COURT OF APPEALS
DECISION
DATED AND FILED

May 31, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal Nos. 2011AP2349-CR & 2011AP2854-CR

Cir. Ct. No. 2010CT1727

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

SUSAN M. THORSTAD,

DEFENDANT-RESPONDENT.

APPEALS from orders of the circuit court for Dane County: STEPHEN E. EHLKE, Judge. *Reversed and cause remanded for further proceedings.*

¶1 VERGERONT, J.[1] The State appeals the circuit court's order granting Susan Thorstad's motion to dismiss the criminal complaint on double jeopardy and due process grounds, as well as the order denying the State's motion to reconsider the order dismissing the complaint.[2] The State contends that neither double jeopardy nor due process prohibits a second prosecution in this case because Thorstad moved for the mistrial and was not induced to do so by "prosecutorial overreaching." We agree that a retrial is not barred on double jeopardy or due process grounds. Therefore, we reverse the order dismissing the criminal complaint and the order denying the State's motion for reconsideration; and we remand for further proceedings.

BACKGROUND

¶2 Susan Thorstad was charged with operating a motor vehicle while intoxicated (OWI), second offense, and operating with a prohibited alcohol concentration (PAC), second offense, in violation of WIS. STAT. § 346.63(1)(a) and (b), respectively. Prior to trial, the court entered an order precluding the State or any witnesses from referencing any of Thorstad's prior contacts with law enforcement, including prior arrests and convictions. However, during the trial, the arresting officer testified that he arrested Thorstad for operating under the

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) and (3) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[2] In an order entered in November 2011, we noted that the notice of appeal from the circuit court's order dismissing the criminal complaint was filed before the reconsideration motion hearing had occurred, and therefore the appeal from the denial of the motion to reconsider was not part of the original appeal. We concluded that, if the State wished to appeal the decision resulting from the reconsideration motion hearing, it must file another notice of appeal in the circuit court. The State did so, and we later consolidated the two appeals.

influence as a second offense. Thorstad moved for a mistrial on the ground that the officer's testimony violated the court's order that witnesses not discuss Thorstad's prior contact with law enforcement. The prosecutor stated to the court: "[I]t's not [the officer's] fault. I failed to inform him not to say that this morning, so I don't want the officer to feel like it was his fault …." The court indicated that the court did not find that "the deputy did this on purpose. I think it was a mistake." Nevertheless, the court granted Thorstad's motion and adjourned to dismiss the jury.

¶3 Later that morning, the parties and the court reconvened, and Thorstad indicated that she would consent to waiving her right to a jury trial and continuing with the trial to the bench. The State refused to consent to a bench trial, so the proceedings were concluded.

¶4 Thorstad moved to dismiss the criminal complaint on double jeopardy and due process grounds. After indicating that the court did not find that the prosecutor "tried to do anything improper or wrong," the court concluded that the mistrial was occasioned "by whatever lack of communication occurred to cause the deputy to say that this was a second offense." The circuit court found this failed communication was due to "laxness on the part of the State." On this ground, the circuit court granted Thorstad's motion to dismiss.

¶5 The State moved for reconsideration of the order to dismiss with prejudice. The circuit court denied the motion. The court again clarified that the court did not find that the prosecutor "was doing anything in terms of prosecutorial overreaching." The court also clarified that, although its comments at the hearing on the motion to dismiss focused on double jeopardy, the court would have come to the same conclusion on the ground of due process in light of

the fact the mistrial was caused by the State and the State refused to continue with a trial to the court.

DISCUSSION

¶6 The State contends that the circuit court erred in dismissing the criminal complaint because retrial is not barred on the ground of double jeopardy absent a showing of prosecutorial intent as defined in the case law, and the court found such intent did not exist in this case. With respect to the issue of due process, the State contends that its refusal to consent to a bench trial did not violate Thorstad's right to due process and, even assuming a due process violation occurred, the appropriate remedy would be a new trial, not a bar to retrial.

¶7 Thorstad responds that double jeopardy bars retrial because prosecutorial laxness induced Thorstad to request a mistrial, and that due process bars retrial because the State refused to continue with the trial to the court after the State violated the court order when the arresting officer testified about Thorstad's prior contact with law enforcement.[3]

¶8 For the reasons we explain below, we conclude that neither double jeopardy nor due process bars retrial in this case.

[3] Thorstad also contends that, even if we conclude that neither due process nor double jeopardy alone bars retrial, a "synergy" or "combination of due process and double jeopardy grounds" establishes that Thorstad's constitutional rights are violated by retrial. This argument is insufficiently developed, and we do not address it. *See* ***Barakat v. DHS***, 191 Wis. 2d 769, 786, 530 N.W.2d 392 (Ct. App. 1995) (explaining that we need not address insufficiently developed arguments).

