaffin denied Brunson’s request for a continuance because his lawyer was not present.\(^16\) Brunson then signed a “Waiver of

\(^{7}\) Brunson, 327 N.C. at 248, 393 S.E.2d at 864.

\(^{8}\) Id. at 247-48, 393 S.E.2d at 863.

\(^{9}\) Id. “We conclude that in a nonjury criminal trial, jeopardy attaches when the court begins to hear evidence or testimony.” Id. at 245, 393 S.E.2d at 861-62.


\(^{11}\) N.C. GEN. STAT. § 20-166 (1989).


\(^{14}\) Brunson, 327 N.C. at 245, 393 S.E.2d at 862.

\(^{15}\) Id.

Counsel' form, and remained in the courtroom for the rest of the day waiting for his case to be called.

The State excused its witnesses for Brunson's case before the lunch recess. The witnesses were instructed to stay where they could be reached if the case came to trial. The State called Brunson's case for trial shortly after 5:00 p.m. The charges were read to Brunson and he pled not guilty. The district attorney then asked for a continuance because some of his witnesses were not present. The district attorney dismissed the case and the judge advised the defendant that he was free to go.

As Brunson left the courtroom, the district attorney had the highway patrolman rearrest Brunson and recharge him with the same violations. Brunson moved to dismiss the charges, claiming that he had already been placed in jeopardy on the same charges. On December 11, 1987, District Court Judge Beaman denied Brunson's motion, stating that because no evidence had been presented in the prior proceeding, jeopardy had not attached.

On February 8, 1988, Brunson appeared in district court before Judge Parker. The court found Brunson not guilty of leaving the scene of an accident, but guilty of impaired driving. Brunson appealed his conviction to superior court and again moved to dismiss on the grounds of double jeopardy. On May 23, 1988, Judge Small found that "the State elected to dismiss the charges

17. Id.
18. Brunson, 327 N.C. at 245, 393 S.E.2d at 862.
19. Id.
20. Id.
21. Id.
22. Id. The court points out that there was some dispute regarding whether the charges were actually read to Brunson or whether he was merely responding to a prosecutor's inquiry. Id. The court's decision seems to assume that Brunson's version of the events is correct.
23. Id.
24. Id.
26. Id.
27. Brunson, 327 N.C. at 245, 393 S.E.2d at 862.
28. Id.
29. Id.
30. Id. at 246, 393 S.E.2d at 862.
31. Id.
while court was in session and a tryer [sic] of fact having jurisdiction over the subject matter was present for the purpose of trying the case." Judge Small concluded that jeopardy attached at the July 20, 1987 proceeding and granted Brunson's motion to dismiss. The State appealed.

On appeal, the North Carolina Court of Appeals considered the issue of when jeopardy attaches in a bench trial. The State argued that jeopardy does not attach until evidence is taken or the first witness is sworn. The defendant urged the court of appeals to uphold Judge Small's ruling that jeopardy attaches when a defendant enters a plea before a competent trier of fact present and ready to try the case. Reversing the superior court, the court of appeals agreed with the State that jeopardy does not attach until evidence has been introduced. On appeal, the North Carolina Supreme Court, in an opinion written by Justice Meyer, unanimously affirmed.

BACKGROUND

A. Protection Against Double Jeopardy

1. Double Jeopardy

The United States Constitution guarantees that no person shall be placed in jeopardy twice for the same criminal offense. North Carolina is one of the few states that does not explicitly recognize a prohibition against double jeopardy in its constitution.

