STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v ALEXANDER ACEVAL, Defendant-Appellant.	FOR PUBLICATION February 5, 2009 9:10 a.m. No. 279017 Wayne Circuit Court LC No. 05-003228-01 Advance Sheets Version

Before: Murphy, P.J., and K. F. Kelly and Donofrio, JJ.

K. F. KELLY, J.

Defendant pleaded guilty of possession with intent to deliver 1,000 or more grams of cocaine, MCL 333.7401(2)(a)(*i*), and was sentenced to 10 to 15 years' imprisonment. Defendant then filed a delayed application for leave to appeal, which this Court denied[1] and, subsequently, he sought leave to appeal in our Supreme Court. In lieu of granting leave to appeal, the Supreme Court remanded the case to this Court

> for consideration . . . of whether the defendant was denied the right to counsel of his choice under *United States v Gonzalez-Lopez*, 548 US 140 [126 S Ct 2557; 165 L Ed 2d 409] (2006), and for consideration of whether the prosecution's acquiescence in the presentation of perjured testimony amounts to misconduct that deprived the defendant of due process such that retrial should be barred. [*People v Aceval*, 480 Mich 1108 (2008).]

We now consider these issues on remand[2] and affirm.

[1] *People v Aceval*, unpublished order of the Court of Appeals, entered October 5, 2007 (Docket No. 279017).

[2] In his brief on appeal, defendant asserts issues not articulated in the Supreme Court's remand order. Because these issues are unpreserved and because the Supreme Court specifically denied leave to appeal in all other respects, *People v Aceval*, 480 Mich 1108 (2008), these additional issues are not properly before this Court and we do not consider them. See *People v Frazier*, 478 Mich 231, 241; 733 NW2d 713 (2007) (noting review of unpreserved issues is not favored).

I. Facts and Procedural History

This matter arises out of an illegal drug transaction. On March 11, 2005, police officers Robert McArthur, Scott Rechtzigel, and others, acting on information obtained from Chad William Povish, a confidential informant (CI), were on surveillance at J Dubs bar in Riverview, Michigan. Povish previously told police officers that defendant had offered him $5,000 to transport narcotics from Detroit to Chicago. That day, the officers observed defendant, Povish, and Bryan Hill enter the bar. Defendant arrived in his own vehicle, while Povish and Hill arrived in another. Eventually the three individuals left the bar and loaded two black duffel bags into the trunk of Povish's car. Povish and Hill then drove away, while defendant drove away in his own vehicle. Subsequently, the officers stopped both vehicles and found packages of cocaine in the duffel bags located in the trunk of Povish's car. Defendant was subsequently arrested and charged with possession with intent to deliver 1,000 or more grams of cocaine, MCL 333.7401(2)(a)(*i*), and conspiracy to commit that offense, MCL 750.157a.

Before trial, defendant moved for the production of the identity of the CI. During an evidentiary hearing on June 17, 2005, defendant requested that the trial court, Judge Mary Waterstone, conduct an in camera interview of McArthur, the officer in charge of the investigation. The judge agreed, and in the conference it was revealed that McArthur and Rechtzigel knew that Povish was the CI. Further, the officer told the trial court that Povish was paid $100 for his services, plus "he was going to get ten percent, whatever we got." The conference was sealed and the trial court denied defendant's motion.

Subsequently, defendant filed a motion to suppress certain evidence. During a hearing on September 6, 2005, Rechtzigel lied when he testified, in response to defense counsel's questioning, that he had never had any contact with Povish before March 11, 2005. The prosecutor did not object. On September 8, 2005, in another sealed in camera conference between the judge and the prosecutor, the prosecutor admitted that she knew that Rechtizigel had knowingly committed perjury but stated that she "let the perjury happen" because "I thought an objection would telegraph who the CI is." In response, the judge stated that she thought " it was appropriate for [the witness] to do that." Further, the court added, "I think the CI is in grave danger . . . . I'm very concerned about his identity being found out."

