RENDERED: December 12, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-003242-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE WILLIAM E. MCANULTY, JR., JUDGE
ACTION NO. 94-CR-473

JOHN PATRICK DOOLAN — APPELLEE

OPINION
REVERSING

*** *** ***

BEFORE: WILHOIT, CHIEF JUDGE;[1] COMBS and JOHNSON, JUDGES.

JOHNSON, JUDGE. The Commonwealth of Kentucky (Commonwealth), appeals from an opinion and order of the Jefferson Circuit Court entered on January 23, 1997, that dismissed with prejudice on double jeopardy grounds, two counts of robbery in the first degree against the appellee, John Patrick Doolan (Doolan). We reverse.

On February 23, 1994, Doolan was indicted on three counts of robbery in the first degree, Kentucky Revised Statute (KRS) 515.020; two counts of burglary in the first degree, KRS 511.020; sexual abuse in the first degree, KRS 510.110; and persistent felony offender, first degree, KRS 532.080. The Commonwealth moved the trial court to dismiss the two burglary

[1] Chief Judge Wilhoit concurred in this opinion prior to his retirement effective November 15, 1997. Release of the opinion was delayed by normal administrative handling.

counts on July 7, 1994. The remaining charges stem from two separate robberies.

The first robbery occurred on July 21, 1993, at Marco Polo Antiques, Louisville, Kentucky, when a man entered the business, held Cheng Shen (Shen) at gunpoint, threatened her, and demanded money. Shen identified Doolan as the man who had spoken with her manager approximately one hour prior to the robbery. Both she and the manager subsequently identified Doolan in a photographic lineup as the robber.

The second robbery occurred on October 19, 1993, at Howard & Company, Louisville, Kentucky, when a man entered the business and robbed Novella Boehnke (Boehnke) and Anita Heim (Heim). Boehnke contacted Louisville police over a year later in December 1994, after seeing Doolan on an episode of "Louisville's Most Wanted." Both Boehnke and Heim subsequently identified Doolan in a photographic lineup.

Doolan was first tried on all counts on July 5, 1994.[2] Doolan orally moved the trial court to suppress Boehnke's identification of him from "Louisville's Most Wanted." The trial court ruled that Boehnke could testify that she viewed a photograph of Doolan on television, but she could not identify the program. Boehnke did not violate the order.

Doolan was found guilty on all counts and sentenced to prison for fifty years. The Kentucky Supreme Court reversed Doolan's conviction in an unpublished opinion (case #94-SC-633)

[2] The first trial was presided over by Judge Edwin A. Schroering, Jr. (Judge Schroering).

on May 23, 1996. The Court remanded the case for new trials with instructions that counts one and three of the indictment (the Shen robbery) be severed for a separate trial from counts four and five (the Boehnke and Heim robberies).[3] Judge Schroering, who, as stated in note 1, had presided at the first trial, recused himself from the case, and Judge William E. McAnulty, Jr., was randomly assigned to the case. The retrial on counts four and five began on November 16, 1996.

Doolan renewed his motion to suppress Boehnke's identification of him from "Louisville's Most Wanted." Judge McAnulty ruled that the law of the case controlled and the previous judge's ruling which had gone before the Supreme Court would stand. Boehnke testified first, stating that she was shown two photographic lineups, that she did not identify Doolan in the first lineup, but that in the second lineup (which was given as a result of seeing Doolan's photograph on a television program) she did identify him. Boehnke did not mention the name of the program during her testimony.

Heim testified next, stating that she, too, was unable to identify Doolan in the first photographic lineup, but she did identify him in the second lineup. During cross-examination by Doolan's trial counsel, Heim stated that she was aware that Boehnke had seen Doolan's photograph on "Louisville's Most Wanted."

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[3] Doolan was acquitted of counts one and three in a jury trial on December 12, 1996.

The trial court then held a bench conference. The court questioned the prosecutor, Assistant Commonwealth's Attorney Stacy Greive, as to whether she had instructed Heim not to mention "Louisville's Most Wanted." Ms. Greive stated that she was unsure as to her exact instructions to Heim since the television program did not arise in her testimony in the original trial. The prosecutor also stated that Heim's reference to the program was a surprise, given that the information was elicited on cross-examination when her direct examination had not broached the subject.

On the basis of Heim's testimony and the order suppressing the naming of "Louisville's Most Wanted" in witness testimony, Doolan's counsel moved for a mistrial. The Commonwealth objected, stating that the answer was forced by the questioning of Heim by the defense. Judge McAnulty questioned Heim outside of the presence of the jury to determine the instructions Heim was given regarding the limits of her testimony. Heim stated that she did not specifically remember whether the prosecutor told her she was not to mention the program's name prior to the current trial; however, she thought she remembered being told not to do so before the first trial. The trial court granted Doolan's motion for a mistrial.

The Commonwealth moved the trial court to make a specific finding that it was a manifest necessity for the trial court to grant a mistrial and that the Commonwealth's conduct was not intentional in bringing the name of the television program

into the trial. Doolan moved the trial court to dismiss the case with prejudice, arguing that the Commonwealth's negligence caused the mistrial. On November 15, 1996, the trial court held a hearing on the parties' motions. The prosecutor said that after reviewing her notes of her meeting with Heim two days before trial, she strongly believed she had informed Heim not to mention the name of the television program, that she had instructed Heim not to mention several other things, and that Heim's response was inadvertent as a result of the cross-examination question. The trial court ordered that counts four and five be dismissed with prejudice.

