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Thomas v. Eighth Judicial Dist. Ct., 133 Nev. Adv. Op. 63 (Sept. 14, 2017)

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CONSTITUTIONAL & CRIMINAL LAW: DOUBLE JEOPARDY

Summary

When a defendant requests and is granted a mistrial, jeopardy will attach if a prosecutor's conduct is so egregious that it results in prejudice to the defendant that cannot be remedied by anything short of a mistrial.²

Background

Lacy L. Thomas, the former chief executive officer at University Medical Center (UMC), was tried for five counts of theft and five counts of official misconduct related to contracts UMC entered with five separate entities who were Thomas's acquaintances. The State found these contracts so grossly unfavorable to UMC, that they constituted theft. One of these contracts involved Superior Consulting (ACS).

On approximately the fifth day of trial, an attorney for ACS informed Thomas' attorneys of a disc containing documents that exonerated ACS. ACS's attorney advised that the documents had been provided to the detectives who were investigating both ACS and Thomas. However, the documents were never provided to Thomas. Accordingly, Thomas moved for a mistrial. The district court found that the documents provided substantial material relevant to the cross-examination of thirteen key witnesses who had already testified and granted a mistrial.

Thomas then filed a motion to dismiss the case under the Double Jeopardy Clause. The district court granted the motion. On appeal, the Court upheld the dismissal of the theft charges related to ACS, but found that the indictment provided Thomas with sufficient notice of the remaining counts of theft and official misconduct.³ On remand, Thomas renewed his motion to dismiss based on double jeopardy. Following an evidentiary hearing, the district court made a conclusive finding that: (1) the documents at issue were exculpatory and (2) the documents had been provided to the district attorney's office. Nonetheless, the district court denied Thomas's double jeopardy motion because it found that the State had not intentionally withheld the documents. The district court added that the documents withheld related to ACS's conduct, and because the theft charge was dismissed with respect to ACS, double jeopardy did not "carryover" to the remaining counts.

Thomas petitioned the Court for extraordinary relief, asking the Court to consider whether double jeopardy bars re prosecution and had attached to all charged counts. He also asked the Court to consider whether the district court had authority to rule on his renewed motion to dismiss for unconstitutional vagueness since he alleged that the district court had not reached these claims.

Discussion:

¹ By Sara Schreiber.

² NEV. CONST. art. I, § 8.

³ *State v. Thomas*, Docket No. 58833 (Order Affirming in Part, Reversing in Part and Remanding, Sept. 26, 2013).

We exercise our discretion to consider Thomas's petition

The Court has the sole discretion to decide whether to consider a writ of mandamus.⁴ Judicial economy supports a review of the double jeopardy issues raised, before a second jury trial. Therefore, the Court exercised discretion to intervene by way of extraordinary writ.

Double jeopardy applies in this case

Generally, a state may not charge a defendant twice for the same offense.⁵ To protect defendants from potential abuse by the State, courts have distinguished between cases where the prosecution requested a mistrial and those where the defense requested a mistrial.⁶

Double jeopardy following the State's request for mistrial

In cases where a prosecutor requests a mistrial, there is a strong concern that the State may seek a mistrial for its own advantage. Under these circumstances, a court must examine: (1) whether the mistrial was imposed by "manifest necessity," and (2) "in the presence of manifest necessity, whether the prosecutor is responsible for the circumstances which necessitated declaration of a mistrial."⁷

Double jeopardy following a defendant's request for mistrial

When a defendant moves for, or consents to, a mistrial generally any bar to reprosecution, under the Double Jeopardy Clause, is removed.⁸ However, there is a narrow exception that enables the defendant to raise double jeopardy as a defense to subsequent reprosecution. This exception applies when the prosecutor intentionally provokes or "goads" the defendant into moving for a mistrial.⁹ The Court had previously adopted the *Kennedy* standard in *Melchor-Gloria v. State*, which bars reprosecution under the Double Jeopardy Clause if a defendant demonstrates intent by the State to provoke a mistrial.¹⁰

Criticism of the Kennedy standard

The inherent difficulties found in the *Kennedy* standard are thoroughly discussed in *Pool v. Superior Court*.¹¹ The Arizona Supreme Court noted that, under *Kennedy*, proving specific intent to provoke mistrial, "must necessarily involve a subjective inquiry and is too difficult to

⁴ *Smith v. Eighth Judicial Dist. Ct.*, 818 P.2d 849, 851 (Nev. 1991).

⁵ U.S. CONST. amend. V; NEV. CONST. art. I, § 8.

⁶ *Taylor v. State*, 858 P.2d 843, 851 (Nev. 1993) (Shearing, J., concurring in part and dissenting in part).

⁷ *Hylton v. Second Judicial Dist. Ct.*, 743 P.2d 622, 625 (Nev. 1987).

⁸ *Oregon v. Kennedy*, 456 U.S. 667, 672 (1982).

⁹ *Id.* at 673-74.

¹⁰ *Melchor-Gloria v. State*, 660 P.2d 109, 112 (Nev. 1983).

