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Double Jeopardy

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

prison terms of twenty-five years to life on the murder convictions, eight and one-third years to twenty-five years on the attempted murder conviction and a concurrent sentence of five years to fifteen years on the conviction of assault.[104]

Defendant appealed, claiming that the verdict should be set aside on the grounds that: (1) promises were made to an eyewitness in consideration of his testimony and the District Attorney failed to disclose this arrangement to the defendant and (2) the District Attorney failed to correct the witness' lie that no arrangement had been made.[105] The defendant additionally contended that the Double Jeopardy Clauses of the United States Constitution[106] and the New York Constitution[107] require dismissal of the indictment.[108]

In a memorandum opinion, the Appellate Division, Second Department reversed the lower court's denial of a new trial.[109] The court held that the prosecutor's errors at trial were not "harmless beyond a reasonable doubt,"[110] however, the

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embodied in New York Penal Law § 120.10. N.Y. PENAL LAW § 125.25 (McKinney 1996)).

104. People v. May, 164 Misc. 2d 54, 56, 623 N.Y.S.2d 515, 516 (Sup. Ct. Queens County 1995), *rev'd*, 644 N.Y.S.2d 525 (2d Dep't 1996).

105. *May*, 644 N.Y.S.2d at 526.

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

107. N.Y. CONST. art. I. § 6. Article I, § 6 of the New York State Constitution provides in pertinent part: "No person shall be subject to be twice put in jeopardy for the same offense . . . ." *Id.*

108. *May*, 644 N.Y.S.2d at 526.

109. *Id.*

110. *Id.* (citing People v. Steadman, 82 N.Y.2d 1, 623 N.E.2d 509, 603 N.Y.S.2d 382 (1993)). In *Steadman*, the prosecution did not disclose that an assistant district attorney promised the witness that he would not go to prison for unrelated pending charges against him if he testified against the defendant. *Id.* at 5, 623 N.E.2d at 510, 603 N.Y.S.2d at 383. The court held that the error was not harmless, pointing out that the witness' credibility was "pivotal" as he was the only identification witness. *Id.* at 8, 623 N.E.2d at 512-13, 603 N.Y.S.2d at 385 (citing People v. Crimmins, 36 N.Y.2d 230, 326 N.E.2d 787, 367 N.Y.S.2d 213 (1975)). The *Crimmins* court explained that an error is not harmless if there is a reasonable possibility that it contributed to a

protection afforded by the Double Jeopardy Clauses did not apply as there was no indication that the prosecutor's error was made with "bad faith intent."[111]

Allen Jordan, a witness to May's acts, testified for the prosecution at May's trial.[112] Jordan had already been convicted, by plea, of attempted burglary in the second degree and criminal sale of a controlled substance in the fifth degree.[113] In exchange for his testimony at Nathan May's trial (for unrelated charges),[114] Jordan was promised a one year sentence for each conviction.[115] At trial, Jordan testified that "no deals or promises had been made, however, he was told his sentence would be one (1) year."[116]

The defendant appealed, arguing that the prosecution's error is grounds for vacating the judgment of conviction against him, and the Double Jeopardy Clauses of the Federal and New York State Constitutions require dismissal of the indictment.[117]

In response to the first contention, the court noted that the prosecution conceded in its error of failing to disclose the arrangement and failing to correct Jordan's testimony.[118] The court concluded that the prosecution's error was not harmless beyond a reasonable doubt and reversed the defendant's conviction.[119] Dealing with the second contention, the court held that the Double Jeopardy Clauses relied upon by the defendant, did not bar a retrial.[120]

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conviction, no matter how strong the evidence. *Id.* at 240-41, 326 N.E.2d at 793, 367 N.Y.S.2d at 221.

111. *Id.* (citing United States v. Wallach, 979 F.2d 912 (2d Cir. 1992); People v. Mitchell, 197 A.D.2d 709, 602 N.Y.S.2d 923 (2d Dep't 1993); People v. Copeland, 127 A.D.2d 846, 511 N.Y.S.2d 949 (2d Dep't 1987)).

112. *May*, 164 Misc. 2d at 57, 623 N.Y.S.2d at 517.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *May*, 644 N.Y.S.2d at 526.

