

[J-218-98]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	2 E.D. Appeal Docket 1998
	:	
Appellant	:	Appeal from the Judgment of Superior
	:	Court entered on October 21, 1996 at
	:	1533 PHL 1995 reversing the Order
v.	:	entered on March 23, 1995 in the Court of
	:	Common Pleas, Philadelphia County,
	:	Criminal Division at 1381-1383 October
RAYMOND MARTORANO,	:	Term, 1982
	:	
Appellee	:	ARGUED: October 22, 1998

COMMONWEALTH OF PENNSYLVANIA,	:	3 E.D. Appeal Docket 1998
	:	
Appellant	:	Appeal from the Judgment of Superior
	:	Court entered on October 21, 1996 at
	:	1534 PHL 1995 in the Court of Common
v.	:	Pleas, Philadelphia County, Criminal
	:	Division at 257-259 January Term, 1983
	:	
ALBERT DAIDONE,	:	
	:	
Appellee	:	ARGUED: October 22, 1998

DISSENTING OPINION

MR. JUSTICE SAYLOR

DECIDED: November 10, 1999

In this case, the majority applies the broad holding of Commonwealth v. Smith, 532 Pa. 177, 615 A.2d 321 (1992), to prohibit the retrial of criminal defendants in cases in which the prosecutor's conduct is deemed by the reviewing court to be intentional and egregious.

Because, in my view, such a rule lacks sufficient definition to serve as a workable standard and fails to afford appropriate weight to public interests, I respectfully dissent.

Both the United States and Pennsylvania constitutions forbid placing individuals twice in jeopardy for the same offense.¹ Nevertheless, it has long been the general rule that neither the reversal of a conviction on appeal, nor the cessation of a trial by reason of a mistrial, bars the subsequent retrial of a criminal defendant. See generally United States v. Dinitz, 424 U.S. 600, 609, 96 S. Ct. 1075, 1080 (1981); United States v. Ball, 163 U.S. 662, 672, 16 S. Ct. 1192, 1195 (1896).² Thus, although a defendant is guaranteed freedom from prosecution after the completion of a trial untainted by prejudicial error, he is not guaranteed such a proceeding in the first instance. Lockhart v. Nelson, 488 U.S. 33, 38, 109 S. Ct. 285, 289-90 (1988). This precept recognizes the burden of withstanding serial trials; however, the defendant's interest in freedom from successive prosecution is subordinated to the community's strong interest in the enforcement of its criminal laws. See generally United States v. Tateo, 377 U.S. 463, 466, 84 S. Ct. 1587, 1589 (1964). This fundamental balance between the interests of criminal defendants and those of society forms the core of the federal double jeopardy jurisprudence. See, e.g., id.

¹ The double jeopardy provision in the Pennsylvania Constitution closely tracks its federal counterpart. The Pennsylvania double jeopardy provision in article I, section 10 provides that "[n]o person shall, for the same offense, be twice put into jeopardy of life or limb." The Fifth Amendment to the United States Constitution similarly provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."

² Exceptions to this rule, which are not relevant in this case, exist in instances in which the defendant's conviction is reversed on the ground that the evidence was insufficient to sustain the jury's verdict, see Burks v. United States, 437 U.S. 1, 18, 98 S. Ct. 2141, 2150 (1978), and where the trial is terminated over the objection of the defendant. See United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824) (establishing the principle that, where the trial court grants a mistrial on its own motion or that of the prosecution, retrial is permitted only where there is a manifest necessity for discontinuance of the initial proceeding).

In the mistrial context, the United States Supreme Court recognized an exception to the general rule permitting retrial in Oregon v. Kennedy, 456 U.S. 667, 102 S. Ct. 2083 (1982). Although a defendant's motion for mistrial generally removes any double jeopardy bar, see Dinitz, 424 U.S. at 611, 96 S.Ct. at 1081, the Supreme Court in Kennedy found that re prosecution would be prohibited in certain cases where the government acts with wrongful intent beyond the mere desire to convict. The Court defined the standard of misconduct required to invoke double jeopardy as follows:

Only where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion.