¹¹ *Pool v. Super. Ct.*, 677 P.2d 261, 271 (Ariz. 1984).

determine.”¹² The court held that in addition to those instances where a prosecutor intentionally attempts to “goad” a defendant into moving for a mistrial, jeopardy would attach where double jeopardy protections “would be impaired by a prosecutor’s intentional, improper conduct.”¹³

New standard for double jeopardy following a defendant’s successful motion for mistrial

The Court reviewed *Pool* and other state court decisions that discussed the *Kennedy* standard and found that it was unduly narrow. The Court adopted the *Pool* standard which states that when a defendant requests and is granted a mistrial, jeopardy will attach if the prosecutor’s conduct is so egregious that it results in prejudice to the defendant which cannot be cured by any means short of a mistrial. Accordingly, courts should consider the following factors when evaluating a double jeopardy claim following a defendant’s motion for a mistrial:

1. mistrial is granted because of improper conduct or actions by the prosecutor; and
2. such conduct is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial . . . ; and
3. the conduct causes prejudice to the defendant which cannot be cured by means short of a mistrial.¹⁴

Concerning the second prong of this test, the Court noted that the question of whether a prosecutor “knows” or “intends” his conduct to be improper and prejudicial should be measured by objective factors such as:

the situation in which the prosecutor found himself, the evidence of actual knowledge and intent and any other factors which may give rise to an appropriate inference or conclusion. [A trial court] may also consider the prosecutor’s own explanations of his “knowledge” and “intent” to the extent that such explanation can be given credence in light of the minimum requirements expected of all lawyers.¹⁵

The Court reiterated that the misconduct at issue must amount to more than “insignificant impropriety.”

Concerning the third prong of this test, the Court noted that the district court has many ways in which to remedy prosecutorial misconduct. Thus, double jeopardy will attach only when misconduct by the prosecutor is egregious and intentional, which necessitates the grant of a mistrial.

Under the facts of this case, double jeopardy bars reprosecution

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 271-72.

¹⁵ *Pool*, 677 P.2d at 271.

At the evidentiary hearing regarding the double jeopardy motion, ACS's counsel testified that he had provided police officers investigating the case with a disc of documents that he believed demonstrated that ACS had met its contractual obligations. Detective Robert Whitely remembered receiving the disc, and stated that, based on this evidence, he and Sergeant Michael Ford had recommended that the district attorney not charge ACS. Prior to the grand jury proceedings, Sergeant Ford remembered speaking with Deputy District Attorney Scott Mitchell on at least one occasion where this evidence had been brought up. After reviewing this testimony, the district court concluded that the prosecution did not intentionally act to withhold the evidence.

The Court disagreed and concluded that this finding was clearly erroneous. The Court found that police officers' testimony, coupled with the State's failure to present any evidentiary testimony in defense against Thomas's motion, was sufficient to determine that double jeopardy bars reprosecution.

Under the Court's newly-adopted three-part test, the record reflected that the mistrial was granted due to Mitchell's improper conduct. The district court properly concluded that a mistrial was the only remedy that would cure the prejudice to Thomas. This conclusion was based on the facts that: (1) the mistrial motion was not fully litigated until the tenth day of trial; (2) the exculpatory nature and volume of documents disclosed; and (3) the number of witnesses that had already testified. The Court found that the intentional withholding of these documents was not a minor error. Rather, the misconduct satisfied the standard set forth in *Pool*, and therefore double jeopardy barred his reprosecution.

Double jeopardy bars reprosecution on all charged counts

When the jury is sworn, double jeopardy attaches.¹⁶ As established by the United States Supreme Court, the protections of the Double Jeopardy Clause arise from the fact that: (1) multiple prosecutions seriously disrupt a defendant's personal life; (2) it can create the potential for governmental harassment of the defendant; and (3) it enhances the likelihood that an innocent defendant may be convicted.¹⁷ The interests protected by the Double Jeopardy Clause strongly suggest that when a case ends in mistrial, double jeopardy will bar reprosecution either on all counts or no counts. Because the Court concluded that double jeopardy attached to all counts when the jury was sworn, it bars reprosecution of Thomas on all counts.

Conclusion

Evidence suggests that the prosecutor intentionally and improperly withheld exculpatory documents from Thomas. The prosecutor's conduct was not an insignificant error. Rather, his conduct was egregious and improper, causing prejudice to Thomas that could only be cured by declaring a mistrial. Therefore, under the standard set forth in *Pool*, double jeopardy bars reprosecution of Thomas. Since double jeopardy attached to all counts when the jury was sworn, reprosecution of Thomas is barred on all counts.

GIBBONS, J., concurring:

¹⁶ Hanley v. State, 434 P.2d 440, 442 (Nev. 1967).

¹⁷ See Arizona v. Washington, 434 U.S. 497, 503-04 (1978).

Justice Gibbons concurred only with the majority's result.

PICKERING, J., dissenting:

Justice Pickering disagreed with the majority's determination that the district court's findings were "clearly erroneous" in regards to whether the State intentionally suppressed the exculpatory documents. Justice Pickering disagreed with the majority's assertion that its decision did not overrule *Melchor-Gloria*. If the court had applied the standard set in *Pool*, to *Melchor-Gloria*, a different analysis would have been required resulting in the defendant going free. This suggests that the new standard in *Pool/Thomas* overrules the goaded-mistrial test that *Melchor-Gloria* adopted from *Kennedy*. Justice Pickering concluded that the majority should have remanded the case so that the parties could litigate and the district court could decide whether a retrial would violate double jeopardy.