

FILED
Jul 29, 2016
Court of Appeals
Division I
State of Washington

No. 74718-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH SCOT GRAY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Thomas J. Wynne
The Honorable Michael T. Downes

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT 1

B. ASSIGNMENTS OF ERROR 1

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR..... 1

D. STATEMENT OF THE CASE..... 2

E. ARGUMENT 6

 1. Retrial of Mr. Gray following the mistrial violated
 double jeopardy. 6

 a. *The Double Jeopardy Clause bars multiple trials for the
 same offense.*..... 6

 b. *Where the prosecution intentionally provokes the defense
 to seek a mistrial, retrial is barred.* 8

 c. *The prosecutor’s actions here were done with the intent
 to provoke a mistrial.*..... 9

 2. The Court should exercise its discretion and deny any
 request for costs on appeal. 11

F. CONCLUSION 13

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS	
U.S. Const. amend V	6
WASHINGTON CONSTITUTIONAL PROVISIONS	
Article I, section 9.....	6
FEDERAL CASES	
<i>Benton v. Maryland</i> , 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), <i>overruled on other grounds sub nom. Payne v. Tennessee</i> , 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991).....	7
<i>Downum v. United States</i> , 372 U.S. 734, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963).....	9
<i>Green v. United States</i> , 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).....	8
<i>Oregon v. Kennedy</i> , 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982).....	9, 10, 12
<i>United States v. Dinitz</i> , 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976).....	8
WASHINGTON CASES	
<i>In re Pers. Restraint of Davis</i> , 142 Wn.2d 165, 12 P.3d 603 (2000)	6
<i>State v. Benn</i> , 161 Wn.2d 256, 165 P.3d 1232 (2007), <i>cert. denied</i> , 128 S.Ct. 2871 (2008).....	7
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	13
<i>State v. Corrado</i> , 81 Wn.App. 640, 915 P.2d 1121 (1996)	7
<i>State v. Ervin</i> , 158 Wn.2d 746, 147 P.3d 567 (2006)	6
<i>State v. Linton</i> , 156 Wn.2d 777, 132 P.3d 127 (2006)	8

<i>State v. Mutch</i> , 171 Wn.2d 646, 254 P.3d 803 (2011).....	7
<i>State v. Nolan</i> , 141 Wn.2d 620, 8 P.3d 300 (2000).....	12
<i>State v. Sinclair</i> , 192 Wn.App. 380, 367 P.3d 612 (2016)	12, 13
<i>State v. Strine</i> , 176 Wn.2d 742, 293 P.3d 1177, 1181 (2013)	8
STATUTES	
RCW 10.73.160	12
RCW 46.61.502	passim
RULES	
RAP 14.2.....	12
RAP 15.2.....	12

A. SUMMARY OF ARGUMENT

Joseph Gray was charged with driving while under the influence (DUI). In opening statement, the prosecutor violated the trial court's *in limine* order and a mistrial was declared. A subsequent trial on the same offense resulted in a conviction for the lesser included offense of physical control of a motor vehicle while under the influence. The imposition of this conviction violated double jeopardy and must result in the reversal and dismissal of the felony conviction.

B. ASSIGNMENTS OF ERROR

1. The imposition of the felony conviction for physical control of a motor vehicle while under the influence violated double jeopardy.

2. The retrial of Mr. Gray following the mistrial violated double jeopardy.

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

The Double Jeopardy clauses of the United States and Washington Constitutions bar multiple prosecutions for the same offense. Following a mistrial due to prosecutorial misconduct in the opening statement, Mr. Gray was tried a second time for the same offense and convicted. Did the retrial and imposition of a conviction violate double jeopardy requiring reversal and dismissal?

D. STATEMENT OF THE CASE

Joseph Gray was charged with one count of felony driving while under the influence (DUI), one count of second degree driving while license suspended, and one count of driving without an ignition interlock. CP 284-85. Prior to trial, Mr. Gray pleaded guilty to the two gross misdemeanor counts and proceeded to trial on the felony DUI count. CP 265-71; 12/21/2015RP 24-28.

Mr. Gray moved *in limine* to bar the State from stating that Mr. Gray had previously been convicted of driving under the influence, submitting that instead, that Mr. Gray would stipulate that he had previously been convicted of a felony offense under RCW 46.61.502. 12/21/2015RP 3-4.