The trial court entered a written opinion and order on January 23, 1997, wherein it found the following: (1) the prosecutor was clearly mistaken in her belief that she advised Heim not to mention "Louisville's Most Wanted"; (2) the prosecutor did not intentionally cause Heim to violate the evidentiary ruling; (3) the prosecutor stated in court, prior to the trial, that all witnesses were advised of the evidentiary ruling; and (4) the prosecutor had not advised all witnesses of the ruling suppressing the mentioning of the television program. The trial court ruled that the prosecutor's misrepresentation was fundamentally unfair to Doolan and had resulted in the court having to grant a mistrial; therefore, the double jeopardy rule prevented Doolan from being tried a second time. This appeal followed.

The Commonwealth argues that the double jeopardy clause is not applicable, and that Doolan can be tried again because the damaging testimony which resulted in a mistrial was elicited by Doolan during cross-examination, and was not the result of any intentional provocation. Doolan contends that the double jeopardy clause bars him from being retried because the Commonwealth was negligent in not instructing its witnesses to adhere to the trial court's evidentiary ruling.

The Fifth Amendment to the United States Constitution and § 13 of the Kentucky Constitution protect a person from being put in jeopardy twice for the same offense. United States v. Wilson, 420 U.S. 332, 343, 95 S.Ct. 1013, 43 L.Ed.2d 232, 241 (1975). The double jeopardy clause has the further effect of preserving a defendant's right to complete his trial before a particular tribunal, Wade v. Hunter, 336 U.S. 684, 689, 69 S.Ct. 834, 93 L.Ed. 974, 978 (1949), and of protecting a defendant from the burdens which arise from multiple prosecutions. United States v. Larry, 536 F.2d 1149, 1152 (6th Cir. 1976), cert. denied, 429 U.S. 984, 97 S.Ct. 502, 50 L.Ed.2d 595 (1976).

An exception was carved out of the general rule, providing that if a defendant moves for a mistrial, there is no prohibition to retrial. Commonwealth v. Lewis, Ky., 548 S.W.2d 509, 510 (1977); United States v. Dinitz, 424 U.S. 600, 607-608, 96 S.Ct. 1075, 47 L.Ed.2d 267, 273-274 (1976). This exception was narrowed in Stamps v. Commonwealth, Ky., 648 S.W.2d 868 (1983), by our Supreme Court adopting the reasoning of the United

States Supreme Court in Oregon v. Kennedy, 456 U.S. 667, 679, 102 S.Ct. 2083, 2091, 72 L.Ed.2d 416, 427 (1982). The Kentucky Supreme Court held that where the prosecutor intentionally provokes the defendant into moving for a mistrial through his conduct, the double jeopardy clause prohibits retrial of the defendant. 648 S.W.2d at 869. The Kentucky Supreme Court refined this exception in Tinsley v. Jackson, Ky., 771 S.W.2d 331 (1989), when it held: "A party seeking to prevent his retrial upon double jeopardy grounds must show that the conduct giving rise to the order of mistrial was precipitated by bad faith, overreaching or some other fundamentally unfair action of the prosecutor or the court." Id. at 332, citing United States v. Love, 597 F.2d 81 (6th Cir. 1979); Larry, supra; and Tamme v. Commonwealth, Ky., 759 S.W.2d 51 (1988). Additionally, the United States Supreme Court has stated that the facts must be considered on a case-by-case basis in order to determine whether the double jeopardy clause is a bar to further prosecution. Wade, supra, 336 U.S. at 690-691, 93 L.Ed. at 978-979.

The issue in this appeal is whether the trial court abused its discretion in applying the Tinsley standard, and finding that the Commonwealth had been fundamentally unfair to Doolan by representing to the court that the prosecutor had informed all witnesses of the evidentiary ruling that suppressed the mentioning of "Louisville's Most Wanted," when she had not done so. Although Tinsley was rendered subsequent to Stamps, supra, the Supreme Court did not state in Tinsley whether the

Tinsley standard is incompatible with, supersedes, or supplements Stamps. However, we certainly cannot find error in the trial court following the latest ruling of the state's high court. Furthermore, in Tinsley, the Court relied on Larry, supra, wherein the Sixth Circuit stated: "The sole limitation on the authority of the court to determine that a mistrial is "manifestly necessary" is that the judge must exercise his "sound discretion" in determining that the ends of public justice would not be served by a continuation of the proceedings." Id. at 1152, citing United States v. Jorn, 400 U.S. 470, 481, 91 S.Ct. 547, 27 L.Ed.2d 543, 554 (1971).

However, after reviewing the record, this Court determines that the trial court did not find the prosecutor's failure to warn Heim to refrain from identifying "Louisville's Most Wanted" by name was the cause of her mentioning the television program. Heim's mention of the program appears to have been spontaneous and inadvertent and might well have occurred in spite of a pre-trial warning. See e.g., Anderson v. Commonwealth, Ky.App., 902 S.W.2d 269 (1995). At least, there is no finding or even testimony indicating that it would not have.

Secondly, the trial court found no intentional conduct on the part of the prosecutor, but only that she was "mistaken" when she advised the court that all of her witnesses had been warned before the trial not to mention the television program. Under Tinsley v. Jackson, Ky., 771 S.W.2d 331 (1989), the ban against double jeopardy is not implicated unless there was

"prosecutorial misconduct" and this conduct was "precipitated by bad faith, overreaching or some other fundamentally unfair action of the prosecutor or the court." Id. at 332. In this case, the trial court did not find misconduct, but instead found mistake. If the prosecutor was negligent in representing to the court that a warning had been given to Heim, then some sanction might have been imposed upon her, but her mistake did not amount to conduct necessary to bar a retrial either under the Constitution of the United States or the Constitution of Kentucky.

The opinion and order of the Jefferson Circuit Court dismissing counts four and five of the indictment against Doolan is reversed, and the case is remanded to the Jefferson Circuit Court for further proceedings consistent with this Opinion.

ALL CONCUR.

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