Kennedy, 456 U.S. at 676, 102 S.Ct. at 2089.³

In adopting this standard, the Supreme Court applied the central double jeopardy equation, balancing the competing interests of the defendant and the public. In this context, the Court viewed the defendant's primary interest as the right to have his fate determined by the first tribunal.⁴ The Kennedy holding quite properly prevents prosecutors from subverting a defendant's double jeopardy interests by manipulating the mistrial rules to avoid a probable acquittal while retaining the possibility of a subsequent conviction. At the same time, the holding attaches substantial and appropriate weight to the public interest in fair trials ending in a just adjudication, and provides courts with a manageable standard to implement the pertinent constitutional principles. See Kennedy, 456 U.S. at

³ Although Kennedy was a plurality opinion, Justice Powell filed a concurring opinion in which he expressed his agreement with the standard articulated in the lead opinion. See Kennedy, 456 U.S. at 680-81, 102 S. Ct. at 2091-92 (Powell, J., concurring).

⁴ This interest should be distinguished from the defendant's interest in a fair trial, which generally is protected, not by the retrial bar, but by the availability of a mistrial or appellate reversal.

675, 102 S.Ct. at 2089 (stating that “[i]nferring the existence or nonexistence of intent from objective facts and circumstances is a familiar process in our criminal justice system”).

In Commonwealth v. Smith, 532 Pa. 177, 615 A.2d 321 (1992), this Court imposed a bar to subsequent prosecution in certain cases outside the mistrial context, utilizing the framework of the Pennsylvania Constitution to support an incremental departure from the principles articulated in Kennedy. The precise issue in Smith was whether double jeopardy bars retrial for “intentional prosecutorial misconduct designed to secure a conviction through the concealment of exculpatory evidence[.]” Id. at 179, 615 A.2d at 322. The mandate prohibiting retrial in such circumstances is justified, in particular, based upon the reasoning expressed by Mr. Justice Flaherty, now the Chief Justice, in his concurring opinion in Commonwealth v. Simons, 514 Pa. 10, 522 A.2d 537 (1987). In Simons, the Chief Justice stated:

Concerning as it does the alleged concealment of information which was necessary to the truth-determining process, the alleged misconduct, even if proved, could well never satisfy the federal standard, as concealment will always negate any “intent to goad the defendant to request a mistrial.” The intent of concealment, indeed its essence, is that the defendant would never know the facts and, thus, would not base any claim for relief on those facts.

* * *

Should the Commonwealth’s concealment of necessary information vitiate the double jeopardy protection afforded by our constitution? I think not. As Judge Del Sole opined below, “I find no functional difference between intentional misconduct, engaged in by the prosecution in order to avoid an acquittal by causing a mistrial and intentional misconduct, engaged in by the prosecution in concealing evidence, which results in a guilty verdict. In either case, the conduct of the prosecution once established, places the defendant twice in jeopardy for the same crime.”

Id. at 23, 522 A.2d at 544 (Flaherty, J., concurring)(citations omitted; emphasis in original).

On its narrow holding, Smith represents a logical and natural extension of Kennedy and

maintains the essential equilibrium between the interests of criminal defendants and the public.⁵

The Court in Smith, however, framed its ultimate holding in broad terms, facially expanding double jeopardy protections under the Pennsylvania Constitution to circumstances in which the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial. Since the holding of the case, as in any case, must be read against its facts, Smith itself would not be controlling for purposes of this broader statement; it is the majority's decision in the present case that gives the broad holding of Smith the force of law.

