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SUPERIOR COURT

2016 DEC 20 PM 3:42

CRIM. DIVISION
101 LAPAYETTE ST
HARTFORD, CT 06106

Docket Nos. HHD-CR09-0635038-T

State of Connecticut

V.

Eddie Perez

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Superior Court

Judicial District of Hartford

December 20, 2016

Defendant's Memorandum In Support Of His Motion To Dismiss

This case presents a novel question of law regarding the principle of double jeopardy. Normally the double jeopardy clause bars a retrial if (1) there was an acquittal; (2) a conviction; (3) after certain mistrials; and (4) multiple punishments. None of those circumstances have occurred in the instant matter. Instead, the issue presented involves the Defendant's right to testify. On the Defendant's appeal our Supreme Court held that the Defendant's right to testify was infringed. Under these circumstances the Defendant is entitled to more than a new trial. He is entitled to dismissal under principles of double jeopardy. No case has been found where a dismissal request on double jeopardy grounds has been made after an appellate ruling reverses the defendant's conviction because the right to testify has been infringed.

Our double jeopardy protection has been held to be part of our due process clause. That protection is co-extensive with the double jeopardy protections of the United States Constitution. The Supreme Court of the United States has not had occasion to rule whether double jeopardy bars a retrial when a defendant's right to testify has been infringed after reversal on appeal.

The Right To Testify

A defendant's right to testify in his own defense is a fundamental constitutional right and is essential to due process of law in a fair adversary process. Rock v. Arkansas, 483 U.S. 44, 51, 53, n. 10, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987); Casiano-Jimenez v. United States, 817 F. 3d 816, 820 (1st Cir. 2016). There, of course, are many errors that can lead to a new trial. We see them every day in our appellate decisions (e.g. illegal searches, evidentiary rulings, jury charge error, prosecutorial impropriety, etc.). It is rare, however, for a new trial to be ordered because the defendant's right to testify has been infringed.

The Court of Appeals of South Carolina recently summarized the critical nature of the right to testify in our jurisprudence:

The right to testify on one's own behalf at a criminal trial is guaranteed by the Fifth, Sixth, and Fourteenth Amendments. *Rock v. Arkansas*, 483 U.S. 44, 51-52, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987). "It is one of the rights that are 'are essential to due process of law in a fair adversary process.'" *Id.* At 51, 107 S.Ct. 2704 (quoting *Faretta v. California*, 422 U.S. 806, 819, n. 15, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)). "However, the right to present testimony is not without limitation." *State v. Rivera*, 402 S.C. 225, 242, 741 S.E.2d 694, 703 (2013). "The right may, in appropriate cases, bow to accommodate other legitimate interest in the criminal trial process. But restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve." *Id.* (internal quotation marks and citations omitted) (quoting *Rock*, 483 U.S. at 55-56, 107 S.Ct. 2704). "In applying its evidentiary rules[,] a [s]tate must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify." *Id.* (quoting *Rock*, 483 U.S. at 56, 107 S.Ct. 2704). Evidence rules that " 'infringe upon a weighty interest of the accused' but fail to serve any legitimate interest are arbitrary." *Id.* (internal quotation marks omitted) (quoting *Holmes v. South Carolina*, 547 U.S. 319, 324-26, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006)).

State v. Wright, 416 S.C. 353 (2016).

Our double jeopardy jurisprudence is broad and rich in Connecticut. State v. Michael, J., 274 Conn. 321 (2005); Couture v. Commissioner, 160 Conn. App. 757 (2015); State v. Tate, 256 Conn. 262 (2001); State v. Butler, 262 Conn. 167 (2002). Despite this, the issue presented here has never been ruled on by our appellate courts.

Normally, a reversal on appeal does not bar a retrial. However, there can be a unique set of circumstances where this can occur. Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2L.Ed.2d 199 (defendant charged with first degree murder, or, alternatively second degree murder; jury found defendant guilty of second degree murder; conviction reversed on appeal, and case remanded for a new trial. Second trial for first degree murder placed him in jeopardy twice for the same offense. The defendant had not waived the constitutional defense of double jeopardy by making a successful appeal of his improper conviction of second degree murder.)

Conduct by a judge or prosecutor resulting in a mistrial can invoke double jeopardy's bar. Mitchell v. Smith, 633 F.2d 1009, 2nd Cir. (1981); United States v. Huang, 960 F.2d 1128 (1992); United States v. Jorn, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971).

The instant case should be governed by the rationale of the decision of the Supreme Court of Pennsylvania in Commonwealth v. Smith, 532 Pa. 177, 615 A.2d 321 (1992) (copy attached). Smith involved a case where a conviction was reversed and remanded for a new trial. Defense counsel filed a motion on remand based on

principles of double jeopardy. The grounds for the motion was based on improper conduct by the prosecution. The court held that although the case involved a reversal on appeal, the prosecutor's conduct was such as to deny the defendant a fair trial, and a retrial was barred by double jeopardy. The Perez case presents a much more egregious violation of a defendant's due process rights. The right of a defendant to testify is the bedrock of our judicial system. If that right is taken away, a defendant's due process rights have been illegally taken from him.

