STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 12, 2004
v	No. 242940 Kent Circuit Court
JACK VICTOR PERDUE, a/k/a JOHN PERDUE, Defendant-Appellant.	LC No. 00-011517-FH

Before: Murray, P.J., and Murphy and Markey, JJ.

PER CURIAM.

Defendant appeals by right his conviction following a second jury trial of receiving and concealing stolen property valued at more than $100, MCL 750.529. We affirm.

This case involves the theft of an automobile from the used car dealership of Berger Chevrolet, defendant's former employer. During a traffic stop in March of 2000 of Todd Hill, an acquaintance of defendant, it was discovered that the car Hill was driving was reported as stolen. A police investigation revealed that Hill received the car from defendant in exchange for repair work that Hill provided on another of defendant's automobiles. Hill was initially charged with receiving and concealing stolen property, but was allowed to plead to unlawful use of a motor vehicle in exchange for his testimony against defendant.

At defendant's first trial, Hill was called as a prosecution witness. Early in his testimony, the attorney who represented him in connection with his receiving and concealing charge and subsequent plea, a member of the Kent County Public Defender's Office, discovered the office also employed defendant's counsel. Believing that continuing to represent defendant would create a conflict of interest, defense counsel moved for a mistrial, to which plaintiff did not object. The court granted the motion. Defendant was later retried, and the jury found him guilty as charged.

On appeal, defendant first argues that he was retried in violation of his state and federal constitutional right to be free from double jeopardy. We disagree.

A constitutional double jeopardy challenge presents a question of law that is reviewed de novo. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). However, where a defendant fails to raise this constitutional issue below, as is the situation here, this court reviews

for plain error only. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Kulpinski*, 243 Mich App 8, 11; 620 NW2d 537 (2000).

While the Double Jeopardy Clause clearly includes the protection against a second prosecution for the same offense following acquittal, it also recognizes an accused's "valued right to have his trial completed by a particular tribunal…." *Wade v Hunter*, 336 US 684, 689; 69 S Ct 834, 93 L Ed 974 (1949). When jeopardy attaches, the defendant has a constitutional right to have his case completed and decided by that tribunal. *People v Henry*, 248 Mich App 313, 318; 639 NW2d 285 (2001). Generally, jeopardy attaches when the jury is selected and sworn. *People v Lett*, 466 Mich 206, 215; 644 NW2d 743 (2002). At that point, retrial is barred, even if a verdict is not rendered, unless the defendant requests or consents to a mistrial, or the mistrial is occasioned by "manifest necessity." *Id.*, citing *Oregon v Kennedy*, 456 US 667, 672, 675-676; 102 S Ct 2083; 72 L Ed 2d 416 (1982). "When a mistrial is granted on defendant's motion, the Double Jeopardy Clause does not bar retrial unless the defendant's motion was induced by bad faith conduct on the part of the judge or prosecutor." *People v Cicotte*, 133 Mich App 630, 634-635; 349 NW2d 167 (1984).

While conceding that the defense counsel moved for mistrial and did not do so out of bad faith or goading by plaintiff or the court, defendant argues that the general rules which would preclude his arguing double jeopardy as a bar to retrial should not apply. His reasoning is that his trial counsel moved for the mistrial not to protect defendant's interests, but, as defense counsel explained, because her continued representation could potentially harm the prosecution because "now I am privy to information from [the file] regarding Mr. Hill, that could cause some type of questions regarding credibility, competence, and other issues that are directly affected by this case." We do not understand, nor is it al all clear what counsel meant by this statement. But certainly it is open to more than one interpretation. Moreover, defendant does not provide any legal authority in support of his claim that in some circumstances a defendant's own motion will bar further prosecutions absent bad faith. "A party may not leave it to this Court to search for authority to sustain or reject its position." *In re Keifer*, 159 Mich App 288, 294; 406 NW2d 217 (1987).

