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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002435-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

v.

APPEAL FROM MARSHALL CIRCUIT COURT
HONORABLE DENNIS R. FOUST, JUDGE
ACTION NO. 04-CR-00233

JAMES RICKY BORDERS — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CAPERTON AND THOMPSON, JUDGES; GRAVES,[1] SENIOR JUDGE.

[1] Senior Judge John W. Graves, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

CAPERTON, JUDGE: The Commonwealth of Kentucky appeals the October 30, 2007, Order of the Marshall Circuit Court granting the motion for dismissal filed by Appellee, James Borders (Borders), on grounds of double jeopardy. After a thorough review of the record and applicable law, we reverse and remand to the Marshall Circuit Court for additional proceedings consistent with this opinion.

On December 9, 2004, a Marshall County Grand Jury indicted Borders for one count of first-degree rape, four counts of first-degree sodomy, and nine counts of first-degree sexual abuse. These charges stemmed from allegations that from October 7, 2004, through October 10, 2004, Borders engaged in sexual intercourse and sexual contact with K.S. while she was physically helpless.

The case proceeded to trial on August 24, 2005. Following opening statements by both the Commonwealth and Borders, the Commonwealth called K.S. as its first witness. At that time, three individuals in the courtroom, Kim Elden,[2] Delbert Hudson,[3] and James Knight[4] were seated in the courtroom behind Borders and were apparently making disruptive noises and expressions during the testimony of K.S.

Following direct examination by the Commonwealth and during the course of cross-examination by Borders, the trial judge stopped the proceedings and sent the jury to the jury room. He then called Elden, Hudson, and Knight to

[2] Borders' girlfriend.

[3] Borders' friend.

[4] Borders' friend.

the stand and explained to the three that if their conduct persisted, they would be removed from the courtroom and jailed for contempt.

The Commonwealth proceeded to request that the three individuals be removed, and Borders informed the court that one of his witnesses had been sitting in the courtroom during the Commonwealth's testimony. The Commonwealth moved to prohibit that witness from testifying. The court then ordered the parties to chambers and stated that it was "about ready" to declare a mistrial. Borders stated that the noise had been distracting to him also. Counsel for the Commonwealth then stated that the three spectators were distracting to her and to the jury. The trial court then asked if the Commonwealth wanted a mistrial, and the Commonwealth stated that it did.

Thereafter, while still in chambers, Borders and the trial court discussed Borders' witness, who had been present in the courtroom. At that point, the trial court stated that it felt the Commonwealth was entitled to a mistrial and that they would just have to come back and do the trial again. The Commonwealth stated that the three individuals should be barred from the next trial, and Borders responded by stating that if they were going to be witnesses, they needed to be out of the courtroom. The trial court stated that it would ensure that the three individuals were kept out of the next trial and that they would be fined as part of contempt sanctions.

Following this conversation, which lasted a total of approximately four minutes, the judge and attorneys returned to the courtroom. The court

explained to the jury that a mistrial was to be granted, and the jury was dismissed. After dismissing the jury, the court again addressed the three disruptive individuals and set a hearing to determine contempt sanctions on September 19, 2005. Finally, the trial court stated that the case would be re-docketed for October 6, 2005, for a new trial date to be scheduled. At no point during these proceedings, or during the conversation in chambers, did Borders object to the declaration of a mistrial or to the scheduling of the October 6, 2005, hearing to set a new trial date.

Subsequently, on September 19, 2005, the trial court held a hearing to determine sanctions for the three disruptive individuals. Each was fined $450.00 and sentenced to 180 days in jail, suspended. Three days thereafter, on September 22, 2005, Borders filed a motion to dismiss. In that motion, Borders claimed that the indictment should be dismissed "after prosecution was terminated by the court's *sua sponte* declaration of a mistrial." Borders further stated that the "court's lack of warning as to the impending mistrial, the lack of consultation or input by either of the parties, and the court's immediate dismissal of the jury from further consideration of the case have so prejudiced the defendant that dismissal is the only appropriate remedy."

