In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-17-00038-CR

EX PARTE ELIZABETH ANN GARRELS

On Appeal from the County Court at Law No. 5
Montgomery County, Texas
Trial Cause No. 17-29859

MEMORANDUM OPINION

Appellant Elizabeth Ann Garrels appeals the trial court's denial of her application for a pretrial writ of habeas corpus, in which she argued that double jeopardy barred further prosecution after the trial judge granted a mistrial. We affirm the trial court's order denying Garrels's application for writ of habeas corpus.

Garrels was charged with driving while intoxicated. After a jury had been sworn and testimony had begun, the defense objected to certain expert testimony under article 39.14(b) of the Texas Code of Criminal Procedure and argued that the State had not timely designated the expert witness. *See* Tex. Code Crim. Proc. Ann.

art. 39.14(b) (West Supp. 2016). The State acknowledged its violation of the statute because "formal written notice" of the identity of the testifying witness was provided to the defense the prior week, but the State argued that there was no surprise to the defense and that the identity of the witnesses "have been well-known to the defense weeks prior [to the deadline required by article 39.14(b).]" The State argued that the appropriate remedy would be a continuance of the trial and not the exclusion of testimony. Defense counsel voiced opposition to a continuance:

> Judge, the only argument I would make is that granting a continuance would allow the state an improper way out of their own mistake by violating the statute and would prejudice Ms. Garrels in an unfair manner. They've had at least one continuance on this case on trial date. And the alternative, we would renew our original request from the Court to strike all the testimony of all expert witness[es] untimely provided by the state in this case.

After a discussion regarding the appropriate remedy for failure to disclose an expert in a timely manner under article 39.14(b), the trial court *sua sponte* granted a mistrial:

> THE COURT: All right. I'm just going to grant a mistrial on my own. Y'all can deal with it and decide what to do going forward. I think the short amount of time that he's had the discovery and the statute being pretty clear black lettering, I don't have any -- legislature didn't give me any instruction and there [are] no cases that are new enough. I guess y'all will figure out what to do going forward.
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> [Prosecutor]: Judge, if you wanted to make some findings related to manifest necessity to see if that fits.

> THE COURT: What I would say is during jury selection we told the jury we would be here Monday, Tuesday, Wednesday and not past that, and that they have the ability to pick between five different court dates to show up. So they were all expecting to have their jury service this week. They told me three days. They told me they didn't have any conflicts in those three days. Now, we're talking about having them coming back July 27th. Puts me on vacation before my kids go back to school or some other time after that. And I can't reset them to some other time after that. I would have to give them a specific set date. I don't think that's a reasonable or even remotely reasonable use of judicial resources. So I don't think that the alternative of admitting all the evidence would be fair, nor do I think it would survive an appeal, based on the fact that it's so defective time wise; three days as opposed to 20 days. So I don't feel like the Court has any other option at this point in time.
>
> [Prosecutor]: Thank you, Judge. Just to be clear[,] the state[] respectfully objects to the granting of a mistrial.
>
> THE COURT: Okay. All right.

Garrels subsequently filed an application for a pretrial writ of habeas corpus, in which she asserted that double jeopardy bars further prosecution because the trial court had granted a continuance, and the court made no finding that manifest necessity for a mistrial existed. The trial court signed an order denying Garrels's application.

In her sole appellate issue, Garrels argues that the trial court abused its discretion by declaring a mistrial *sua sponte* absent Garrels's consent and without considering less drastic measures. Garrels argues that she did not expressly consent to the mistrial, did not expressly object to the trial court's declaration, and was silent

after the trial court declared the mistrial. Garrels contends that her consent cannot "be inferred from a silent record[,]" and that "the totality of the circumstances fails to establish that [she] consented to the mistrial." Garrels asserts that, because she voiced her opposition to a continuance as a remedy and "a mistrial would have given the State the same opportunity to correct its error as a continuance[,]" and one could "reasonably conclude that Garrels would not have been satisfied with such a result."

"The Fifth Amendment to the United States Constitution prohibits a State from twice putting a defendant in jeopardy for the same offense." *Ex parte Brown*, 907 S.W.2d 835, 838 (Tex. Crim. App. 1995) (citations omitted). Jeopardy attaches once a jury has been impaneled and sworn. *Id.* at 839. "Consequently, as a general rule, if, after the defendant is placed in jeopardy, the jury is discharged without reaching a verdict, double jeopardy will bar retrial." *Id.* A defendant who does not object to the trial judge's *sua sponte* declaration of a mistrial, despite an adequate opportunity to do so, has impliedly consented to the mistrial. *See Ex parte Jackson*, Nos. 09-14-00138-CR, 09-14-00139-CR, and 09-14-00140-CR, 2014 WL 3845780, at **6-7 (Tex. App.—Beaumont Aug. 6, 2014, pet. ref'd) (mem. op., not designated for publication) (citing *Torres v. State*, 614 S.W.2d 436, 441-42 (Tex. Crim. App. [Panel Op.] 1981); *Ledesma v. State*, 993 S.W.2d 361, 365 (Tex. App.—Fort Worth 1999, pet. ref'd)).

Based on this record, Garrels's counsel had an adequate opportunity to object to the mistrial, but did not do so. We conclude that Garrels consented to the mistrial.[1] *See id.* (citing *Torres*, 614 S.W.2d at 441-42; *Ledesma*, 993 S.W.2d at 365). Therefore, double jeopardy does not bar further prosecution. *Ex parte Brown*, 907 S.W.2d at 838. Accordingly, we overrule Garrels's issue on appeal and affirm the trial court's order denying Garrels's pretrial application for writ of habeas corpus.

AFFIRMED.

LEANNE JOHNSON
Justice

Submitted on May 3, 2017
Opinion Delivered May 10, 2017
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Before McKeithen, C.J., Kreger and Johnson, JJ.

[1] Because we conclude that Garrels consented to the trial court's *sua sponte* declaration of a mistrial, we need not address her argument alleging that manifest necessity did not exist. *See Ex parte Jackson*, Nos. 09-14-00138-CR, 09-14-00139-CR, and 09-14-00140-CR, 2014 WL 3845780, at *7 n.1 (Tex. App.—Beaumont Aug. 6, 2014, pet. ref'd) (mem. op., not designated for publication) (citing Tex. R. App. P. 47.1; *Ex parte Brown*, 907 S.W.2d 835, 838 (Tex. Crim. App. 1995)).