I. Double Jeopardy

¶9 Both the United States and Wisconsin Constitutions protect against subjecting any person "for the same offense to be twice put in jeopardy." ***State v. Hill***, 2000 WI App 259, ¶10, 240 Wis. 2d 1, 622 N.W.2d 34. However, as a general matter, retrial is not barred when a defendant successfully requests a mistrial because, in that situation, "the defendant is exercising control over the mistrial decision or in effect choosing to be tried by another tribunal." ***State v. Jaimes***, 2006 WI App 93, ¶7, 292 Wis. 2d 656, 715 N.W.2d 669 (citation omitted). There is an exception to this general rule, which is the subject of the dispute in this case.

¶10 It is well established that "retrial is barred when a defendant moves for and obtains a mistrial due to prosecutorial overreaching." ***Hill***, 240 Wis. 2d 1, ¶11 (citing ***State v. Copening***, 100 Wis. 2d 700, 714, 303 N.W.2d 821 (1981)); *accord* ***Oregon v. Kennedy***, 456 U.S. 667, 679 (1982) ("[W]e do hold that the circumstances under which such a defendant may invoke the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial."); ***Jaimes***, 292 Wis. 2d 656, ¶8; ***State v. Lettice***, 221 Wis. 2d 69, 82, 585 N.W.2d 171 (Ct. App. 1998). To constitute prosecutorial overreaching, the conduct which induces the defendant to move for a mistrial must satisfy two elements:

> (1) The prosecutor's action must be intentional in the sense of a culpable state of mind in the nature of an awareness that his [or her] activity would be prejudicial to the defendant; *and* (2) the prosecutor's action was designed either to create another chance to convict, that is, to provoke a mistrial in order to get another "kick at the cat" because the first trial is going badly, or to prejudice the defendant's rights to successfully complete the criminal

> confrontation at the first trial, i.e., to harass him [or her] by successive prosecutions.

Copening, 100 Wis. 2d at 714-15 (emphasis in original).

¶11 Thorstad does not contend that she was induced to request a mistrial by prosecutorial overreaching. Instead, Thorstad contends that the prosecutor's "laxness" induced her to request a mistrial, that is, the prosecutor's failure to inform the testifying officer not to mention this was Thorstad's second offense. Whether a mistrial induced by prosecutorial "laxness" is an exception to the general principle that retrial is not barred when a defendant requests a mistrial is a question of law we review de novo. *See* ***State v. Badker***, 2001 WI App 27, ¶8, 240 Wis. 2d 460, 623 N.W.2d 142 ("[W]hether the circuit court's findings of fact satisfy a constitutional standard is a question of law that we review de novo." (citation omitted)).

¶12 Thorstad cites ***State v. Barthels*** in support of her assertion that prosecutorial laxness that induces a defendant's request for a mistrial bars retrial. ***State v. Barthels***, 174 Wis. 2d 173, 495 N.W.2d 341 (1993), *abrogated in part by* ***State v. Seefeldt***, 2003 WI 47, ¶33, 261 Wis. 2d 383, 661 N.W.2d 822. However, we disagree with Thorstad's reading of ***Barthels***.

¶13 In ***Barthels*** the supreme court reviewed the circuit court's grant of the prosecution's motion for a mistrial, over the defendant's objection, when one of the State's witnesses left the courthouse prior to testifying. ***Barthels***, 174 Wis. 2d at 180. The court stated that, when a prosecutor requests a mistrial, the circuit court must find a "high degree of necessity," or "manifest necessity," before granting the request, and that this determination is committed to the circuit court's discretion. ***Id.*** at 183. Then, in the context of discussing an appellate

court's standard of review of a circuit court decision to grant a mistrial, the court first noted that, generally, if the defendant requests or consents to a mistrial, the reviewing court gives the circuit court's decision to grant a mistrial great deference. ***Id.*** at 184. However, the court stated—and this is the sentence on which Thorstad relies—that if "the prosecutor requests the mistrial, or the judge determines that the defendant's request was occasioned by prosecutorial overreaching *or laxness*, then this court gives stricter and more searching scrutiny to the judge's decision to grant a mistrial." ***Id.*** (emphasis added) (citations omitted). The court then proceeded to apply the strict scrutiny standard to the circuit court's decision to grant the prosecutor's request for a mistrial without further discussion of the reference to prosecutorial "laxness." Indeed, because the case concerned the *prosecutor's* request for a mistrial, there was no discussion, other than the quoted language, of the situation in which a defendant requests a mistrial.

¶14 We doubt that the supreme court intended in ***Barthels***, with one sentence and no further discussion, to expand the exception for prosecutorial overreaching to include another category of conduct—laxness—that need not meet the requirements for overreaching. However, even if Thorstad's reading of ***Barthels*** is plausible when ***Barthels*** is read in isolation, a more recent supreme court case makes clear that ***Barthels*** did not expand the exception.

