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Double Jeopardy Supreme Court Appellate Division Second Department

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.*

retrial after a mistrial[68] was granted by the trial court.[69] The prosecutor moved for the mistrial after his only non-police witness refused to testify, because the witness claimed that he was threatened on two occasions by the "defendant or some person acting on his behalf."[70]

The court permitted a retrial on two theories.[71] First, "the prosecutor made a sufficient showing that the refusal of its only non-police witness to testify, after he was twice threatened, could be factually attributed to the 'defendant or some person acting on his behalf.'"[72] Second, the witness' evidence was not merely corroborative but "he possessed important evidence that no one else could offer."[73]

In its holding, the *Boneta* court adhered to the rule set forth by the Supreme Court in *United States v. Perez*[74] that stated "[w]hen a court grants a mistrial without the consent of or over

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68. *Boneta*, 649 N.Y.S.2d at 444. *See* N.Y. CRIM. PROC. LAW § 280.10 (McKinney 1993). Section 280.10 states in pertinent part:

> At any time during the trial, the court must declare a mistrial and order a new trial of the indictment . . .
>
> 2. Upon motion of the people, when there occurs during the trial, either inside or outside the courtroom, gross misconduct by the defendant or some person acting on his behalf, . . . resulting in substantial and irreparable prejudice to the people's case.

Id.

69. *Boneta*, 649 N.Y.S.2d at 444.

70. *Id.*

71. *Id.*

72. *Boneta*, 649 N.Y.S.2d at 444. *See also* People v. Paquette, 31 N.Y.2d 379, 380-81, 292 N.E.2d 17, 18, 339 N.Y.S.2d 959, 960 (1972) (holding that a retrial is permitted when the prosecutor's inability to produce witnesses was factually attributed to the defendant because of threats that he made to witnesses); Grant v. Kreindler, 162 A.D.2d 531, 532, 556 N.Y.S.2d 727, 728 (2d Dep't 1990) (holding that a retrial is permitted when the prosecutor's inability to produce a witness was factually attributed to the defendant's uncle).

73. *Boneta*, 649 N.Y.S.2d at 444. *See, e.g.*, People v. Allen, 86 N.Y.2d 599, 606-07, 658 N.E.2d 1012, 1017, 635 N.Y.S.2d 139, 144 (1995) (Titone, J., concurring) (finding that "the witness in question did, in fact, have important evidence–i.e., a statement by defendant elucidating intent–that only that witness was in a position to offer").

74. 22 U.S. 579 (1824).

the objection of the defendant, the double jeopardy provisions . . . prohibit retrial for the same crime unless there was 'manifest necessity' for the mistrial, or 'the ends of public justice would otherwise be defeated.'"[75] This rule was followed by the New York State Court of Appeals in *People v. Ferguson*.[76]

In *Perez*, the defendant was on trial for a capital offense.[77] The jury, however, unable to agree to a verdict, was discharged by the court from giving a verdict in the case without the permission of the defendant.[78] The Court held that because the prisoner had never been convicted or acquitted, and was still able to argue his defense, "the facts constitute[d] no legal bar to a future trial."[79]

In *Illinois v. Somerville*,[80] the state was granted a mistrial, despite the defendant's objection, when it realized that the defendant's grand jury indictment for the crime of theft was "fatally deficient" under state law.[81] Subsequently, the grand jury cured the defect by providing the requisite intent and the defendant was tried and convicted of theft.[82] The Court held that a retrial did not violate the defendant's rights under the double jeopardy provisions because "[a] trial judge properly exercises his discretion to declare a mistrial if . . . a verdict of conviction could be reached but would have to be reversed on appeal due to an obvious procedural error in the trial."[83] The Court further stated that "it would not serve 'the ends of public justice' to require that the Government proceed with its proof when, if it

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75. *Id.* at 580.

76. 67 N.Y.2d 383, 494 N.E.2d 77, 502 N.Y.S.2d 972 (1986).

77. *Perez*, 22 U.S. at 579.

78. *Id.*

79. *Id.* at 580.

80. 410 U.S. 458 (1973).

