TOURO LAW
JACOB D. FUCHSBERG LAW CENTER

Touro Law Review

Volume 13 | Number 3 Article 11

July 2019

Double Jeopardy

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 . . . .

COURT OF APPEALS

Davis v. Brown[1]
(decided March 28, 1996)

Petitioner, Arthur Davis, was charged for robbery in the second degree.[2] The Supreme Court, Queens County, granted a mistrial[3] without prejudice and the petitioner commenced a proceeding in the nature of a prohibition to bar his retrial under the Federal and State Constitutional Double Jeopardy Clause.[4]

---

1. 87 N.Y.2d 626, 664 N.E.2d 884, 641 N.Y.S.2d. 819 (1996).

2. *Id.* at 628, 664 N.E.2d at 885, 641 N.Y.S.2d at 820.

3. The defendant, the State, or the court may make a motion for a mistrial. N.Y. CRIM. PROC. LAW § 280.10 (McKinney 1980). Section 280.10 provides in pertinent part:

> At any time during the trial, the court must declare a mistrial and order a new trial of the indictment under the following circumstances:
> (1)Upon motion of the defendant, when there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, which is prejudicial to the defendant and deprives him of a fair trial.

Id.

4. *Id.* The petitioner made an application for a writ of prohibition pursuant to article 78 of New York's Civil Practice Laws and Rules. N.Y. CIV. PRAC. L. & R § 7801. Although CPLR 7801(2) generally cannot be relied upon to challenge a determination made in a civil action or criminal matter, prohibition is an exception that "serves to restrain judicial or quasi-judicial officers from acting without jurisdiction or in excess of their jurisdiction." N.Y. CIV. PRAC. L. & R. § 7801(2) (McKinney 1980) (citing Practice Commentaries § C7801:4 (citing Town of Huntington v. New York

The petitioner asserted that he specifically limited his mistrial motion to one with prejudice and that because he did not consent to the mistrial without prejudice, his retrial is barred by the Federal[5] and New York State[6] Constitutional Double Jeopardy Clauses.[7] The Appellate Division, Second Department, denied petitioner's application for a writ of prohibition to prevent his retrial.[8] The New York State Court of Appeals reversed the lower court and held that the defendant should be permitted to limit a mistrial motion to one with prejudice, and if the defendant is not given the opportunity to withdraw the motion because the court did not grant the total relief requested, the defendant's retrial should be barred by double jeopardy.[9]

Before the petitioner's trial, the trial court issued two pretrial rulings precluding the People from eliciting testimony that the complaining witness had identified petitioner while watching a "Court T.V." program and from introducing any evidence of prior warrants issued against petitioner.[10] Despite the rulings, a

---

State Div. of Human Rights, 82 N.Y.2d 783, 604 N.Y.S.2d 541, 624 N.E.2d 678 (1993))). "Prosecutors . . . have been brought within the ambit of prohibition on the theory that they perform a quasi-judicial role when representing the public in bringing criminal wrongdoers to justice." *Id.* (citing Practice Commentaries § C7801:4 (citing Schumer v. Holtzman, 60 N.Y.2d 46, 467 N.Y.S.2d 182, 454 N.E.2d 522 (1983))). Thus, prohibition proceedings are appropriate when the issue is a criminal prosecution in potential violation of double jeopardy. *Id.* (citing Practice Commentaries § C7801:4 (citing Kraemer v. County Court of Suffolk County, 6 N.Y.2d 363, 189 N.Y.S.2d 878, 168 N.E.2d 633 (1959))).

5. U.S. CONST. amend. V. The Fifth Amendment provides in pertinent part: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . ." *Id.*

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

7. *Davis*, 87 N.Y.2d at 628, 664 N.E.2d at 885, 641 N.Y.S.2d at 820. *See* Benton v. Maryland, 395 U.S. 784 (1969). In *Benton*, the Supreme Court held that the Double Jeopardy Clause of the Fifth Amendment applied to the States through the Fourteenth Amendment. *Id.* at 793-96.

8. *Id.* at 629, 664 N.E.2d at 886, 641 N.Y.S.2d at 821.

9. *Id.* at 630-31, 664 N.E.2d at 886, 641 N.Y.S.2d at 821.

