UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 967

September Term, 2016

DAVID WADE NUNGESSER

v.

STATE OF MARYLAND

Reed,
Beachley,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: May 1, 2017

In the Circuit Court for Montgomery County, appellant, David Nungesser, moved to dismiss all motor vehicle citations lodged against him because 1) the circuit court lacked jurisdiction and 2) double jeopardy barred further prosecution. The circuit court denied the motion to dismiss, and appellant noted this interlocutory appeal. Appellant presents two questions for our review, which we have discerned from the Argument section of his brief:[1]

1) Did the circuit court have jurisdiction?

2) Where appellant's driver's license has already been suspended for refusing to submit to a breath test pursuant to Section 16-205.1 of the Transportation Article, is a subsequent criminal prosecution barred by double jeopardy?

We hold that the jurisdictional question is not properly before us in this interlocutory appeal and that double jeopardy is not a bar to appellant's criminal prosecution.

FACTUAL BACKGROUND

On November 3, 2015, at approximately 11:53 p.m., appellant was arrested by a Montgomery County police officer on suspicion of driving while under the influence of alcohol. The officer transported appellant to the Germantown police station where appellant refused to submit to a breath test requested by the officer. Appellant received citations for driving under the influence, driving while impaired, and failing to stop before entering a highway. Because appellant refused to submit to a breath test, and pursuant to

[1] We note that these questions are consistent with the two motions appellant raised in the circuit court.

Md. Code (1977, 2012 Repl. Vol.) § 16-205.1 of the Transportation Article ("TR"), the officer confiscated appellant's driver's license, issued a temporary license, and served appellant with an Order of Suspension.

Appellant timely requested an administrative hearing before the Motor Vehicle Administration on the proposed suspension of his license. Appellant failed to appear for the scheduled administrative hearing, and his license was suspended for 120 days. Appellant also failed to appear in the District Court for Montgomery County on December 22, 2015, for trial on the traffic citations. After a warrant was issued and later recalled, the District Court scheduled trial for June 28, 2016.

Appellant appeared on June 28, 2016 in the District Court and requested a jury trial. The District Court granted appellant's request for a jury trial and directed the parties to immediately proceed to the circuit court. Prior to jury selection in the circuit court, appellant moved to dismiss the charges. Appellant first argued that the circuit court lacked jurisdiction because the State failed to file the citations in the District Court. Appellant also argued that the citations were not signed by the officer. The circuit court denied this motion, noting that the State had remedied the issue by filing the citations in the circuit court, and that, in any event, appellant had waived the argument by "implicitly recogniz[ing] the authority of the District Court to preside over [appellant's] case[.]." Appellant also contended that, because the administrative suspension of his driver's license constituted a "punishment," any subsequent criminal prosecution of the traffic citations

violated double jeopardy. The circuit court denied this motion as well.[2] Appellant promptly advised the court that he intended to note an interlocutory appeal. When the State objected, the court advised the parties that it would reconvene the next morning to consider the issue. On June 29, 2016, the court determined that it could not preclude appellant from noting an interlocutory appeal. Appellant filed his appeal later that day.

DISCUSSION

I. The Collateral Order Doctrine Bars Interlocutory Appellate Review of Appellant's "Jurisdictional" Claims.

Appellant's primary argument on appeal is that because his license has already been suspended for refusing to submit to a breath test pursuant to TR § 16-205.1, any subsequent criminal prosecution violates the Double Jeopardy Clause of the United States Constitution. U.S. Const. amend. V. He also argues that the circuit court did not have jurisdiction over his case. While the State concedes that denial of a motion to dismiss on double jeopardy grounds is immediately appealable under the collateral order doctrine,[3] it asserts that the denial of appellant's motion to dismiss based on "jurisdictional" claims is not immediately appealable. As a preliminary matter, we hold that these "jurisdictional" claims are not properly before us on this appeal.

[2] Appellant raised several other motions at the motions hearing which are not relevant to this appeal.

