TOURO LAW
Touro College Jacob D. Fuchsberg Law Center

Touro Law Review

Volume 18
Number 2 *New York State Constitutional Decisions: 2001 Compilation*

Article 4

March 2016

People v. Boone

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DOUBLE JEOPARDY

United States Constitution Amendment V:

[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.

New York Constitution Article I, Section 6:

[N]o person shall be subject to be twice put in jeopardy for the same offense . . . .

SUPREME COURT, APPELLATE DIVISION

SECOND DEPARTMENT

People v. Boone[1]
(Decided October 1, 2001)

Darrel Boone sought review of a jury verdict convicting him of first degree manslaughter.[2] Boone claimed that his motion for a mistrial based on misconduct of the prosecutor barred his re-prosecution and conviction under a theory of double jeopardy.[3] Boone argued that after his motion for a mistrial, a continuance of the trial offended the double jeopardy clauses of both the United States Constitution[4] and the New York State Constitution.[5] The appellate court held that because the prosecution did not act with deliberate misconduct intending to provoke Boone into requesting a mistrial, Boone's prosecution was not barred by the theory of

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[1] 287 A.D.2d 461, 731 N.Y.S.2d 73 (2d Dep't 2001).

[2] *Boone*, 287 A.D.2d at 462, 731 N.Y.S.2d at 74.

[3] *Id.*

[4] U.S. CONST. amend. V 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."

[5] N.Y. CONST. art. I, § 6 provides in pertinent part: "[N]o person shall be subject to be twice put in jeopardy for the same offense . . . ."

double jeopardy.[6] However, the court held that a sentence reduction was warranted.[7]

At the time of his arrest, Boone was a forty-two year old father of three, who had no criminal record and was gainfully employed.[8] Boone's fourteen year old daughter had been sexually assaulted by two men at gun point.[9] While visiting her at the hospital, he learned the identification of one of his daughter's assailants.[10] He then returned to his apartment, located an unlicensed gun and a hammer and went in pursuit of the seventeen year old young man.[11] Boone proceeded to accuse the alleged assailant and despite the young man's denial, Boone shot and beat him to death.[12] Boone admitted to his actions and cooperated with the police, expressing remorse throughout the proceeding.[13] Despite psychiatric experts for both sides testifying that the defendant had acted under extreme emotional disturbance and had virtually "snapped," Boone was found guilty of manslaughter.[14] He was sentenced to an indeterminate term of seven-to-fourteen years imprisonment.[15]

On appeal, the sentence was reduced to an indeterminate term of four-to-eight years imprisonment because the appellate court, in exercising its judicial discretion, found that the extraordinary circumstances warranted a reduction but not a dismissal of the charges.[16] The appellant claimed that the jury trial resulting in his conviction was the product of a mistrial and that his retrial should have been barred by the Double Jeopardy Clause of both the United States Constitution[17] and the New York Constitution.[18] In reviewing the record, the court found that

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[6] *Boone*, 287 A.D.2d at 462, 731 N.Y.S.2d at 74.
[7] *Id.*
[8] *Id.* at 463, 731 N.Y.S.2d at 75.
[9] *Id.*
[10] *Id.*
[11] *Boone,* 287 A.D.2d at 463, 731 N.Y.S.2d at 75.
[12] *Id.*
[13] *Id.* at 462, 731 N.Y.S.2d at 74.
[14] *Id.*
[15] *Id.*
[16] *Boone*, 287 A.D.2d at 462, 731 N.Y.S.2d at 74.
[17] U.S. CONST. amend. V.
[18] N.Y. CONST. art. I, § 6; *see also Boone*, 287 A.D.2d at 462, 731 N.Y.S.2d at 74.

although the prosecution elicited evidence that may have been somewhat prejudicial and was irrelevant to the case at hand, the prosecution did not act with the level of misconduct that constituted overreaching.[19] The court reasoned that, while the prosecutor improperly elicited the irrelevant information, he did not do so with the goal of provoking Boone into requesting a mistrial.[20] Overreaching triggers double jeopardy protection and bars re-prosecution.[21] The appellate court held that double jeopardy did not bar the retrial.[22]