On October 6, 2005, the Commonwealth filed its response. Therein, the Commonwealth argued that Borders failed to object to the declaration of a mistrial despite a five-minute discussion in chambers regarding that possibility. Further, the Commonwealth argued that the mistrial was a manifest necessity.

On October 30, 2007, the court granted Borders' motion to dismiss, holding that even though it "believe[d] it was acting properly at the time it granted the mistrial, the Court in reviewing the law is of the opinion that the legal arguments of the defendant are correct in that the Court had other options available to it short of dismissal." Thereafter, on November 29, 2007, the Commonwealth filed its notice of appeal.

We note at the outset that the Fifth Amendment of the United States Constitution and Section 13 of the Kentucky Constitution are identical in the import of their prohibition against double jeopardy. *See Commonwealth v. Ray*, 982 S.W.2d 671, 673 (Ky. App. 1998), *citing Jordan v. Commonwealth*, 703 S.W.2d 870, 872 (Ky. 1985). Accordingly, we will rely herein on both state and federal law in rendering our decision.

It is well established that jeopardy attaches when a jury is impaneled and sworn. *Commonwealth v. Ray*, 982 S.W.2d 671, 673 (Ky. App. 1998). In this instance, we agree that Borders was placed in jeopardy upon the impaneling and swearing of the jury and questioning of the first witness. Certainly, the law is clear that once jeopardy attaches, prosecution of a defendant before a jury other than the original jury or contemporaneously-impaneled alternates is barred unless, *inter alia*, the defendant either requests or consents to the termination, or moves for mistrial, or in some other manner waives his right to object to the termination. *See* KRS 505.030(4); *Ray*, *supra* at 673, *Leibson v. Taylor*, 721 S.W.2d 690, 693 (Ky. 1986), *United States v. Dinitz*, 424 U.S. 600, 606-07, 96 S.Ct. 1075, 1079, 47

L.Ed.2d 267 (1976), *Oregon v. Kennedy*, 456 U.S. 667, 676, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982).

It is the law of this Commonwealth that normally a manifest necessity for a mistrial must exist before it will be granted. *Martin v. Commonwealth*, 170 S.W.3d 374, 381 (Ky. 2005), and KRS 505.030(4)(b). As a constitutionally protected interest is inevitably affected by any mistrial decision, the trial judge must certainly exercise 'sound discretion' in declaring a mistrial. *See Grimes v. McAnulty*, 957 S.W.2d 223, 225 (Ky. 1977). It is a power which should be used sparingly, with the utmost caution, under urgent circumstances, and for very plain and obvious cause. *See Commonwealth v. Scott*, 12 S.W.3d 682, 685 (Ky. 2000).

It is also the law in this Commonwealth that a retrial may not be conducted if a trial was begun and the first witness was introduced and thereafter a mistrial was declared without the defendant's consent or a finding by the trial court that there was a manifest necessity that a mistrial be granted. *See Commonwealth v. Scott*, 12 S.W.3d 682, 685 (Ky. 2000). Nevertheless, as our United States Supreme Court has clearly stated, it is not necessary for the Court to even consider the manifest necessity of the mistrial where the defendant chooses to terminate the proceedings against him. *Oregon v. Kennedy*, 456 U.S. 667 (1982).

Further, in *Camden v. Circuit Court of Second Judicial Circuit, Crawford County, Ill.*, 892 F.2d 610, 614 (7th Cir. 1989), the Seventh Circuit held that because the appellant in that case "neither requested nor expressly consented to a mistrial, the double jeopardy clause will only permit [his] retrial if defense

counsel's conduct constituted implied consent." Indeed, the *Camden* court went on to expressly hold that an implied consent to a mistrial has the same effect as an express consent and vitiates any double jeopardy bar to retrial. Further, as case law clearly indicates, the First, Second, Fourth, Fifth, Seventh, and Eleventh Circuits have adopted a rule that defendants give implied consent to a mistrial if they have an opportunity to object but fail to do so.[5]

Our thorough review of the record in this matter indicates that counsel for both Borders and the Commonwealth entered the judge's chambers with the judge at 1:59 p.m. on August 24, 2005, and entered into an approximately four minute discussion as outlined above. After the discussion in chambers the attorneys and the judge returned to the courtroom, at which time the court declared a mistrial and released the jury. As noted, the court thereafter addressed the three individuals disrupting the proceedings, and re-docketed the case for October 6, 2005.

