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# Appellate Division, Second Department, Smith v. Marrus

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**SUPREME COURT OF NEW YORK  
APPELLATE DIVISION, SECOND DEPARTMENT**

Smith v. Marrus<sup>1</sup>  
(decided October 10, 2006)

The petitioner, Danny Smith, challenged his retrial for first degree attempted robbery and second degree criminal possession of a weapon,<sup>2</sup> asserting that it would violate the Double Jeopardy Clauses of the New York State Constitution<sup>3</sup> and the United States Constitution.<sup>4</sup> The court denied Smith's motion, holding that the first trial court did not abuse its discretion when it declared a mistrial after determining that the jury was deadlocked.<sup>5</sup>

In Smith's first trial, where he was tried for first degree attempted robbery and second degree criminal possession of a weapon, jury deliberations commenced the third day of the trial.<sup>6</sup> The jury had only deliberated for a few hours when it acquitted the defendant of criminal possession of a weapon in the second degree.<sup>7</sup> Additionally, during this time period, the court reinstructed the jury on the attempted robbery charge.<sup>8</sup> The jury delivered two notes, two

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<sup>1</sup> 826 N.Y.S.2d 263 (App. Div. 2d Dep't 2006).

<sup>2</sup> *Id.* at 264.

<sup>3</sup> N.Y. CONST. art. I, § 6 states: "[n]o person shall be subject to be twice put in jeopardy for the same offense."

<sup>4</sup> U.S. CONST. amend. V states: "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb."

<sup>5</sup> *Smith*, 826 N.Y.S.2d at 265.

<sup>6</sup> *Id.* at 265 (Crane, J., dissenting).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

hours apart, to the judge regarding its inability to agree on a verdict for the first degree attempted robbery count.<sup>9</sup> The second note stated, “We stand firm on this, 10 to 2.”<sup>10</sup> Despite both the prosecutor’s and the defense counsel’s objections to a mistrial,<sup>11</sup> the court declared a mistrial on the undecided count based on its belief that the jury was “resolute on this vote” and that it was “a hopeless situation to get a reliable verdict from this jury.”<sup>12</sup> The total amount of time spent on the deliberations was “only a few hours.”<sup>13</sup> In the current petition, Smith claimed that the State should have been barred from retrying him for the undecided count because the court abused its discretion in declaring a mistrial.<sup>14</sup>

The *Smith* court found there was enough evidence that “manifest necessity existed” so that the objections of the defense counsel would not affect whether or not jeopardy attached.<sup>15</sup> The trial was brief.<sup>16</sup> The jury was only deadlocked on one simple issue.<sup>17</sup> On its own initiative, the jury twice conveyed to the judge that it was deadlocked after a few hours of deliberation.<sup>18</sup> Its last declaration indicated that the deadlock was “firm.”<sup>19</sup> The appellate court upheld the trial judge’s decision to call a mistrial since, from the facts

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<sup>9</sup> *Id.* at 266.

<sup>10</sup> *Smith*, 826 N.Y.S.2d at 266 (Crane, J., dissenting) (internal quotation marks omitted).

<sup>11</sup> *Id.* at 266.

<sup>12</sup> *Id.* (internal quotation marks omitted).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 264 (majority opinion). This court ultimately held that the trial court did not abuse its discretion. *Id.* at 265.

<sup>15</sup> *Smith*, 826 N.Y.S.2d at 265.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 266 (Crane, J., dissenting) (internal quotation marks omitted).

available, “the jury appeared to be genuinely deadlocked.”<sup>20</sup>

The *Smith* decision is in line with cases from the United States Supreme Court. In *United States v. Perez*,<sup>21</sup> the jury for Josef Perez’s capital offense trial was unable to agree on a verdict, so the Court dismissed the jury.<sup>22</sup> Neither Perez nor the prosecution granted consent to the dismissal.<sup>23</sup> Perez then argued that future trials should have been barred.<sup>24</sup> The Supreme Court held that since Perez was neither “convicted [n]or acquitted,” he could be put on trial again.<sup>25</sup> In particular, the Court stated that judges may discharge juries “whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.”<sup>26</sup>

The New York Court of Appeals summarized the effect of mistrials on the constitutional double jeopardy protections in *Plummer v. Rothwax*.<sup>27</sup> The prohibition against double jeopardy exists to prevent the State “ ‘with all its resources and power’ ” from repeatedly trying a defendant until a successful result is obtained.<sup>28</sup> However, the prohibition goes into effect only if the “merits of the charges against the defendant” have been resolved.<sup>29</sup> Therefore, a mistrial that occurs because of a “genuinely deadlocked jury” would

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<sup>20</sup> *Smith*, 826 N.Y.S.2d at 265 (majority opinion).

<sup>21</sup> 22 U.S. 579 (1824).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 580.

<sup>26</sup> *Perez*, 22 U.S. at 580.

<sup>27</sup> 471 N.E.2d 429 (N.Y. 1984).

<sup>28</sup> *Id.* at 433 (quoting *Green v. United States*, 355 U.S. 184, 187 (1957)).