In reaching its decision on the issue of double jeopardy, the appellate court relied on the United States Supreme Court's holding in *Oregon v. Kennedy*[23] which defined prosecutorial overreaching.[24] In this case, the defendant was accused of stealing an oriental carpet.[25] The prosecution asked a witness whether he refused to do business with the defendant because he thought the defendant was a 'crook.'[26] The state court of appeals in *Kennedy* reasoned that the prosecutor's misconduct constituted overreaching and had provoked the defendant into requesting a mistrial.[27] Therefore, a second trial was barred under double jeopardy theory.[28] The United States Supreme Court concluded that while the state court of appeals had relied on appropriate federal constitutional analysis, it had taken an overly expansive view when applying the Double Jeopardy Clause and had redefined the perimeters of what constituted prosecutorial overreaching.[29] The Court differentiated between double jeopardy issues raised by the declaration of a mistrial over the objections of a defendant, such as in the case of a hung jury, from a mistrial declared at the request of the defendant.[30] In the former situation, a showing of "manifest

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[19] *Boone*, 287 A.D.2d at 462, 731 N.Y.S.2d at 74.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] 456 U.S. 667 (1982).
[24] *Id.* at 667-70.
[25] *Id.* at 669.
[26] *Id.*
[27] *Id.* at 668.
[28] *Kennedy*, 456 U.S. at 668.
[29] *Id.*
[30] *Id.* at 672.

necessity" by the state defeats the Double Jeopardy Clause, while in the latter case double jeopardy is not a bar to retrial unless it falls within a narrow exception.[31]

Accordingly, in *United States v. Dinitz,* the United States Supreme Court held that a retrial was not barred by the Double Jeopardy Clause because the judge did not act with bad faith when he expelled the defendant's attorney and granted the defendant's motion for mistrial.[32] To constitute bad faith, the judge would have had to act with the intent to prejudice the defendant's chance of acquittal, thus constituting overreaching.[33] The Court went on to explain that if the misconduct was specifically meant to "goad the defendant into requesting a mistrial . . . [then] the Double Jeopardy Clause bars retrials where bad faith conduct by a judge or prosecutor threatens the harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict the defendant."[34] Justice Stevens' concurrence enumerates possible reasons that a prosecutor might provoke a defendant to request a mistrial, "in order to shop for [a] more favorable trier of fact, or to correct deficiencies in his case, or to obtain an unwarranted preview of the defendant's evidence."[35]

To make a determination if such an intent on the part of the prosecutor exists, the court must make a finding of fact by examining the objective facts and circumstances.[36] If the record shows the conduct was intended to goad the defendant to make a motion for a mistrial, the defendant in a criminal case can raise the

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[31] 424 U.S. 600, 606 (1976), *cert. denied,* 429 U.S. 1104 (1977) (defining manifest necessity as a doctrine). In this case, "manifest necessity" was defined as the defendant having "no choice" but to request a mistrial. *See also* BLACK'S LAW DICTIONARY 963 (6TH ed. 1990) ("Doctrine of 'manifest necessity' which will authorize granting of mistrial in a criminal case, and preclude defendant from successfully raising plea of former jeopardy, contemplates a sudden and overwhelming emergency beyond control of court . . . it becomes no longer possible to conduct trial or to reach a fair result based upon the evidence.").

[32] *Dinitz,* 424 U.S. at 611.

[33] *Id.*

[34] *Kennedy,* 45 U.S. at 674 (quoting *Dinitz,* 424 U.S. at 611); *see also* U.S. CONST. amend. V.

[35] *Id.* at 686 (Stevens, J., concurring).

[36] *Id.* at 675.

bar of double jeopardy.[37] Where prosecutorial misconduct is a factor, double jeopardy provides protection of the defendant's rights by giving the defendant the limited option to continue with a tainted proceeding or begin anew.[38] The defendant's interests in barring a second effort to prosecute him must be balanced against society's interest in giving the prosecutor a full and fair opportunity to present all of the evidence to a jury.[39] Therefore, the defendant's ability to invoke this double jeopardy protection is narrowly limited to situations in which the prosecutor intended to provoke a mistrial by overreaching or harassment of the defendant.[40] It is the defendant's burden to prove that the exception to overreaching exists and that he is, therefore, entitled to claim the protection of double jeopardy.[41] Additionally, Chief Justice Burger, in his concurrence, noted that nothing in the Court's holding was meant to prevent a state court from finding that even though the Federal Constitution may not dictate a double jeopardy violation in a particular case, a state constitution may extend the protection and conclude that a defendant's retrial would violate its own state constitution's Double Jeopardy Clause.[42]

New York state courts have interpreted the New York Constitution's Double Jeopardy Clause[43] in much the same way as the United States Supreme Court has interpreted the Federal Constitution's Double Jeopardy Clause.[44] The New York appellate court in *Boone* relied on *Davis v. Brown*[45] in holding that because the prosecution did not act with deliberate misconduct intending to provoke the defendant into requesting a mistrial, the defendant's retrial was not barred by double jeopardy.[46] In *Davis,* two witnesses for the prosecution, prodded by the prosecution, introduced evidence that had been prohibited by the court in a

