

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONTE SHONTEL PRYOR,

Defendant-Appellant.

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UNPUBLISHED

May 21, 1999

No. 208976

Jackson Circuit Court

LC No. 97-081127

Before: Markman, P.J., and Hoekstra and Zahra, JJ.

PER CURIAM.

Defendant was charged with assault with intent to commit murder, MCL 750.83; MSA 28.278, carrying a concealed weapon, MCL 750.227; MSA 28.424, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). His first trial ended in a mistrial. Upon retrial, a jury convicted defendant on all charges and the trial court sentenced him to twenty-five to fifty years' imprisonment. Defendant appeals as of right. We affirm.

At defendant's first trial, during jury selection, the prosecutor informed the court and defense counsel, in a bench conference, that witness, Christopher Crance, a Jackson City Police Officer, would not be available to testify because, despite being under subpoena, the witness had gone on vacation. Officer Crance was listed on the prosecution's witness list. The court told the parties that the issue would be discussed after the completion of jury selection. After the jury was impaneled and sworn, the issue was revisited. At that time, in response to the court's inquiry, the prosecutor indicated that Crance was one of the initial officers at the scene and that he was the first to interview the complainant. The prosecutor also stated that while Crance had been subpoenaed, the prosecution did not plan on calling him and would be unable to produce him for trial. Counsel for co-defendant then indicated that he had "difficulty" with Crance's unavailability because he was "a necessary party [sic] in this matter." Counsel for defendant promptly concurred in this position. Immediately thereafter, the trial court responded that it had no alternative but to declare a mistrial. Three weeks later, defendant was retried before a new jury and convicted.

Defendant argues that his retrial violated his double jeopardy rights. We disagree. Because this issue presents a question of constitutional law, our review is de novo. *People v White*, 212 Mich App 298, 304-305; 536 NW2d 876 (1995).

Both the United States Constitution and the Michigan Constitution prohibit placing a defendant twice in jeopardy for a single offense, which protects a defendant against both successive prosecutions and multiple punishments for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Torres*, 452 Mich 43, 63-64; 549 NW2d 540 (1996). Generally, jeopardy attaches in a jury trial once the jury is impaneled and sworn. *People v Mehall*, 454 Mich 1, 4; 557 NW2d 110 (1997). At that point, the defendant has a constitutional right to have his or her case completed and decided by that tribunal. *People v Dry Land Marina, Inc*, 175 Mich App 322, 325; 437 NW2d 391 (1989). When a mistrial is declared, retrial is permissible under double jeopardy principles where (1) manifest necessity required the mistrial, or (2) the defendant consented to the mistrial and the mistrial was caused by innocent conduct on the part of the prosecutor, or judge or by factors beyond their control. *Mehall*, *supra* at 4; *People v Dawson*, 431 Mich 234, 252-253; 427 NW2d 886 (1988). Here, the jury was impaneled and sworn before the judge declared a mistrial. Therefore, defendant's retrial violated double jeopardy unless manifest necessity existed for the mistrial or defendant consented to the mistrial. Because we conclude that defendant impliedly consented to the mistrial, we hold that defendant's retrial did not violate the prohibition against double jeopardy.

In determining whether a defendant has consented to a mistrial, "[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed." *People v Benton*, 402 Mich 47, 54; 260 NW2d 77 (1977), citing *United States v Dinitz*, 424 US 600, 607-609; 96 S Ct 1075, 1081; 47 L Ed 2d 267 (1976). In that regard, the relevant issue is whether a defendant consented to the discontinuance of the trial, rather than whether he formally consented to the declaration of a mistrial. *People v Tracey*, 221 Mich App 321, 329; 561 NW2d 133 (1997). Defendant's consent can be expressed or implied. *People v Hoffman*, 81 Mich App 288, 297; 265 NW2d 94 (1978), citing *People v Gardner*, 62 Mich 307, 311; 29 NW 19 (1886). Moreover, acting on a defendant's behalf, counsel may provide the requisite consent. *Benton*, *supra* at 55; *Hoffman*, *supra* at 298.

