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Double Jeopardy: People v. Mitchell

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New York has long recognized that a state is free, as a matter of its own law, to impose greater protection to defendants than those that the Supreme Court holds to be necessary under federal constitutional standards. New York has done just that in the constitutional realm of double jeopardy, as is apparent in the New York Criminal Procedure Law, which provides greater protections than those afforded a defendant under both State and Federal Constitutions, which simply requires the prohibition against double jeopardy for "the same offense." In the context of the facts enunciated in *Latham*, C.P.L. section 40.20(2)(d) legislatively articulates that under federal and state constitutional analysis, the death of an injured person is the principal element of homicide. It is the element that creates a separate offense from attempted murder and permits successive prosecutions without subjecting the defendant to double jeopardy.

SUPREME COURT, APPELLATE DIVISION

SECOND DEPARTMENT

People v. Mitchell²⁴⁸
(decided October 25, 1993)

Defendant asserted that his right to be free from double jeopardy under the State²⁴⁹ and Federal²⁵⁰ Constitutions was violated when the court, which earlier granted the defendant's motion for a mistrial because of prosecutorial misconduct, later denied the defendant's request for a dismissal of his indictment

248. 197 A.D.2d 709, 602 N.Y.S.2d 923 (2d Dep't 1993).

249. N.Y. CONST. art I, § 6. Section 6 provides in pertinent part: "No person shall be subject to be twice put in jeopardy for the same offense" *Id.*

250. U.S. CONST. amends. V, XIV. The Fifth Amendment provides in pertinent part: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb" *Id.* The Fourteenth Amendment provides in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Id.*

from the second trial. The appellate division held that the prosecutor did not intentionally act to cause the defendant to move for a mistrial and, therefore, the Double Jeopardy Clause did not preclude reprosecution of the defendant.²⁵¹

During the first trial, the prosecutor called the defendant a "pimp" in her opening statement.²⁵² The defendant claimed that the prosecutor acted with the intent to cause the defendant to make a motion for a mistrial.²⁵³ He contended that his indictment in the second trial should have been dismissed because his filing a motion for a mistrial was caused by prosecutorial misconduct.²⁵⁴ However, the court disagreed with the defendant.²⁵⁵ The court stated that there was no proof in the record that showed the prosecutor "inten[ded] to provoke a mistrial."²⁵⁶ In addition, the court explained that without a prosecutor's bad-faith intent or misconduct to cause the defendant to move for a mistrial, the Double Jeopardy Clause would not be a bar to reprosecution of the defendant.²⁵⁷

In its reasoning, the appellate division referred to *Schoendorf v. Mullen*.²⁵⁸ In that case, the defendant was charged with the murder of his wife.²⁵⁹ After the murder, the defendant made oral statements to the police which were followed by a written confession.²⁶⁰ The court ordered the suppression of certain statements made during the oral confession because the defendant was not given proper notice.²⁶¹ However, during the prosecutor's opening statement, he improperly referred to the suppressed statements.²⁶² The court granted the defendant's motion for a mistrial because the testimony was prejudicial and

251. *Mitchell*, 197 A.D.2d at 709, 602 N.Y.S.2d at 924.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. 152 A.D.2d 715, 544 N.Y.S.2d 170 (2d Dep't 1989).

259. *Id.* at 715, 544 N.Y.S.2d at 170.

260. *Id.*

261. *Id.*

262. *Id.*

denied him a fair trial.²⁶³ The defendant asserted that this motion was caused by the prosecutor's misconduct and, as a result, he claimed that the Double Jeopardy Clause precluded a retrial.²⁶⁴ The court disagreed and stated that the prosecutor did "not intend" to cause the defendant to move for a mistrial.²⁶⁵ The court further commented that because the prosecutor did not intend to cause the defendant to move for a mistrial, the Double Jeopardy Clause did not prevent reprosecution.²⁶⁶ The defendant's claim was thus denied by the court.²⁶⁷

In its reasoning, the appellate division in *Mitchell* also cited *People v. Copeland*.²⁶⁸ In *Copeland*, the defendant was arrested for possession of a weapon.²⁶⁹ After his arrest, the defendant remained silent for three and one-quarter hours.²⁷⁰ He then made a statement to a detective.²⁷¹ The court stated that the prosecutor could not impeach the defendant's testimony by referring to the defendant's period of silence.²⁷² The prosecutor, however,

263. *Id.* at 715, 544 N.Y.S.2d at 171.

