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Double Jeopardy

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N.Y. CONST. art. I, § 6:

No person shall be subject to be twice put in jeopardy for the same offense . . . .

U.S. CONST. amend. V:

No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb . . . .

SUPREME COURT, APPELLATE DIVISION

FIRST DEPARTMENT

Randall v. Rothwax[125]
(decided September 6, 1990)

Invoking the constitutional protection against double jeopardy,[126] Randall's attorney (petitioner) brought an article 78 proceeding on behalf of Randall to prohibit Randall's reprosecution after the withdrawl of his guilty plea.[127]

The court found that during Randall's criminal trial, the trial court had coerced him to withdraw from his trial and enter a guilty plea to a lesser charge.[128] The court held that since Randall had been coerced out of a trial in which he had an otherwise "excellent" chance of acquittal,[129] his subsequent

125. 161 A.D.2d 70, 560 N.Y.S.2d 409 (1st Dep't 1990), *aff'd*, No. 209, 1991 N.Y. LEXIS 4797 (N.Y. Nov. 21, 1991).

126. Both the United States and the New York State Constitutions provide, in substance, that a criminal defendant may not be placed twice in jeopardy for the same offense. U.S. CONST. amend. V; N.Y. CONST. art. I, § 6.

127. *Randall*, 161 A.D.2d at 71, 560 N.Y.S.2d at 409.

128. *Id.* at 76, 560 N.Y.S.2d at 413.

129. *Id.* The court attached significant attention to the fact that the jury would have, in all likelihood, acquitted Randall if he had not withdrawn from the trial. *Id.* However, regardless of defendant's chances at his first trial, the court's holding was premised on the fact that the trial court had coerced

withdrawl of the guilty plea could not be viewed as consent to reprosecution.[130] The court concluded that because Randall had "irretrievably lost through no fault of his own" his "old chance of acquittal," the government would be precluded from reprosecuting him.[131]

Randall was charged with attempted murder in the second degree and related crimes.[132] During jury deliberations the trial judge informed Randall that "the jury was divided ten to two in favor of conviction."[133] Consequently, though protesting his innocence, Randall agreed to plead guilty to criminal use of a firearm in the first degree, in exchange for a promised sentence of 4 1/4 to 8 1/2 years.[134]

Shortly after the jury was discharged, it was learned that the jury was, in fact, leaning ten to two in favor of acquittal.[135] Randall then moved to withdraw his plea, claiming that he had been induced to enter a plea based upon "improperly conveyed and inaccurate information."[136] The trial judge granted the motion.[137]

Following the plea withdrawal, Randall then moved to preclude a retrial on double jeopardy grounds.[138] The trial judge denied the motion and Randall appealed.[139] On appeal, the court determined that Randall's reprosecution would violate both federal and state double jeopardy clauses.[140] The court began its

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defendant into retreating from his first trial. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 71, 560 N.Y.S.2d at 409.

133. *Id.* at 71, 560 N.Y.S.2d at 410.

134. *Id.* at 72, 560 N.Y.S.2d at 410.

135. *Id.*

136. *Id.*

137. *Id.* In granting defendant's motion to vacate the plea, the trial judge stated, "it appears to me that the defendant and his Counsel may have been misled, inadvertent to be sure, but misled by the Court nevertheless." *Id.*

138. *Id.*

139. *Id.* at 72-73, 560 N.Y.S.2d at 410-11.

140. *Id.* at 81, 560 N.Y.S.2d at 416. In support of its holding, the court relied on state law to describe the historic importance and rationale behind double jeopardy protection. *Id.* at 73, 560 N.Y.S.2d at 411 ("[t]he protection, an ancient one deeply rooted in the common law has been thought an essential

analysis by noting that a defendant may consent to reprosecution in different situations. First, a defendant may consent to reprosecution when he challenges a judgment of conviction.[141] Second, consent may also be inferred when a defendant either moves for, or acquiesces in, the declaration of a mistrial.[142] In both of these situations, a defendant is said to consent to reprosecution in a quest for adjudication "in a forum free from prejudicial taint."[143] The court concluded that "[w]here . . . a defendant has not sought to void or avoid a judgment, . . . no consent to reprosecution can be inferred."[144]