10. *Id.* at 628, 664 N.E.2d at 885, 641 N.Y.S.2d at 821.

prosecution witness mentioned that he had taped a show on "channel 51."[11] In petitioner's initial motion for a mistrial, he argued that this testimony was prejudiced because the jury would know that channel 51 was the local "Court T.V." channel.[12] The trial court reserved decision on the motion.[13]

The following day, the arresting officer testified, in violation of the pretrial ruling, that a prior warrant was issued against the petitioner.[14] Davis again moved for a mistrial and asked that it be granted with prejudice and reminded the judge of the previous mistrial motion.[15] When the judge asked if petitioner was "'pressing that motion for a mistrial now,' the petitioner responded that he was 'pressing it with prejudice.'"[16] Davis argued further that "'I think there is evidence that the People intentionally brought in this information before the jury . . . ignoring the court's order and I am moving for a mistrial with prejudice.'"[17] The judge granted a mistrial but stated that he would determine later whether to grant it with prejudice.[18] The petitioner requested that the judge decide immediately if the mistrial would be granted with prejudice so that Davis could know whether to withdraw his motion.[19] The judge repeated his decision to postpone the decision of the terms of the mistrial.[20] The judge requested that both parties submit written legal memoranda on whether the mistrial should be with or without prejudice.[21] Petitioner's memorandum unequivocally stated that his motion was only for a mistrial with prejudice, based on intentional prosecutorial misconduct.[22]

---

11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 629, 664 N.E.2d at 885, 641 N.Y.S.2d at 820.
20. *Id.*
21. *Id.*
22. *Id.*

When petitioner renewed his mistrial motion with prejudice in court, the judge granted it without prejudice because "there was no intent upon the People to provoke the defendant in moving for a mistrial."[23] Petitioner objected, asserting that the case should proceed with the impaneled jury.[24] The court adhered to its ruling and added that the petitioner's initial motion was not limited, and that his qualification for a mistrial with prejudice was merely "an addendum -- added yesterday."[25] The jury was discharged and the petitioner was released pending a retrial.[26] The appellate division denied Davis' application for a writ of prohibition barring retrial because the court concluded that the prosecutorial conduct was not intended to provoke the defendant to move for a mistrial and the petitioner's limited mistrial motion was not made until after the court had granted the mistrial without prejudice.[27]

The New York State Court of Appeals granted leave to appeal and reversed the appellate division.[28] The court of appeals began its analysis by stating that under the Double Jeopardy Clauses of the Federal and New York State Constitutions, a defendant may not twice be put in jeopardy of a criminal prosecution for the same offense.[29] The court stated that under both constitutions, double jeopardy means that if there is a judicial or prosecutorial error warranting a mistrial, the defendant has the right to choose whether to request a new trial or to continue to defend the case before the already impaneled jury.[30]

The court of appeals reiterated certain rules under both federal and state law that flow from this constitutional protection.

---

23. *Id.*

24. *Id.* at 629, 664 N.E.2d at 885-86, 641 N.Y.S.2d at 820-21.

25. *Id.* at 629, 664 N.E.2d at 886, 641 N.Y.S.2d at 821.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 629-30, 664 N.E.2d at 886, 641 N.Y.S.2d at 821. (citing U.S. CONST. amend. V; N.Y. CONST. art. I, § 6.).

30. *Id.* at 630, 664 N.E.2d at 886, 641 N.Y.S.2d at 821 (citing United States v. Dinitz, 424 U.S. 600, 609 (1976); People v. Ferguson, 67 N.Y.2d 383, 388 494 N.E.2d 77, 80, 502 N.Y.S.2d 972, 975 (1986)).

Jeopardy attaches when the jury is impaneled and sworn in.[31] The Supreme Court of the United States has held that once jeopardy attaches, the defendant has a "'valued right to have his trial completed by a particular tribunal.'"[32] In the event of prosecutorial or judicial error, the defendant may make a motion for a mistrial.[33] Accordingly, where the defendant requests a mistrial or consents to a mistrial, there is usually no bar to a retrial.[34] However, if a court finds that the prosecution intentionally provoked a mistrial motion, even where the defendant has requested or consented to the mistrial, such retrial will be barred.[35] Conversely, where the court grants a mistrial without the consent of the defendant, or over the defendant's objections, the constitutional double jeopardy protection will usually bar a retrial.[36] However, retrial will not be barred, even where the defendant objected to the mistrial, if the court finds that there was "manifest necessity" or "the ends of public justice would otherwise be defeated."[37]

Although the United States Supreme Court has not addressed the issue of a limited mistrial motion, certain federal circuits relied upon by the New York State Court of Appeals have concluded that a defendant is allowed to request a mistrial with prejudice based on prosecutorial misconduct, and is then given

31. Crist v. Bretz, 437 U.S. 28, 35; People v. Ferguson, 67 N.Y.2d 383, 388, 494 N.E.2d 77, 80, 502 N.Y.S.2d 972, 975 (1986).