The matter went to trial on September 12, 2005. At trial, the prosecutor and the judge continued their efforts to protect the CI's identity. Povish testified that he had never met Rechtzigel or McArthur before they stopped his vehicle on the day that he received the duffel bags and that neither had offered him a deal of any kind. He further testified that did not know what was in the duffel bags and that, until trial, he believed that he could be charged with a crime for his role in the incident. The prosecutor made no objection to this testimony. The prosecutor and the judge again indicated, in another sealed ex parte bench conference on September 19, 2005, that they knew Povish had perjured himself in order to conceal his identity. At the close of the trial, the jury was unable to reach a verdict and, thus, the trial court declared a mistrial.

On December 7, 2005, attorney Warren E. Harris filed an appearance to represent defendant in his retrial, again in Judge Waterstone's court. On March 6, 2006, attorney David L. Moffitt petitioned for leave to file a limited appearance solely for purposes of filing certain motions by defendant, which the trial court granted on March 17, 2006. Subsequently, at a

hearing on March 28, 2006, defendant indicated that he had become aware that the CI was Povish and argued that the case should be dismissed because of the trial court's and the prosecutor's complicit misconduct in permitting perjured testimony. Defendant also requested that both the prosecuting attorney and Judge Waterstone disqualify themselves from the case. Judge Waterstone disqualified herself on the record. The following day, Judge Vera Massey-Jones, the successor judge, entered an order unsealing the three in camera interviews.

Twelve days before defendant's second trial, Harris moved to withdraw because of a breakdown in the attorney-client relationship that he attributed to Moffitt's increased involvement. After finding that Moffitt's appearance was only a limited appearance, the trial court, noting that it "can't deal with lawyers who aren't in the case all the way[,]" disallowed Moffitt from participating in the case and did not permit Harris to withdraw. The trial court stated, "And there's no way in the world I'm going to let you have a new trial lawyer come in here and mess up." Further, the trial court indicated that the matter was set for trial on a "particular date, and it's going to go to trial that date[,]" and that there was "no way I'm going to let" you "ruin my trial docket."

Defendant's retrial began on June 1, 2006, with Harris acting as counsel. Before trial, defendant allegedly contacted a prosecution witnesses and directed him to provide false testimony in support of the defense. After the prosecution discovered this information, it informed the trial court and defense counsel. Subsequently, the witness testified that defendant had asked him to lie and he purged his testimony. Thereafter, defendant pleaded guilty to the charge of possession with intent to distribute more than 1,000 grams of cocaine.

II. Right to Counsel

We first address whether defendant was denied the right to counsel of his choice under *Gonzalez-Lopez*, *supra*. Defendant did not preserve this argument by asserting it in the trial court. Because this issue is, at a minimum, unpreserved,[3] our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Both the United States and Michigan constitutions provide that the accused shall have the right to counsel for his defense. US Const, Am VI; Const 1963, art 1, § 20. A defendant's right under the Michigan Constitution is the same as that guaranteed by the Sixth Amendment. *People v Reichenbach*, 459 Mich 109, 118; 587 NW2d 1 (1998). This guaranteed right encompasses a defendant's right to effective assistance of counsel, *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the right to self-representation, *Faretta v California*, 422 US 806, 818; 95 S Ct 2525; 45 L Ed 2d 562 (1975), the right of indigent defendants to have appointed counsel in felony prosecutions, *Gideon v Wainwright*, 372 US 335, 344; 83 S Ct 792;

[3] By pleading guilty, defendant waived appellate review of this issue. "[A] plea of guilty waives all nonjurisdictional defects in the proceedings." *People v New*, 427 Mich 482, 488; 398 NW2d 358 (1986) (quotation marks and citation omitted). Nevertheless, we will address this issue pursuant to our Supreme Court's order.

9 L Ed 2d 799 (1963), and the right to choice of counsel, *Powell v Alabama*, 287 US 45, 53; 53 S Ct 55; 77 L Ed 158 (1932), which is at issue in this case.