The court noted that by entering a guilty plea, a defendant does not seek to avoid a judgment of conviction.[145] Additionally, where a defendant has withdrawn his plea, in a case in which the plea was coerced, there is also "no basis for characterizing the motion to withdraw the plea as a consent to reprosecution."[146]

The court acknowledged that "there are circumstances in which

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check upon the power of the state to intimidate its citizenry") (citations omitted). Although the court chose to reach its ultimate holding by utilizing federal law, the court expressly invoked the state constitution as an alternative source of broader protection in the event that federal law could not support its holding. *Id.* at 81, 560 N.Y.S.2d at 416 ("even if it were not possible to distinguish *Tateo* [federal law], as we have, we would still determine to bar reprosecution of the defendant, premising our ruling upon the independent protections against double jeopardy found in our state constitution").

141. *Id.* at 74, 560 N.Y.S.2d at 411 (unless the reversal "is predicated upon evidentiary insufficiency").

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* ("[o]bviously, no consent to reprosecution can be inferred from an action so unequivocally intended to bring the prosecution to a definite end").

146. *Id.* at 74, 560 N.Y.S.2d at 412. The court stated:

> Where, however, the plea was coerced and the waiver of the defendant's right to proceed before the first tribunal was therefore vitiated, we can perceive no basis for characterizing the motion to withdraw the plea as a consent to reprosecution. To conclude otherwise would be to say in effect that a defendant may only vindicate one constitutional right -- the right not to be convicted upon a coerced plea -- at the expense of another constitutional right -- the right not to be twice placed in jeopardy.

Id.

a defendant may be retried notwithstanding his lack of consent to the premature termination of his first trial," but that such retrial is "sharply limited to those cases in which the termination of the first trial was dictated by manifest necessity."[147] The court then stated that "[w]e can conceive of no case in which it would be manifestly necessary for a Trial Judge to coerce a guilty plea from a defendant. Far from being necessary, such conduct is clearly contrary to the ends of public justice."[148]

The court next discussed the United States Supreme Court's disposition of a factually similar case.[149] In *United States v. Tateo*, the defendant withdrew from his ongoing criminal trial and entered a guilty plea.[150] The trial judge told defendant that if he insisted on continuing with his trial, and was convicted, the court would surely sentence defendant to life imprisonment without possibility of parole.[151] Consequently, the defendant's plea was set aside as coerced.[152] However, the Supreme Court held that defendant's reprosecution would not be foreclosed by the double jeopardy clause of the United States Constitution.[153]

In so holding, the Supreme Court stated that "[a] defendant is no less wronged by a jury finding of guilt after an unfair trial than by a failure to get a jury verdict at all; the distinction between the two kinds of wrongs affords no sensible basis for differentiation with regard to retrial."[154]

The first department, in *Randall*, clearly disagreed with the *Tateo* holding. The court respectfully opined that the coercion of a guilty plea by a trial judge is more serious than "'any defect sufficient to constitute reversible error.'"[155] The court reasoned

147. *Id.* at 77, 560 N.Y.S.2d at 413.

148. *Id.*

149. United States v. Tateo, 377 U.S. 463 (1964) (five to four decision).

150. *Id.* at 464.

151. *Id.*

152. *Id.* at 464-65.

153. *Id.* at 464.

154. *Id.* at 467. The Supreme Court continued its rationale in a footnote and stated that "[i]t is also difficult to understand why Tateo should be treated differently from one who is coerced into pleading guilty before a jury is impaneled." *Id.* at 467 n.2.

