IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
	)	
v.	)	ID. No. 0405017780
	)	
JEROME SULLINS,	)	
	)	
Defendant.	)	

Submitted: March 21, 2006
Decided: April 11, 2006

OPINION

Defendant's Motion to Dismiss Indictment.
Denied.

Motion to Appointment of New Counsel.
Denied.

Appearances:

Jan A. T. Van Amerongen, Jr., Esquire, Wilmington, Delaware.
Attorney for Defendant Jerome Sullins

Martin O'Connor, Esquire, Wilmington, Delaware.
Deputy Attorney General.

JOHN E. BABIARZ, JR., JUDGE.

Defendant has moved to dismiss the indictment in this case on double jeopardy grounds. He asserts that the Court *sua sponte* declared a mistrial on the occasion of his first trial under circumstances not amounting to manifest necessity or, in the alternative, that the defense was "goaded" into requesting a mistrial. The motion will be denied because the Court did not act *sua sponte*, and the defense was not goaded into requesting a mistrial. Defendant's *pro se* motion for appointment of new counsel will also be denied.

The indictment charges Defendant with Trafficking in Cocaine and associated drug charges. Defendant was arrested at his home, where he was serving a sentence on house arrest, following the execution of a search warrant based in part on information supplied by a confidential informant.

Shortly into the first trial, which began on February 15, 2005,[1] his defense counsel, who is not now representing Defendant, moved for a mistrial when the prosecutor asked the first witness, a police officer, whether he was "working with an individual or an informant." The defense argued that the reference to an informant would unfairly buttress the credibility of the police witnesses. The Court denied the motion but cautioned the prosecution that the witness should not "even come close

[1] After the mistrial was declared, the defendant jumped bail. He was re-apprehended in California and returned to Delaware in December, 2005.

to testifying as to what an informant told him."

On re-direct examination, the prosecutor asked the witness to describe his "role in this, what actually went down on April 21st, 2004." The witness replied he that he "had information that a black male named George who lived on Carter Street was selling crack cocaine." According to other testimony George was a name used by Defendant. At this point Defendant renewed his motion for a mistrial. He argued that not only had the existence of an informant been disclosed but also the information supplied by him. The Court denied the motion but instructed the jury to disregard the testimony because it was hearsay.[2]

At the conclusion of the day, the defense requested a *Flowers*[3] hearing to determine whether the confidential informant could testify favorably to the defense case. While that request was not explicitly tied to a motion for a mistrial, the Court took it to be, since it related to the previous mistrial motions and argument covered a good bit of the same ground. The Court denied the motion based on its recollection of the *Flowers* opinion.

During the overnight recess the Court re-read *Flowers* and concluded that the

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[2] In retrospect, this motion should have been granted in view of the Court's earlier admonition not to disclose the contents of the informant's communication. The Court also now entertains some doubt as to whether the jury could have disregarded the testimony.

[3] *State v. Flowers,* 316 A.2d 564 (Del. 1973).

previous day's ruling was erroneous. At the start of the next day's proceedings, the Court discussed the possible reversal of its position primarily with the prosecution. The following exchange took then place.

> THE COURT: Well, Mr. Malik [defense counsel], I don't know if there's anything for you to say since I told you I'm about 98 percent toward granting your motion.
>
> MR. MALIK: Sometimes, Your Honor, it's better to say nothing and just sit down. That's what I'm going to do. I agree with the Court.
>
> THE COURT: I will grant then the defendant's motion for a mistrial based on not having had an opportunity to have a *Flowers* hearing pretrial. The case will go back on the list so the State can then determine whether it's necessary at the subsequent trial to refer to the informer because that appears to be the key element here.
> So a mistrial is declared.
>
> MR. MALIK: Okay. Thank you, Your Honor.

The prosecutor then stated that he was of the impression that a mistrial was not being considered and began to re-argue the merits of his *Flowers* position:

> MR. CHAPMAN [prosecutor]: Mr. Malik didn't file the pretrial *Flowers* hearing before the trial. I don't see why the State is being – why the case – there's got to be a mistrial declared.
>
> MR. MALIK: Your Honor, if I can just respond just for the purposes of the record. I'd like to respond to why I didn't file for a *Flowers* hearing before trial. That was because under the three scenarios of *Flowers*, I didn't think that anything applied where there was a basis for it when we got into trial. And then when the State started mentioning the informant – they mentioned the informant, not me.

THE COURT: I find that as well.

Defendant argues that the Court acted *sua sponte* and was thus required to find "manifest necessity"[4] before granting a mistrial. The Court concedes that it did not consider whether there was a manifest necessity for a mistrial. But that was because the Court correctly believed that it was acting on a defense motion.

Several factors of record support this belief. First, the Court stated that it was granting the "defendant's motion for a mistrial." Second, following the ruling defense counsel said, "Okay. Thank you," and did not protest that defendant had not moved for a mistrial. Third, the defense did not join with the prosecution when it said that it did not realize that a mistrial was under consideration. And, fourth, the defense spoke in support of the Court's ruling when it was attacked by the prosecution. This case is in no way comparable to *Hughey, supra*, where the defendant objected to the mistrial or *Bailey, supra*, where the defendant apparently did not get the opportunity to object.[5] Here there is no evidence of an objection by the defendant when he had ample opportunity to object. On the contrary, the record demonstrates that the

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[4]The double jeopardy clause does not preclude a defendant's retrial if the record shows the mistrial was declared *sua sponte* by the Court for reasons of "manifest necessity." *Hughey v. State*, 522 A.2d 335, 338 (Del. 1987) (citing *Bailey v. State*, 521 A.2d 1069 (Del. 1986)).

[5]In *Bailey*, the trial judge stopped the proceedings and without discussion with the defense announced that " '[a] mistrial is declared. The case will be rescheduled for trial at a later date. We will stand in recess.' " 521 A.2d at 1074.

defense saw the Court's action the same way that the Court did, as the granting of a defense motion. Because the Court granted the defense motion for a mistrial, Defendant cannot claim that this was error warranting dismissal.

Nor can the defense show that it was goaded by the prosecution into moving for a mistrial, thereby waiving the protection of the double jeopardy clause. Under both the state and federal double jeopardy clauses, a subsequent trial is prohibited if bad faith conduct by a judge or a prosecutor is intended to provoke the defense into moving for a mistrial.[6] In assessing intent in this context, the court is to rely primarily on the objective facts and circumstances leading up to the request for a mistrial.[7] In this case, defense counsel made his first motion for a mistrial after the prosecutor's second substantive question to his first witness, far too soon for defense counsel to have been goaded into anything.

Defense counsel again moved for a mistrial based on the officer's non-responsive testimony referring to information he had received that had started the investigation. Intentional prosecutorial action designed to provoke a mistrial is not established by a spontaneous declaration from a witness.[8] Under the circumstances

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[6] *Bailey v. State*, 521 A.2d at 1078 (citing *United States v. Dinitz*, 424 U.S. 600, 611 (1976) and *Oregon v. Kennedy*, 456 U.S. 667, 679 (1982)).

[7] *Id.*

[8] *Bailey v. State*, 521 A.2d at 1079.

of this case, it is clear that the prosecutor did not act in bad faith or intend to provoke a mistrial.

For all these reasons, Defendant's motion to dismiss the indictment is ***Denied.*** Defendant's *pro se* motion for appointment of new counsel is ***Denied***.

It Is So ORDERED.

Judge John E. Babiarz, Jr.

JEBjr/ram/bjw
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