The United States Supreme Court recently expounded upon a defendant's right to choice of counsel in *Gonzalez-Lopez*, *supra*. The Court stated, "[The Sixth Amendment] commands . . . that the accused be defended by the counsel he believes to be best." *Gonzalez-Lopez*, *supra* at 146. The Court continued, "Deprivation of the right is 'complete' when the defendant is *erroneously* prevented from being represented by the lawyer he wants . . . ." *Id.* at 148 (emphasis added). It is not necessary that a defendant show prejudice; it is enough that a defendant merely show that a deprivation occurred. *Id*. at 150. However, this right to choice of counsel is limited and may not extend to a defendant under certain circumstances. *Id*. at 151; *Wheat v United States*, 486 US 153, 164; 108 S Ct 1692; 100 L Ed 2d 140 (1988). As the *Gonzalez-Lopez* Court stated:

> [T]he right to counsel of choice does not extend to defendants who require counsel to be appointed for them. See *Wheat*, 486 U.S., at 159, 108 S. Ct. 1692, 100 L. Ed. 2d 140; *Caplin & Drysdale [v United States]*, 491 U.S. [617], at 624, 626, 109 S. Ct. 2646, 109 S. Ct. 2667, 105 L. Ed. 2d 528 [1989]. Nor may a defendant insist on representation by a person who is not a member of the bar, or demand that a court honor his waiver of conflict-free representation. See *Wheat*, 486 U.S., at 159-160, 108 S. Ct. 1692, 100 L. Ed. 2d 140. We have recognized a trial court's wide latitude in balancing the right to counsel of choice against the needs of fairness, *id.*, at 163-164, 108 S. Ct. 1692, 100 L. Ed. 2d 140, and against the demands of its calendar, *Morris v. Slappy*, 461 U.S. 1, 11-12, 103 S. Ct. 1610, 75 L. Ed. 2d 610 (1983). [*Gonzalez-Lopez*, *supra* at 151-152.]

Similarly, this Court has opined that "[a] balancing of the accused's right to counsel of his choice and the public's interest in the prompt and efficient administration of justice is done in order to determine whether an accused's right to choose counsel has been violated." *People v Krysztopaniec*, 170 Mich App 588, 598; 429 NW2d 828 (1988).

In the present matter, defendant was represented by not one, but *two*, attorneys of his choice. Before the case was transferred to Judge Massey-Jones, Judge Waterstone permitted Moffitt to file a limited appearance and participate in the case solely with respect to certain pretrial motions, while Harris, who was already part of the case, handled matters pertaining to defendant's retrial. Just 12 days before trial, Harris moved to withdraw because of a disagreement between the two counsel regarding proper trial strategy and a resulting breakdown in the attorney-client relationship between Harris and defendant. At the hearing on Harris's motion, Judge Massey-Jones disallowed Moffitt's limited appearance and denied Harris's motion to withdraw. Defendant did not object to proceeding to trial with Harris.

Given these facts, it is our view that defendant was not denied his right to choice of counsel. While Judge Massey-Jones denied defendant a second "limited-attorney" of defendant's choosing, defendant was not denied counsel of his choice, Harris, who was fully involved in the litigation. Moreover, the trial court did not indicate that defendant could not have a cocounsel. Rather, the trial court's statement that it would not "deal with lawyers who aren't in the case all the way" would have permitted Moffitt to file a full appearance and to act as

cocounsel had defendant wished Moffitt to do so. Moffitt, however, did not file an appearance and was unwilling or unable to undertake the complete defense of defendant's case. Significantly, defendant did not object to the continued representation by Harris. In short, defendant exercised his right to counsel of choice by proceeding to trial with Harris, who was willing and able to do so.

