
State of New York

Court of Appeals

IN THE MATTER OF THE APPLICATION OF ROBERT GORGHAN,

Appellant,

-against-

PATRICIA DEANGELIS, AS DISTRICT ATTORNEY OF
RENSSELAER COUNTY, AND HON. PAUL CZAJKA,
AS JUDGE OF THE COUNTY COURT, RENSSELAER COUNTY,

Respondents.

**Brief of the
New York State Association of Criminal Defense Lawyers, *Amicus Curiae***

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PRELIMINARY STATEMENT

This brief is submitted on behalf of the New York State Association of Criminal Defense Lawyers (“NYSACDL”) in support of appellant’s brief in *Matter of Robert Gorghan, Appellant, v. Patricia DeAngelis, as District Attorney of Rensselaer County, et al., Respondents*.

The NYSACDL is a non-profit membership organization of more than 800 attorneys who practice criminal defense law in the state of New York. Founded in 1986, its purpose is to assist, educate and provide support to the criminal defense bar to enable its members to better serve the interests of their clients and to enhance the professional standing of its members. The NYSACDL therefore has an interest in ensuring that its members’ clients are not subject to punishment through unconstitutional conduct of prosecutors.

Accordingly, the NYSACDL urges this Court to adopt appellant’s argument that the misconduct of the prosecution during appellant’s criminal was so egregious that it constituted an exceptional circumstance warranting the interposition of double jeopardy to bar appellant’s re-prosecution.

POINT

THE PROSECUTOR'S MISCONDUCT WAS SO EXTRAORDINARY AS TO SUBVERT THE INTEGRITY OF THE TRIAL AND WARRANT THE IMPOSITION OF THE DOUBLE JEOPARDY BAR TO RETRIAL.

In *People v. Adames*, 83 N.Y.2d 89, 91 (1993), this Court stated: “Some prosecutorial error may be so egregious or provocative as to warrant the interposition of the double jeopardy bar, even when no mistrial is granted.” The case at bar is that case. The prosecutor’s misconduct throughout the trial was so deliberate, relentless, and ruthless as to subvert appellant’s constitutional right to a fair trial and mandate, as this Court suggested, “an exceptional circumstances approach to the general remedial relief which allows for retrial.” *Id.* The appropriate judicial remedy for this exceptional case of prosecutorial overreaching is to bar retrial under the Double Jeopardy Clause of the Fifth Amendment of the U.S. Constitution and Article I, Section 6 of the New York State Constitution (“No person shall be subject to be twice put in jeopardy for the same offense.”).

As the Appellate Division correctly observed in reversing appellant’s conviction, “this record reveals a pervasive pattern by the prosecutor of pushing beyond accepted boundaries on key issues and in a fashion prejudicial to a fair trial.” *People v. Gorghan*, 13 A.D.3d 908, 911 (3d Dept. 2004). Indeed, the prosecutor’s conduct throughout the appellant’s trial is a catalogue of almost every type of misconduct that a prosecutor can commit. As described in appellant’s brief, the prosecutor made false and misleading statements to the jury, fabricated statements of witnesses, inflamed the passions and prejudices of the jury, assassinated the defendant’s character, improperly vouched for the testimony of witnesses the prosecutor did not call nor had

any intention of calling, improperly bolstered the testimony of witnesses, and repeatedly defied admonitions of the trial court to desist from her misconduct. As appellant's brief also notes, defense counsel's repeated requests for a mistrial were denied.

The U.S. Supreme Court's double jeopardy jurisprudence reflects a constitutional policy of establishing limits to criminal prosecution in order to protect defendants from repeated criminal proceedings for the same offense. *Green v. United States*, 355 U.S. 184, 187-188 (1957) ("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"). This constitutional policy ordinarily is not implicated when a defendant is found guilty by the particular jury that the defendant chose, but where that verdict is vacated on appeal due to prosecutorial or judicial error. See *United States v. Jorn*, 400 U.S. 470 (1971); *People v. Catten*, 69 N.Y.2d 547 (1987). This is the result because the defendant has voluntarily relinquished his "particular tribunal" as irreparably tainted by the prosecutor's misconduct and has himself requested a second trial. See *United States v. Dinitz*, 424 U.S. 600, 609 (1976) ("In such circumstances, the defendant generally does face a 'Hobson's choice' between giving up his first jury and continuing a trial tainted by prejudicial judicial or prosecutorial error. The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error."). However, as discussed below, when a prosecutor, either by mistrial or reversal of a conviction, has intentionally and in bad faith exposed a defendant to multiple trials for the same offense, the Double Jeopardy Clause should be available to bar re-prosecution, as this Court suggested in *Adames*.

