

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

STATE OF DELAWARE,)	
)	
v.)	I.D. No. 0607023686
)	
CHARLES BURLEY,)	
)	
Defendant.)	

Date Submitted: December 02, 2010

Date Decided: January 06, 2011

Upon Defendant's Motion to Dismiss:
Motion to Dismiss ***DENIED***

MEMORANDUM OPINION

Renee L. Hrivnak, Deputy Attorney General
Wilmington, Delaware 19801
Attorney for State of Delaware

Anne Marie Hayes, Deputy Attorney General
Wilmington, Delaware 19801
Attorney for State of Delaware

Anthony A. Figliola, Jr., Esquire
Wilmington, Delaware 19810
Attorney for Defendant Charles Burley

JOHN A. PARKINS, JR., JUDGE

Factual and Procedural Background

Defendant has twice been convicted of the murder of John Triplett. Both of those convictions were vacated by this Court; the first time because a prosecutor inappropriately introduced the issue of race into the case; the second because this Court concluded that it abused its discretion when it denied Defendant's request for a continuance made on the first day of trial. Defendant, whose third trial is scheduled for March, 2011, has now moved to dismiss the charges against him. He argues that because the prosecutor's conduct in the first trial prompted his motion for a mistrial (which was denied), the double jeopardy clause bars his retrial. Defendant's argument fails because his unsuccessful motion for mistrial at the first trial never deprived him the opportunity for an acquittal.

The Prosecutor's Comment at the First Trial

At his preliminary hearing in the Court of Common Pleas, Defendant (who is an African American) told the court that the police officer, magistrate, defense counsel, prosecutor and Court of Common Pleas judge were engaged in a "racist conspiracy" to convict him. Defendant was bound over to the Superior Court for trial.

Race was never an issue at Defendant's first trial (or second trial, for that matter). Defendant, the victim and the witnesses at the scene were African

American.¹ In particular, there was no evidence whatsoever that the alleged actions of Defendant were racially motivated. Still, during his cross-examination of Defendant, the prosecutor² asked Defendant, “I believe you previously said that this was a racist conspiracy?” This question prompted a motion for a mistrial which was denied by the trial judge. At the conclusion of trial the jury returned a verdict finding Defendant guilty of non-capital murder in the first degree and associated weapons offenses.

Defendant moved for a new trial after the verdict, basing his motion in part on the prosecutor’s question. The Court concluded that there was a significant possibility that the prosecutor’s conduct deprived Defendant of a fair trial and, therefore, granted his motion for a new trial. Defendant now argues that because of these events at his first trial, his further prosecution is barred by the double jeopardy clause of the federal Constitution.

Discussion

The Fifth Amendment of the United States Constitution provides that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb”³ This “double jeopardy prohibition” applies to the states by way of the

¹ The chief investigating officer and some of the witnesses (who were not present at the scene of the alleged crime) called by the State are Caucasian.

² The former prosecutor does not now represent the State in this matter.

³ U.S. Const., amend. V.

Fourteenth Amendment.⁴ Furthermore, the Delaware Constitution contains a double jeopardy clause that is identical to that of the United States Constitution, and the analysis thereof also mirrors its federal equivalent.⁵

The fundamental premise underlying the protection against double jeopardy:

is 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.⁶

However, the protection from double jeopardy should not be construed as guaranteeing a defendant only one trial for a given offense -- retrial is possible where a conviction is reversed upon appeal or where a motion for mistrial is granted due to “prosecutorial or judicial error.”⁷ Furthermore, retrial is typically not prohibited when it is granted upon a defendant’s motion for mistrial which indicates “a deliberate election” on the part of the defendant to forego the trial.⁸

Nevertheless, the protection from double jeopardy does prevent repeated prosecutions and trials after a mistrial is declared “where the governmental conduct in question is intended to goad the defendant into moving for a mistrial”⁹ In *Oregon v. Kennedy*, the United States Supreme Court found that the protection

⁴ *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

⁵ *Bailey v. State*, 521 A.2d 1069, 1075 (Del. 1987); *State v. Lloyd*, 2002 WL 971795, *6 (Del. Super. May 10, 2002).

⁶ *Green v. United States*, 355 U.S. 184, 187-88 (1957); *Sullins v. State*, 930 A.2d 911, 915 (Del. 2007).

⁷ *United States v. Jorn*, 400 U.S. 470, 484-485 (1971); *Bailey*, 521 A.2d at 1075.