Your Honor, part of the purpose of the stipulation is to sort of cleanse the prejudice that comes with criminal history that the case law acknowledges. My stipulation mirrors the language of the statute of what elevates a crime from gross misdemeanor driving under the influence to felony driving under the influence.

12/21/2015RP 8.

The trial court agreed and Mr. Gray stipulated to the felony prior conviction. 12/21/2015RP 22-24.

During the State's opening statement, the prosecutor made references to Mr. Gray's previous felony conviction for driving while under the influence:

At the conclusion of the proceedings, I will be back here with my closing arguments and I will be asking you to return a verdict of guilty when it comes to felony DUI. You'll be asked to return a verdict of guilty for the DUI portion, but then you'll be given a special verdict for felony DUI and you'll be asked to answer the question whether or not *Mr. Gray had a prior felony DUI conviction.*

And I expect that you will receive a stipulation in the form that he did, in fact, have a prior felony DUI –

...

12/21/2015RP 34-35 (emphasis added). The trial court immediately sustained Mr. Gray's objection to this violation of the trial court's *in limine* order. 12/21/2015RP 35.

Outside the presence of the jury, Mr. Gray moved for a mistrial. 12/21/2015RP 38. The trial court disagreed with the prosecutor's explanation for the violation and granted the mistrial:

THE COURT: I thought we already went over that this morning when you signed the stipulation agreeing to use the term 46.61.502 in lieu of DUI.

MS. THOMASON: Your Honor, it's my understanding in signing that stipulation was not that I was signing away my ability to describe what the statute is as what it is.

THE COURT: Well, that was the Court's intent. Why do that if we're not going to refer to DUI, refer to DUI in a DUI trial?

MS. THOMASON: Your Honor, the purpose of the stipulation is certainly to sanitize the facts of the particular case, but it does not relieve the State of its burden of proving every element beyond a reasonable doubt. If the WPIC committee and if the jury instructions state that it is a felony violation of that statute and felony violation – and it is a felony prior driving-related offense, then the State does need to prove that. I will reference our charging document, our Information, our second -- sorry.

THE COURT: I've read your Information.

MS. THOMASON: Okay.

THE COURT: And I took care reading the Information only to use the term 46.61.502 as Ms. Rivera has noted.

MS. THOMASON: And, Your Honor, I would still note that as we filed it, we do need to prove all of the elements of that crime and it does say felony driving under the influence.

THE COURT: Well, you prove all the elements of that crime with the special verdict form in the form and stipulation -- in the form that we provided. The Court went to some care to accomplish all of that.

12/21/2015RP 37-38. The court agreed with Mr. Gray and ordered a mistrial:

Well, Counsel, you entered into a stipulation that the defendant, Joseph Scot Gray, was convicted on September 29th, 2011, of a felony violation of RCW 46.61.502 in the State of Washington. It didn't say a

felony DUI. We did that for a reason. I drafted the language up. You agreed to it.

I've also provided you with an instruction to go with this which includes the limiting instruction.

I've also drafted a special verdict form which asks the question whether the defendant has previously been convicted of a felony violation of 46.61.502.

So I think it should have been clear to everybody that the intent was not to refer to DUI but refer to the statute, the RCW, which contains the DUI offense, to give the State the ability to prove that felony offense but at the same time to provide the maximum protection for the defendant for not admitting evidence that can be construed as propensity evidence or propensity to commit the offense of DUI.

Given the motions in limine and the previous agreement to the language of the stipulation, I'm going to grant the motion for a mistrial, finding that there's no way we can now unring the bell once the bell of referring to felony DUI has been rung with the jury during the opening statement. And I don't think it was intentional on your part, but here we are.

12/21/2015RP 42-43.

Following the second trial, Mr. Gray was acquitted of felony DUI, but found guilty of the lesser included offense of actual physical control of a motor vehicle while under the influence. CP 203-04;

1/13/2016RP 483-84.

E. ARGUMENT

1. Retrial of Mr. Gray following the mistrial violated double jeopardy.

- a. *The Double Jeopardy Clause bars multiple trials for the same offense.*

Under the Double Jeopardy Clause of the Fifth Amendment, no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. amend V.¹ Washington Constitution article I, section 9 similarly guarantees that, “No person shall ... be twice put in jeopardy for the same offense.” “The federal and state [double jeopardy] provisions afford the same protections and are identical in thought, substance, and purpose.” *State v. Ervin*, 158 Wn.2d 746, 752, 147 P.3d 567 (2006) (alteration in original) (internal quotation marks omitted), *quoting In re Pers. Restraint of Davis*, 142 Wn.2d 165, 171, 12 P.3d 603 (2000).