In addition, our review of the record indicates that Judge Massey-Jones's decision to deny Harris's motion to withdraw 12 days before trial was based primarily on retrying defendant in a timely manner. At one point, Judge Massey-Jones stated, "[T]here's no way in the world I'm going to let you have a new trial lawyer come in here and mess up[,]" and, further, indicated that substituting a new attorney would "ruin [the court's] trial docket." Here, the demands of the trial court's calendar clearly outweighed defendant's right to choice of counsel when defendant maintained the first and primary attorney of his choosing, despite the fact that limited counsel was ejected from the case just 12 days before trial. *Morris*, *supra* at 11-12; *Krysztopaniec*, *supra* at 598. Under these circumstances, we cannot conclude that defendant was denied his Sixth Amendment right to counsel when the trial court did not permit Moffitt's limited appearance. Defendant has failed to show plain error affecting his substantial rights. *Carines*, *supra* at 763-764.

III. Due Process

We next address whether the prosecutor's acquiescence in the presentation of perjured testimony at defendant's first trial constituted misconduct that deprived defendant of due process to the extent that retrial should have been barred. This issue presents a question of constitutional law that we review de novo. *People v Dunbar*, 463 Mich 606, 615; 625 NW2d 1 (2001).[4]

It is well settled that a conviction obtained through the knowing use of perjured testimony offends a defendant's due process protections guaranteed under the Fourteenth Amendment. *Mooney v Holohan*, 294 US 103, 112; 55 S Ct 340; 79 L Ed 791 (1935); *Pyle v Kansas*, 317 US 213, 216; 63 S Ct 177; 87 L Ed 214 (1942); *Napue v Illinois*, 360 US 264, 269; 79 S Ct 1173; 3 L Ed 2d 1217 (1959). If a conviction is obtained through the knowing use of perjured testimony, it "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v Agurs*, 427 US 97, 103; 96 S Ct 2392; 49 L Ed 2d 342 (1976); see also *Giglio v United States*, 405 US 150, 154-155; 92 S Ct 763; 31 L Ed 2d 104 (1972); *Napue*, *supra* at 269-272. Stated differently, a conviction will be reversed and a new trial will be ordered, but only if the tainted evidence is material to the defendant's guilt or punishment. *Smith v Phillips*, 455 US 209, 219; 102 S Ct 940; 71 L Ed 2d 78 (1982); *Giglio*, *supra* at 154-155; *People v Cassell*, 63 Mich App 226, 227-229; 234 NW2d 460 (1975). Thus, it

[4] We note that defendant's guilty plea did not waive appellate review of this issue. Our Supreme Court in *New*, *supra*, recognized that a guilty plea does not waive defenses based on the Due Process Clause. The Court stated, "Wherever it is found that the result of the right asserted would be to prevent the trial from taking place, we follow the lead of the United States Supreme Court and hold a guilty plea does not waive that right." *New*, *supra* at 489 (quotation marks and citation omitted).

is the "misconduct's effect on the trial, not the blameworthiness of the prosecutor, [which] is the crucial inquiry for due process purposes." *Phillips*, *supra* at 220 n 10. The entire focus of our analysis must be on the fairness of the trial, not on the prosecutor's or the court's culpability. *Id.* at 219.

While it is plain that a new trial is the remedy for a conviction obtained through misconduct that materially affected the trial's outcome, our Supreme Court has asked us to consider whether, under the circumstances of this case, a different remedy—a bar to retrial—is warranted. We conclude that it is not.

The purpose behind the Double Jeopardy Clause informs the reason for our answer, because our decision is based on the particular type of harm that a bar to retrial is intended to address. In instances where retrial is barred, that remedy stems from a violation of the Double Jeopardy Clause. US Const, Am V; Const 1963, art 1, § 15. The constitutional prohibition against double jeopardy bars retrial, or a second prosecution, after acquittal or conviction and protects against multiple punishments for the same offense. *People v Smith*, 478 Mich 292, 299; 733 NW2d 351 (2007). The purpose of the Double Jeopardy Clause is to "protect a person from being twice placed in jeopardy for the 'same offense' [and] . . . to prevent the state from making repeated attempts at convicting an individual for an alleged crime." *People v Torres*, 452 Mich 43, 63; 549 NW2d 540 (1996) (citations omitted). Thus, the remedy arising from a double jeopardy violation—a bar to retrial—is specifically tailored to the nature of the harm that the Double Jeopardy Clause is intended to prevent—the "embarrassment, expense and ordeal . . . [of living] in a continuing state of anxiety and insecurity" that arises from being twice placed in jeopardy. *Id.* at 64 (quotation marks and citation omitted).