33. Brunson, 327 N.C. at 246, 393 S.E.2d at 862.
34. Id.
38. Brunson, 327 N.C. at 244, 393 S.E.2d at 861.
39. Id. at 245, 393 S.E.2d at 862.
40. U.S. Const. amend. V. The double jeopardy clause of the fifth amendment reads: "[N]o person shall be subject for the same offence to be twice put in jeopardy of life or limb."
The North Carolina courts, however, have concluded that protection against double jeopardy is a fundamental right embodied in our law of the land clause.\footnote{Id.} Additionally, the United States Supreme Court has made double jeopardy protection applicable to all states through the fourteenth amendment.\footnote{Id.}

Double jeopardy protects a criminal defendant in three circumstances involving prosecutions or punishments after completion of the first trial.\footnote{Id. at 449, 80 S.E.2d at 245} “It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.”\footnote{Id. at 454, 80 S.E.2d at 245} Double jeopardy protection is also available in some situations where the trial terminates prior to a judgment.\footnote{Id. at 454, 80 S.E.2d at 245} The North Carolina Supreme Court follows the general rule that jeopardy attaches in a jury trial “when a defendant in a criminal prosecution is placed on trial; (1) on a valid indictment or information, (2) before a court of competent jurisdiction, (3) after arraignment, (4) after plea, and (5) when a competent jury has been empaneled and sworn.”\footnote{Id. at 454, 80 S.E.2d at 245}

The other states that do not explicitly recognize double jeopardy protection in their constitutions are Connecticut, Maryland, Massachusetts and Vermont. All of these states recognize the protection at common law. Id. 42. State v. Crocker, 239 N.C. 446, 80 S.E.2d 243 (1954). “It is a fundamental and sacred principle of the common law, deeply imbedded in our criminal jurisprudence, that no person can be twice put in jeopardy of life or limb for the same offense.” Id. at 449, 80 S.E.2d at 245. Also, the court stated that the principle “has been regarded as an integral part of the ‘law of the land.’” Id. Accord, State v. Cameron, 283 N.C. 191, 195 S.E.2d 481 (1973); State v. Ballard, 280 N.C. 479, 186 S.E.2d 372 (1972). The applicable part of the law of the land clause reads: “No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land.” N.C. Const. art. I § 19.

43. Benton v. Maryland, 395 U.S. 784 (1969). The court held “the double jeopardy prohibition of the fifth amendment represents a fundamental ideal in our constitutional heritage, that it should apply to the States through the fourteenth amendment.” Id. at 794. The North Carolina Supreme Court held that since double jeopardy protection was already an integral part of North Carolina law Benton added nothing to the state’s law. State v. Battle, 279 N.C. 484, 486, 183 S.E.2d 641, 643 (1971).


45. Id. at 717.

46. See, e.g., Downum v. United States, 372 U.S. 734 (1963)(holding that jeopardy attaches when a jury is impaneled and sworn even if the jury is discharged before it reaches a verdict).

The United States Supreme Court has determined that in bench trials, jeopardy attaches when evidence or testimony is introduced.\(^{48}\) Until its \textit{Brunson} decision, the North Carolina Supreme Court had not directly addressed the issue of when jeopardy attaches in a bench trial.\(^{49}\)

2. \textit{State v. Coats} and \textit{State v. Lee}

It is well-settled that a state may not restrict the rights granted its citizens by the United States Constitution.\(^{50}\) A state may, however, grant greater protection than that afforded by the federal Constitution.\(^{51}\) The defendant in \textit{Brunson} claimed that prior decisions of the North Carolina courts, in particular \textit{State v. Coats} and \textit{State v. Lee}, increased the double jeopardy protection provided by the United States Constitution.\(^{52}\)

In \textit{State v. Coats},\(^{53}\) the North Carolina Court of Appeals indicated in dicta that jeopardy attaches in a bench trial when a qualified judge is present to sit as trier of fact. The defendant in \textit{Coats} was charged with driving under the influence.\(^{54}\) He objected to his trial being continued to allow the State to subpoena the breathalyzer operator.\(^{55}\) The case resumed before a new jury which convicted the defendant.\(^{56}\) On appeal, the court of appeals reiterated when jeopardy attaches in a jury trial\(^{57}\) and held that the de-

\(^{48}\) Serfass v. United States, 420 U.S. 377 (1975). In \textit{Serfass}, the defendant's motion to dismiss was granted before any jury was impaneled and the judge was not a competent trier of fact. Therefore, any actions taken by the judge did not make jeopardy attach and would not have made it attach even if he had been empowered, because it only attaches when evidence or testimony is introduced. \textit{Id.} at 388. \textit{See also} United States v. Jorn, 400 U.S. 470 (1971); Wade v. Hunter, 336 U.S. 684 (1949), \textit{reh'g denied}, 337 U.S. 921 (1949).