There are several reasons why I believe that a double jeopardy standard focusing upon the prosecutor's generalized culpability as it relates to fairness lacks appropriate constraints. First, the rule, taken on its terms, would appear to encompass most acts of prosecutorial misconduct. Since nearly every activity of a prosecutor who has embarked

⁵ Indeed, the federal courts have made similar observations about the appropriateness of applying a bar to reprosecution in cases involving covert activity by the prosecution. For example, in United States v. Wallach, 979 F.2d 912 (2d Cir. 1992), cert. denied, 508 U.S. 939, 113 S. Ct. 2414 (1993), the court stated that:

[i]f any extension of Kennedy beyond the mistrial context is warranted, it would be a bar to retrial only where the misconduct of the prosecutor is undertaken, not simply to prevent an acquittal, but to prevent an acquittal that the prosecutor believed at the time was likely to occur in the absence of his misconduct Indeed, if Kennedy is not extended to this limited degree, a prosecutor apprehending an acquittal encounters the jeopardy bar to retrial when he engages in misconduct of sufficient visibility to precipitate a mistrial motion, but not when he fends off the anticipated acquittal by misconduct of which the defendant is unaware until after the verdict. There is no justification for that distinction.

Id. at 916.

upon a criminal prosecution can be viewed as intended to prejudice the defendant, when such actions are ultimately deemed to have eroded the fairness of the trial, they will necessarily satisfy the intent requirement of the majority's test. Thus, a broad range of defendants in cases involving prosecutorial misconduct will be candidates for immunity from subsequent prosecutions; their motions for application of the double jeopardy bar can be expected; and it is highly likely that reviewing courts will have differing interpretations as to whether application of the bar is warranted, thus resulting in uneven application.⁶ The majority's double jeopardy standard may also have the practical effect of adversely impacting the interests of some criminal defendants -- a trial judge may become hesitant to grant defense motions for mistrial, knowing that the double jeopardy bar will likely preclude retrial. See Kennedy, 456 U.S. at 676, 102 S. Ct. at 2089-90.

Most important, however, I believe that the standard imposed by the majority fails to attach sufficient weight to the legitimate interests of the community. When a defendant is provoked into moving for a mistrial, he is deprived of his right to continue a trial before a particular tribunal because of misconduct specifically intended to deprive him of that very right. In such cases, it is appropriate for the public's interest in the enforcement of the criminal laws to yield to the interest of the defendant that was subverted. The same can be said when the government conceals or withholds exculpatory evidence, which can be viewed as the functional equivalent of this form of deprivation. However, when the aim of the prosecutor is not so specific, it is the defendant's and the community's interest in a fair

⁶ As an example, the Commonwealth cites to Commonwealth v. Moose, 424 Pa. Super. 579, 623 A.2d 831 (1993), appeal denied, 538 Pa. 613, 645 A.2d 1317 (1994), cert. denied, 513 U.S. 1060, 115 S. Ct. 672 (1994), in which the Superior Court rejected the defendant's attempt to invoke the double jeopardy clause in a case in which this Court previously had characterized the prosecution's tactics as "villainy." See Commonwealth v. Moose, 529 Pa. 218, 228, 602 A.2d 1265, 1270 (1992).

trial that is primarily affected, and, applying the double jeopardy equation, a new trial represents the appropriate remedy.

In my view, the public interests in fair trials designed to end in just judgments, and in the enforcement of the criminal laws, are simply too important to be subordinated to a vaguely defined concept hinged upon a prosecutor's general misconduct alone. Application of the Kennedy standard, supplemented by the narrow holding of Smith, would provide a workable, practical standard for judges to apply in determining whether the double jeopardy clause prohibits a subsequent prosecution, thus enabling courts to guarantee the constitutional rights of criminal defendants without diminishing society's interest in justice.⁷

In the present case, there is no question that the district attorney engaged in a pattern of misconduct which served to deprive Appellants of a fair trial -- indeed, it is for this reason that their convictions were reversed. There is, however, no factual finding by the trial court that the district attorney intended to provoke a mistrial or engaged in covert activity. Thus, on this record, I would not hold that double jeopardy bars retrial.

Mr. Justice Castille and Mr. Justice Nigro join this dissenting opinion.

⁷ While prosecutorial misconduct cannot be condoned, there are remedies available to the court, such as contempt or disciplinary proceedings, to penalize recalcitrant attorneys without penalizing the public as a whole.