Our review of the record indicates that at no point during any of the above exchanges did Borders object to the mistrial, or offer any alternative course of conduct. Our own Sixth Circuit Court of Appeals held in *United States v.*

[5]*See, e.g.*, *United States v. DiPietro*, 936 F.2d 6, 9-10 (1st Cir. 1991), *United States v. Toribio-Lugo*, 276 F.3d 33, 40 (1st Cir. 2004), *United States v. Goldstein*, 470 F.2d 1061, 1067 (2nd Cir.), *cert. denied*, 414 U.S. 873, 94 S.Ct. 151, 38 L.Ed.2d 113 (1973), *United States v. Ham*, 58 F.3d 78, 83 (4th Cir. 1995), *United States v. Gordy*, 526 F.2d 631, 635 n.1 (5th Cir. 1976), *United States v. Nichols*, 977 F.2d. 972, 974 (5th Cir. 1992), *United States v. Palmer*, 122 F.3d 215, 218 (5th Cir. 1997); *United States v. Gilmore*, 454 F.3d 725, 729 (7th Cir. 2006); *United States v. Buljubasic*, 808 F.2d 1260, 1265-66 (7th Cir.), *cert. denied*, 484 U.S. 815, 108 S.Ct. 67, 98 L.Ed.2d 31 (1987), *United States v. You*, 382 F.3d 958, 965 (9th Cir. 2004), *United States v. Smith*, 621 F.2d 350, 351-52 (9th Cir. 1980), *United States v. Puleo*, 817 F.2d 702, 705 (11th Cir.), *cert. denied*, 484 U.S. 978, 108 S.Ct. 491, 98 L.Ed.2d 489 (1987).

White, 914 F.2d 747 (6th Cir. 1990), that the failure of a defendant to object to a mistrial did not act to waive double jeopardy as a bar to a new trial, because the defense had no time to object to the mistrial. Our thorough review of the record in the matter *sub judice* indicates that, contrary to the situation in *White*, Borders had ample opportunity to either object to the decision to grant a mistrial, or to offer an acceptable alternative course of action. He did neither. Accordingly, we find that Borders impliedly consented to the mistrial and, as a result, his retrial is not barred on double jeopardy grounds.

This aside, we are of the further opinion that Borders again gave implied consent to the mistrial by contemplating additional proceedings. Indeed, in *Camden*, the court held that consent was implied where, after the court declared a mistrial *sua sponte*, defense counsel did not object but instead engaged in the planning of a new trial. *See Camden* at 615. A review of the record indicates that Borders not only failed to object, but in fact engaged in discussion with the court, both in and out of chambers, regarding potential witnesses for the next trial. Accordingly, we again hold, in light of his own acquiescing conduct, that double jeopardy does not bar Borders from receiving a new trial.

In this instance, we agree with the Commonwealth that by failing to object to the entry of a mistrial, and by consenting to the scheduling of a new trial and engaging in discussion as to the content thereof, Borders acquiesced in the court's decision to grant the mistrial. Accordingly, he cannot now seek dismissal of his case because the court did what it proposed to do.

Therefore, for the reasons set forth herein, we conclude that the trial court erred as a matter of law in granting Borders' motion to dismiss. We therefore reverse the October 30, 2007, order of the Marshall Circuit Court, and remand this matter for proceedings consistent with this opinion.

GRAVES, SENIOR JUDGE CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

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