Once this matter is considered by our appellate court, that court will possess the power to invoke its supervisory authority over the administration of justice in the instant case. State v. Rose, 305 Conn. 594 (2012). The Court should recognize the uniquely important role of a defendant's right to testify, and that infringement of this right warrants a unique remedy. We urge the court to issue an order barring the retrial of a defendant when his right to testify has been infringed. Such an order would not conflict with U.S. Supreme Court precedent because the Court has never ruled on the issue.

**THE DEFENDANT,
EDDIE PEREZ**

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ORDER

The foregoing motion having been heard, it is hereby:
GRANTED/DENIED.

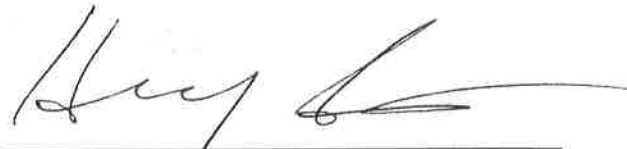
BY THE COURT

Judge

CERTIFICATION

THIS IS TO CERTIFY THAT a copy of the foregoing has been mailed, first class postage prepaid this 20th day of December, 2016 to:

Michael A. Gailor, Esq.
Executive Assistant State's Attorney
Office of the Chief State's Attorney
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HUBERT J. SANTOS

KeyCite Yellow Flag - Negative Treatment

Disagreed With by State v. Michael J., Conn., July 5, 2005

532 Pa. 177

Supreme Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellee,

v.

Jay C. SMITH, Appellant.

Argued May 6, 1992.

Decided Sept. 18, 1992.

Defendant was convicted in the Court of Common Pleas, Dauphin County, Nos. 1677, 1677(A) and 1677(B) C.D. 1985, William W. Lipsitt, J., of three counts of first-degree murder, and was sentenced to death. The Supreme Court, No. 48 M.D., Appeal Docket 1987, 523 Pa. 577, 568 A.2d 600, reversed and remanded for new trial. On remand, defendant filed motion reasserting claim for double jeopardy relief on grounds of prosecutorial misconduct. The Court of Common Pleas, Robert L. Walker, J., denied relief and the Superior Court, No. 368 Harrisburg 1990, 404 Pa.Super. 553, 591 A.2d 730, affirmed and appeal was taken. The Supreme Court, No. 83 M.D. Appeal Docket 1991, Flaherty, J., held that prosecutorial misconduct in failing to disclose material exculpatory physical evidence, intentional suppression of evidence while arguing in favor of death sentence on direct appeal, and attempt to discredit state trooper who had testified as to existence of the evidence, constituted prosecutorial misconduct such as violated all of principles of justice and fairness embodied in the Pennsylvania Constitution's double jeopardy clause.

Reversed.

West Headnotes (2)

[1] **Double Jeopardy**

↪ Effect of Proceedings After Attachment of Jeopardy

Double Jeopardy

↪ Effect of Arresting, Vacating, or Reversing Judgment or Sentence, or of Granting New Trial

The double jeopardy clause of the Pennsylvania Constitution prohibited retrial of defendant who was denied fair trial by prosecutorial misconduct; there was deliberate failure to disclose exculpatory physical evidence during capital trial, intentional suppression of evidence while arguing in favor of death sentence on direct appeal, and an attempt to discredit state trooper who had testified as to existence of the evidence. Const. Art. 1, § 10.

94 Cases that cite this headnote

[2] **Double Jeopardy**

↪ Effect of Proceedings After Attachment of Jeopardy

Double Jeopardy

↪ Fault of Prosecution

Double jeopardy clause of Pennsylvania Constitution prohibits retrial of defendant not only when prosecutorial misconduct is intended to provoke defendant into moving for mistrial, but also when conduct of prosecutor is intentionally undertaken to prejudice defendant to point of denial of fair trial. Const. Art. 1, § 10.

95 Cases that cite this headnote

Attorneys and Law Firms

***321 *178** William C. Costopoulos, Lemoyne, for appellant.

Robert A. Graci, Chief Deputy Atty. Gen. and Anthony Sarcione, Executive Deputy Atty. Gen., for appellee.

***179** Before NIX, C.J., and LARSEN, FLAHERTY, McDERMOTT, ZAPPALA, PAPADAKOS and CAPPY, JJ.

OPINION OF THE COURT

FLAHERTY, Justice.

investigation of Corporal Balshy's role in the production of the evidence rather than its own role in the suppression of evidence constitute prosecutorial misconduct such as violates all principles of justice and fairness embodied in the Pennsylvania Constitution's double jeopardy clause.