Having understood the proper purpose of a remedy barring retrial, the unsuitability of that remedy in the context of a due process violation becomes evident. In contrast to the prohibition against double jeopardy, a criminal defendant's right to a fair trial derives from the Due Process Clause of the Fourteenth Amendment. US Const, Am XIV; Const 1963, art 1, § 17. It goes without saying that it is not necessary to conduct a double jeopardy inquiry to establish a due process violation. As noted, the crux of the due process analysis in cases of alleged prosecutorial misconduct is whether the defendant received a fair trial. *Phillips*, *supra* at 220 n 10. The remedy when a defendant receives an unfair trial because of prosecutorial misconduct is a new and, presumably, fair trial. *Cassell*, *supra* at 227-229; *Agurs*, *supra* at 103; *Napue*, *supra* at 269-272. This remedy naturally flows from the type of harm that the defendant has suffered. It does not follow that a due process violation should bar retrial, because such a remedy would be unduly broad and would fail to address the specific harm the defendant has suffered. Specifically, barring retrial on the basis of due process grounds would amount to "punishment of society for [the] misdeeds of a prosecutor" because it would permit the accused to go free. *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). Further, our Supreme Court has noted, "[T]he protections of substantive due process [do not] require recognition of a

remedy for the harm incident to one or more mistrials [unless it also places a defendant in double jeopardy]." *People v Sierb*, 456 Mich 519, 525; 581 NW2d 219 (1998).[5]

Nor do we find, as defendant urges, that the court's and the prosecutor's disgraceful conduct itself should warrant a bar to retrial. Assuming that the acts of the trial judge and the prosecutor in this case violated Michigan's Rules of Professional Conduct, MRPC 3.4, and Code of Judicial Conduct, Canon 3, and were clearly opprobrious, the remedy for their wrongs is accomplished in other forums, such as the Attorney Discipline Board and the Judicial Tenure Commission. *People v Green*, 405 Mich 273, 292-295; 274 NW2d 448 (1979). These codes, however, do not confer upon a defendant any type of constitutional right or remedy. *Id.* at 293. Rather, the particular constitutional right determines the constitutional remedy and these codes play no part in such decisions. *Id*. at 293-294. For these reasons, we do not take the opportunity here to create a new remedy for a due process violation arising out of prosecutorial and judicial misconduct.

Turning to the present matter, we find that defendant was denied due process because of the trial court's and the prosecutor's misconduct. However, here we stress that defendant was *not* convicted following his first trial; rather, the trial court declared a mistrial because of a hung jury.[6] This was clearly the appropriate remedy. Although both the trial court's and the prosecutor's conduct was plainly reprehensible, the blameworthiness of either is not the critical factor, because the primary inquiry is the misconduct's effect on the trial. *Phillips*, *supra* at 220 n 10; *Cassell*, *supra* at 227-229. In this case, the complained-of misconduct did not prejudice defendant because he received the remedy that was due him: a new trial. For these reasons, defendant's constitutional due process claim must fail.

Donofrio, J., concurred.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio

---

[5] This is not to suggest however, that prosecutorial misconduct can never invoke the constitutional protection against double jeopardy. On that issue, we offer no opinion because, as Judge Murphy notes in his concurrence, "there is no indication whatsoever that the prosecutor committed the misconduct for the purpose of avoiding or preventing an acquittal, nor can it be said that an acquittal was likely to occur if the prosecutor refrained from the misconduct or that the prosecutor believed such was the case." *Post* at 10-11.

[6] Here, the prohibition against double jeopardy did not prevent defendant's retrial. Retrial after a mistrial is not barred if the mistrial was the result of "manifest necessity," such as a hung jury, as was the case here. *People v Lett*, 466 Mich 206, 217-218; 644 NW2d 743 (2002).