Also, as a general rule, '"[i]n our legal system, an attorney is his client's agent and representative…. Like any other principal, a client may be bound by the acts of his agent, acting within the scope of his authority."' *AMCO Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 104; 666 NW2d 623 (2003) (Young, J. concurring), quoting *Prate v Freedman*, 583 F2d 42, 48 (CA 2, 1978). Accordingly, absent a showing that defense counsel acted beyond the scope of her authority, her motion for a mistrial is imputed to defendant. And, without a showing of bad faith by the prosecutor or judge, the Double Jeopardy Clause will not bar retrial. *Cicotte*, *supra*. Because there is no authority to depart from the well established rule that a defendant's own mistrial motion will not bar retrial, defendant's argument must fail.

Defendant's next contention on appeal is that he was denied his constitutional right to a jury drawn from a venire representative of a fair cross section of the community. We disagree.

Defendant's specific claim stems from an error in the jury selection process in Kent County, which defendant claims excluded minorities from jury pools. In support of his claim, defendant attached to his brief on appeal an array of newspaper articles and reports chronicling the mishap. We initially note that we are unable to take judicial notice of this material as it

constitutes inadmissible hearsay. *People v McKinney*, 258 Mich App 157, 161 n 4; 670 NW2d 254 (2003).

Constitutional questions concerning the exclusion of minorities in jury venires are reviewed de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 472; 552 NW2d 493 (1996). To properly preserve a challenge to the jury array, a party must raise the issue before the jury is empanelled and sworn. *McKinney, supra* at 161. Unpreserved constitutional error is reviewed for plain error that affects the substantial rights of the defendant. *Carines, supra* at 763, 774.

Here, defendant failed to timely raise this issue below, leaving it unpreserved for review and limiting this Court's inquiry to search for plain error apparent from the record alone. Defendant attempts, however, to circumvent this rule by arguing that an exception to the plain error doctrine exists when the asserted error was not discoverable at the time objection or preservation was required. In support of this contention, defendant cites two cases, *Hubbard, supra*, and *Amadeo v Zant*, 486 US 214; 108 S Ct 1771; 100 L Ed 2d 249 (1998).

In *Hubbard*, however, the defendant objected to the panel before the panel was sworn. The Court simply rejected the prosecutor's attempts to enlarge the preservation requirements to include such things as a written, rather than mere oral, objection to the panel, and that the objection be voiced before voir dire. *Id.,* 464-465. Therefore, we find that defendant's reliance on *Hubbard* is misplaced.

Defendant also cites *Amadeo, supra*, in support of his proposition that the plain error rule does not apply. *Amadeo*, however, addressed the "cause and prejudice " rule established by the United States Supreme Court which bars federal habeas corpus review absent a showing of cause and prejudice. See *Francis v Henderson*, 425 US 536; 96 S Ct 1708; 48 L Ed 2d 149 (1976). Though this federal rule seems to operate in the same manner over habeas corpus claims as does the plain error doctrine in Michigan state court appeals, it is not the same rule, and *Amadeo* does not control or apply to the case at bar. The nature of the plain error doctrine is that of a state procedural rule which imposes issue preservation requirements over claims of error. *Carines, supra* at 460 Mich 762. The United States Supreme Court has recognized a state's right to establish such rules, even where the error claimed by an appellant implicates protections established by the federal Constitution. *Id*, at 762-763. Accordingly, the plain error rule of *Carines* controls here, so, we review defendant's claims for plain error.

When a claim of error is unpreserved, this Court is limited to reviewing for mistakes apparent on the record. There is no evidence in the lower court record to support defendant's claims. Although defendant cites several newspaper articles and reports, these materials are not part of the record, nor can we take judicial notice of them, as explained above. Accordingly, we find ourselves in the same position as the Court in *McKinney*. We have no way to review defendant's claims. See *McKinney, supra* at 161-162.

We affirm.

/s/ Christopher M. Murray
/s/ William B. Murphy
/s/ Jane E. Markey