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Case Number 220,2013

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LAMONTE BUTLER,	)	
Defendant-Below,	)	
Appellant	)	
	)	**NO. 220, 2013**
v.	)	
	)	
	)	
STATE OF DELAWARE	)	
Plaintiff-Below,	)	
Appellee.	)	

APPELLANT'S REPLY BRIEF

ON APPEAL FROM THE SUPERIOR COURT IN AND OF NEW CASTLE COUNTY

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September 25, 2013

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I. THE TRIAL JUDGE INTENTIONALLY GOADED BUTLER INTO REQUESTING A MISTRIAL THROUGH HER DELIBERATE ACTIONS WHICH PREVENTED HIM FROM PROCEEDING TO TRIAL WITH HIS FIRST EMPANELED JURY.

The State erroneously claims that Butler waived his double jeopardy claim below. Resp.Br. at 15-16. While it is true that Butler requested the mistrial, that request was the result of Judge #2's deliberate actions. Thus, the request was not a waiver. *See Sudler v. State*, 611 A.2d 945, 948 (Del. 1992); Resp.Br. at 9. Further, defense counsel's comment that she thought that double jeopardy was a non-issue does not preclude the issue from being reviewed by this Court. After defense counsel's initial expression of opinion, she determined that she had been incorrect so she filed a Motion to Dismiss on double jeopardy grounds. The judge denied this motion on the merits of the argument and not due to a finding of waiver resulting from counsel's comment.[1] Thus, the motion filed after the initial comment and the judge's subsequent ruling preserved the issue for review by this Court.

The State currently claims that Judge #2's conduct, which it had previously characterized as a "deliberate contravention of established law," is not relevant to the issue of whether she goaded Butler into asking for a mistrial. Resp.Br. at 19, 21. Yet, the State's Motion to Recuse Judge #2 and

[1] The judge did look to that comment as a factor in concluding that the judge did not goad Butler into requesting a mistrial. *See* Ex.B at 5, att to Op.Br.

the prosecutors' affidavits filed in support of that motion extensively set forth and explained why the judge's "deliberate contravention of established law" and other conduct required recusal. In its Motion to Recuse, the State noted that the judge erroneously chose to conduct two office conferences off the record. A-89. Additionally, the State explained that the judge made an "unrecorded expression of opinion about the appropriate resolution of this case and pressure to reach that resolution." A-89.

In their affidavits, each prosecutor explained that the judge inappropriately mouthed to one prosecutor, "plea" when defense counsel was discussing the mistrial dilemma. A-95, 99. Interestingly, the State fails to consider that in its brief on appeal. The State also fails to consider in its argument on appeal the fact that the judge told counsel that if the trial did begin, it would take longer as she could only preside over the case for a few hours each day. A-93, 97. Thus, the State's Motion to Recuse and affidavits reveal that the State, at least at one point, did find the judge's "deliberate contravention of established law" and other conduct to be relevant to the double jeopardy issue.

Butler does not, as the State seems to believe, argue that a mistrial was warranted simply because the judge failed to have proceedings recorded. Resp.Br. at 19-21. However, along with the judge's other

conduct, this factor must be considered in determining whether the judge acted in bad faith. And, the consideration of that factor, along with the others, supports a conclusion that Judge #2 did not intend for there to be a trial over which to preside on December 4th. A-92-93,97.

The State also ignores the unreliability of the judge's factual findings with respect to her own conduct and its effect on Butler's rights. The findings of facts in the denial of the Motion to Dismiss are a significant factor in determining the issue of double jeopardy on appeal. *Sullins v. State*, 930 A.2d 911, 916 (Del. 1992). Here, however, Judge #2 is the one whose conduct provoked the mistrial and, despite a request by both parties, was the one who made findings about her own conduct. *Id.* at 915-16. Thus, for the reasons set forth in Argument II, *infra*, regarding bias and partiality, this Court cannot rely on those findings.

The State is correct that a defendant's rights are typically not violated when an original juror must be replaced with an original alternate. Resp.Br. at 17. What the State fails to understand is the difference between our situation and that contemplated by this Court in *Claudio v. State*, 585 A.2d 1278 (Del. 1991). While the State relies on *Delaware Superior Court Criminal Rule* 24 (c) to support its position, it overlooks the fact that the rule contemplates that all the jurors and alternates selected must be subject to the

same examination and challenges. *See Claudio*, 585 A.2d at 1299 (noting that jurors and alternates are to be selected simultaneously). In other words, counsel selects both the original jurors and the original alternates based on responses to the same questions asked during the same *voir dire*. Here, on the other hand, the makeup of the jury, including the alternates that were eventually seated, had been whittled away through questioning that was not propounded to the entire jury panel during the selection process.

The original jury in our case resulted after the exercise of challenges for cause and preemptory challenges and after the parties expressed their contentment with the jury. The makeup of the sworn jury was then changed based on additional *voir dire* which counsel was not able to factor into her original jury selection. This is different from a situation where all the alternates and jurors are selected simultaneously and one of those alternates must replace one of those jurors. Here, as the result of the judge's actions, Butler was deprived of his right to go to trial with his originally selected jury.

Because the trial court goaded Butler into requesting a mistrial, his convictions and sentences must be reversed and the State barred from retrying him.

II. JUDGE #2 ABUSED HER DISCRETION WHEN SHE DENIED BUTLER'S MOTION TO RECUSE HERSELF FROM DECIDING HIS MOTION TO DISMISS WITHOUT CONDUCTING THE REQUIRED ANALYSIS UNDER *LOS V. LOS*.[2]

Significantly, the State concedes that Judge #2 erred when she failed to conduct an objective analysis under the second prong in *Los v. Los*. This is particularly so when both parties filed a Motion to Recuse. Thus, the State acknowledges there was an appearance of bias based on the judge's failure to record substantive matters. Resp.Br. at 27.

For Judge #2 to decide the Motion to Dismiss, she had to sit in judgment of her own conduct. This created a "risk of injustice to the parties in th[is] particular case …the risk of undermining the public's confidence in the judicial process." *Stevenson v. State*, 782 A.2d 249, 258 (Del. 2001) (*quoting Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 864 (1988)). Thus, should this Court choose not to reverse Butler's conviction due to Judge #2's erroneous decision on the Motion to Dismiss as set forth in Argument I, *supra*, the proper remedy, which the State agrees is appropriate,[3] is to remand this case for a different judge to conduct a hearing on the Motion to Dismiss.

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[2] 595 A.2d 381, 385 (Del. 1991).
[3] Resp.Br. at 29.

CONCLUSION

For the foregoing reasons and upon the authority cited herein, the undersigned respectfully submits that Butler's conviction and sentence must be reversed.

\s\ Nicole M. Walker
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Date: September 25, 2013