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## Double Jeopardy: People v. Lowe

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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. Lowe<sup>308</sup>  
(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 State<sup>309</sup> and Federal<sup>310</sup> Constitutions.<sup>311</sup> 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.<sup>312</sup>

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

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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.

Broome County Supreme Court.<sup>314</sup> On appeal, the defendant set forth several points of contention, all of which were rejected by the appellate division.<sup>315</sup> Most significantly, the defendant claimed that “there should be a reversal and dismissal of the indictment because he was tried in violation of the double jeopardy proscriptions of the Federal and State Constitutions.”<sup>316</sup>

Defendant’s claim was based upon the fact that during the first trial it was discovered that defense counsel previously represented the prosecution witness in a separate criminal matter.<sup>317</sup> Upon this finding, the “County Court immediately conducted a *Gomberg* inquiry,”<sup>318</sup> and determined that the defendant wanted a mistrial and a new attorney.<sup>319</sup> Consequently, defendant’s application for a mistrial was granted, and a new trial was conducted in supreme court.<sup>320</sup> Nevertheless, defendant maintained that “because the People were aware of the conflict prior to commencement of the first trial, their failure to reveal the conflict to the court and defendant dictates dismissal of the indictment.”<sup>321</sup> In response, the court cited *People v. Wandell*,<sup>322</sup> where, in spite of the reversal of defendant’s conviction, was because of counsel’s failure to alert the trial court as to a conflict of interest, a new trial was warranted.<sup>323</sup> Ultimately, the appellate division held that “[i]nasmuch as

314. *Id.*

315. *Id.* at 825-86, 598 N.Y.S.2d at 614. The defendant claimed insufficient evidence to sustain conviction, violation of double jeopardy protection, unlawful search and seizure of handgun, and trial was not timely commenced. *Id.*

316. *Id.* at 826, 598 N.Y.S.2d at 614.

317. *Id.*

318. *Id.*; *People v. Gomberg*, 38 N.Y.2d 307, 342 N.E.2d 550, 379 N.Y.S.2d 769 (1975). “What is required is that when two or more defendants are represented by the same attorney, the trial court ascertain, on the record, whether each defendant has an awareness of the potential risks involved in that course and has knowingly chosen it.” *Id.* at 313-14, 342 N.E.2d at 554, 379 N.Y.S.2d at 775 (citations omitted).

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

320. *Id.*

321. *Id.*

322. 75 N.Y.2d 951, 554 N.E.2d 1274, 555 N.Y.S.2d 686 (1990).

323. *Id.* at 953, 554 N.E.2d at 1275, 555 N.Y.S.2d at 687.

defendant sought the mistrial, retrial of the action is not barred.”<sup>324</sup>

The New York Court of Appeals set forth the broad mandates of the Double Jeopardy Clause in *People v. Catten*.<sup>325</sup> The court stated that

[t]he Double Jeopardy Clauses of both the Federal and State Constitutions prohibit a person’s being placed in jeopardy twice for the same offense. Thus, retrial will be barred after the declaration of a mistrial without the defendant’s consent unless ‘it is physically impossible to proceed with the trial in conformity with law’ or there was ‘manifest necessity’ for the mistrial or ‘the ends of public justice would otherwise be defeated.’<sup>326</sup>

However, despite the general principles enunciated, the court stated that when the defendant himself moves for a mistrial, he “waives his double jeopardy protections” and thus, retrial is not prohibited “regardless of whether there was manifest necessity for the mistrial.”<sup>327</sup> In addition, relying on *People v. Ferguson*,<sup>328</sup> the *Catten* court noted that “a defendant need not agree with counsel, or even be in the courtroom when counsel moves for a mistrial, for the motion to be binding on him.”<sup>329</sup> Furthermore, New York courts have stated that when “a mistrial was ordered at the request of the petitioner, and there is no evidence of bad faith or an intention by the prosecutor to provoke

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

325. 69 N.Y.2d 547, 508 N.E.2d 920, 516 N.Y.S.2d 186 (1987).

326. *Id.* at 553-54, 508 N.E.2d at 924, 516 N.Y.S.2d at 189 (citations omitted).

327. *Id.* at 554, 508 N.E.2d at 924, 516 N.Y.S.2d at 190 (citations omitted). See also *People v. Ferguson*, 67 N.Y.2d 383, 494 N.E.2d 77, 502 N.Y.S.2d 972 (1986). “[W]here the defendant either requests a mistrial or consents to its declaration, the double jeopardy clauses do not ordinarily bar a second trial.” *Id.* at 388, 494 N.E.2d at 80, 502 N.Y.S.2d at 975 (citations omitted). Accord *People v. Reardon*, 126 A.D.2d 974, 511 N.Y.S.2d 748 (4th Dep’t 1987).

328. 67 N.Y.2d 383, 494 N.E.2d 77, 502 N.Y.S.2d 972 (1986).

329. *Catten*, 69 N.Y.2d at 556, 508 N.E.2d at 925, 516 N.Y.S.2d at 191.

a mistrial motion, retrial is not barred by the double jeopardy protections.”<sup>330</sup>

The Federal Double Jeopardy Clause has the same effect as the New York provision.<sup>331</sup> The justification for this constitutional protection is set forth in *United States v. Dinitz*. The court stated:

Underlying this constitutional safeguard is the belief that ‘the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.’<sup>332</sup>

Further, when it is the defendant himself who requests a mistrial in a prior proceeding, the Supreme Court has stated that “the Double Jeopardy Clause is not offended by a second prosecution.”<sup>333</sup>

Finally, as a guideline to aid in the implementation of the Double Jeopardy Clause, the *Dinitz* Court stated 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 such error.”<sup>334</sup> In the case at bar, since the defendant himself submitted the application for a mistrial, it is impossible to say that the defendant did not have control over the course of events. Thus, applying either the

330. *Pierre-Lewis v. Tomei*, 157 A.D.2d 661, 662, 549 N.Y.S.2d 763, 764 (2d Dep’t 1990); see also *People v. Woodward*, 127 A.D.2d 929, 512 N.Y.S.2d 513 (3d Dep’t 1987). “When a defendant requests a mistrial, double jeopardy does not preclude another trial unless the underlying error which brought on the defendant’s motion was caused by governmental conduct intended to provoke the defendant into moving for a mistrial.” *Id.* at 931, 512 N.Y.S.2d at 515 (citations omitted).

331. *United States v. Dinitz*, 424 U.S. 600, 606 (1976) (“The Double Jeopardy Clause of the Fifth Amendment protects a defendant in a criminal proceeding against multiple punishments or repeated prosecutions for the same offense.”).

332. *Id.* (citing *Green v. United States* 355 U.S. 184, 187-88 (1957)).

333. *United States v. Scott*, 437 U.S. 82, 93 (1978).

334. *Dinitz*, 424 U.S. at 609.

Federal or New York State Double Jeopardy Clause, the defendant's rights were not violated by the second trial.