STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAY EVART GOREE,

Defendant-Appellant.

UNPUBLISHED
July 6, 1999

No. 202938
Kent Circuit Court
LC No. 96-001192 FH

Before: Griffin, P.J., and McDonald and White, JJ.

GRIFFIN, P.J. (*dissenting*).

I respectfully dissent. Defendant appeals by right the trial court's grant of a mistrial on the basis of manifest necessity, claiming it led to a second trial that violated his protection against double jeopardy. I find no double jeopardy violation and therefore would affirm.

Day one of defendant's first trial involved only jury selection and opening statements. The witnesses expected to appear the following day included Robert and Colleen Trumbull, the Grand Rapids homeowners whose garage defendant had broken into. Since the break-in, the victims had relocated to Port Huron, yet through diligent efforts by the prosecutor and the Victim Witness office they had been located and contacted. Up to the day trial proceedings began, the Trumbulls expressed no hesitation about testifying; however, after the close of proceedings on day one, the prosecutor was informed by the Trumbulls that they would not be appearing.

The prosecutor moved for a mistrial, and over defendant's objection the court granted the motion on a finding of manifest necessity. Extensive discussion of the sudden problem and futile attempts to secure the Trumbulls' appearance were made in chambers the morning of day two. The court subsequently placed its ruling on the record, additionally outlining the findings it determined to justify the grant of mistrial.

Defendant claims that in considering the prosecutor's motion for a mistrial, the trial court's inquiry focused on the wrong factors and the court failed to use any of the possible reasonable alternatives. Therefore, defendant asserts his second trial for the same offense was a violation of his constitutional right to protection from double jeopardy.

Under both the United States and the Michigan Constitutions, an accused cannot be placed in jeopardy twice for the same offense. US Const, Am V; Const 1963, art 1, § 15. Jeopardy attaches in a jury trial once the jury is impaneled and sworn. *People v Mehall*, 454 Mich 1, 4; 557 NW2d 110 (1997). Once jeopardy has attached, the defendant has a constitutional right to have his case completed and decided by that tribunal. *People v Dry Land Marina, Inc,* 175 Mich App 322, 325; 437 NW2d 391 (1989). If proceedings are interrupted, retrial for the same offense is permitted only if the defendant consents or a mistrial is declared because of manifest necessity. *Mehall, supra* at 4.

Although defendant made a timely objection to the court's decision to grant a mistrial after jeopardy attached, he failed to move for dismissal on double jeopardy grounds when placed on trial a second time for the same offense. Nevertheless, I review this claim because defendant asserts deprivation of a fundamental constitutional right. *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994).

A trial court's determination that manifest necessity requires the grant of a mistrial is reviewed for an abuse of discretion. *People v Blackburn*, 94 Mich App 711, 714; 290 NW2d 61, (1980). Though the courts have established no precise test to determine manifest necessity, it "appears to refer to the existence of sufficiently compelling circumstances that would otherwise deprive the defendant of a fair trial or make its completion impossible." *People v Rutherford*, 208 Mich App 198, 202; 526 NW2d 620 (1994). Courts must consider all circumstances balancing the defendant's interests in completing his trial before a particular tribunal and remaining free from governmental harassment against the strength of the justification for a mistrial that seeks to ensure the ends of public justice are not defeated. *People v Hicks*, 447 Mich 819, 828-829; 528 NW2d 136 (1994).

While the courts of this state have not answered the specific question whether unavailability of a witness constitutes manifest necessity, federal cases provide adequate guidance to resolve the present issue. The Supreme Court of the United States has held that where the prosecutor initiates proceedings knowing a crucial witness will not appear, retrial of a defendant is barred by double jeopardy. *Downum v United States*, 372 US 734, 737-738; 83 S Ct 1033; 10 L Ed 2d 100 (1963). However, the Court refused to hold that the absence of a witness "can never justify discontinuance of a trial." *Id* at 737. Here, the only evidence on record demonstrates that the prosecutor justifiably believed the Trumbulls would testify when the trial began. When the witnesses unexpectedly refused to appear, despite repeated prior assurances that they intended to testify, the prosecution made every reasonable effort to secure their appearance.

Where there is no evidence that the prosecutor is using the superior resources of his office to gain a tactical advantage over the defendant and there is no evidence tending to show the witnesses will never agree to testify, a finding of manifest necessity may be appropriate. *United States v Gallagher*, 743 F Supp 745, 749 (Or, 1990). Though a finding of manifest necessity is not precluded where the prosecutor acted properly, generally such a finding cannot be based on the failure of a prosecution witness to testify absent extraordinary circumstances. *United States v Khait*, 643 F Supp 605, 609 (SDNY, 1986).

Nothing in the record demonstrates that the Trumbulls' refusal to testify could have been viewed at the time as an unchangeable position. Available to testify at an initial trial date, that proceeding was postponed because of a lack of judges. Sometime between this postponement and the rescheduling of trial, the family moved to Port Huron, over 100 miles away. While physically able to appear for the rescheduled trial, testifying would require Mr. Trumbull to miss work at a job he had only recently started and necessitate alternative arrangements for the care of the Trumbulls' seven children, five of whom had special needs. As the lower court noted, the Trumbulls' position was the result of a unique and extreme set of circumstances.

Although the Trumbulls had been served with subpoenas, the prosecution chose not to enforce these court orders by arrest. The court found that in view of the significant hardship the Trumbulls and their seven children would endure were such action undertaken, the prosecution's decision was both compassionate and reasonable. The court also suggested that as victims of a crime, the Trumbulls were due some regard and ought to be given the opportunity to reconsider their decision not to pursue the case.

Though the lower court's discretionary judgment is entitled to great deference, a reviewing court has an obligation to satisfy itself that sound discretion was exercised. *Arizona v Washington*, 434 US 497, 514; 98 S Ct 824; 54 L Ed 2d 717 (1978). Acknowledging the lack of a full hearing on the record, the trial court explained that its recitation of findings was based on extensive consultation in chambers with both prosecution and defense counsel, and other court personnel. The court recognized that its decision raised serious questions of double jeopardy, implicating defendant's interest in having the trial concluded before a single tribunal. Defense counsel neither objected to the representation of the factual circumstances at the time presented by the trial court nor filed a motion to dismiss the second indictment — as was expectantly suggested by the trial court several times during its ruling. On review of the record before this Court, I am satisfied that the trial court gave this matter extensive consideration and acted responsibly and deliberately in making its decision. *Id.* at 434 US 516.

Defendant also contends that because the trial court failed to "use any of the possible reasonable alternatives," a finding of manifest necessity is precluded. As a general rule, trial judges must consider reasonable alternatives before declaring a mistrial. *Hicks, supra* at 841. Contrary to defendant's claim that reasonable alternatives must be "used," all this rule requires is consideration.

Recognizing the consequences of declaring a mistrial, possible alternatives were explicitly considered. The court found compelling appearance of the witnesses by arresting them to be unreasonable because the Trumbulls' unique circumstances presented concerns of more than mere convenience. The court also considered the possibility of continuing the case for a short period of time in order to secure the witnesses' appearance and conclude the trial before the same jury. But noting that the impaneled jurors were at the end of a month-long term of service, the court stated that it had a duty to honor its commitment to them that the trial would be over by week's end and their service concluded. Again, the court found the situation to present more than an issue of convenience and therefore the alternative to be unreasonable.

Affording the trial court's determination considerable deference, I find no abuse of discretion. *People v Benton*, 402 Mich 47, 65; 260 NW2d 77 (1977). I would affirm.

/s/ Richard Allen Griffin