264. *Id.* at 716, 544 N.Y.S.2d at 171.

265. *Id.*

266. *Id.*; see also *Person v. Cooperman*, 175 A.D.2d 898, 898-99, 573 N.Y.S.2d 627, 627 (2d Dep't 1991) (holding the Double Jeopardy Clause was not applicable because the defendant's motion for a mistrial was not deliberately provoked by prosecutorial misconduct); *People v. Putnam*, 150 A.D.2d 925, 927, 541 N.Y.S.2d 269, 270 (3d Dep't 1989) (holding the defendant should not be afforded double jeopardy protection because the prosecutorial conduct was not intentional misconduct); *People v. Presley*, 136 A.D.2d 949, 949, 525 N.Y.S.2d 84, 84 (4th Dep't 1988) (holding there is no evidence to show that the prosecutor's conduct was intentional to cause the defendant to move for a mistrial and the defendant could be reprosecuted).

267. *Schoendorf*, 152 A.D.2d at 716, 544 N.Y.S.2d at 171.

268. 127 A.D.2d 846, 511 N.Y.S.2d 949 (2d Dep't 1987).

269. *Id.* at 846-47, 511 N.Y.S.2d at 949.

270. *Id.* at 847, 511 N.Y.S.2d at 950.

271. *Id.*

272. *Id.* The appellate court explained that the defendant's silence for 3 1/4 hours after his arrest and before his statement to the detective is distinguishable from important exculpatory information that a defendant intentionally omitted from his statement to police after his arrest. *Id.* The intentional silence and omissions made during a defendant's statement to police after his arrest can be used to impeach the defendant's testimony during his trial. *Id.* However, silence may not be used to impeach the defendant's credibility at trial when the

ignored the court's ruling and referred to the defendant's silence.²⁷³ Consequently, the court granted the defendant's motion for a mistrial.²⁷⁴ In addition, the defendant filed a motion to dismiss his indictment from the subsequent trial because he argued that the prosecutor intended to provoke him to move for a mistrial.²⁷⁵ The court reasoned that even though the prosecutor may have acted intentionally, his action was not intended to cause the defendant to make a motion for a mistrial.²⁷⁶ The court held that the prosecutor did not have a "bad-faith intent" and, therefore, the defendant could be reprosecuted.²⁷⁷

Similarly, in *People v. Gemmill*,²⁷⁸ the court held that the defendant's reprosecution in the second trial was not barred by the Double Jeopardy Clause.²⁷⁹ In *Gemmill*, the defendant was arrested for robbery.²⁸⁰ During the first trial a prosecution witness made a prejudicial statement and the court granted the co-defendant's motion for a mistrial.²⁸¹ In the second trial, the defendant was convicted for robbery in the second degree.²⁸² The defendant contended that the second trial violated his

defendant remained silent after his arrest but before he gave a statement to police. *Id.*

273. *Id.*

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.*; see also *Ford v. Lagana*, 157 A.D.2d 728, 728-29, 549 N.Y.S.2d 823, 824 (2d Dep't 1990) (holding the retrial of the defendant was not barred by the Double Jeopardy Clause because there was no proof of the prosecutor's bad faith or intention to cause a mistrial); *Jordan v. O'Dwyer*, 152 A.D.2d 671, 671, 543 N.Y.S.2d 737, 738 (2d Dep't 1989) (retrial of the defendant was not prevented by the Double Jeopardy Clause because there was no proof that the prosecutor intentionally acted in bad faith to provoke a mistrial); *People v. Ramos*, 141 Misc. 2d 930, 938-39, 535 N.Y.S.2d 663, 669 (Sup. Ct. New York County 1988) (holding defendant could be reprosecuted because the prosecutor's use of a chart during trial was not used in bad faith with the intention to cause a mistrial).

278. 146 A.D.2d 951, 537 N.Y.S.2d 80 (3d Dep't 1989).

279. *Id.* at 953, 537 N.Y.S.2d at 82.

280. *Id.* at 951, 537 N.Y.S.2d at 81.