\(^{50}\) \textit{See} Benton v. Maryland, 395 U.S. 784 (1969)(federal jeopardy standards are applicable to the states).

\(^{51}\) State v. Carter, 322 N.C. 709, 370 S.E.2d 553 (1983)(where the court refused to allow a good faith exemption to the exclusionary rule, even though the United States Supreme Court had done so in Massachusetts v. Sheppard, 468 U.S. 981 (1984)).

\(^{52}\) \textit{Brunson}, 327 N.C. at 247-48, 393 S.E.2d at 863.

\(^{53}\) 17 N.C. App. 407, 408, 194 S.E.2d 366, 368.

\(^{54}\) \textit{Id.} at 409, 194 S.E.2d at 368.

\(^{55}\) \textit{Id.}

\(^{56}\) \textit{Id.}

\(^{57}\) \textit{Id.} at 414, 194 S.E.2d at 371. \textit{See supra} note 1.
fendant had been placed twice in jeopardy. The court added that "a duly elected, qualified, and assigned district court judge [who] is present to sit as the trier of fact," is equivalent to an impaneled and sworn jury.

Eight years after its decision in *Coats*, the North Carolina Court of Appeals held that jeopardy attaches in a bench trial when a qualified trier of fact is present and ready to hear evidence. In *State v. Lee* the defendant was charged with feloniously and intentionally acquiring possession of Talwin. At the probable cause hearing the judge ruled that the proceedings were limited to a misdemeanor charge because a magistrate's order formed the basis of the action. The district attorney dropped the charges before any plea was taken. The State obtained a warrant for the defendant's arrest based on the identical charges. The district court rejected the defendant's claim of double jeopardy. The defendant was convicted and he appealed. Accepting the dicta from *Coats* regarding when jeopardy should attach in a bench trial, the court of appeals held that jeopardy had not attached because the defendant had not entered a plea.

3. *In re Hunt*

Despite the language of *Coats*, in *In re Hunt* the North Carolina Court of Appeals held that jeopardy does not attach in a bench trial until the court actually begins to hear evidence. Defendant Douglas McArthur Hunt was charged with intentionally disturbing junior high classes and obstructing an officer. Defend-
ant Roger Alan Dowd was charged with possession of marijuana. Both appeared before the juvenile court, in which only bench trials are held, and both cases were continued in order for the State to introduce additional evidence. In each action the case resumed approximately ten days later before the same judge. Both defendants were convicted and both appealed. The court of appeals consolidated the cases, and in determining when jeopardy attached, stated that jeopardy only attaches "when the judge, as trier of fact, begins to hear evidence." The court held that even though evidence had been introduced, jeopardy did not attach because the trials resumed before the same judge.

B. Procedure in District Courts

Criminal trials in North Carolina district courts are limited to bench trials. Standard district court procedure requires the district attorney to call the names of the defendants on the printed calendar, and to ask each defendant how he intends to plead. The district attorney first handles those cases in which the defendant intends to plead guilty. Those defendants who are pleading not guilty wait in the courtroom until their cases are called. This procedure is followed in thousands of criminal cases before the district courts each year.

In Brunson, the briefs for both the State and the defendant argued that the supreme court's decision would significantly impact the manner in which criminal cases are handled in North Carolina. In particular, a decision that jeopardy attaches when a de-

70. Id. at 733, 266 S.E.2d at 386.
71. Id.
72. Id. at 735, 266 S.E.2d at 387.
73. Id. at 732, 266 S.E.2d at 386.
74. Id. at 735, 266 S.E.2d at 387.
75. Id.
78. Id.
79. Id.
80. Id.
fendant enters his plea would afford a defendant unprecedented protection against double jeopardy and would place a greater burden on the State to try cases in one proceeding. In holding that jeopardy attaches when evidence is introduced or a witness begins to testify, the Brunson court clarified a murky area of North Carolina law and provided all criminal defense and district attorneys with clear guidelines for determining when jeopardy has attached.