[3] *See Abney v. United States*, 431 U.S. 651, 662 (1977) and *Scriber v. State*, 437 Md. 399, 406 (2014).

The circuit court's denial of appellant's motion to dismiss based on alleged procedural defects such as the State's failure to file the citations in the District Court and the officer's failure to sign them does not constitute a final judgment. *Kacour v. State*, 70 Md. App. 625, 628 (1987). *See also*, Md. Code (1974, 2013 Repl. Vol.) § 12-301 of the Courts and Judicial Proceedings Article ("CJP"). "In the absence of a final judgment, appellate review is limited to three exceptions: (1) appeals from interlocutory orders specifically allowed by statute; (2) immediate appeals permitted under Maryland Rule 2-602; and (3) appeals from interlocutory rulings allowed under the common law collateral order doctrine." *Md. Bd. of Physicians v. Geier*, ____ Md. ____, No. 11, Sept. Term, 2016, slip op. at 8 (Ct. of App. Jan. 23, 2017) (citation omitted), *motion for reconsideration granted on other grounds*. As in *Geier*, neither of the first two exceptions is implicated in this case. Therefore, the common law collateral order doctrine is appellant's only potential avenue for interlocutory appellate redress for the denial of his motion to dismiss based on defects in the citations.

In *Geier*, the Court of Appeals explained that "[t]he common law collateral order doctrine is a well-established but narrow exception to the general rule that appellate review must ordinarily await the entry of a final judgment disposing of all claims against the parties." *Id.*, slip op. (citation omitted). The Court then reiterated the four criteria that must be satisfied to invoke the doctrine:

> For the doctrine to apply, the interlocutory order must satisfy the following four requirements: (1) the order must conclusively determine the disputed question; (2) the order must resolve an important issue; (3) the order must resolve an issue that is completely separate from the merits of the

> action; and (4) the issue would be effectively unreviewable if the appeal had to await the entry of a final judgment. These four requirements are strictly applied, and appeals under the doctrine may be entertained only in extraordinary circumstances.

Id., slip op. (citations omitted).

As to the motion to dismiss based on defects in the citations, appellant, at a minimum, cannot satisfy the fourth component of the collateral order doctrine. We addressed the fourth component of the collateral order doctrine in *Kacour*, *supra*. There, the police stopped Kacour and issued him four traffic citations. After requesting a jury trial, Kacour filed two motions to dismiss, "one contending that [the citations] were 'duplicitous,' and one contending that each of the citations failed to allege the requisite elements of the respective offense charged." *Id*. at 626-27. The trial court denied the motions but stayed the matter and allowed Kacour to take an immediate appeal. *Id*. at 627. On review, this Court held that the appeal was not proper under the collateral order doctrine because the fourth criterion was not satisfied, as there was not "even a pretense that the order appealed from in this case would be 'effectively unreviewable on appeal from a final judgment[.]'" *Id*. at 628.

In this case, appellant asserted before the circuit court that it lacked jurisdiction because the citations were never signed by the officer nor filed in the District Court. As in *Kacour*, we hold that these alleged defects in the charging document do not independently satisfy the criteria of the collateral order doctrine – appellant's claims would be fully reviewable on an appeal from a final judgment.

We further reject appellant's argument that, because the denial of his motion to dismiss on double jeopardy grounds is immediately appealable, the denial of his motion to dismiss based on defects in the citations is also appealable. This "piggyback" argument was soundly rejected by the *Geier* Court: "[O]rders that do not independently satisfy the four-part [collateral order] test may not be appealed by 'piggybacking' onto another interlocutory order that does satisfy the test." *Geier*, slip op. at 12. We therefore hold that appellant cannot raise his jurisdictional arguments in this interlocutory appeal.[4]