81. *Id.* at 459. The indictment was "fatally deficient" because "it did not allege that [defendant] intended to permanently deprive the owner his property. Under the applicable . . . criminal statute, such intent is a necessary element of the crime of theft, and failure to allege intent renders the indictment insufficient to charge a crime." *Id.* (citation omitted).

82. *Id.*. at 460.

83. *Id.* at 464.

succeeded before the jury, it would automatically be stripped of that success by an appellate court."[84]

In *Oregon v. Kennedy*,[85] the Supreme Court acknowledged the existence of the *Perez* rule, but recognized its inapplicability to the facts of this specific case.[86] In *Oregon*, the defendant moved for a mistrial.[87] Here, because "the defendant himself ha[d] elected to terminate the proceedings against him . . . the 'manifest necessity' standard ha[d] no place in the application of the Double Jeopardy Clause."[88]

New York State has also adopted the rule from *Perez*. In *People v. Ferguson*,[89] the defendant's first trial was terminated when the judge declared a mistrial when the defendant was not present in court The mistrial came as a result of an automobile accident that injured one of the jurors; there were no alternates available.[90] Defense counsel claimed that he had not given his "unqualified consent" to the mistrial and moved to dismiss the indictment prior to the second trial based on the defendant's double jeopardy right.[91] The motion was denied, and, following the second trial, the defendant was convicted of second degree murder.[92] The New York State Court of Appeals held that there was no "manifest necessity" for the judge to declare a mistrial.[93] Instead, the judge should have inquired "as to how long the juror would remain unavailable."[94] In addition, the judge never ascertained the extent of the juror's injuries.[95] Since the *Ferguson* court believed that it might have been possible for the

84. *Id.*
85. 456 U.S. 667 (1982).
86. *Id.* at 672.
87. *Id.* at 669.
88. *Id.* at 672.
89. 67 N.Y.2d 383, 494 N.E.2d 77, 502 N.Y.S.2d 972 (1986).
90. *Id.* at 386, 494 N.E.2d at 79, 502 N.Y.S.2d at 974.
91. *Id.* at 387, 494 N.E.2d at 79, 502 N.Y.S.2d at 974.
92. *Id.* at 386, 494 N.E.2d at 78, 502 N.Y.S.2d at 974.
93. .*Id.* at 388, 494 N.E.2d at 80, 502 N.Y.S.2d at 975.
94. *Id.*
95. *Id.*

juror to have continued after a short amount of time,[96] a brief continuance could have been a viable alternative to a mistrial.[97]

The New York State Court of Appeals did, however, hold that there was "manifest necessity" for the judge to declare a mistrial in *People v. Paquette*.[98] In *Paquette*, the prosecution was unable to produce its witnesses because of threats made to the witnesses by the defendant's uncle.[99] The court reasoned that "[i]f the act of a defendant himself aborts a trial, he ought not readily be heard to say that by frustrating the trial he had succeeded in erecting a constitutional shelter based on double jeopardy."[100]

It is clear from the aforementioned federal and state cases that the rules governing when a retrial is prohibited pursuant to the federal and state Double Jeopardy Clauses are clearly congruous in their application. Both courts will preclude a retrial when a mistrial is granted by the court without the consent of or over the objection of the defendant "unless there was a 'manifest necessity' for the mistrial, or 'the ends of public justice would otherwise be defeated.'"[101]

People v. May[102]
(decided June 10, 1996)

Defendant, Nathan May, was convicted in 1988 of murder in the second degree, attempted murder in the second degree and assault in the first degree.[103] He was sentenced to consecutive

96. *Id.*

97. *Id.*

98. 31 N.Y.2d 379, 380, 292 N.E.2d 17, 18, 339 N.Y.S.2d 959, 960 (1972).

99. *Id.*

37. *Id.*

101. *See Perez*, 22 U.S. at 580; *Boneta*, 649 N.Y.S.2d at 443.

102. 644 N.Y.S.2d 525 (2d Dep't 1996).

103. *Id.* at 526. The New York statute for murder in the second degree is embodied in New York Penal Law § 125.25. N.Y. PENAL LAW § 125.25 (McKinney 1996). The New York statute for assault in the first degree is