

IN THE SUPREME COURT OF THE STATE OF DELAWARE

IN THE MATTER OF THE §
PETITION OF JAMES DORSEY §
FOR A WRIT OF PROHIBITION § No. 244, 2001
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Submitted: June 29, 2001

Decided: July 23, 2001

Before **VEASEY**, Chief Justice, **WALSH** and **HOLLAND**, Justices

ORDER

This 23rd day of July 2001, upon consideration of the petition of James Dorsey for a writ of prohibition, and the State of Delaware's answer and motion to dismiss, it appears to the Court that:

(1) Dorsey seeks a writ of prohibition to prevent the Superior Court from retrying him on charges of first degree murder and possession of a firearm during the commission of a felony. Dorsey claims that the Double Jeopardy Clause of the Delaware Constitution¹ bars his retrial because the prosecution a) intentionally deprived him of a fair trial; and b) presented insufficient evidence to sustain his conviction.² The State of Delaware, as the

¹Del. Const. art. I, § 8.

²This is the second time Dorsey has sought a writ of prohibition on the basis of these arguments. We dismissed Dorsey's first petition, concluding that he should file a
(continued...)

real party in interest, has filed a response and a motion to dismiss Dorsey's petition. After careful consideration of the parties' positions, we have determined that the State's motion to dismiss must be granted.

(2) In May 1998, a Superior Court jury convicted Dorsey of murder in the first degree, possession of a firearm during the commission of a felony, and possession of a deadly weapon by a person prohibited. At the subsequent penalty hearing, the jury recommended that the Superior Court impose the death penalty. Following the penalty hearing, Dorsey moved for a mistrial or, in the alternative, for a judgment of acquittal. In November 1998, the Superior Court granted Dorsey a new trial based upon its determination that he had been deprived of a fair trial.³ Dorsey's convictions for murder and possession of a firearm during the commission of a felony were vacated. The

²(...continued)

motion to dismiss in the Superior Court in the first instance so that we might have the benefit of the trial court's view of the evidence and the conduct of counsel. *In re Dorsey*, Del. Supr., No. 573, 2000, Walsh, J., 2001 WL 93008 (January 23, 2001) (ORDER). Dorsey filed a motion to dismiss, which was denied by the Superior Court, and then filed the present petition for a writ of prohibition in this Court.

³There were three bases for the Superior Court's decision: the Medical Examiner gave improper testimony concerning Dorsey's credibility; a complete ruling concerning the admissibility of certain evidence was never made on the record; and the prosecution's closing argument was improper. It appears that, with one exception, Dorsey did not object to any instance of prosecutorial misconduct during the trial and did not move for a mistrial until after the penalty hearing.

Superior Court did not disturb Dorsey's conviction for possession of a deadly weapon by a person prohibited, but that conviction was reversed by this Court on appeal.⁴

(3) In a writ of prohibition proceeding, the petitioner has the burden of demonstrating to this Court, by clear and convincing evidence, that the contemplated action of the trial court exceeds its jurisdiction.⁵ A writ of prohibition will not be issued if the petitioner has another adequate and complete remedy.⁶ The right to appeal a criminal conviction is generally considered to be such an adequate and complete remedy.⁷ This Court has acknowledged, however, that the remedy of appeal in a criminal case may be inadequate when the lack of jurisdiction of the trial court is clear and unmistakable.⁸

(4) Dorsey has failed to demonstrate by clear and convincing evidence that the Superior Court's contemplated action of retrying him for

⁴*Dorsey v. State*, Del. Supr., 761 A.2d 807 (2000).

⁵*In re Hovey*, Del. Supr., 545 A.2d 626, 629 (1988).

⁶*Id.* at 628.

⁷*Id.*

⁸*Id.* at 629.

murder and possession of a firearm during the commission of a felony exceeds its jurisdiction. In its decision on Dorsey's motion to dismiss, the Superior Court reiterated that Dorsey's right to a fair trial had been undermined by prosecutorial misconduct, but nevertheless found, based upon its view of the evidence and the conduct of counsel at trial, that the prosecution had not willfully provoked a mistrial or exhibited the kind of bad faith conduct the double jeopardy bar to retrial is intended to address.⁹ Dorsey has failed to demonstrate by clear and convincing evidence that those findings by the Superior Court were incorrect. We do not find that the Superior Court clearly and unmistakably lacks jurisdiction to retry him.

(5) As for Dorsey's claim that double jeopardy bars his retrial because there was insufficient evidence to convict him, the Superior Court twice denied Dorsey's motions for judgment of acquittal on that basis—once after the close of the prosecution's case and again after trial. Dorsey has failed to demonstrate by clear and convincing evidence that those rulings of the Superior Court were incorrect. Again, we do not find that the Superior Court clearly and unmistakably lacks jurisdiction to retry him.

⁹*Bailey v. State*, Del. Supr., 521 A.2d 1069, 1078 (1987) (citing *Oregon v. Kennedy*, 456 U.S. 667, 679 (1982)).

(6) Our denial of relief through a writ of prohibition in this case does not preclude later assertion of a claim of prosecutorial misconduct in the event of a direct appeal of any subsequent conviction.

NOW, THEREFORE, IT IS ORDERED that the petition for a writ of prohibition is DISMISSED.¹⁰

BY THE COURT:

s/ Joseph T. Walsh
Justice

¹⁰We also deny Dorsey's subsequently-filed request for oral argument.