COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00324-CR

EX PARTE KENNETH LEE GRADNEY

FROM THE 297TH DISTRICT COURT OF TARRANT COUNTY
TRIAL COURT NO. 1405089D

MEMORANDUM OPINION[1]

Applicant Kenneth Lee Gradney appeals from the trial court's order denying his pretrial habeas corpus application in which he asserted a retrial was double-jeopardy barred after his first trial ended in a mistrial. Because Gradney requested the mistrial, he was required to show that the State acted with the specific intent to avoid the prospect of an acquittal to bar his retrial. Gradney did not make this showing to the trial court; therefore, double jeopardy would not be

[1]*See* Tex. R. App. P. 47.4.

offended by a retrial, leading to our conclusion that the trial court did not abuse its discretion by denying Gradney's application.

I. BACKGROUND

A. THE OFFENSE AND POLICE INVESTIGATION

On February 6, 2015, a man entered a convenience store that was owned by Hue Dinh. After Dinh attempted to help the man, whom she believed had "special needs," the man stabbed Dinh and ran out of the store with the cash register, leaving behind a food-stamp card that he had told Dinh he wanted to use to buy groceries at the store. Two men, Benjamin Owens and Aurelio Arrellano, responded to Dinh's cries for help, confronted the man, and returned the cash register to Dinh. The man fled. Arrellano was familiar with the man because he was in the area "pretty much all the time."

The responding police officers, Officer Nicholas Toombs and Officer Justin Tullis, were able to get a "vague" description of the robber: A "black male," who walked "with a limp," was "wearing a black shirt," and had "an afro-style haircut." Because Dinh was understandably upset, her description of her attacker was "conflicting" and was clear only on the fact that "he was dark." The officers broadcast that the suspect was "dark" and "limping" and detailed what direction he had been seen running from the store. They also reported that the suspect was wearing a dark jacket and beige pants.

While Tullis was patrolling the area, he saw a man in "dark clothing" running across the street. Tullis stopped him and when the man walked toward

him, Tullis noticed that his walk "was definitely different." The man identified himself as "Kenneth Treeman," and Tullis believed that he was intoxicated. Although Tullis was unable to identify a Kenneth Treeman through the police data system, Tullis took a picture of the man. This encounter was recorded by Tullis's dashboard video camera. The man was later identified as Gradney.

A short time later, Tullis was dispatched to transport another man, later identified as Perry Barker, to Dinh's convenience store for a possible identification. This drive also was recorded by Tullis's dashboard video camera. When they arrived at Dinh's store, witnesses told Tullis that Barker was not the robber they had seen. Barker was arrested for public intoxication. In the arresting officer's report, he noted that Barker had been initially detained because he "match[ed] the description of the robbery suspect."

Tullis later compared the photo he had taken of the first man to a video of the robbery and to the video from his dashboard camera from the first encounter and concluded that it was the same man in all three. In fact, the distinctive, dark jacket Tullis saw on the robber in the video from the convenience store was the same jacket Gradney was wearing when Tullis stopped him a short time later. Tullis did not include his transport of Barker to the convenience store in his resulting report regarding his encounter with Gradney. Tullis also did not mention Barker to the investigating detective, although Tullis did show the detective the video of his initial detention of Gradney. Approximately three weeks later, Gradney was arrested for the aggravated robbery of the

convenience store. A grand jury indicted Gradney for aggravated robbery. *See* Tex. Penal Code Ann. § 29.03(a) (West 2011).

B. MISTRIAL

At trial, the State called Tullis as a witness to testify to his initial detention of Gradney. After Tullis testified to his questioning of Gradney and the fact that he eventually "let him go," Tullis described his later transport of Barker to the convenience store. Tullis stated after witnesses at the convenience store could not identify Barker as the robber, Barker was arrested for public intoxication. During cross-examination, Tullis confirmed that he did not mention Barker in his report regarding Gradney, causing counsel for Gradney—Mary Thornton—to ask for a hearing outside the jury's presence. The State then learned that Tullis had Barker's arrest report showing Barker had matched the description of the robbery suspect but had been arrested for public intoxication; therefore, the State immediately turned the report over to Thornton.

