IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: SEPTEMBER 21, 2006
NOT TO BE PUBLISHED

FINAL

Supreme Court of Kentucky

2006-SC-000171-MR DATE 10-12-06 ENAGRAWITH, D.C.

JACK CALDWELL, SR. — APPELLANT

V. — APPEAL FROM THE COURT OF APPEALS
ACTION NO. 05-CA-002356

DARREN PECKLER, JUDGE
BOYLE CIRCUIT COURT — APPELLEE

AND

COMMONWEALTH OF KENTUCKY — REAL PARTY IN INTERST

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Appellant, Jack Caldwell, Sr., appeals as a matter of right pursuant to CR 76.36(7) (a) from an order of the Court of Appeals denying his petition for writ of prohibition to prevent his retrial on charges of murder of his neighbor Jim Rachsel, a former principal of the local school district. The Appellant argues that the trial court erroneously declared a mistrial without the "manifest necessity" necessary to do so, thus, violating his constitutional right not to be tried twice for the same offense under the Fifth Amendment of the Constitution of the United States and Section Thirteen of the Kentucky Constitution. Based upon the record, we affirm the Court of Appeals.

Facts and procedural background

The Appellant was indicted on October 1, 2004 by the Boyle County Grand Jury for murder. On August 15, 2005, the trial began. During voir dire, the appellant moved to strike twelve prospective jurors for cause. He argued the jurors made statements regarding the publicity of the trial in the Boyle County area. Based upon this motion, the trial court struck nine of the twelve jurors, but refused to strike the other three after those individuals assured the court they would be fair and impartial. The appellant was then forced to use his peremptory challenges to strike those jurors. After swearing in the jury, the trial court recessed until the next morning.

When court reconvened, the trial court stated that the appellant's motion to strike all twelve jurors should have been granted. Therefore, he restored the peremptory challenges to the Appellant. However, there were no replacement jurors to be utilized in the event the appellant wished to use his peremptory challenges because the jury had been dismissed the previous day. Therefore, the trial court declared a mistrial.

The trial court stated he had already discussed with both counsel he was going to *sua sponte* declare a mistrial. He also noted on record that the error, not striking the three jurors for cause, was preserved on the record. He gave both counsel time to read the relevant law, and then asked if there were any objections to the mistrial for the record. The appellant answered, "No, Your Honor."

On September 13, 2005, the Appellant moved the court to dismiss the charges against him based upon double jeopardy. On November 8, 2005, the

court issued an order denying the motion. Then, the appellant filed a petition for writ of prohibition with the Court of Appeals requesting an order to deny the court the right to retry him. The Court of Appeals denied the writ stating that "after careful review of the record, we believe that [the Appellant] will not be subjected to double jeopardy because he did, in fact, explicitly consent to the court's decision to declare a mistrial." We agree.

Applicable law

"We must review this matter under an appellate standard because it has come before us as a matter of right appeal and not an original action." Grange Mutual Insurance Co. v. Trude, 151 S.W.3d 803, 809 (Ky. 2005)). "Where 'the lower court is acting within its jurisdiction but in error, the court with which the petition for a writ is filed only reaches the decision as to issuance of the writ once it finds the 'conditions precedent,' i.e. no adequate remedy and irreparable harm.'" Id. (citing Grange, 151 S.W.3d at 810). Obviously, if the mistrial was in error, the appellant has no adequate remedy, by appeal or otherwise, upon denial of a writ. Therefore, the first test is successfully met. The second test, irreparable injury, is also met if the writ is denied, because there would be a great injustice if the new trial places him in double jeopardy.

However, once jeopardy attaches, prosecution of the defendant before a subsequent jury is only barred absent manifest necessity for a mistrial *or the defendant either requested or consented to the mistrial.* Commonwealth v. Ray, 982 S.W.2d 671, 673 (Ky. 1998) (citing KRS 505.030(4); Leibson v. Taylor, 721 S.W.2d 690, 693 (Ky. 1986); United States v., Dinitz, 424 U.S. 600, 606-7, 96 S.Ctr. 1075, 1079, 47 L.Ed.2d 267(1976)). A defendant impliedly consents if he

does not object. "Where defendant failed to object . . . defendant impliedly consented . . . and was bound by the result." Blakeman v. Joyce, 511 S.W.2d 112, 114 (Ky. 1974) (citing Marlow Construction Company v. Jacobs 302 S.W.2d 612 (Ky.1957); CR 15.02). This reasoning is consistent with other jurisdictions' holdings as well. See United States v. Avnaim, 211 F.3d 1275 (9th Cir. 2000)(where the defendant implicitly consented to the mistrial when he failed to object); United States v. Smith, 621 F.2d 350 (9th Cir. 1980)(where defendant impliedly consented when he did not object to sua sponte declaration of a mistrial); Keating v. Sherlock, 278 Mont. 218, 924 P.2d 1297 (Mont. 1996); State v. Mounce, 859 S.W.2d 319 (Tenn. 1993).

Here, the Appellant consented to the mistrial. When the trial court declared a mistrial, explaining his error in denying the appellant's motion to strike certain jurors for cause, the appellant made no objection. When the trial court asked if the appellant had any objections to the declaration of the mistrial, he specifically stated, "No, your honor." The appellant had time to make an objection; but did not. Therefore, because he consented to the mistrial, his retrial does not subject him to double jeopardy.

Conclusion

Therefore, the Court of Appeal's decision is affirmed.

All concur, except McAnulty, J., not sitting.

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