281. *Id.*

282. *Id.* at 951-52, 537 N.Y.S.2d at 81.

constitutional right against double jeopardy.²⁸³ The court explained that the Double Jeopardy Clause bars a second trial only if the reason for the defendant's motion for a mistrial was caused by the prosecutor's conduct which intended to cause the defendant to move for a mistrial.²⁸⁴ The court reasoned that the misconduct was not intentionally caused in bad faith by the prosecutor or the witness.²⁸⁵ Therefore, the court held that since there was no prosecutorial misconduct, the defendant's constitutional right pursuant to the Double Jeopardy Clause did not preclude the second trial.²⁸⁶

More recently, in *Roman v. Brown*,²⁸⁷ the defendant filed a motion for a mistrial because of alleged prosecutorial misconduct.²⁸⁸ He claimed that a retrial was precluded by the Double Jeopardy Clause because his motion was a result of the prosecutor's misconduct.²⁸⁹ However, the court disagreed with the defendant.²⁹⁰ The court stated that there was no proof that the prosecutor acted with a "bad-faith intent" to make the defendant file a motion for a mistrial.²⁹¹ The court, therefore, denied the defendant's motion to dismiss the indictment.²⁹²

283. *Id.* at 952, 537 N.Y.S.2d at 81.

284. *Id.*; see also *Collins v. Quinones*, ___ A.D.2d ___, ___, 606 N.Y.S.2d 306, 306 (2d Dep't 1994) (retrial of defendant was not prevented by the Double Jeopardy Clause because there was no evidence that the prosecutor intentionally acted to provoke a mistrial); *Owen v. Harrigan*, 131 A.D.2d 20, 23, 520 N.Y.S.2d 271, 273 (3d Dep't 1987) (holding Double Jeopardy Clause did not prevent the defendant's retrial because there was no proof that the prosecutor intended to cause a mistrial); *People v. Sorenson*, 118 A.D.2d 607, 608, 499 N.Y.S.2d 450, 451 (2d Dep't 1986) (holding that the prejudicial testimony elicited by the prosecutor during the defendant's prior trial did not constitute prosecutorial misconduct because the prosecutor did not intend to cause a mistrial).

285. *Gemmill*, 146 A.D.2d at 952-53, 537 N.Y.S.2d at 82.

286. *Id.* at 953, 537 N.Y.S.2d at 82.

287. 175 A.D.2d 899, 573 N.Y.S.2d 627 (2d Dep't 1991).

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

In *Mitchell*, the defendant asserted that because the prosecutor called the defendant a “pimp” in her opening statement, the prosecutor intentionally caused the defendant to move for a mistrial.²⁹³ In applying the facts in *Mitchell* to the holdings of *Schoendorf*, *Copeland*, *Gemmill* and *Roman*, they are similar to and in agreement with the holding in *Mitchell*. Therefore, the New York courts have held that the Double Jeopardy Clause will not bar reprosecution when there is no evidence to show that the prosecutor’s conduct intentionally caused the defendant to move for a mistrial.

Federal case law in this area is in accord with New York case law. In support of its reasoning, the court in *Mitchell* referred to and quoted the Supreme Court case, *Oregon v. Kennedy*.²⁹⁴ In this case, the defendant was arrested for theft.²⁹⁵ During the defendant’s first trial, in the prosecutor’s redirect examination of a witness, he referred to the defendant as a “crook.”²⁹⁶ The defendant then filed a motion for a mistrial which was granted by the trial court.²⁹⁷ After the prosecution attempted to reprosecute, the defendant claimed that, because of the Double Jeopardy Clause, the charges should have been dismissed.²⁹⁸ The trial court denied the defendant’s motion to bar the retrial because the prosecutor did not intend to cause the defendant to move for a mistrial.²⁹⁹ The state appellate court reversed the trial court’s decision and held that the retrial was barred because the prosecutor’s misconduct was “overreaching.”³⁰⁰ However, the Supreme Court disagreed with the appellate court’s ruling.³⁰¹

The Court explained that a defendant will be afforded the protection of the Double Jeopardy Clause to bar a second trial only when the governmental conduct intends to “goad” the

293. *Mitchell*, 197 A.D.2d. at 709, 602 N.Y.S.2d at 924.

294. 456 U.S. 667 (1982).

295. *Id.* at 669.

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.* at 669-70.

300. *Id.* at 670.