32. United States v. Dinitz, 424 U.S. 600, 606 (1976) (quoting Wade v. Hunter, 336 U.S. 684, 689 (1949); United States v. Jorn, 400 U.S. 470, 484-85 (1971); Downum v. United States, 372 U.S. 734, 736 (1963)).

33. *Davis*, 87 N.Y.2d at 630, 664 N.E.2d at 886, 641 N.Y.S.2d at 821.

34. *Id.* (citing Oregon v. Kennedy, 456 U.S. 667, 673 (1982); People v. Ferguson, 67 N.Y.2d 383, 388 494 N.E.2d 77, 80, 502 N.Y.S.2d 972, 975 (1986)).

35. *Id.* (citing Oregon v. Kennedy, 456 U.S. 667, 673 (1982); People v. Ferguson, 67 N.Y.2d 383, 388 494 N.E.2d 77, 80, 502 N.Y.S.2d 972, 975 (1986)).

36. *Id.* (citing People v. Ferguson, 67 N.Y.2d 383, 388, 494 N.E.2d 77, 80, 502 N.Y.S.2d 972, 975 (1986) (citing United States v. Perez, 9 Wheat [22 U.S.] 579, 580 (1824))).

37. *Id.* (citing Enright v. Siedlecki, 59 N.Y.2d 195, 199, 451 N.E.2d 176, 179, 464 N.Y.S.2d 418, 421 (1983) (citing Unites States v. Perez, 9 Wheat [22 U.S.] 579, 580 (1824))). Manifest necessity was not at issue in *Davis*. *Id.*

the opportunity to proceed with the initial jury if the mistrial is not granted with prejudice. In *Weston v. Kernan*,[38] two witnesses who were only to testify regarding the identification of the defendant, offered additional testimony about the defendant's prior criminal history, thus potentially prejudicing the defendant.[39] The defendant's initial mistrial motion was not a limited request, but was followed by a written motion which made it clear that the defendant only desired a mistrial if jeopardy would attach.[40] If retrial would not be barred, the defendant desired that the court provide cautionary instructions to the jury and allow the trial to continue.[41] The judge declared a mistrial without prejudice, but still made a finding that the testimony was prejudicial to the defendant.[42] The defendant objected to the judge's declaration of a mistrial without prejudice, thereby making it clear that he did not consent to the mistrial.[43]

The *Weston* court acknowledged that the initial mistrial motion itself could be viewed as unqualified because it lacked an explicit limitation request, but found that the written motion and the objections did clarify the defendant's limited request.[44] The court reasoned that the trial court's grant of a mistrial without prejudice deprived the defendant of his right to "'retain primary control' over the course of the proceedings" after judicial or prosecutorial error.[45] Additionally, the court stated that without the defendant's "clear acquiescence," the defendant was deprived of his right to choose whether to continue with the original jury.[46]

---

38. 50 F.3d 633 (9th Cir. 1995).

39. *Id.* at 635.

40. *Id.* at 635-36. The defendant argued that the prosecution had intentionally goaded the defendant into requesting the mistrial because of the extraneous testimony offered by the witnesses. *Id.*

41. *Id.* at 636.

42. *Id.*

43. *Id.*

44. *Id.* at 637.

45. *Id.* at 638 (quoting United States v. Dinitz, 424 U.S. 600, 609 (1976)).

46. *Id.* (citing Oregon v. Kennedy, 456. U.S. 667, 673 (1982)). In *Weston*, the third circuit reiterated the Supreme Court's enumerated purposes for the double jeopardy protection:

In *United States v. Huang*,[47] there was a problem during the trial with a translator summarizing testimony, rather than relaying the testimony verbatim.[48] Two of the defendants, Park and Cheoi, on trial for multiple related crimes, objected to the court's declaration of a mistrial, unless it contained an order barring retrial.[49] Although the defendants requested to proceed with the first jury, the trial judge declared a mistrial without prejudice.[50] The New York State Court of Appeals determined that the trial court did not "scrupulously" explore whether there was "manifest necessity" to grant the mistrial, thus double jeopardy barred their retrial.[51]

The New York double jeopardy jurisprudence is consistent with the federal double jeopardy jurisprudence. A defendant makes a motion "with prejudice" when the defendant believes that the prosecutor's conduct was intentionally designed to provoke the defendant to move for a mistrial because the prosecution feared that it's presentation of the case might result in an acquittal.[52] Such a tactic would, in effect, provide the prosecution with an "impermissible second bite at the apple . . . in direct violation of the letter and spirit of both the State and Federal Double Jeopardy Clauses."[53]

---

(1) to ensure the finality of judgments in criminal cases; (2) to avoid compelling a defendant to live in a constant state of anxiety and insecurity attendant with successive prosecutions for the same offense; (3) to avoid giving the prosecution an unfair opportunity to retry the defendant using information gained from the first trial concerning the strengths and weaknesses of the State's case; (4) to ensure that the defendant's right to have his fate decided by the first jury empaneled is protected; and (5) to avoid the imposition of multiple punishments for the same offense.