155. *Randall*, 161 A.D.2d at 77, 560 N.Y.S.2d at 413 (quoting *Tateo*, 377

that other prejudicial trial errors "leave the defendant with the option of continuing the trial in order to obtain a verdict of acquittal . . . ."[156] However, when a trial judge coerces a defendant to withdraw from his trial and enter a guilty plea, "the trial judge completely abrogates that option, and so, defeats the valued right of the defendant to obtain a verdict in one proceeding from the first impanelled jury."[157]

After expressing disagreement with the *Tateo* holding, the court then challenged *Tateo* as being inconsistent with both prior and subsequent Supreme Court decisions.[158] Specifically, the court noted that in *United States v. Jorn,*[159] Justice Harlan, who had also authored *Tateo*, made the "unexceptionable acknowledgment of the defendant's very substantial interest in retaining the option to have his case decided by the first tribunal . . . ."[160] However, the Supreme Court in *Jorn* distinguished its holding from the one in *Tateo*, indicating that the defendant in *Tateo* retained the option of proceeding with his trial and could later "rely on post-conviction proceedings to redress the wrong done to him by the judge,"[161] but that the defendant in *Jorn* lost such option by the judge's *sua sponte* declaration of a mistrial.[162] The first department, in *Randall*, argued that this distinction is untenable,

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U.S. at 466).

156. *Id.* at 77, 560 N.Y.S.2d at 413-14.

157. *Id.* at 77-78, 560 N.Y.S.2d at 414.

158. *Id.* The court found it difficult, *inter alia*, to "reconcile *Tateo* with subsequent Supreme Court doctrine indicating that '[t]he important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of [judicial or prosecutorial] error.'" *Id.* at 78, 560 N.Y.S.2d at 414 (quoting United States v. Dinitz, 424 U.S. 600, 609 (1976)).

159. 400 U.S. 470 (1971). In *Jorn*, the District Court of Utah dismissed the case on the ground of former jeopardy on an information charging the defendant with willfully assisting in the preparation of fraudulent income tax returns. *Id.* at 472. On appeal, the Court held that reprosecution of the defendant would violate the double jeopardy provision of the fifth amendment. *Id.* at 487.

160. *Randall*, 161 A.D.2d at 78, 560 N.Y.S.2d at 414.

161. *Id.* at 79, 560 N.Y.S.2d at 414 (quoting *Jorn*, 400 U.S. at 484, 485 n.11).

162. *Id.* at 78, 560 N.Y.S.2d at 414 (citing *Jorn*, 400 U.S. at 484).

urging that:

> [t]he entry of a plea of guilty and loss of the right to proceed before the first jury, are inextricably bound together. If the plea has not been voluntary, we are completely at a loss to understand how the defendant may be said to have still retained some meaningful option to go to the jury.[163]

However, because *Tateo* has never been expressly overruled, and because of its close factual similarity to the present case, the first department attempted to distinguish it from *Randall.*

The court noted that "[a]lthough the Trial Judge's threat in *Tateo* was highly coercive, it could not have affected [the defendant's] assessment of his chances for acquittal."[164] On the other hand, because the coercion in *Randall* was based on factual misrepresentation, Randall believed his chances for acquittal were substantially diminished.[165]

The first department also found no merit in the argument that absent governmental intent to avoid an acquittal, Randall's double jeopardy claim could not succeed.[166] The court noted that intent only becomes relevant in cases where "the defendant has been left with *some* option to go forward with his trial."[167] In the court's view, Randall was completely deprived of his option to obtain a jury verdict.[168]

The court noted that reprosecution is constitutional if there is no finding of an intent to avoid acquittal and where the defendant retains an option to proceed with his trial:[169]

> Most typically, these are situations in which a mistrial has been declared on the defendant's motion as a result of either judicial

163. *Id.* at 79, 560 N.Y.S.2d at 414-15.

164. *Id.* at 79, 560 N.Y.S.2d at 415 ("the defendant, arguably, might still have chosen to submit his case to the jury had he had sufficient confidence in its merits").

165. *Id.* ("the Judge's misrepresentation led the defendant to believe that he could no longer trust the jury with his fate no matter how convinced he was of his innocence and the merits of his defense").

166. *Id.* at 80, 560 N.Y.S.2d at 415.

167. *Id.* (emphasis added).

168. *Id.* at 81, 560 N.Y.S.2d at 415-16.

169. *Id.* at 80, 560 N.Y.S.2d at 415.