**ANALYSIS**

In *Brunson*, the North Carolina Supreme Court held that jeopardy attaches in a bench trial when evidence is introduced or a witness begins to testify. The court listed five reasons for its decision. First, the court accepted the idea that jeopardy should attach when the parties begin to actively participate in the trial. Second, the court concluded that there had been no prior determination that North Carolina intended to expand a defendant's freedom from former jeopardy. Third, the court found decisions of the United States Supreme Court and other jurisdictions persuasive. Fourth, the court rejected the precedents cited by the defendant as controlling, and adopted the decision cited by the court of appeals as the better statement of the law. Finally, the court indicated its appreciation for the logic and practicality of a rule where jeopardy attaches when evidence or testimony is introduced. Each of these reasons will be discussed in the following sections.

**A. Active Participation**

In determining that jeopardy attaches in a bench trial when evidence or testimony is introduced, the *Brunson* court saw a clear distinction between the passive role of appearing before a judge and the active role of selecting a jury. In a jury trial, a defendant

82. *Brunson*, 327 N.C. at 245, 393 S.E.2d at 861-62.
83. Id. at 249, 393 S.E.2d at 864.
84. Id. at 247-48, 393 S.E.2d at 863.
85. Id. at 250, 393 S.E.2d at 865.
89. Id. at 251, 393 S.E.2d at 865.
90. Id. at 249-50, 393 S.E.2d at 864-65.
may actively participate in the selection of his trier of fact. Since the defendant helps determine the composition of the jury, he has an interest in ensuring that the particular jury chosen remains his trier of fact once it is impaneled and sworn. The court noted that a defendant's self-interest is apparent in the often long voir dire process that takes place before a jury trial begins. The Brunson court acknowledged that jeopardy attaching upon the impaneling and swearing in of a jury is in recognition of this interest.

In a bench trial, a defendant has no active involvement in the selection of the trier of fact. A defendant merely comes to court on the assigned day and appears before the judge who happens to be presiding. The Brunson court refused to equate the impaneling and swearing of a jury with the appearance before an authorized judge because it "does not involve [the] same logical connection with any particular interest of the defendant." The court then attempted to adopt a rule that associated the actual attachment of jeopardy with the beginning of the risk of conviction. The court reasoned that "[w]ithout the introduction of evidence, a defendant claiming innocence cannot be legally convicted." The court concluded that it is only logical to attach legal jeopardy at the period of actual jeopardy. Yet, this argument contradicts the very reasons offered by the court for when jeopardy attaches in a jury trial. The court had previously reasoned that, in a jury trial, the defendant's active involvement and self-interest justifies jeopardy attaching when the jury is impaneled and

91. Id. at 249, 393 S.E.2d at 864.
92. Id. See Arizona v. Washington, 434 U.S. 497 (1978). The "valued right" is to be free of the increased financial and emotional burden and to be quickly free from the stigma attached with the accusation. Id. at 503-04.
94. Id. at 250, 393 S.E.2d at 865.
95. Id.
96. Id.
97. Id.
98. Id.
99. Id.
100. Id. See also People v. Deems, 81 Ill. 2d 384, 410 N.E.2d 8 (1980), cert. denied, 450 U.S. 925 (1981), which explains the "rule is predicated upon the fact that the first witness is normally an individual whose testimony is part of the State's case - a prosecution witness whose appearance is a part of the incriminating presentation jeopardizing defendant." Id. at 390, 410 N.E.2d at 11.
sworn. At the point at which a jury is impaneled and sworn, however, there has been no evidence or testimony introduced upon which the defendant could be convicted. Thus, the court's attempt to attach legal jeopardy at the period of actual jeopardy is flawed.