Id. at 636.

47. 960 F.2d 1128 (2nd Cir. 1992).
48. *Id.* at 1130.
49. *Id.* at 1134.
50. *Id.*
51. *Id.*
52. *Davis*, 87 N.Y.2d at 630, 664 N.E.2d at 886, 641 N.Y.S.2d at 821.
53. *Id.*

In reaching its holding that the defendant may delimit his mistrial motion, the New York State Court of Appeals reasoned that, if the defendant were disallowed the opportunity to continue with the first jury because the court found no intentional prosecutorial misconduct, that would, in effect, penalize the defendant for misperceiving the deliberateness of the conduct.[54] Henceforth, the defendant's right to have his case decided by the first jury would be eroded.[55] Moreover, following the *Weston* decision, the court stated that "in the absence of the petitioner's unequivocal acquiescence to a mistrial without prejudice, the court lacked the petitioner's consent to discharge the first jury," thereby barring a retrial.[56]

The court relied on *People v. Catten*[57] in addressing the issue of the defendant initially making an unqualified mistrial motion and then adding the "with prejudice" limitation the following day. In *Catten*, the New York State Court of Appeals held that the defendant may withdraw a motion for mistrial at anytime prior to the court granting the motion, and the defendant is free to continue with the initial jury.[58] In *Davis*, the court reasoned that the *Catten* holding "implies the right to modify or limit the motion before" the mistrial is granted.[59] Again, this is consistent with the defendant's right to be tried by the first jury.[60] Furthermore, the court determined that any doubts regarding the motion were resolved by the defendant's written legal memorandum and repeated objections.[61]

In conclusion, federal and New York law are similar with respect to treatment of the Double Jeopardy protection where a

54. *Id.* at 631, 664 N.E.2d at 887, 641 N.Y.S.2d at 822.

55. *Id.*

56. *Id.*

57. 69 N.Y.2d 547, 508 N.E.2d 920, 516 N.Y.S.2d 186 (1987).

58. *Id.* at 555, 508 N.E.2d at 925, 516 N.Y.S.2d at 190. This is to be distinguished from the situation where the defendant desires to withdraw a mistrial motion after the court grants a mistrial. The decision is then within the judge's discretion whether to allow the withdrawal. *Id.*

59. *Davis*, 87 N.Y.2d at 632, 664 N.E.2d at 887, 641 N.Y.S.2d at 822.

60. *Id.*

61. *Id.*

defendant makes a limited motion for a mistrial with prejudice and desires to proceed with the impaneled jury if the court grants the mistrial without prejudice. Under both the federal and state constitutions, the defendant has the right to have his trial before the first jury, thereby maintaining primary control over the path upon with to proceed.[62] The Second Circuit and the Ninth Circuit Court of Appeals and New York have held that the defendant would be deprived of that right if he is not allowed to make a limited motion based on prosecutorial misconduct. Additionally, New York law establishes that the right to make a limited mistrial motion flows naturally from the well settled right allowing the defendant to withdraw a mistrial motion before the court grants the motion.[63] Thus, both the federal and New York state courts are making law to ensure that the double jeopardy protection is not easily eroded.

SUPREME COURT, APPELLATE DIVISION SECOND DEPARTMENT

People v. Boneta[64]
(decided October 21, 1996)

The defendant, William Boneta, was convicted of second and third degree assault.[65] He appealed to the Appellate Division, Second Department, claiming that the double jeopardy provisions of the Federal[66] and New York State Constitutions[67] precluded a

62. United States v. Dinitz, 424 U.S. 600, 609 (1976); People v. Ferguson, 67 N.Y.2d 383, 388, 494 N.E.2d 77, 80, 502 N.Y.S.2d 972, 975 (1986).

63. *Davis*, 87 N.Y.2d at 555, 664 N.E.2d at 925, 641 N.Y.S.2d at 190.

64. 649 N.Y.S.2d 443 (2d Dep't 1996).

65. *Id.* at 443-44.

66. U.S. CONST. amend. V. The Fifth Amendment provides in pertinent part: "No person shall . . . be subject for the same offense to be twice out in jeopardy of life and limb . . . ." *Id.*

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