Thornton moved for a mistrial and argued that the failure to disclose that Tullis had detained another individual—Barker—was exculpatory information that was required to be disclosed by the State before trial. Thornton stated that a continuance would not ameliorate the harm caused by the late production because "[h]ad [she] known about [Barker], [her] strategy, [her] voir dire, [her] argument, the way [she] question[ed] witnesses would be totally different, because [she] would be basing those questions [on the fact] that they had a second suspect." The lead prosecutor—Rebecca McIntire—asserted that Tullis's

dashboard-camera video, which the State had produced before the trial, clearly showed that Tullis had detained a second individual after his encounter with Gradney and that Tullis had taken that person to the convenience store for a possible identification.[2] Thornton admitted that she had received the video during discovery but that she had not watched it past Tullis's encounter with Gradney to see the second suspect in Tullis's patrol car. Even so, Thornton asserted that the video did not clearly show that the second man on the video was a suspect in the robbery or that he had been taken to the convenience store for identification.

The trial court granted Gradney's request for a mistrial based on the late disclosure of a second suspect:

> [T]he Court, after considering the other alternatives that are available in the form of granting a continuance as well as granting other time to the defense would not solve or eradicate the problem, because the voir dire in the case, the Defense, throughout the case, has indicated that there is a mistake in identity of [Gradney]; and that had this information been made available, could have potentially changed or altered the Defense in terms of the overall tenor of this case.

[2]The audio on the video was "limited" and "muted" at certain points. The portion of the video reflecting Tullis's encounter with Gradney occurred approximately five minutes into the fifty-five minute video; the portion showing Barker occurred approximately thirty-four minutes into the video, which was shortly after Tullis took Gradney's picture and left.

C. PRETRIAL HABEAS CORPUS APPLICATION

Gradney then filed a pretrial application for habeas corpus relief, arguing that a retrial would violate double jeopardy:

> [T]he State was aware of a second suspect in the aggravated robbery, yet failed to disclose a police report and other evidence noting the existence of a second suspect. This report was not disclosed to [Gradney] until late morning of the second day of trial. The withheld information is material to [Gradney]. The State's nondisclosure of this exculpatory material compelled [Gradney] to move for a mistrial. The defense strategy would have been substantially different had the defense known of this second suspect prior to trial.
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> . . . .
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> A reasonable inference from the State's knowledge of a second suspect, its reliance on a virtually audio-less videotape to disclose such, and its withholding of an offense report is that the State intentionally withheld exculpatory evidence with the intent to avoid the possibility of an acquittal.

See Tex. Code Crim. Proc. Ann. art. 11.01 (West 2015); *Ex parte Robinson*, 641 S.W.2d 552, 555 (Tex. Crim. App. [Panel Op.] 1982). The trial court held a hearing on the application. Tullis testified that during his meeting with McIntire the week before trial, he had disclosed that he had detained a second individual that matched the vague description of the robbery suspect.

Thornton testified that she believed the late disclosure of the "second suspect" affected her trial strategy and provoked her into requesting a mistrial. Thornton again admitted that she had received the video from Tullis's patrol car but had viewed only the portion showing Tullis's earlier encounter with Gradney. Thornton did not believe that the first time McIntire saw or was told about

Barker's arrest report was during trial and thought that Tullis had told McIntire about it pretrial. At the time she requested the mistrial, Thornton believed that the trial was going "better . . . than [she] had hoped" but recognized that a "bad outcome" for Gradney "was possible," especially because the State had not yet admitted evidence that the food-stamp card left in the convenience store by the robber was registered to Gradney.

The State again argued that the presence of a second man on Tullis's dashboard-camera video was "open and obvious," disproving any discovery violation. McIntire testified that she was assigned the case shortly before the trial date and that her review of the video, including Tullis's transport of Barker to the convenience store, caused her to question Tullis about the second man. McIntire stated that she asked Tullis for additional information or reports about the second suspect; but when she received no further information, she forgot about the issue in the rush to prepare for trial, which had unexpectedly been moved to an earlier date. She averred that the first time she saw Barker's arrest report was during the trial. McIntire believed that when the mistrial was granted, the State's case was going better than expected, and Dinh had made an unexpected but "strong" in-court identification of Gradney as the robber. Although Arrellano had failed to identify Gradney at trial as he had during a pretrial photo lineup, she discovered later that his failure was caused by an obstructed sight line in the courtroom and that as he stepped down from the witness stand and had a clear view, he did in fact recognize Gradney as the robber. McIntire had intended to introduce

evidence that when Gradney was arrested, he was wearing the same jacket that the robber had been wearing in the video of the robbery; that the food-stamp card left at the store belonged to Gradney; and that Gradney fled when officers tried to arrest him weeks after the robbery.[3]

The trial court denied the application and did not enter findings of fact or conclusions of law. *See Ex parte Falk*, 449 S.W.3d 500, 504 (Tex. App.—Waco 2014, pet. ref'd) (recognizing findings and conclusions regarding pretrial habeas corpus application not required), *cert denied*, 135 S. Ct. 1559 (2015). Gradney appeals from the trial court's denial and argues that because the State intentionally suppressed favorable evidence with the intent to avoid an acquittal, his retrial is double-jeopardy barred. *See* Tex. R. App. P. 31.