In this case, defense counsel promptly concurred when counsel for co-defendant indicated that Crance was a "necessary party [sic] to this matter." Further, emphasizing the importance of the testimony, defense counsel indicated that he had anticipated using Crance's testimony to impeach the complainant. Then, when the trial court declared a mistrial, neither defendant nor his counsel objected. While mere silence or failure to object to the jury's discharge is not consent, *People v Alvin*, 121 Mich App 681, 688; 329 NW2d 456 (1983), defendant's silence, coupled with the fact that the mistrial was clearly granted for defendant's benefit and defense counsel argued that Crance was indispensable, leads us to conclude that defendant impliedly consented to the discontinuation of his trial.<sup>1</sup>

Finding defendant's retrial constitutionally permissible is consistent with the underlying rationale of the prohibition against double jeopardy. The United States Supreme Court, in *United States v DiFrancesco*, 449 US 117, 127; 101 S Ct 426; 66 L Ed 2d 328 (1980), recognized that there are several well settled principles that have emerged from that Court's double jeopardy decisions. Quoting

from its opinion in *Green v United States*, 355 US 184, 187-188; 78 S Ct 21; 2 L Ed 2d 199 (1957), the Supreme Court explained the “general design” of the Double Jeopardy Clause:

The constitutional prohibition against ‘double jeopardy’ was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense . . . . The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. [*Id.* at 127-128.]

This “general design” has also been stated in terms of “preserving the finality of judgments.” *Id.* at 128. Also well settled is the principle that the Double Jeopardy Clause was designed as a barrier to “affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.” *Id.* at 128. “Implicit in this is the thought that if the Government may reprosecute, it gains an advantage from what it learns at the first trial about the strengths of the defense case and the weaknesses of its own.” *Id.*

Defendant’s retrial did not offend the foregoing principles of the Double Jeopardy Clause. The mistrial was granted almost immediately after the jury was sworn and before opening statements were given. Obviously, no witnesses had testified. Thus, it cannot be said that the prosecution had gained an advantage from learning about the strengths of defendant’s case or the weaknesses of its own during the first trial.

Nor did the retrial give the prosecution an opportunity to muster evidence unavailable to it during the first trial. At the time of retrial, Crance was available and did in fact testify. However, he was called by the prosecution at defendant’s request for purposes of cross-examination. Therefore, it was defendant that was afforded an evidentiary opportunity unavailable, through no fault of the prosecution, at the first trial. Lastly, because the jury did not deliberate to a verdict there can be no concern for the integrity of the judgment. We conclude that because defendant impliedly consented to a mistrial, and the principles of the Double Jeopardy Clause were not violated in this case, defendant’s retrial was constitutionally permissible.

Affirmed.

/s/ Stephen J. Markman

/s/ Joel P. Hoekstra

/s/ Brian K. Zahra

<sup>1</sup> Implied consent, standing alone, is not enough to validate the retrial of defendant. The mistrial must also be the result of “innocent conduct on the part of prosecutor or judge, or by factors beyond their control.” *Dawson, supra* at 252-253. Whether conduct is innocent depends upon the factors motivating the actor.

We are disturbed by the manner in which the trial court handled this issue. It is a well established legal principle that mistrials are to be sparingly ordered. When faced with a possible mistrial, a trial court should proceed with extreme caution. A conscientious trial judge should develop a full and complete record encompassing the legal positions of all involved litigants. The trial court failed to proceed with such caution in the instant case. The course of action chosen by the trial court, however, does not render the decision to retry defendant constitutionally impermissible. The trial court's decision to grant the mistrial was motivated solely by a desire to insure that defendant received a fair trial with an opportunity to present a full and complete defense. The trial court did not in any manner advance, directly or indirectly, the interests of the prosecutor. Rather, the court was merely attempting to accommodate defendant, whose counsel characterized police officer Crance as a "necessary" witness. Under the circumstances, we find that the mistrial was the result of innocent, albeit hasty, conduct on the part of the trial judge.