301. *Id.* at 671.

defendant to make a motion for a mistrial.³⁰² The Court further stated, that even if a defendant's motion for a mistrial is granted, this will not preclude a retrial "absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause."³⁰³

Federal case law in this area has applied the rationale and holding of *Oregon v. Kennedy*. In *United States v. Huang*,³⁰⁴ the Second Circuit stated that the defendant is protected by the Double Jeopardy Clause from reprosecution only when the governmental conduct provoked the defendant into making a motion for a mistrial.³⁰⁵ The court determined that the governmental conduct was not intended to cause the defendant to move for a mistrial.³⁰⁶ Therefore, the Second Circuit denied the defendant's motion and held that the defendant's constitutional rights under the Double Jeopardy Clause were not violated.³⁰⁷

302. *Id.* at 676.

303. *Id.*; see also *Lee v. United States*, 432 U.S. 23, 34 (1977) (holding that the errors alleged by the defendant did not bar reprosecution because such errors were not intentionally made in bad faith or to provoke a mistrial); *United States v. Dinitz*, 424 U.S. 600, 611 (1976) (holding that the defendant could be retried because the trial judge's action of having the respondent's counsel removed during the trial was not intentionally done in bad faith to cause the defendant to move for a mistrial), *cert. denied*, 429 U.S. 1104 (1977).

304. 960 F.2d 1128 (2d Cir. 1992). The defendants were charged with racketeering and kidnapping. *Id.* at 1130. In the first trial, the interpreter hired by the Assistant United States Attorney for the defendant was not certified and he was also an employee of the United States Attorney, not the court. *Id.* at 1132. Instead of interpreting the defendant's testimony accurately, the interpreter summarized the testimony. *Id.* at 1131. The defendants asserted that reprosecution violated their constitutional rights under the Double Jeopardy Clause. *Id.* at 1133.

305. *Id.*; see also *United States v. G.A.F. Corp.*, 884 F.2d 670, 673-74 (2d Cir. 1989) (court applied the reasoning in *Kennedy* and stated that the prosecutor's conduct was "not intended to goad" the defendant to move for a mistrial); *United States v. Rivera*, 802 F.2d 593, 598-99 (2d Cir. 1986) (court determined that the standard for prosecutorial misconduct as defined in *Kennedy* also applies to conduct by a trial judge), *aff'd*, 812 F.2d 713 (2d Cir. 1987).

306. *Huang*, 960 F.2d at 1134.

307. *Id.*

Accordingly, under the State and Federal Constitutions the Double Jeopardy Clause will bar a second trial of the defendant only where the prosecutor intentionally caused or provoked the defendant to make a motion for a mistrial. In applying the facts in *Mitchell* under the State and Federal Constitutions, the defendant could only be afforded protection under the Double Jeopardy Clause if he could prove that the prosecutor intentionally acted to cause the defendant to move for a mistrial. However, without a showing of this type of prosecutorial misconduct, reprosecution of the defendant will not be precluded by the Double Jeopardy Clause. Thus, the court in *Mitchell*, which held that reprosecution of the defendant was not barred by the Double Jeopardy Clause because there was no evidence of prosecutorial misconduct, is in accord with the State and Federal Constitutions.

THIRD DEPARTMENT

People v. Lowe³⁰⁸
(decided June 3, 1993)

Defendant challenged his criminal conviction, which followed a mistrial and a second trial, and claimed that relitigation was prohibited by the Double Jeopardy Clauses of the State³⁰⁹ and Federal³¹⁰ Constitutions.³¹¹ The court held that because it was the defendant himself who requested a mistrial during the original proceedings, retrial of the action was not improper.³¹²

On November 1, 1991, defendant was convicted on two counts of "criminal possession of a weapon in the third degree"³¹³ in

308. 194 A.D.2d 825, 598 N.Y.S.2d 613 (3d Dep't 1993).

309. N.Y. CONST. art. I, § 6. Section 6 provides in part: "No person shall be subject to be twice put in jeopardy for the same offense." *Id.*

310. U.S. CONST. amend. V. The Fifth Amendment states in pertinent part: "No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb." *Id.*

311. *Lowe*, 194 A.D.2d at 826, 598 N.Y.S.2d at 614.

312. *Id.*

313. *Id.* at 825, 598 N.Y.S.2d at 613-14.