> or prosecutorial error. It is recognized that in such circumstances, although the defendant is left with a most unhappy choice, the choice of whether to proceed is still his; cognizant of the error which has been made and its probable impact on his chances with the jury, the defendant may intelligently elect either to continue his trial or to seek to abort the tainted proceeding in order to obtain a fresh chance for acquittal . . . .[170]

In these situations, the availability of the option to proceed has been held enough to preclude most double jeopardy claims under the Federal Constitution.[171] The first department recognized that the rationale behind this is "that the social price of barring reprosecution in all cases where government error or even overreaching has provoked the defendant to move successfully for a mistrial would be too high."[172] However, the court noted that "there must be *some* effective sanction for governmental overreaching" that results in reprosecution.[173] On the federal level, the line has been drawn at actions intentionally trying to coerce the defendant into requesting a mistrial.[174]

Finding, in the present case, that the defendant's option to proceed had been, for all intents and purposes, "extinguished," the court decided that the case was more like a mistrial declared *sua sponte* by the judge, rather than by defendant's motion.[175] The court, while able to distinguish this case from *Tateo*, made it clear that had it not been distinguishable that it would have barred reprosecution nonetheless:[176]

> We are left with the most serious doubts as to whether the availability of a constitutional right as fundamental as the right not to be twice tried for the same offense, ought to depend upon the sort of distinctions made relevant by *Tateo* . . . . [O]nce it had been factually determined, as it was in *Tateo*, that a defendant had been 'enveloped by a coercive force . . . which, under all the circumstances, foreclosed a reasoned choice by him at the

170. *Id.*
171. *Id.* (citing United States v. Dinitz, 424 U.S. 600, 606-09 (1976)).
172. *Id.*
173. *Id.* (emphasis added).
174. *Id.* (citing Oregon v. Kennedy, 456 U.S. 667, 675-76 (1982)).
175. *Id.* at 81, 560 N.Y.S.2d at 415-16.

> time he entered his plea,' there would be no possibility of sensibly concluding that the surrender of the right to go to the first jury had been voluntary.[177]

Citing the case at bar as "unique,"[178] the court did not base its conclusion on existing New York precedent. Rather, its analysis was based on disagreement with what seems to be the leading federal case on point, namely *Tateo*.

SUPREME COURT

KINGS COUNTY

People v. Smith[179]
(decided December 11, 1990)

A criminal defendant brought a motion to bar his retrial and for dismissal of his indictment on the grounds that a retrial would violate his right to protection from double jeopardy under the federal[180] and state[181] constitutions.[182] The court held that the declaration of a mistrial due to the inability of a juror to continue with deliberations, upon learning that her nephew had been shot and killed, was within the trial judge's proper discretion and constituted a "manifest necessity" permitting retrial under double jeopardy analysis.[183] The court additionally held that the prosecutor had met his burden of establishing the manifest necessity.[184]

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176. *Id.* at 81, 560 N.Y.S.2d at 416.

177. *Id.* (quoting United States v. Tateo, 214 F. Supp. 560, 568 (1963)).

178. *Id.* at 71, 560 N.Y.S.2d at 409.

179. 149 Misc. 2d 346, 563 N.Y.S.2d 1012 (Sup. Ct. Kings County 1990).

180. U.S. CONST. amend. V.

181. N.Y. CONST. art. I, § 6.

182. *Smith*, 149 Misc. 2d at 347, 563 N.Y.S.2d at 1013.

183. *Id.* at 349, 563 N.Y.S.2d at 1015; *see also* Illinois v. Somerville, 410 U.S. 458 (1973); Benton v. Maryland, 395 U.S. 784 (1969); 3 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE, § 24.1(c), at 63 (1984) [hereinafter LAFAVE & ISRAEL].

184. *Smith*, 149 Misc. 2d at 349, 563 N.Y.S.2d at 1015; *see also* LAFAVE & ISRAEL, *supra* note 184, at 65 (stating that the burden falls on the prosecutor when the mistrial has been declared over the objections of the defendant, and