<sup>29</sup> *Id.* at 434.

not bar a retrial because the merits of the case would not have been resolved.<sup>30</sup>

On the other hand, while the trial judge has broad discretion to declare mistrials, it is not unlimited.<sup>31</sup> Reviewing courts will grant great deference to the trial judge's decision, but they will be looking for evidence that there was " 'a manifest necessity for the act.' "<sup>32</sup> The reviewing court must be satisfied that a mistrial was the only reasonable alternative available.<sup>33</sup> Factors that the trial judge should consider in making the decision include "the length and complexity of the trial, the length of the deliberations, the extent and nature of the communications between the court and the jury, and the potential effects of requiring further deliberation."<sup>34</sup> If the trial court abused its discretion in declaring a mistrial, then jeopardy attaches to that trial and the defendant may not be retried.

In *Plummer*, the defendant challenged the mistrial declaration of his first trial in which the jury deliberated for approximately four and one-half hours<sup>35</sup> before sending the trial judge a note stating, "Your Honor, we cannot come to a verdict."<sup>36</sup> After questioning the foreperson in the presence of the other jurors regarding whether the jury was actually deadlocked, and receiving affirmative answers to

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Plummer*, 471 N.E.2d at 434 (quoting *Perez*, 22 U.S. at 580).

<sup>33</sup> *See Smith*, 826 N.Y.S.2d at 267 (Crane, J., dissenting) (explaining that "manifest necessity" exists only if there are actual and substantial reasons that make the mistrial necessary).

<sup>34</sup> *Plummer*, 471 N.E.2d at 434.

<sup>35</sup> *Id.* at 435.

<sup>36</sup> *Id.* at 432 (internal quotation marks omitted).

his questions, the trial judge declared a mistrial.<sup>37</sup> The defense counsel objected based on the short amount of time that the jury had spent in deliberations.<sup>38</sup> The New York Court of Appeals upheld the trial judge's decision, reasoning that the jury's deliberations were not "insufficient as a matter of law" for such a short trial, which lasted less than two days and involved the jury deciding the simple issue regarding whether the complainant was credible.<sup>39</sup> Factors that were important in the Court of Appeals decision included the jury telling the judge on its own initiative that it was deadlocked and the trial judge making an effort to ascertain whether or not any further deliberations would be fruitful.<sup>40</sup>

The Second Department, Appellate Division, applied *Plummer* in *People v. Sparacino*.<sup>41</sup> At the defendant's first trial, which was "short and free from complex legal intricacies," the jury was deadlocked after several hours of deliberations.<sup>42</sup> The court instructed the jury to continue its deliberations, but "[s]hortly thereafter, the jury indicated to the court that there had been no progress in their deliberations."<sup>43</sup> The trial court declared a mistrial.<sup>44</sup> The defendant was tried a second time and convicted.<sup>45</sup> In his appeal, he claimed that double jeopardy barred the second trial because the

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<sup>37</sup> *Id.* at 432-33.

<sup>38</sup> *Id.* at 433.

<sup>39</sup> *Plummer*, 471 N.E.2d at 435.

<sup>40</sup> *Id.*

<sup>41</sup> 542 N.Y.S.2d 235 (App. Div. 2d Dep't 1989).

<sup>42</sup> *Id.* at 236.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 235.

trial court abused its discretion in declaring a mistrial for the first trial.<sup>46</sup> The *Sparacino* court, considering the *Plummer* factors, upheld the trial court's discretion since it appeared to the trial court that the jury was "genuinely deadlocked."<sup>47</sup>

Similarly, in *People v. Wincelowicz*,<sup>48</sup> a mistrial was declared after the jury deliberated for about five hours without reaching a verdict after a brief trial.<sup>49</sup> During its deliberations, the jury sent seven notes to the trial judge.<sup>50</sup> In at least two of these notes, the jury asked the court to define "stolen property" in the context of the first count, which was for "criminal possession of stolen property in the fourth degree."<sup>51</sup> The jury had unanimously agreed on a verdict for the second count, but declared itself "deadlocked on count one."<sup>52</sup> Instead of redefining "stolen property" for the jury, in response to the jury's last request, the trial court declared a mistrial on that count.<sup>53</sup> The defendant appealed the trial court's decision.<sup>54</sup> The appellate court upheld it, reasoning that the trial judge did not abuse "his discretion in concluding that it would be unwise to pressure the jurors to agree on a verdict upon the first count, when they were having difficulty understanding the elements of the crime charged therein."<sup>55</sup>

The common factor in these federal and state cases is that as

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<sup>46</sup> *Sparacino*, 542 N.Y.S.2d at 235.

<sup>47</sup> *Id.* at 236.

<sup>48</sup> 685 N.Y.S.2d 741 (App. Div. 2d Dep't 1999).

<sup>49</sup> *Id.* at 741.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* The jury was instructed three times regarding the meaning of "stolen property." *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Wincelowicz*, 685 N.Y.S.2d at 741.

<sup>54</sup> *See id.*

<sup>55</sup> *Id.* at 742.

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long as the trial court has grounds for its belief that the jury is genuinely deadlocked, a mistrial decision will probably not be overturned as an abuse of discretion. The standard is the same in both federal and state courts. While recommended, it is not necessary for the trial court to question the jury about its deadlocked position if other evidence is available concerning the strength of the deadlock. In addition, it is now well-established that short deliberations may be sufficient as a matter of law, if the deadlocked jury is only asked to consider simple issues and evidence. Reviewing courts look at the totality of the circumstances in determining whether or not an abuse of discretion occurred. Therefore, an appeal based on just one aspect of the trial court's decision, without taking into account the context in which it was made, is unlikely to be successful.

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