Prior to the decision of the United States Supreme Court in *Oregon v. Kennedy*, *supra*, the intentional misconduct of the prosecutor at appellant's trial would unquestionably have resulted in the invocation of the double jeopardy bar against subsequent prosecution. The standard in effect prior to *Oregon v. Kennedy* was:

*184 "The Double Jeopardy Clause does protect a defendant against governmental actions intended to provoke mistrial requests and thereby to subject defendants to the substantial burdens imposed by multiple prosecutions.

"[The Double Jeopardy Clause] bars retrials where 'bad faith conduct by judge or prosecutor,' threatens the '[h]arassment of an accused by successive prosecutions or declarations of a mistrial so as to afford the prosecution a more favorable opportunity to convict' the defendant." *United States v. Dinitz*, 424 U.S. [600], at 611, 47 L.Ed.2d 267, 96 S.Ct. 1075 [1081] (citations omitted).

Id., 456 U.S. at 674, 102 S.Ct. at 2088, 72 L.Ed.2d at 423-24. The same standard was embodied in our caselaw:

The United States Supreme Court has enunciated principally two types of prosecutorial overreaching. First there is the prosecutorial misconduct which is designed to provoke a mistrial in order to secure a second, perhaps more favorable, opportunity to convict the defendant. Second there is the prosecutorial misconduct undertaken in bad faith to prejudice or harass the defendant. In contrast to prosecutorial error, overreaching is not an inevitable part of the trial process and cannot be condoned. It signals the breakdown of the integrity of the judicial proceeding, and represents the type of prosecutorial tactic which the double jeopardy clause was designed to protect against.

Commonwealth v. Starks, 490 Pa. 336, 341, 416 A.2d 498, 500 (1980) (citations omitted). *Oregon v. Kennedy*, however, under the guise of simplifying and clarifying the principle, restated the test as follows:

Because of the confusion which these varying statements of the standard in question have occasioned in other courts, we deem it best to acknowledge the confusion and its justifiability in the light of these statements from previous decisions. We do not by this opinion lay down a flat rule that where a defendant in a criminal trial successfully moves for a mistrial, he may not thereafter invoke the bar of double jeopardy against a second **325 trial. But we do hold that the circumstances under which such a defendant may invoke *185 the bar of double jeopardy in a second effort to try him are limited to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial.

456 U.S. at 679, 102 S.Ct. at 2091, 72 L.Ed.2d at 426-27. This court, recognizing that theretofore the standard under the double jeopardy clause of the Pennsylvania Constitution had been coextensive with the federal Constitution, restated the test in *Commonwealth v. Simons*, *supra*, in terms of the federal standard enunciated in *Oregon v. Kennedy*.

In neither *Oregon v. Kennedy* nor *Commonwealth v. Simons* did the reworded test produce a different result than would have been reached under the prior test. In *Oregon v. Kennedy*, the prosecutor asked a question in such form as to reflect adversely on the character of the defendant, but the inadvertent reference was not calculated to provoke a mistrial nor to prejudice the defendant; he would not have received double jeopardy protection under the prior test or under the restated test. In *Simons*, the defendant made a "doubtful" claim that the prosecutor failed to make full disclosure of a plea agreement with a Commonwealth witness, but the prosecutor's conduct clearly was not intended to provoke

a mistrial nor to prejudice the defendant. The *Simons* court specifically stated that

we are describing anew only the present applicable standard of review and the circumstances which will cause double jeopardy to attach but not changing the right itself.... Double jeopardy, nevertheless, continues to mean what it has always meant; no new rights were created by *Starks* nor are they being subtracted by virtue of this analysis.

Commonwealth v. Simons, 514 Pa. at 16, 522 A.2d at 54. Thus the restatement of the double jeopardy standard does not appear as a diminution of a defendant's constitutional rights, though it was predicted in *Simons* that cases might arise in which the new standard would afford less protection than the prior test. See *Id.* at 20-23, 522 A.2d at 542-44 (Flaherty, J., concurring).

*186 Although it is arguable that the test enunciated by the United States Supreme Court in *Oregon v. Kennedy* would bar appellant's retrial on the theory that the prosecutor's conduct was intended to subvert the protections afforded by the double jeopardy clause, see 456 U.S. at 675-76, 102 S.Ct. at 2088-89, 72 L.Ed.2d at 424, it is possible that some courts would not view the prosecutorial misconduct in this case as rising to the level

of subversion of constitutional rights. Regardless of what may be required under the federal standard, however, our view is that the prosecutorial misconduct in this case implicates the double jeopardy clause of the Pennsylvania Constitution.

[2] We now hold that the double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, but also when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial. Because the prosecutor's conduct in this case was intended to prejudice the defendant and thereby deny him a fair trial, appellant must be discharged on the grounds that his double jeopardy rights, as guaranteed by the Pennsylvania Constitution, would be violated by conducting a second trial.

Order reversed and appellant discharged.

LARSEN, J., did not participate in the consideration or disposition of this case.

McDERMOTT, J., did not participate in the disposition of this case.

All Citations

532 Pa. 177, 615 A.2d 321

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