The Double Jeopardy Clauses protect a defendant against multiple punishments or repeated prosecutions for the same offense.

¹ The Double Jeopardy Clause of the Fifth Amendment was made applicable to the states through the due process clause of the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969), *overruled on other grounds sub nom. Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991).

United States v. Dinitz, 424 U.S. 600, 606, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976).

Underlying this constitutional safeguard is the belief that “the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.”

Dinitz, 424 U.S. at 606, quoting *Green v. United States*, 355 U.S. 184, 187-88, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).

Retrial is barred by double jeopardy where three elements are present: “(a) jeopardy previously attached, (b) jeopardy previously terminated, and (c) the defendant is again in jeopardy ‘for the same offense.’” *State v. Corrado*, 81 Wn.App. 640, 645, 915 P.2d 1121 (1996). If the defendant consents to a mistrial, double jeopardy bars retrial when the prosecutor’s intent is to goad the defendant to move for a mistrial. *State v. Benn*, 161 Wn.2d 256, 270, 165 P.3d 1232 (2007), *cert. denied*, 128 S.Ct. 2871 (2008).

While Mr. Gray did not raise the double jeopardy issue before the trial court, the issue may be raised here for the first time on appeal. *See State v. Mutch*, 171 Wn.2d 646, 661, 254 P.3d 803 (2011) (a double jeopardy claim is of constitutional proportions and may be

raised for the first time on appeal). “[T]he declaration of mistrial and discharge of the jury implicate [the defendant’s] manifest constitutional right to be free from double jeopardy.” *State v. Strine*, 176 Wn.2d 742, 751, 293 P.3d 1177, 1181 (2013).

Here, jeopardy attached and Mr. Gray was tried for the same offense as that prior to the mistrial ruling. *See Downum v. United States*, 372 U.S. 734, 735-36, 83 S.Ct. 1033, 10 L.Ed.2d 100 (1963) (jeopardy attaches once the jury has been selected and sworn). Thus the issue here is whether jeopardy terminated. *See State v. Linton*, 156 Wn.2d 777, 783, 132 P.3d 127 (2006) (whether jeopardy terminated is a question of law).

b. Where the prosecution intentionally provokes the defense to seek a mistrial, retrial is barred.

Generally, when a trial ends in a mistrial requested by the defendant, the Double Jeopardy Clause does not bar retrial. *Oregon v. Kennedy*, 456 U.S. 667, 672-73, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982). But, where the prosecutor’s “conduct giving rise to the successful motion for mistrial was intended to provoke the defendant into moving for a mistrial,” retrial is barred by double jeopardy. *Id.* at 676. Under this standard, the focus is on the prosecutor’s intent, which can be inferred from objective facts. *Id.* at 675.

In *Kennedy*, the prosecutor asked an expert witness: “Have you ever done business with the Kennedys?” *Kennedy*, 456 U.S. at 669. When the witness answered he had not, the prosecutor asked, “Is that because he is a crook?” *Id.* The defense successfully moved for a mistrial and the State sought to retry. The defense then moved to dismiss, raising the double jeopardy bar the defendant for the same offense. The trial court found the prosecutor did not intend to cause the mistrial and refused to dismiss. *Kennedy*, 456 U.S. at 670. The Oregon Court of Appeals reversed finding double jeopardy barred retrial. *Kennedy*, 456 U.S. at 670. The United States Supreme Court disagreed with the Oregon appellate court, ruling that since the trial court found the prosecutor’s conduct was not intended to provoke a mistrial, double jeopardy did not bar a retrial. *Id.* at 679.

c. The prosecutor’s actions here were done with the intent to provoke a mistrial.

Here, the prosecutor was intent upon stressing to the jury that Mr. Gray had a prior felony conviction for DUI. Dissatisfied with the trial court’s ruling, the prosecutor argued that it was the State’s duty to present this fact to the jury. 12/21/2015RP 3 (“it is part of the State’s case in chief and I’m not aware of any case law on point that indicates that going that route is approved by any of our appellate courts”);

12/21/2015RP 6 (“I’ve also . . . prepared my own counter stipulation to that that is in line with the charging language on the Information that explicitly does say that it is a felony driving under the influence offense”).