Relying on the dictum in *Adames*, the *Amicus* submits that in extraordinary cases of prosecutorial overreaching – and the present case is extraordinary even under the most forgiving standard for prosecutorial overreaching -- the exceptional remedy of barring retrial is mandated at least for three reasons: First, to deter prosecutors from ignoring their special responsibility to “do justice” [see American Bar Association, *Prosecution Function*, Standard 3-1.2(c)(3d ed. 1993)(“the duty of the prosecutor is to seek justice, not merely to convict”)]; Second, to discourage prosecutors from using their enormous power and prestige to subvert the fair and orderly processes of the criminal trial [see *Brady v. Maryland*, 373 U.S. 83, 88 (1963)(prosecutor is “architect” of trial with the power to “shape a trial that bears heavily on the defendant”)]; Third, to protect a defendant from having to endure a second trial after the prosecutor has deliberately and in bad faith undermined the integrity of the first trial. [See *Arizona v. Washington*, 434 U.S. 497, 503-04 (1978)(multiple prosecutions create potential for governmental harassment of defendant); Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in an Emerging Jurisprudence*, 71 TEMP. L. REV. 887, 896-97 (1998)(explaining how prosecutor’s considerable power and discretion can be used to manipulate a trial and prejudice a defendant’s constitutional right to fair trial)]. Indeed, as the instant case dramatically illustrates, there are some trials in which a prosecutor’s misconduct is so pernicious as to deprive the defendant as a practical matter of his “valued right to have his trial completed by a particular tribunal.” In such a case, Double Jeopardy should be applicable to bar retrial.

Most courts and commentators recognize that the incidence of courtroom misconduct by prosecutors is a serious and systemic problem because, more than any other official, the prosecutor has the power to protect or subvert the integrity of the criminal trial. As Robert H.

Jackson, former Justice of the U.S. Supreme Court and U.S. Attorney General famously observed, “[w]hile the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.” *The Federal Prosecutor*, 31 J. CRIM. L. & CRIM. 3, 3 (1940). Indeed, today, judicial opinions and anecdotal evidence disclose a system of criminal justice that is permeated with misconduct by prosecutors.

The 2003 report by the Center for Public Integrity analyzed every accessible state appellate court opinion since 1970 and found that of the 11, 458 opinions, 2,017 were reversed due to prosecutorial misconduct, and in 513 other cases dissenting judges believed prosecutorial misconduct warranted reversal. See Steven Weinberg, *Breaking the Rules: Who Suffers When a Prosecutor is Cited for Misconduct?* The Center for Public Integrity (June 26, 2003). Startlingly, this report notes that New York State leads every other state in appellate reversals for prosecutorial misconduct. Similarly, a study by Newsday revealed that since 1998 at least 13 men convicted in 11 New York City murder cases had their convictions overturned because of prosecutorial misconduct. See Sean Gardner, *For Them, No Justice*, NEWSDAY, Dec. 8, 2002, at A3.

Moreover, each of the recent capital murder convictions reversed by this Court contain examples of prosecutorial misconduct found by all or some judges of this Court. See *People v. LaValle*, 3 N.Y.3d 88 (2004) (prosecutor’s improper use of victim impact evidence and inflammatory summation); *People v. Mateo*, 2 N.Y.3d 383 (2004) (according to dissent, prosecutor’s introduction of three unrelated murders prejudiced defendant’s right to fair trial); *People v. Cahill*, 2 N.Y.3d 14 (2003)(conviction reversed based on prosecutor’s “witness elimination” theory); *People v. Harris*, 98 N.Y.2d 452 (2002)(prosecutor’s improper use of victim impact evidence and prejudicial reference to defendant’s having smiled during testimony

of two witnesses). This Court should take this opportunity to demonstrate to trial courts and prosecutors that extreme acts of prosecutorial misconduct can result in dismissal of charges. This sanction is the only practical means of ensuring that such instances will remain rare or cease altogether.

