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Double Jeopardy

> 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

In the case at bar, the defendant had been indicted for the criminal sale of a controlled substance in the third degree. His trial was prematurely terminated by the judge during the course of jury deliberations. The deliberations were interrupted by the judge when he determined that it was necessary to inform one of the jurors that her nephew had been shot and killed. The juror felt unable to continue with deliberations, the remaining eleven jurors were dismissed, and a mistrial was declared due to manifest necessity. The defense objected and then moved to bar retrial under the double jeopardy doctrine.[185] The essence of defendant's argument was that the mistrial had been declared after the jury had been sworn, hence double jeopardy had attached and retrial was barred.[186]

The court began its analysis with a brief review of double jeopardy principles and relied upon relevant federal and state case law[187] interchangeably. The law is clear that "once a jury has been sworn, jeopardy has attached."[188] Nevertheless, "absent defendant's consent or misconduct, a defendant can be retried following a post-swearing declaration of mistrial only where such declaration of mistrial was 'manifestly necessary.'"[189] "The bur-

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that the trial must be terminated before completion due to "circumstances making it impossible or impractical to proceed further").

185. *Smith*, 149 Misc. 2d at 346-47, 563 N.Y.S.2d at 1013.

186. *Id.* at 347, 563 N.Y.S.2d at 1013.

187. The court made no distinction between the federal and state doctrines of double jeopardy and manifest necessity, thus suggesting that analysis of these claims would be similar under federal and state law. *Id.* at 348, 563 N.Y.S.2d at 1014. The leading Supreme Court cases in this area include: Crist v. Bretz, 437 U.S. 28 (1978) (holding that the federal constitutional standards of double jeopardy apply equally to the states); Illinois v. Somerville, 410 U.S. 458 (1973); Downum v. United States, 372 U.S. 734 (1963); United States v. Perez, 22 U.S. 579 (1824).

188. *Smith*, 149 Misc. 2d at 347, 563 N.Y.S.2d at 1014. LaFave states that "when the jury is 'empaneled [sic] and sworn,' that is when the entire jury has been selected and has taken the oath required for service at trial." LAFAVE & ISRAEL, *supra* note 184, at 63 (citations omitted).

189. *Smith*, 149 Misc. 2d at 347, 563 N.Y.S.2d at 1014 (citing Colcloughley v. Johnson, 115 A.D.2d 58, 499 N.Y.S.2d 686 (1st Dep't 1986)). The manifest necessity term originated in the 1824 case of United States v. Perez, 22 U.S. 579 (1824), which stated:

den of establishing manifest necessity is on the prosecutor."[190] The court must engage in a balancing test when determining whether to declare a manifest necessity mistrial. This balancing must weigh the defendant's interest in a particular tribunal deciding the outcome of his case against the public's interest in fair trials "designed to end in just judgments."[191]

The court next discussed some of the exceptional circumstances necessary to prevent double jeopardy from attaching. One type of exceptional circumstance meeting this standard consists of some occurrence rendering it physically impossible to proceed with the trial, such as death or serious illness of the judge or other essential court personnel."[192] However, the court's excusing a jury based upon an inconvenience to the remaining jurors has been ruled reversible error.[193] Additionally, jeopardy may not attach when there is a "hung jury" or "fatal legal defect in the case."[194]

The court noted that it was unable to locate cases with the same facts as the case at bar. However, the court did discuss *People v. Magee*,[195] because the facts of *Magee* were the converse of the *Smith* case. In *Magee*, a juror had been informed of his mother's death during deliberations, but the juror had expected the death

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> We think that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, 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.

Id. at 579 (emphasis added).

190. *Smith*, 149 Misc. 2d at 347, 563 N.Y.S.2d at 1014, (citing Dickson v. Morgenthau, 102 A.D.2d 168, 476 N.Y.S.2d 841 (1st Dep't 1984)).

191. *Id.* at 347-48, 563 N.Y.S.2d at 1014 (citing Hall v. Potoker, 49 N.Y.2d 501, 403 N.E.2d 1210, 427 N.Y.S.2d 211 (1980)). The original formulation of the balancing test appears in the Supreme Court case of Wade v. Hunter, 336 U.S. 684 (1949). The wording is identical, thus showing that New York has adopted the federal constitutional standards. *See supra* note 183 and accompanying text.

192. *Smith*, 149 Misc. 2d at 348, 563 N.Y.S.2d at 1014 (citing People *ex rel.* Epting v. Deove, 309 N.Y. 818, 130 N.E.2d 616 (1955)).

193. *Smith*, 149 Misc. 2d at 348, 563 N.Y.S.2d at 1014.

194. LAFAVE & ISRAEL, *supra* note 184, at 71.

195. 122 A.D.2d 227, 504 N.Y.S.2d 758 (1986).

and, thus, chose to continue with the deliberations.[196]

The court in *Magee* affirmed the judgment of conviction, and ruled that it was not an abuse of discretion to allow the deliberations to continue, especially in light of the fact that the juror had wanted to remain and had been instructed not to inform the other jurors of the death in his family. Similarly, the court reasoned in *Smith* that the trial judge did not abuse his discretion in informing a juror of the death of her nephew. Furthermore, in recognizing the juror's inability to continue deliberations, it was not an abuse of discretion to declare a mistrial. The court, therefore, concluded that the People met their burden to demonstrate the existence of manifest necessity.[197] Thus, the defendant's motion was denied since his right not to be subject to double jeopardy was not violated.[198]

196. *Smith*, 149 Misc. 2d at 348, 563 N.Y.S.2d at 1014.
197. *Id.* at 349, 563 N.Y.S.2d at 1015.
198. *Id.*