Matter of Gorman v Rice
2012 NY Slip Op 33700(U)
February 23, 2012
Supreme Court, Nassau County
Docket Number: 8279/2010
Judge: F. Dana Winslow

SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. F. DANA WINSLOW,

Justice
TRIAL/IAS, PART 3
NASSAU COUNTY

In the matter of the Application of
CATHERINE A. GORMAN,

Petitioner,

RETURN DATE: 1/17/12
SEQUENCE NO.: 002

- against -

INDEX NO.: 8279/2010

HON. KATHLEEN M. RICE AND THE JUDGES OF THE DISTRICT COURT, COUNTY OF NASSAU,

Respondents.

The following papers read on this petition (numbered 1-3)

Notice of Motion for Reargument..... 1
Petitioner's Attorney's Affirmation in Opposition.....2
Petitioner's Memorandum of Law.....2A
Petitioner's Exhibits.....2B
Reply Affirmation.....3
Argument before the Court.....4

Respondent Hon. Kathleen M. Rice moves for an Order pursuant to **CPLR §2221** granting leave to reargue the decision and order of this Court, dated August 16, 2010 and entered on August 25, 2010 (the "Prior Order"), which granted petitioner's motion for a judgment pursuant to Article 78 of the CPLR dismissing her case under Docket No. 2006NA016493 and prohibiting respondents from further prosecuting petitioner for the crimes therein. The Court notes that the motion was timely made, and was adjourned several times, upon the request and consent of the parties, and at the Court's direction for purposes of oral argument and for ascertaining the status of the motion in light of intervening circumstances which could have rendered it academic.

In essence, the petitioner's motion pursuant to CPLR §2221 seeks CPLR §2221(d) relief on the basis that the court misapprehended the law when it drew a bright line rule,

holding that the *sua sponte* declaration of a mistrial by a Nassau County District Court Judge was definitive and not subject to withdrawal or modification. The facts and circumstances, including the events leading to the mistrial declaration, have been recited in this Court's August 16, 2010 short form order and will not be repeated. The Court has considered the persuasive presentation of the respondents' oral and written arguments and grants respondents leave to reargue pursuant to CPLR §2221(d). Upon reargument and also upon consideration of petitioner's submissions, the application is determined as follows.

Assistant District Attorney Kornblau accurately recites the history of the Article 78 proceeding in her attorney affirmation, which the court accepts as a fair representation until paragraph 13 on page 5, when history becomes argument. There, ADA Kornblau characterizes rulings "by the New York Court of Appeals and other courts" as expressly holding that a court may rescind its declaration of a mistrial if the jury has not been discharged. In the attached memorandum of law, page 5, Assistant District Attorney Kornblau cites the case law that this Court purportedly misapprehended or failed to consider; namely, People v Rodriquez 39 NY2d 976 (1976). Fortunately, this Court did consider the two-page decision by the Court of Appeals, but did not cite the decision in its August 16, 2010 Short Form Order because of the multiplicity of issues decided by the Court of Appeals, with only the following single paragraph devoted to the present issue:

> Since no order of mistrial had been entered and the jury had not been discharged, the trial court's purported declaration of a mistrial obviously was a statement of intention rather than a completed act, despite its declarative form. It was rescinded almost immediately. Hence, there is no basis for the assertion of double jeopardy. Rodriquez, 39 NY2d at 978.

On revisiting this decision, the Court readily apprehended the purpose for ADA Kornblau's reliance. Nonetheless, the Court found that the seemingly concrete statement of policy had more sand than cement upon close examination of two elements, the absence of which leads to the inevitable collapse of the edifice.

1) Statement of intention rather than a completed act.
2) Rescinded almost immediately.

Less obvious but no less important, the Court notes that Rodriquez includes no application or analysis of CPL §280.10(3), even though the section was adopted six years prior to the Court's 1976 decision.

This Court saw, in the record of the underlying District Court trial, that there was a clear declaration of mistrial, followed by time to reflect, read or confer before the judge's return to the bench. Elements (1) and (2) above are intertwined. The declaration of mistrial in the underlying District Court trial cannot be viewed as a "statement of intention" rather than a "completed act," particularly because the declaration was not "immediately rescinded." Further, upon the Judge's return to the bench, it was apparent that the Judge had changed his position, and that the history of the proceedings, particularly the animus that pervaded the trial, diminished the ability of the defendant to make a free and voluntary choice to consent to the mistrial.

The adoption of CPL §280.10(3) became a nearly invisible marker in criminal jurisprudence. It established a standard or criterion for when the *sua sponte* declaration of a mistrial permits a new trial on the indictment – an important aspect of the criminal trial process, yet one which has not been examined closely in our case law. That standard has not been met in the underlying trial at issue here.

No one in the court room has unfettered licence to retract his or her statements or acts -- not even, or particularly not, the trial judge. Every trial has it mistakes or errors, usually harmless or correctable, but certain precepts can and must prevail. This Court holds that there cannot be second thoughts about the declaration of a mistrial.

Accordingly, the Court adheres to its determination as set forth in the Prior Order. The application to rescind or modify the Prior Order is **denied.** This constitutes the decision and Order of the Court.

ENTER:

Dated: February 23, 2012

J.S.C