The Brunson court initially stated that jeopardy should attach when a defendant begins to "participate actively" in the trial. It then substituted "risk of conviction" as the standard to be used in determining when jeopardy attaches in a bench trial. In using active participation as the standard in a jury trial, the court recognized other interests that compel establishing the attachment of jeopardy at a period earlier than the actual risk of conviction. Yet, the court failed to address why the other interests, with the exception of the State's interest in having the ability to gain conviction of guilty defendants, are not also detrimentally affected in a bench trial. With regard to the State's interest, the court recognized the problem of balancing the State's interest and the defendant's, but determined that this problem alone could not justify the use of separate standards.

102. See supra notes 91-94 and accompanying text.
103. Brunson, 327 N.C. at 249, 393 S.E.2d at 865. But see, Crist v. Bretz, 437 U.S. 28 (1978). In Crist, a Montana statute which attached jeopardy in a jury trial only when evidence or testimony introduced was ruled unconstitutional. The court concluded that "the defendant's 'valued right to have his trial completed by a particular tribunal' is now within the protection of the constitutional guarantee against double jeopardy." Id. at 36.
104. In a jury trial the court defines jeopardy as the active participation by the defendant, while in a nonjury trial it is the defendant's risk of conviction. See supra notes 90-104 and accompanying text.
105. Brunson, 327 N.C. at 249, 393 S.E.2d at 864.
106. Id. at 250, 393 S.E.2d at 865.
107. Id. at 249, 393 S.E.2d at 864 (citing Arizona v. Washington, 434 U.S. 497, 503-04 (1978)). The Arizona court found that failure to complete a trial in one proceeding increases the financial and emotional burden, prolongs the stigmatization period and increases the risk of an innocent person being convicted. Id.
108. Brunson, 327 N.C. at 249, 393 S.E.2d at 864.
109. Id.

There are competing interests with regard to the resolution of this issue: the interest of society in having a final resolution in which 'the truth' is determined; the interest of the defendant in having all issues relating to the charge tried at one time without prolonging the proceedings longer than necessary; and the interest of the State in having the ability to gain conviction of guilty defendants, even in the face of unavoidable delays.
B. No Intent to Expand Rights

The defendant in \textit{Brunson} claimed that the North Carolina courts have interpreted the North Carolina Constitution as providing greater protection against jeopardy to criminal defendants than does the federal Constitution.\footnote{110} The defendant relied on decisions in \textit{State v. Coats}\footnote{111} and \textit{State v. Lee}\footnote{112} to support his proposition that the State intended such an expansion of a defendant’s rights.\footnote{113} The \textit{Brunson} court, however, rejected this argument.\footnote{114} The court found the language in \textit{Coats} to be mere dicta.\footnote{115} Moreover, the court concluded that the \textit{Lee} court’s use of the language in \textit{Coats} was not persuasive since the result in \textit{Lee} would be the same if the \textit{Brunson} rule were applied.\footnote{116} The \textit{Brunson} court instead adopted the rationale of \textit{In re Hunt}, which held that jeopardy attaches in a bench trial when a qualified judge begins to hear evidence or testimony.\footnote{117} The \textit{Hunt} decision seriously undermined the authoritative value of \textit{Coats} and \textit{Lee}. Also, the court noted that the North Carolina Supreme Court had never directly addressed this question; therefore, the defendant relied on weak authority to make his case.\footnote{118}