II. The Administrative Suspension of Appellant's Driver's License is Not "Punishment" for Double Jeopardy Purposes.

We turn now to appellant's double jeopardy argument. Appellant argues that because his license has already been suspended for refusing to submit to a breath test pursuant to TR § 16-205.1, any subsequent criminal prosecution violates the Double Jeopardy Clause of the United States Constitution. The Double Jeopardy Clause, applicable to the States under the Fourteenth Amendment, provides, in part, that "nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb[.]" U.S. Const. amend. V. The protections of the Double Jeopardy Clause are well-established:

> The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for

[4] At oral argument, appellant referred us to the Court of Appeals' recent decision in *State v. Jones*, ____ Md. ____, No. 52, Sept. Term, 2015, slip op. (Ct. of App. Feb. 24, 2017), in support of his collateral order argument. That case is readily distinguishable because the jurisdictional arguments here are not "inextricably intertwined" with the double jeopardy issue.

> the same offense after conviction. And it protects against multiple punishments for the same offense.

Brown v. Ohio, 432 U.S. 161, 165 (1977) (citation and quotations marks omitted). Appellant claims that the third abuse – protection against multiple punishments for the same offense – is violated in this case. Specifically, appellant asserts that the temporary suspension of his driver's license under TR § 16-205.1 constitutes "punishment" for double jeopardy purposes, thereby precluding the State from prosecuting him for driving while impaired.

As the State correctly points out, whether an administrative suspension of a person's driver's license for refusing to take a breath test constitutes "punishment" for double jeopardy purposes has been resolved by both the Court of Appeals and this Court. *See State v. Jones*, 340 Md. 235 (1995); *Johnson v. State*, 95 Md. App. 561 (1993). In addressing the same statute and identical issue presented here, the *Jones* Court succinctly summarized its holding:

> In this appeal, we must determine whether administrative suspension of a driver's license under Maryland Code (1977, 1992 Repl.Vol., 1994 Cum.Supp.) § 16-205.1 of the Transportation Article constitutes "punishment" within the ambit of the United States Constitution's Double Jeopardy Clause or Maryland common law, thereby precluding the State from bringing a subsequent prosecution for the crime of driving while intoxicated. We hold that a temporary suspension of a driver's license under § 16-205.1 does not constitute "punishment" under the law of double jeopardy.

340 Md. at 240.

Recognizing the insurmountable obstacle that *Jones* presents to prevailing on his double jeopardy argument, appellant asserts that the *Jones* Court used double jeopardy

analysis articulated by the Supreme Court in *United States v. Halper*, 490 U.S. 435 (1989), which appellant notes was later "disavowed" in *Hudson v. United States*, 522 U.S. 93 (1997). Indeed, the *Hudson* Court concluded, "[w]e believe that *Halper's* deviation from longstanding double jeopardy principles was ill considered." *Id*. at 101. Resolution of the instant case, then, depends on ascertaining whether proper application of double jeopardy law as articulated in *Hudson* would change the result reached by the Court of Appeals in *Jones*. We hold that it would not.

In *Hudson*, Chief Justice Rehnquist identified the deficiencies in *Halper*:

> The analysis applied by the *Halper* Court deviated from our traditional double jeopardy doctrine in two key respects. First, the *Halper* Court bypassed the threshold question: whether the successive punishment at issue is a "criminal" punishment. Instead, it focused on whether the sanction, regardless of whether it was civil or criminal, was so grossly disproportionate to the harm caused as to constitute "punishment." In so doing, the Court elevated a single *Kennedy* factor – whether the sanction appeared excessive in relation to its nonpunitive purposes – to dispositive status. But as we emphasized in *Kennedy* itself, no one factor should be considered controlling as they "may often point in differing directions." 372 U.S., at 169, 83 S.Ct., at 568. The second significant departure in *Halper* was the Court's decision to "asses[s] the character of the actual sanctions imposed," 490 U.S., at 447, 109 S.Ct., at 1901, rather than, as *Kennedy* demanded, evaluating the "statute on its face" to determine whether it provided for what amounted to a criminal sanction, 372 U.S., at 169, 83 S.Ct., at 568.