118. *Id.*

119. *Id.*

120. *Id.*

In *United States v. Wallach*,[121] after a four month jury trial, the defendants were convicted of racketeering, mail fraud, interstate transportation of stolen property and conspiracy to violate federal conflict of interest law.[122] At trial, Anthony Guariglia testified against the defendants.[123] On direct examination, he testified that he had stopped his compulsive gambling in the summer of 1988.[124] On cross-examination however, he admitted to signing gambling markers in September and October of 1988 at an Atlantic City casino.[125] On redirect, he restated he had stopped gambling the summer of 1988.[126] After Wallach's conviction, the government acquired additional evidence sufficient to indict and convict Guariglia of perjury.[127]

While Wallach's conviction was reversed on the ground that the government should have known that Guariglia was committing perjury, the United States Court of Appeals, Second Circuit, determined that a retrial was not barred.[128] The court explained that generally a "defendant who secures a reversal of his conviction because of a defect in the proceedings leading to conviction normally obtains from the Double Jeopardy Clause no insulation against retrial."[129] The court further explained that there are two exceptions: (1) "a reversal for insufficiency of the evidence at trial" and (2) "in some circumstances involving misconduct by a prosecutor."[130] The United States Court of Appeals concluded that neither exception applied in this case.[131]

In construing the protection afforded by the second exception, the New York cases cited to by the *May* court held that absent a

121. 979 F.2d 912 (2d Cir. 1992).
122. *Id.* at 913.
123. *Id.*
124. *Id.*
125. *Id.* at 913-14.
126. *Id.* at 914.
127. *Id.*
128. *Id.* at 917.
129. *Id.* at 915.
130. *Id.*
131. *Id.* at 917.

bad faith intent to provoke a mistrial, the misconduct of prosecutors did not bar a retrial.[132]

In *People v. Copeland*,[133] the defendant was arrested for possession of a loaded gun.[134] On the night of his arrest, the defendant remained silent for three hours and fifteen minutes before giving a statement.[135] The trial court ruled that the prosecutors were precluded from impeaching the defendant's trial testimony by introducing evidence of his silence.[136] Despite the court's instructions, the prosecutor referred to the defendant's silence at trial.[137] The Appellate Division, Second Department, held that the evidence did not support a finding that the prosecutor's intent was to provoke a motion for mistrial.[138]

Again, in *People v. Mitchell*,[139] the court found no intent to provoke a mistrial when the prosecutor referred to the defendant as a "pimp" in her opening statement.[140] Quoting *Copeland*, the court held "'[a]bsent such a bad-faith intent, the misconduct does not constitute that type of prosecutorial overreaching contemplated by the United States Supreme Court as requiring the barring of re-prosecution on the ground of double jeopardy.'"[141]

In *People v. May*, the court was faced with the question of whether or not the prosecutor's error was made with bad faith intent.[142] Without a long analysis, following the guidance of

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132. *Copeland*, 127 A.D.2d at 847, 511 N.Y.S.2d at 950; People v. Mitchell, 197 A.D.2d at 709, 602 N.Y.S.2d at 924.

133. 127 A.D.2d 846, 511 N.Y.S.2d 949.

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

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

136. *Id.*

137. *Id.* (holding that the "motion by the defendant for a mistrial was appropriately granted in light of the prosecutor's repeated references to that 3 1/4-hour silence despite the instruction to the contrary by the trial court.") *Id.*

138. *Id.*

139. 197 A.D.2d 709, 602 N.Y.S.2d 923.

140. *Id.* at 709, 602 N.Y.S.2d at 924.

141. *Id.* (quoting *Copeland*, 127 A.D.2d at 847, 511 N.Y.S.2d at 949).

142. 644 N.Y.S.2d 525 (2d Dep't 1996).

these earlier decisions, the court found that there was no showing of bad faith intent.[143]

In comparing the federal and state cases referred to by the *May* court, the federal case explicitly stated the general rule for retrial and two exceptions and the state court construed the second exception on a case to case basis. In applying the second exception, which allows for the preclusion of a retrial in some circumstances involving misconduct by a prosecutor, the Appellate Division, Second Department has construed it to require a showing of bad faith intent.[144]

SUPREME COURT

QUEENS COUNTY

People v. Gerstner[145]
(decided February 2, 1996)

Defendant moved to dismiss felony charges arising out of violations of Sections 1192(2)[146] and 1192(3)[147] of New York

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143. *Id.*

144. *See Copeland*, 127 A.D.2d at 846, 511 N.Y.S.2d at 949; *See also Mitchell*, 197 A.D.2d at 709, 602 N.Y.S.2d at 924.

145. 168 Misc. 2d 495, 638 N.Y.S.2d 559 (Sup. Ct. Monroe County 1996).

146. N.Y. VEH. & TRAF. LAW § 1192(2) (McKinney 1996). Section 1192 (2) provides:

> Driving while intoxicated; per se. No person shall operate a motor vehicle while such person has .10 of one per cent or more by weight of alcohol in the person's blood as shown by chemical analysis of such person's blood, breath, urine or saliva, made pursuant to the provisions of section eleven hundred ninety-four of this article.

Id.

147. N.Y. VEH. & TRAF. LAW § 1192(3) (McKinney Supp. 1996). Section 1192(3) provides: "Driving while intoxicated. No person shall operate a motor vehicle while in an intoxicated condition." *Id.*