The court found N.C. Gen. Stat. § 15A-931(a) to be an indication that the legislature had no intent to afford additional protection against former jeopardy.\footnote{119} The statute requires the clerk of court to note on voluntary dismissals of criminal prosecutions “whether a jury has been impaneled or evidence has been introduced.”\footnote{120} The court reasoned that “this indicates an assumption

\begin{footnotes}
\item[110.] \textit{Brunson}, 327 N.C. at 247-48, 393 S.E.2d at 863.
\item[111.] See supra notes 53-59 and accompanying text.
\item[112.] See supra notes 60-67 and accompanying text.
\item[113.] \textit{Brunson}, 327 N.C. at 246, 393 S.E.2d at 862.
\item[114.] \textit{Id.} at 248, 393 S.E.2d at 863.
\item[115.] \textit{Id.}
\item[116.] \textit{Id.} at 248, 393 S.E.2d at 863-64.
\item[117.] 46 N.C. App. 732, 266 S.E.2d 385 (1980). See supra notes 68-75 and accompanying text.
\item[119.] \textit{Id.} at 248, 393 S.E.2d at 864.
\item[120.] \textit{Id.} N.C. GEN. STAT. § 15A-931(a) (1988). The full section of the statute reads:
\begin{quote}
Except as provided in G.S. 20-138.4, the prosecution may dismiss any charges stated in a criminal pleading by entering an oral dismissal in open court before or during the trial, or by filing a written dismissal with the clerk at any time. The clerk must record the dismissal entered by the prosecutor and note in the case file whether a jury has been impaneled or
\end{quote}
\end{footnotes}
by the legislature that jeopardy attaches upon introduction of evidence when a bench trial is held." The court concluded that North Carolina did not intend to afford additional protection from former jeopardy than that provided by the federal Constitution.

C. Decision in Accord with other Jurisdictions

In a brief, but important part of the decision, the Brunson court found persuasive decisions by the United States Supreme Court and other jurisdictions which determined that jeopardy attaches when evidence or testimony is introduced. The court noted that North Carolina has adopted a rule for when jeopardy attaches in jury trials identical to that of the United States Supreme Court, and added that it held the decisions of the United States Supreme Court in high regard. Moreover, the court implied throughout its opinion a need for uniformity, although it never stated a uniformity requirement in express terms. The court determined that the decision adopted in Brunson is consistent "with the trend, if not the majority rule."

D. Precedents and Brunson

1. State v. Coats and State v. Lee

The court in Brunson distinguished the court of appeals' decisions in Coats and Lee in rejecting the defendant's argument that these cases established when jeopardy attaches in a nonjury trial.

*Evidence has been introduced.*

*Id.* (N.C. Gen. Stat. § 20-138.4 (1989) requires a prosecutor to explain why he accepts a voluntary dismissal, substitutes another charge or takes a discretionary action that reduces an impaired driving charge.).

121. *Brunson*, 327 N.C. at 248, 393 S.E.2d at 864.


123. *Brunson*, 327 N.C. at 249, 393 S.E.2d at 864.

124. *Id.* at 250, 393 S.E.2d at 865.
The court characterized the holding in *In re Hunt* as a more accurate reflection of the correct rule of law.\(^\text{125}\)

The court rejected the language in *Coats*, which stated that jeopardy would attach in a bench trial when the defendant entered a plea before a competent trier of fact ready to hear evidence.\(^\text{126}\) Also, the court rejected the suggestion in *Coats* that a “duly elected, qualified and assigned District Court judge”\(^\text{127}\) sitting as a trier of fact is equivalent to an impaneled and sworn jury.\(^\text{128}\) The court clearly stated that the language on which the defendant relied was mere dicta that had no bearing on the outcome of *Coats*.\(^\text{129}\) In *Coats*, jeopardy attached because the defendant’s case was continued and then begun anew, even though testimony had already been introduced in the earlier trial.\(^\text{130}\) Application of the *Brunson* rule to the facts in *Coats* would result in the same finding that jeopardy had attached.\(^\text{131}\)

The *Coats* court logically determined that jeopardy attaches in a bench trial when a defendant appears before an authorized judge ready to hear evidence.\(^\text{132}\) Recognizing that the impaneling and swearing of the jury is a defendant’s first appearance before a competent trier of fact in a jury trial, the court in *Coats* equated this period with the appearance before an authorized judge in a bench trial.\(^\text{133}\) The *Brunson* court, however, disagreed with the court of appeals’ conclusion, characterizing such a rule as arbitrary.\(^\text{134}\) The *Brunson* court believed that the attachment of jeopardy in a bench trial should reflect when a defendant is placed in actual jeopardy.\(^\text{135}\) The rule *Coats* advanced was a rational attempt to find a comparable time for jeopardy to attach in jury and nonjury trials.\(^\text{136}\) The problem, however, with the *Coats’* approach is that the