II. DOUBLE JEOPARDY

We review the trial court's denial of Gradney's application for an abuse of discretion, viewing the evidence in the light most favorable to the trial court's ruling. *See Ex parte Roberson*, 455 S.W.3d 257, 260 (Tex. App.—Fort Worth 2015, pet. ref'd), *cert. denied*, 136 S. Ct. 490 (2015); *Bond v. State*, 176 S.W.3d 397, 400 (Tex. App.—Houston [1st Dist.] 2004, no pet.). If a mistrial is granted after jeopardy has attached, the State generally is not precluded from trying the defendant again, particularly if the defense requested or consented to the mistrial. *See United States v. Dinitz*, 424 U.S. 600, 607, 96 S. Ct. 1075, 1079–80

[3]Indeed, the record shows that Gradney was also charged with evading arrest.

(1976); *Ex parte Wheeler*, 203 S.W.3d 317, 322 (Tex. Crim. App. 2006); 41 George E. Dix & John M. Schmolesky, *Texas Practice Series: Criminal Practice and Procedure* § 19:34 (3d ed. 2011). But even if the defendant requested the mistrial, a retrial will be double-jeopardy barred if the State engaged in conduct that was specifically intended to provoke or goad him into moving for the mistrial to avoid an acquittal. *See Oregon v. Kennedy*, 456 U.S. 667, 679, 102 S. Ct. 2083, 2091 (1982); *Ex parte Masonheimer*, 220 S.W.3d 494, 507–08 (Tex. Crim. App. 2007); *Ex parte Lewis*, 219 S.W.3d 335, 336–37, 371 (Tex. Crim. App. 2007). To establish this bar, Gradney had the burden of demonstrating that the State acted with "specific intent" to avoid the prospect of an acquittal at the first proceeding. *Masonheimer*, 220 S.W.3d at 507–08. Gradney, as the habeas applicant, bore the burden to prove the State's specific intent by a preponderance of the evidence. *See Ex parte Chandler*, 182 S.W.3d 350, 353 n.2 (Tex. Crim. App. 2005).

We conclude that Gradney did not meet this burden. McIntire believed that the detention of a second individual—Barker—was obvious from the video that was timely produced to Gradney. She asked Tullis for more information about the second individual but received none until the date of trial. The weight of Thornton's assertions that McIntire, in fact, knew about the Barker arrest report before trial comes down to a credibility determination by the trial court, which it was entitled to make in favor of the State. *See Sandifer v. State*, 233 S.W.3d 1, 3–4 (Tex. App.—Houston [1st Dist.] 2007, no pet.). Even Thornton recognized

that a bad outcome for Gradney was possible at the time she moved for a mistrial even though the State's most damning evidence had yet to be introduced. This evidence, viewed in the light most favorable to the trial court's denial of Gradney's application, failed to show by a preponderance that the State intentionally withheld evidence with the specific intent of goading Gradney into moving for a mistrial to avoid the prospect of an acquittal. *See, e.g.*, *Millage v. State*, No. 05-12-00636-CR, 2014 WL 1407331, at *2–3 (Tex. App.—Dallas Apr. 8, 2014, pet. ref'd) (mem. op., not designated for publication); *Ex parte Coleman*, 350 S.W.3d 155, 160–61 (Tex. App.—San Antonio 2011, no pet.); *Ex parte O'Connor*, No. 09-09-00122-CR, 2009 WL 3126254, at *5–6 (Tex. App.—Beaumont Sept. 30, 2009, no pet.) (mem. op., not designated for publication); *Ex parte Lopez*, Nos. 2-06-232-CR, 2-06-233-CR, 2-06-234-CR, 2-06-235-CR, 2-06-236-CR, 2007 WL 1776061, at *2–3 (Tex. App.—Fort Worth June 21, 2007, pet. ref'd) (mem. op., not designated for publication).

III. CONCLUSION

Viewing the evidence in the light most favorable to the trial court's implied findings and ultimate denial, we conclude that Gradney did not show by a preponderance of the evidence that the State had the specific intent to withhold material and favorable evidence in order to goad Gradney into seeking a mistrial and thereby avoid the prospect of an acquittal. We overrule Gradney's sole point and affirm the trial court's order. *See* Tex. R. App. P. 31.3.

/s/ Lee Gabriel

LEE GABRIEL
JUSTICE

PANEL: LIVINGSTON, C.J.; GABRIEL and PITTMAN, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: April 13, 2017