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[37] *Id.* at 676.
[38] *Id.* at 686.
[39] *Kennedy,* 45 U.S. at 684.
[40] *Id.* at 684.
[41] *Id.*
[42] *Id.* at 680 (Brennan, J., concurring).
[43] N.Y. CONST. art. I, § 6.
[44] U.S. CONST. amend. V.
[45] 87 N.Y.2d 626, 664 N.E.2d 884, 641 N.Y.S.2d 819 (1996).
[46] *Boone,* 287 A.D.2d at 462, 731 N.Y.S.2d at 74.

pretrial order.[47] The petitioner specifically requested a mistrial *with prejudice*, but the court granted a mistrial *without prejudice*, with the result that the petitioner was blocked from raising a bar to his retrial based on double jeopardy.[48] However, the New York Court of Appeals held that the petitioner could not be retried because it would violate double jeopardy.[49] The court reasoned that when a prosecutor engages in deliberate and prejudicial misconduct designed to cause a mistrial, a mistrial should be granted and any attempt at retrial should be barred.[50] Conversely, so long as it was found that the prosecutor's actions were not specifically intended to produce a mistrial, the case may be retried even if his conduct was improper.[51]

Other recent New York cases interpreting New York State's Double Jeopardy Clause[52] have largely relied on federal case law to delineate the boundaries, thus proving that the two clauses are interpreted much the same.[53] In *State v. Hart*,[54] the court denied the defendant's motion to dismiss the indictment, despite the prosecutor's eliciting information from a witness that was prohibited by the court's pretrial ruling.[55] The Appellate Court, Second Department, held that double jeopardy did not bar retrial, as the record did not support the conclusion that the prosecutor acted in bad faith or intended to provoke the defendant into moving for a mistrial.[56] In the New York case of *State v.*

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[47] *Davis*, 87 N.Y.2d at 628, 664 N.E.2d at 886, 641 N.Y.S.2d at 821.

[48] *Id.* (emphasis added).

[49] *Id.*

[50] *Id.*

[51] *Id.* at 631, 664 N.E.2d at 889, 641 N.Y.S.2d at 824.

[52] N.Y. CONST. art. I § 6.

[53] *See Davis*, 87 N.Y.2d at 626, 664 N.E.2d at 884, 641 N.Y.S.2d at 627; State v. Hart, 216 A.D.2d 486, 628 N.Y.S.2d 743 (2d Dep't 1995); State v. Mitchell, 197 A.D.2d 709, 602 N.Y.S.2d 923 (2d Dep't 1993); Roman v. Brown, 175 A.D.2d 899, 573 N.Y.S.2d 627 (2d Dep't 1971); State v. Copeland, 127 A.D.2d 846, 511 N.Y.S.2d 949 (2d Dep't 1987). All of these courts relied heavily on the case of *Oregon v. Kennedy*, 456 U.S. 667 (1982).

[54] 216 A.D.2d 486, 628 N.Y.S.2d 743 (precluding the prosecutor from eliciting hearsay statements from the police detective/witness as to the defendant's connection with the drugs).

[55] *Id.* at 487, 628 N.Y.S.2d at 744.

[56] *Id.*

Mitchell,[57] the prosecutor referred to the defendant as a "pimp."[58] The second department of the New York appellate division relied on the United States Supreme Court's decision in *Oregon v. Kennedy*,[59] holding "absent a bad faith intent, the misconduct does not constitute the type of prosecutorial overreaching contemplated by the United States Supreme Court as requiring the barring of reprosecution on the ground of double jeopardy."[60] Likewise, in *Roman v. Brown*,[61] in denying that the Double Jeopardy Clause barred retrial, the Appellate Court, Second Department relied on the same holding in *Kennedy* and specifically added that a retrial was not prohibited by the New York State Constitution's Double Jeopardy Clause.[62]

In *State v. Copeland*,[63] the prosecution, despite the court's instructions to the contrary, repeatedly referred to the fact that the defendant had maintained silence for three hours after his arrest in an attempt to impeach defendant's testimony.[64] Upon review of the case, the Appellate Court, Second Department, relied on *Dinitz*, using almost identical language in its decision to deny defendant's motion to dismiss and bar retrial despite the prosecutor's intentional and damaging inference.[65] The court in *Copeland* embraced the holding in *Dinitz* and concluded, "absent 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."[66]