\(^{125}\) Id. at 246, 393 S.E.2d at 862-63.
\(^{126}\) Id. at 246, 251, 393 S.E.2d at 862, 865.
\(^{127}\) Id. at 248, 393 S.E.2d at 863.
\(^{130}\) Id. at 248, 393 S.E.2d at 863-64.
\(^{131}\) Coats, 17 N.C. App. at 409, 194 S.E.2d at 368.
\(^{132}\) Brunson, 327 N.C. at 248, 393 S.E.2d at 863-64.
\(^{133}\) Coats, 17 N.C. App. at 415, 194 S.E.2d at 371.
\(^{134}\) Id.
\(^{135}\) Brunson, 327 N.C. at 250, 393 S.E.2d at 865.
\(^{136}\) Id.
\(^{137}\) In fact, the superior court judge and one member of the court of appeals accepted the reasoning advanced in *Coats* as correct. *Brunson*, 327 N.C. at 244, 393 S.E.2d at 861 (1990).
court failed to provide justification for its conclusion that North Carolina provides extensive and unique protection against double jeopardy. Although the result in Coats was logical, the defendant in Brunson erroneously relied on Coats as establishing even greater protection from former jeopardy than the federal Constitution provides. An inherent weakness in the defendant's argument resulted from it being premised on dicta from a court of appeals decision.\(^{138}\) A subsequent court of appeals decision which conflicted with the analysis in Coats regarding when jeopardy would attach in a bench trial\(^{139}\) also contributed to the frailty of the argument. Furthermore, the fact that the North Carolina Supreme Court had never considered this issue further weakened the defendant's argument.\(^{140}\) Finally, the fact that the legislature had adopted a statute which seemed to indicate that the introduction of evidence was necessary in order for jeopardy to attach\(^{141}\) eliminated all support for the defendant's claim. The scant authority for defendant's contention that the state intended to provide expanded protection from former jeopardy rendered his argument implausible.

The Brunson court found the defendant's reliance on State v. Lee equally tenuous. Lee reiterated the concept espoused in Coats that jeopardy would attach in a bench trial when a plea was entered before an authorized judge ready to hear evidence.\(^{142}\) The Brunson court rejected the defendant's argument that Lee affirmed the dicta in Coats and determined when jeopardy would attach in a bench trial.\(^{143}\) The Brunson court distinguished the Lee decision because, like the decision in Coats, the result in Lee would be the same under the Brunson rule.\(^{144}\)

In Lee, the State dropped the original charges against the defendant when the judge would only allow the charges as misdemeanors.\(^{145}\) The State then obtained a warrant charging the defendant with the same criminal violation for the same incident.\(^{146}\)

\(^{139}\) See In re Hunt, 46 N.C. App. 732, 266 S.E.2d 385 (1980).
\(^{140}\) Brunson, 327 N.C. at 248, 393 S.E.2d at 863.
\(^{141}\) N.C. GEN. STAT. § 15A-931(a) (1988).
\(^{142}\) State v. Lee, 51 N.C. App. 344, 276 S.E.2d 501 (1981). Surprisingly, the court of appeals did not discuss the defendant's arguments regarding Lee's relevance or even mention Lee.
\(^{143}\) Brunson, 327 N.C. at 248, 393 S.E.2d at 863.
\(^{144}\) Id. at 248, 393 S.E.2d at 863-64.
\(^{145}\) See supra notes 60-67 and accompanying text.
\(^{146}\) Id.
If the rule in *Coats* applied, the finding of no prior jeopardy would still be correct because the defendant had not entered a plea before an authorized judge.\(^{147}\) If the *Brunson* rule applied, the finding of no prior jeopardy is still correct because no evidence or testimony was introduced.\(^{148}\) Therefore, under either rule the finding of no former jeopardy was correct.