⁸ *U.S. v. Scott*, 437 U.S. 82, 83 (1978); *Bailey*, 521 A.2d at 1075; *Lloyd*, 2002 WL 971795 at *6.

⁹ *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982); *Bailey*, 521 A.2d at 1078; *Lloyd*, 2002 WL 971795 at *6.

against double jeopardy bars retrial “only if the conduct giving rise to the mistrial was conduct by the prosecutor or the court which was intended to provoke the mistrial.”¹⁰ Previously, in *United States v. Dinitz*,¹¹ the Court stated that retrial was barred where bad faith conduct on the part of prosecutors subjects an accused to successive prosecutions or to a mistrial in order to give the prosecution more favorable circumstances for a conviction.¹² However, in *Bailey v. State*, the Delaware Supreme Court stated that *Oregon v. Kennedy* refined the holding in *Dinitz* and held that double jeopardy would bar a retrial only if the conduct in question was intentional.¹³ In addition, the intent must be to provoke a mistrial -- intent by the prosecution “to seriously prejudice the defendant’s chances of an acquittal” is insufficient to bar retrial under double jeopardy.¹⁴

If the court needed to reach the issue it would likely hold that the prosecutor’s comment was not intended to provoke a mistrial. The State’s case against Defendant was a strong one, and it would have been apparent to an experienced prosecutor that a conviction was likely. Thus neither the State nor the prosecutor had an incentive to avoid a verdict by seeking a mistrial.

The Court need not reach the question of the prosecutor’s intent, however, because the motion for a mistrial was not granted. The United States Supreme

¹⁰ *Bailey*, 521 A.2d at 1078.

¹¹ *U.S. v. Dinitz*, 424 U.S. 600 (1976).

¹² *Bailey*, 521 A.2d at 1078 (citing *Dinitz*, 424 U.S. at 611).

¹³ *Bailey*, 521 A.2d at 1078 (citing *Kennedy*, 456 U.S. at 679); *State v. Long*, 1992 WL 207258, *5 (Del. Super. July 23, 1992).

¹⁴ *United States v. Singleterry*, 683 F.2d 122, 125 (5th Cir. 1982).

Court's holding in *Kennedy* is applicable only where a mistrial is granted by the trial court but not where a mistrial is denied because denial of a motion for mistrial does not violate a defendant's right to have the first jury hear his case.¹⁵

State v. Weddington is remarkably similar to the instant matter. In that case a defendant moved for mistrial when the prosecutor asked him an improper question based on race.¹⁶ The motion for a mistrial was denied by the trial court, but, upon appeal, the Delaware Supreme Court reversed and held that a mistrial should have been granted and, thus, remanded the case for retrial.¹⁷ Upon return to this Court the defendant moved to dismiss, claiming that his continued prosecution subjected him to double jeopardy. This Court denied that motion because the defendant had "not lost his chance for an acquittal by the first jury" and, therefore, his rights were not violated.¹⁸

While this determination may at first seem incongruous because Defendant's motion for new trial was granted on the same grounds upon which his requested mistrial was denied, the two tacks are not equivalent.¹⁹ Under the circumstances here, the prosecutor's alleged intention to provoke a mistrial failed. Therefore, any danger that Defendant's Constitutional right -- the right to have the first jury decide

¹⁵ *Kennedy*, 456 U.S. at 676, 679 (stating that only where government conduct intends to provoke a defendant to move for mistrial, "may a defendant raise the bar of double jeopardy to a second trial *after having succeeded in aborting the first on his own motion*") (emphasis added); *State v. Weddington*, 1988 WL 130447, *1 (Del. Super. Nov. 10, 1988); see *Singleterry*, 683 F.2d at 124.

¹⁶ 1988 WL 130447 at *1.

¹⁷ *Weddington*, 1988 WL 130447 at *1.

¹⁸ *Weddington*, 1988 WL 130447 at *1.

¹⁹ See *Singleterry*, 683 F.2d at 124.

his fate -- was violated does not exist here.²⁰ That first jury decided in favor of conviction. Furthermore, any alleged intention of the prosecutor to provoke a mistrial in order to have a better opportunity to convict Defendant disappears under these facts -- again, Defendant was convicted.

The Court finds that no Constitutional violation of Defendant's rights has occurred. Accordingly, Defendant's Motion to Dismiss is ***DENIED***.

IT IS SO ORDERED.

Judge John A. Parkins, Jr.

²⁰ See *Singleterry*, 683 F.2d at 124.