After Mr. Gray’s objection to the State’s opening, the prosecutor again stressed her subjective belief the State had the right to tell the jury Mr. Gray had a prior felony DUI conviction:

THE COURT: I thought we already went over that this morning when you signed the stipulation agreeing to use the term 46.61.502 in lieu of DUI.

MS. THOMASON: Your Honor, it’s my understanding in signing that stipulation was not that I was signing away my ability to describe what the statute is as what it is.

THE COURT: Well, that was the Court’s intent. Why do that if we’re not going to refer to DUI, refer to DUI in a DUI trial?

MS. THOMASON: Your Honor, the purpose of the stipulation is certainly to sanitize the facts of the particular case, but it does not relieve the State of its burden of proving every element beyond a reasonable doubt. If the WPIC committee and if the jury instructions state that it is a felony violation of that statute and felony violation -- and it is a felony prior driving-related offense, then the State does need to prove that.

I will reference our charging document, our Information, our second -- sorry.

THE COURT: I’ve read your Information.

MS. THOMASON: Okay.

THE COURT: And I took care reading the Information only to use the term 46.61.502 as Ms. Rivera has noted.

MS. THOMASON: And, Your Honor, I would still note that as we filed it, we do need to prove all of the elements of that crime and it does say felony driving under the influence.

12/21/2015RP 36-37.

The prosecutor's repeated comments on her need to present the fact Mr. Gray had a prior felony DUI conviction, demonstrates that her intent was to violate the trial court's order *in limine* in order to have the court reconsider its ruling. In line with the *Kennedy* decision, this Court must find that prosecutor's action caused jeopardy to terminate and the subsequent trial of Mr. Gray for the same offense violated double jeopardy.

Mr. Gray's conviction must be reversed and the information dismissed as the retrial violated his right against double jeopardy.

2. The Court should exercise its discretion and deny any request for costs on appeal.

Should this Court reject Mr. Gray's argument on appeal, he asks this Court to issue a ruling refusing to allow the State to seek any reimbursement for costs on appeal due to his continued indigency. Such

as request is authorized under this Court’s recent decision in *State v. Sinclair*, 192 Wn.App. 380, 389-90, 367 P.3d 612 (2016).

The appellate courts may require a defendant to pay the costs of the appeal. RCW 10.73.160. While appellate court commissioners have no discretion in awarding costs where the State substantially prevails, the appellate courts may “direct otherwise.” RAP 14.2; *Sinclair*, 192 Wn.App. at 385-86, *quoting State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000). This discretion is not limited to “compelling circumstances.” *Sinclair*, 192 Wn.App. at 388, *quoting Nolan*, 141 Wn.2d at 628.

In addition, a defendant found to be indigent is presumed to remain indigent “throughout the review” unless there is a finding that the defendant is no longer indigent. RAP 15.2(f). Mr. Gray had previously been found indigent prior to trial, and there has been no showing that Mr. Gray’s circumstances have so changed that he is no longer indigent.

In *Sinclair*, the Court ruled it has an obligation to deny or approve a request for costs, and a request for the Court to consider the issue of appellate costs can be made when the issue is raised preemptively in the Brief of Appellant. 192 Wn.App. at 390-91. This

Court must then engage in an “individualized inquiry.” *Id.* at 391, citing *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015).

Because of his current and presumed continuing indigency, Mr. Gray asks this Court to order that the State cannot obtain an award of costs on appeal, should the State seek reimbursement for such costs. *Sinclair*, 192 Wn.App. at 393.

F. CONCLUSION

For the reasons stated, Mr. Gray asks this Court to reverse his felony conviction and order it dismissed for a violation of double jeopardy. Alternatively, Mr. Gray asks this Court to deny any request by the State for reimbursement of costs on appeal due to his continued indigency.

DATED this 25th day of July 2016.

Respectfully submitted,

s/Thomas M. Kummerow

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STATE OF WASHINGTON,)	
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Respondent,)	
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JOSEPH GRAY,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29TH DAY OF JULY, 2016, I CAUSED THE ORIGINAL **AMENDED OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] SETH FINE, DPA [sfine@snoco.org] SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	() () (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] JOSEPH GRAY ID #1707271 SNOHOMISH COUNTY CORRECTIONS 3025 OAKES ST EVERETT, WA 98201	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON, THIS 29TH DAY OF JULY, 2016.



X _____

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