

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ERIK GEOFFREY PHILLIPS,

Defendant-Appellee.

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UNPUBLISHED

October 11, 2011

No. 298918

Oakland Circuit Court

LC No. 2009-227817-FH

Before: MURPHY, C.J., and TALBOT and MURRAY, JJ.

PER CURIAM.

The Prosecutor appeals the trial court's order dismissing the case against Erik Phillips. The Prosecutor argues that the retrial of Phillips, following a mistrial, did not violate double jeopardy as Phillips both consented to the mistrial and it was manifestly necessary. We reverse.

On April 12, 2009, Phillips was arrested after a traffic stop. Phillips was later bound over on one count of operating a vehicle on a highway with the presence of THC in his body, third offense<sup>1</sup>, and one count of possession of marihuana.<sup>2</sup>

Phillips' first trial was on March 1, 2010. That day the prosecution played a videotape for the jury of Phillips' traffic stop. The videotape had not been provided to the prosecution until the day of trial and was first viewed by the prosecution and Phillips' attorney that morning. It was decided that the tape was to be muted for any conversations regarding Phillips' "prior drunk drivings." Though it is unclear exactly what was said on the videotape as it was not transcribed fully in the trial transcript, it appears that the tape was not properly muted and the jury was potentially exposed to inadmissible information regarding Phillips' history of drunk driving.

Initially, Phillips' attorney moved for a mistrial and it was unclear whether the jury had heard any of the inadmissible information. The court granted Phillips' motion for a mistrial and his attorney then asked the court for a recess. When counsel returned he advised the court that

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<sup>1</sup> MCL 257.625(8), (9)(c).

<sup>2</sup> MCL 333.7403(2)(d).

Phillips did not want a mistrial. Before the trial resumed, defense counsel indicated that he did not know what he would do if “it happened again.”

The prosecutor continued playing the videotape for the jury. On the tape, Phillips can be heard saying that he had been arrested before. The tape, however, was not muted and continued to play until it was stopped by the prosecutor.

The next witness to be called to the stand to testify was Phillips. Before he began to testify, the court was given a note from one of the jurors indicating that he/she had heard the reference to Phillips’ drunk driving conviction. The court then indicated that it would not “step all over” Phillips’ rights and declared a mistrial. Neither Phillips nor his counsel made any response to the court’s decision to declare a mistrial, but Phillips’ attorney did provide the court with his availability for the retrial date.

Phillips was retried on May 25, 2010. After the testimony of two witnesses, Phillips moved to dismiss the case on the ground that the retrial constituted double jeopardy, as he did not consent to the March 1, 2010 mistrial and it was not manifestly necessary. The court granted his motion and dismissed the case with prejudice.

On appeal, the prosecution argues that the court improperly dismissed the case against Phillips because his retrial was not double jeopardy as he consented to the March 1, 2010, mistrial and the mistrial was manifestly necessary. We agree that the May 25, 2010 trial was not double jeopardy because it was manifestly necessary.

The issue regarding whether Phillips’ May 25, 2010 retrial was double jeopardy was properly preserved for appeal by the prosecution when it opposed Phillips’ May 25, 2010, motion to dismiss the case.<sup>3</sup> Claims related to double jeopardy are questions of law that are reviewed de novo.<sup>4</sup>

“A person may not be twice placed in jeopardy for a single offense. When a defendant exercises the right to trial by jury, jeopardy generally attaches at the time the jury is selected and sworn.”<sup>5</sup> Phillips was tried on March 1, 2010, and May 25, 2010, for the same offenses. The first trial ended in a mistrial after the jury was selected and sworn, so typically jeopardy would attach.

“[O]nce placed in jeopardy, a defendant has a right to a determination of guilt or innocence by the trier of fact unless he either consents to a mistrial or a mistrial is granted because of manifest necessity.”<sup>6</sup> Therefore, if Phillips either consented to the earlier mistrial or

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<sup>3</sup> *People v Wilson*, 242 Mich App 350, 359-360; 619 NW2d 413 (2000).

<sup>4</sup> *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001).

<sup>5</sup> *People v Mehall*, 454 Mich 1, 4; 557 NW2d 110 (1997) (citations omitted).

<sup>6</sup> *People v Squires*, 100 Mich App 672, 676; 300 NW2d 366 (1980).

the mistrial was granted because of manifest necessity, the May 25, 2010, trial would not have been prohibited by double jeopardy.

A defendant's consent to a mistrial cannot be given by "[m]ere silence or failure to object to the jury's discharge."<sup>7</sup> An "express manifestation of consent" for the mistrial is required either from a defendant or his attorney.<sup>8</sup> Phillips initially consented to a mistrial when his attorney requested a mistrial on his behalf. He withdrew that consent when he decided to proceed with the trial. At the time consent was withdrawn it was only suspected that the jury may have heard inadmissible information. It was later confirmed that at least one juror heard the inadmissible information and the court declared a mistrial. After the mistrial was declared, neither Phillips nor his attorney objected, however, they also did not expressly consent to the mistrial.

Even if Phillips failed to expressly consent to the mistrial, Phillips' retrial would not constitute double jeopardy if the mistrial was manifestly necessary. Manifest necessity refers to "the existence of sufficiently compelling circumstances that would otherwise deprive the defendant of a fair trial or make its completion impossible."<sup>9</sup> Determining whether manifest necessity exists depends on the particular facts of each case and "requires a balancing of competing concerns: the defendant's interest in completing his trial in a single proceeding before a particular tribunal versus the strength of the justification for a mistrial."<sup>10</sup> "[A] trial judge properly exercises discretion to declare a mistrial when an impartial verdict cannot be obtained, or when a guilty verdict could be returned but would be reversed on appeal because of an obvious procedural error occurring during the trial. Any doubts concerning the existence of manifest necessity should be resolved in favor of the defendant."<sup>11</sup>

The trial court declaring a mistrial was manifestly necessary. While Phillips had an interest in the trial proceeding on that date before that particular jury, that interest was outweighed by the justification for the mistrial. Phillips' ability to obtain an impartial verdict was affected by the jury hearing prejudicial and inadmissible information regarding his past drunk driving. Had the trial proceeded, Phillips could have been deprived of a fair trial. It has been held that any doubt regarding the existence of manifest necessity should be resolved in favor of protecting Phillips' rights, which is what occurred in this case.<sup>12</sup>

Phillips argues that there was no manifest necessity for a mistrial because he waived any error in regard to the videotape. When Phillips withdrew his motion for a mistrial there was only

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<sup>7</sup> *People v Johnson*, 396 Mich 424, 432; 240 NW2d 729 (1976) (citation omitted).

<sup>8</sup> *People v Hoffman*, 81 Mich App 288, 298; 265 NW2d 94 (1978).

<sup>9</sup> *People v Rutherford*, 208 Mich App 198, 202, 526 NW2d 620 (1994).

<sup>10</sup> *People v Hicks*, 447 Mich 819, 829; 528 NW2d 136 (1994).

<sup>11</sup> *Id.* at 830.

<sup>12</sup> *Id.*

the possibility that the jury had heard inadmissible information. At that time Phillips' attorney advised the court that should "it happen again," he was unsure if he would again move for a mistrial. Thereafter, it was confirmed that inadmissible information had been heard by at least one juror thus changing the existing circumstances. As a result, the court properly exercised its discretion to declare a mistrial based on manifest necessity.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy  
/s/ Michael J. Talbot  
/s/ Christopher M. Murray