2. *In re Hunt*

The court of appeals decision in *In re Hunt* involved facts very similar to the facts in *Brunson* because, as in district court trials, juvenile hearings are before judges and never before juries.\(^{149}\) The *Brunson* court affirmed the lower court's conclusion that the *Hunt* court correctly reasoned that jeopardy did not attach when the defendants' cases were continued and resumed before the same judge.\(^{150}\) The *Brunson* court accepted as the sounder view, the conclusion that jeopardy attaches only when a judge begins to hear evidence.\(^{151}\) An important aspect of *Hunt* is that it was decided after the *Coats* decision and produced a different definition of when jeopardy attaches, thus seriously damaging any precedential value *Coats* might have.

E. A Practical Rule

An important advantage of the rule adopted in *Brunson* is that a judge hearing a claim of former jeopardy will not have to consider conflicting evidence about how far along a case has actually proceeded. In *Brunson*, a dispute arose over whether or not the defendant had actually entered a plea.\(^{152}\) The State contended that "the defendant was not in fact called for trial but was called to the bench and informally inquired of as to his intention concerning plea at a time when the State was moving for a continuance."\(^{153}\) The State reasoned that the defendant's claim that he

\(^{147}\) *Brunson*, 327 N.C. at 248, 393 S.E.2d at 863.

\(^{148}\) *Id.*

\(^{149}\) *In re Hunt*, 46 N.C. App. 732, 735, 266 S.E.2d 385, 387 (1980).


\(^{151}\) *Brunson*, 327 N.C. at 248, 393 S.E.2d at 864.


\(^{153}\) *Id.*
had entered a plea was due to his "not being familiar with the court proceedings and [being] without the assistance of counsel," and that he therefore did not understand what occurred.\(^{154}\) Disputes such as those that occurred in *Brunson* will no longer have to be considered by judges when seeking to determine if jeopardy has attached. With this decision, the North Carolina Supreme Court resolved the problem of determining the procedural context of a case and implemented a "bright-line rule"\(^{155}\) that can easily be applied. The court acknowledged the importance of this rule when it stated "[n]ot only is this rule theoretically sound, but it is also practical."\(^{156}\)

**Conclusion**

The *Brunson* decision will not have an immediate impact on the way criminal cases are presently handled in the district courts. Criminal cases will be treated in the same manner as they have always been, with the morning calendar call determining the intent of the defendants concerning their plea. The *Brunson* decision will give prosecutors greater flexibility in inquiring into the defendant's plea, even when they are in front of an authorized judge ready to hear evidence. The decision will make it easier for judges to make a determination of whether jeopardy attached because the judges will have objective evidence from which to decide. While this rule provides greater flexibility to prosecutors and judges, it detrimentally impacts defendants. An establishment of a rule where jeopardy attaches at an earlier period would make it more difficult for the State to revive voluntarily dismissed charges.

In determining when jeopardy attached in a bench trial, the *Brunson* court found decisions by the United States Supreme Court and other jurisdictions extremely persuasive and could have used these as the sole basis for its conclusion. While the court attempted to offer other rationales for its decision, it never adequately addressed why a defendant's rights to be free from the expense and anxiety of prolonged litigation are not better served by a later period of jeopardy attachment. Nevertheless, the statute clearly demonstrated that the North Carolina legislature did not intend to expand protection from jeopardy. Although prior court of appeals decisions that addressed this question were in conflict, the

\(^{154}\) *Id.*

\(^{155}\) *Brunson*, 327 N.C. at 251, 393 S.E.2d at 865.

\(^{156}\) *Id.*
Brunson court adopted the decision which in the court’s view enunciated the correct rule. Thus, the court correctly concluded that North Carolina did not intend additional protection from double jeopardy and set forth the rule that jeopardy attaches in a nonjury trial when evidence or testimony is introduced.

John M. Nunnally