522 U.S. at 101.

We see nothing in the double jeopardy analysis explicated in *Hudson* which would cause the Court of Appeals to revise its holding in *Jones*. Neither of the two *Halper* "deviations" from traditional double jeopardy analysis noted in *Hudson* was integral to the Court of Appeals' analysis in *Jones*. First, the Court of Appeals did not focus on whether

the sanction "was so grossly disproportionate to the harm caused to constitute 'punishment.'" *Hudson*, 522 U.S. at 101. The *Jones* Court did not commit the error Chief Justice Rehnquist identified in *Halper* – elevating a single *Kennedy*[5] factor (excessiveness of the sanction) to dispositive status. To the contrary, *Jones* properly recognized that the severity of the sanction imposed is but "one element" in the constitutional analysis. 340 Md. at 249. Nor did the *Jones* Court rely on *Halper's* "second significant departure" from traditional double jeopardy analysis. In the parlance of *Hudson*, the *Jones* Court did not "asses[s] the character of the actual sanctions imposed, rather than, as *Kennedy* demanded, evaluating the 'statute on its face' to determine whether it provided for what amounted to a criminal sanction." 522 U.S. at 101 (internal citations omitted). Rather, the *Jones* Court correctly evaluated the statute on its face and concluded that "license suspensions generally serve remedial purposes." *Jones*, 340 Md. at 251.

A close reading of *Jones* demonstrates that the *Hudson* Court's clarification of double jeopardy analysis would not change the Court of Appeals' conclusion that sanctions imposed pursuant to TR § 16-205.1 do not constitute "punishment" for double jeopardy purposes. Immediately prior to its analysis under *Halper* and its progeny, the *Jones* Court noted that sanctions under TR § 16-205.1 would not have been considered "punishment" prior to *Halper*. The Court stated,

> Under our prior cases, § 16-205.1 was not understood as imposing "punishment." In those decisions, we focused on whether the proceeding was criminal or civil in nature. If civil in nature, the proceedings would not

[5] *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963).

> have implicated the Double Jeopardy Clause. Under this mode of analysis, § 16.205.1 would not constitute a "punishment" within the meaning of the Double Jeopardy Clause.

340 Md. at 242-43 (internal citations and explanatory parentheticals omitted). The Court concluded, "(1) that license suspensions typically serve remedial purposes, (2) that § 16-205.1's language and structure are consistent with the remedial purpose of removing potentially dangerous drivers from the highways, and (3) that the legislature intended that § 16-205.1 serve both remedial and punitive purposes[.]" *Id*. at 263. These observations in *Jones* compel us to conclude that, applying the traditional principles of double jeopardy referred to in *Hudson*, the Court of Appeals would reach the same conclusion – that sanctions imposed under TR § 16-205.1 do not constitute "punishment" in double jeopardy analysis.[6]

Our conclusion is further supported by the Court of Appeals' recent decision in *Garrity v. Md. State Bd. of Plumbing*, 447 Md. 359 (2016). In *Garrity*, the Court expressly recognized that "*Hudson* displaced the analysis applied in *Halper*." *Id*. at 385. Notably, the *Garrity* Court cited *Jones* in its double jeopardy analysis. *Id*. at 387-88. That the Court cited *Jones* with approval knowing that *Jones* had relied on *Halper* convinces us that *Jones* remains good law. As appellant acknowledges, to the extent that *Jones* remains valid, it controls the resolution of this case. We hold that *Jones* remains good law and, accordingly,

[6] The parties acknowledge that the provisions of TR § 16-205.1 have not changed substantively since the publication of *Jones* in 1995.

that the administrative suspension of appellant's driving privileges pursuant to TR § 16-205.1 does not constitute "punishment" for double jeopardy purposes.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY DENYING APPELLANT'S MOTION TO DISMISS BASED ON DOUBLE JEOPARDY AFFIRMED. CASE REMANDED TO CIRCUIT COURT FOR MONTGOMERY COUNTY FOR FURTHER PROCEEDINGS. APPELLANT TO PAY COSTS.