Finally, in *State v. Key*[67] the New York Court of Appeals concluded that recent decisions in the United States Supreme Court did not affect established New York law in the area of double

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[57] *Mitchell*, 197 A.D.2d at 709, 602 N.Y.S.2d at 923.
[58] *Id.* at 710, 602 N.Y.S.2d at 924.
[59] 456 U.S. at 667 (1982).
[60] *Mitchell*, 197 A.D.2d at 710, 602 N.Y.S.2d at 924.
[61] 175 A.D.2d at 899, 573 N.Y.S.2d at 627.
[62] *Id.*
[63] 127 A.D.2d at 846, 511 N.Y.S.2d at 949.
[64] *Id.* at 847, 511 N.Y.S.2d at 950.
[65] *Id.*
[66] *Id.*
[67] 45 N.Y.2d 111, 379 N.E.2d 1147, 408 N.Y.S.2d 16 (1978).

jeopardy.[68] In *Key,* the trial court dismissed the case on the defendant's motion. Subsequent to jury selection, the defendant learned the traffic information and deposition provided by the state did not allege a necessary element of the crime.[69] While the trial court held that retrial was barred by double jeopardy, the appellate court reversed and the Court of Appeals affirmed.[70] The Court of Appeals, in reviewing New York law, held that if an accusatory instrument is so defective that it cannot support a conviction, then double jeopardy does not attach and a retrial on a corrected instrument is not barred.[71] Retrial is allowed for a dismissal granted on the motion of a defendant as long as that dismissal is not based on any adjudication of the facts that pertain to his guilt. This rule is applicable even if double jeopardy has attached before the dismissal.[72] The New York Court of Appeals, having reviewed United States Supreme Court decisions, found that the cases could be divided into two groups - cases in which the proceedings are terminated in favor of the defendant and do not permit a retrial, and cases that are dismissed on a motion of the defendant based on an error and that error is not caused by bad faith or an intent to provoke a mistrial.[73] This latter group of cases does not bar reprosecution based on double jeopardy.[74] The court maintained that "following the [United States] Supreme Court's latest explanation of its earlier double jeopardy holdings, it appears unnecessary to abandon traditional New York Law in this area."[75]

In the area of double jeopardy, New York law based on the New York Constitution's Double Jeopardy Clause seems to follow

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[68] *Id.* at 120, 379 N.E.2d at 1158, 408 N.Y.S.2d at 19.

[69] *Id.* at 114, 379 N.E.2d at 1149, 408 N.Y.S.2d at 9 (finding that neither the original information nor the deposition asserted that the car was actually in operation or that the defendant was driving, a necessary element of the DWI charge).

[70] *Id.*

[71] *Id.* at 117, 379 N.E.2d at 1150, 408 N.Y.S.2d at 13.

[72] *Key*, 45 N.Y.2d at 117, 379 N.E.2d at 1150, 408 N.Y.S.2d at 13.

[73] *Id.* at 119, 379 N.E. 2d at 1151, 408 N.Y.S.2d at 18 (holding that as the defendant had moved for dismissal based on defective pleading, and as there had been no adjudication on the facts related to his innocence or guilt, the defendant was not in a position to request a dismissal based on a double jeopardy bar to his retrial).

[74] *Id.*

[75] *Id.* at 120, 379 N.E.2d at 1152, 408 N.Y.S.2d at 19.

the same interpretation as that of federal law based on the Federal Constitution's Double Jeopardy Clause. In order to bar retrial under the Double Jeopardy Clause of the United States Constitution, the prosecutorial or judicial misconduct must reach a level of overreaching in bad faith as defined by the United States Supreme Court in *Kennedy* and its progeny.[76] This interpretation of double jeopardy protection is reflected in New York jurisprudence.[77] Only in a situation in which the record shows that a dismissal was the result of intentional judicial or prosecutorial misconduct with the goal of provoking the defendant into requesting a mistrial so as to gain an advantage in a second trial, will the protection of double jeopardy be afforded to prohibit a retrial.[78]

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[76] *Kennedy*, 45 U.S. at 674.

[77] *Key*, 45 N.Y.2d at 120, 379 N.E.2d at 1152, 408 N.Y.S.2d at 19; *see also Hart*, 216 A.D.2d at 486, 628 N.Y.S.2d at 743; *Mitchell*, 197 A.D.2d at 709, 602 N.Y.S.2d at 923; *Roman*, 175 A.D.2d at 894, 573 N.Y.S.2d at 627.

[78] *Kennedy*, 45 U.S. at 676.

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