¶15 In ***State v. Henning***, 2004 WI 89, 273 Wis. 2d 352, 681 N.W.2d 871, the court stated that "[m]ultiple trials on a single charge are not prohibited if the first trial resulted in a mistrial that was justified under the manifest necessity doctrine or was requested or consented to by the defense (absent judicial or prosecutorial overreaching that is aimed at forcing the mistrial)." ***Id.***, ¶43 (quotation omitted) (alteration in original). Nowhere in ***Henning*** was

"prosecutorial laxness" mentioned as conduct that, if it induced a defendant to request a mistrial, would bar retrial.

¶16 We also note that Thorstad has brought to our attention no case from the United States Supreme Court that has extended the exception to prosecutorial laxness. Thorstad cites ***United States v. Jorn***, 400 U.S. 470 (1971), relying on the statement that "lack of preparedness by the Government … implicates policies underpinning … the double jeopardy provision." ***Id.*** at 486. However, read in context, this statement does not support an expansion of the prosecutorial overreaching exception. ***Jorn*** involved a trial judge's sua sponte discharge of a jury without comment from either the prosecutor or the defendant on the need for a mistrial and without considering whether there was a manifest necessity for a mistrial. ***Id.*** at 473. For these reasons, the Court concluded the trial judge erroneously exercised its discretion in discharging the jury and the Court barred retrial on double jeopardy grounds. ***Id.*** at 487. The context of the statement on which Thorstad relies is a discussion of the competing interests judges should consider when deciding to grant a mistrial, in light of the double jeopardy clause. *See* ***id.*** at 486. Nothing in ***Jorn*** suggests that, when a defendant requests a mistrial because of the prosecutor's lack of preparedness, a retrial is barred. Indeed, the Court in ***Jorn*** explained that, where the circumstances are not attributable to prosecutorial or judicial overreaching, "a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error." ***Id.*** at 485. Thus, ***Jorn*** supports the proposition that retrial is not barred when a defendant requests a mistrial due to prosecutorial "laxness."

¶17 Because we conclude that prosecutorial laxness is not a basis for denying retrial, and because Thorstad has not established that her motion for a

mistrial was induced by prosecutorial overreaching, we hold that the double jeopardy provisions of the United States and Wisconsin Constitutions do not prohibit retrial in this case.

II. Due Process

¶18 The circuit court stated that its decision to bar retrial rested, either alternatively or in part, on due process grounds. The court concluded that the combination of the State's causing the mistrial and the State's refusal to agree to a bench trial constituted a violation of due process.

¶19 Due process guarantees "that a criminal defendant will be treated with that fundamental fairness essential to the very concept of justice." ***State v. Disch***, 119 Wis. 2d 461, 469, 351 N.W.2d 492 (1984) (quoting ***United States v. Valenzuela-Bernal***, 458 U.S. 858, 872 (1982)).

¶20 The State argues that the circuit court erred when it concluded that its refusal to continue the trial without a jury violated Thorstad's right to due process. The State also asserts that the remedy for a denial of due process is to grant the defendant another trial, not to bar retrial.

¶21 The focus of Thorstad's due process argument is on the State's refusal to continue the trial to the court after the jury was excused. Thorstad argues that this prejudiced her and deprived her of due process, and therefore she should not be retried. Thorstad cites ***Singer v. United States***, 380 U.S. 24, 37-38 (1965), as support for her contention that there may be some situations where the defendant can insist upon a bench trial. In ***Singer***, the Supreme Court upheld the validity of a federal rule of criminal procedure permitting a defendant to waive the right to a jury trial only with the consent of the government and approval of the

court. ***Id.*** at 37. The petitioner in ***Singer*** had argued that, in some cases, "passion, prejudice, public feeling, or some other factor may render impossible or unlikely an impartial trial by jury." ***Id.*** at 37-38. However, because the petitioner had requested a bench trial only to "save time," the Court did not address whether there may be situations where the government must consent to a bench trial. ***Id.*** at 38.

¶22 We disagree with Thorstad that this is the type of situation where the State's insistence on trial by jury could result in the denial to the defendant of an impartial trial upon retrial. *See* ***id.*** at 37. Thorstad has not alleged that the State's refusal to continue without a jury in any way affects her right to be tried by an impartial jury: she can be retried by a jury that was not exposed to the testifying officer's comment regarding her prior contact with law enforcement. Accordingly, we reject Thorstad's assertion that she was denied due process when the State refused to forego a jury trial and continue with a bench trial and that therefore retrial is barred.

CONCLUSION

¶23 We reverse the order of the circuit court dismissing the criminal complaint against Thorstad, as well as the order denying the State's motion for reconsideration. We remand for further proceedings.

By the Court.—Orders reversed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.