Even in post-conviction contexts where appellants have sought reversal, double jeopardy has been applied to prohibit retrial based on prosecutorial misconduct at the first trial. Much of the judicial and academic literature examining those occasions when a prosecutor's misconduct at trial has implicated the Double Jeopardy Clause have focused on those instances when a mistrial has been granted at a defendant's request provoked by a prosecutor's misconduct. The U.S. Supreme Court suggested that "bad faith" or "overreaching" conduct by a prosecutor that provoked a mistrial could under Double Jeopardy preclude re-prosecution. See *Lee v. United States*, 432 U.S. 23 (1977) (retrial barred when prosecutorial misconduct is "intended to provoke" a mistrial or is otherwise "motivated by bad faith or undertaken to harass or prejudice the defendant"); *United States v. Dinitz*, *supra* at 611 (retrial barred where "bad faith conduct by judge or prosecutor threatens the 'harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict"). In *Oregon v. Kennedy*, 456 U.S. 667, 676 (1982), however, the Supreme Court narrowed the standard for prosecution-provoked mistrials that implicate Double Jeopardy, holding that retrial would be barred only when the prosecutor's conduct was "intended to 'goad' the defendant into moving for a mistrial."

Inasmuch as the appellant's repeated requests for a mistrial were denied by the trial judge, the question of the appropriate standard under the New York State Constitution for prosecutor-provoked mistrials is not before this Court. Nevertheless, the extent to which Double

Jeopardy protects a defendant who has been found guilty by a jury after a trial permeated with extensive and egregious prosecutorial misconduct, and after repeated requests for a mistrial were denied, is squarely presented in this appeal. To be sure, the Appellate Division determined that the prosecutor's conduct, however egregious, did not fit within the narrow exception of *Adames*. Relying on), the Appellate Division held that when a verdict of guilty has been reversed for prosecutorial misconduct, Double Jeopardy bars re-prosecution "only if the integrity of the judicial process itself has been impaired." *Matter of Gorghan v. DeAngelis*, 25 A.D.3d 872 (3d Dept. 2006). Although the Appellate Division neither defined what it meant by "the integrity of the judicial process" nor explained when such integrity would be "impaired," the court cited *Matter of Randall v. Rothwax*, 78 N.Y.2d 494, 499 (1991) for its holding. In *Rothwax*, the secrecy of the jury's deliberations had been breached by a court officer causing erroneous information to be communicated to the defendant that provoked his decision to plead guilty. Plainly, the Double Jeopardy Clause is the appropriate remedy for a blatant malfunctioning of the judicial process as described in *Rothwax*. Indeed, this Court in *Adames* distinguished *Rothwax*, finding that the error in *Rothwax* was of a far more serious magnitude than the error in *Adames*, which this Court characterized as "more analogous to a reversal on appeal for relatively ordinary trial error." *Id.* at 93.

But despite the settled principle that a defendant who obtains a reversal of a conviction for "ordinary trial error" ordinarily cannot invoke the Double Jeopardy Clause to preclude re-prosecution, courts have recognized several exceptions which bar re-prosecution even after a trial has been completed. First, when a conviction has been reversed based on insufficiency of evidence, Double Jeopardy ordinarily bars retrial. See *United States v. DiFrancesco*, 449 U.S. 117 (1980); *Burks v. United States*, 437 U.S. 1 (1978). Moreover, when the evidentiary

insufficiency is attributable to prosecutorial misconduct, Double Jeopardy principles may be applicable. For example, if a prosecutor has intentionally introduced tainted evidence without which the remaining evidence would be insufficient, then the Double Jeopardy protection is available. See *Jacob v. Clarke*, 52 F.3d 178 (8th Cir. 1995). Indeed, the Supreme Court has intimated that such an extension might be appropriate. In *Lockhart v. Nelson*, 488 U.S. 33 (1988), the Court held that a reviewing court's determination that a conviction was based on insufficient evidence ordinarily should consider all of the evidence that had been erroneously admitted. However, the Court framed its Double Jeopardy discussion by noting that the record revealed no evidence of prosecutorial misconduct in the submission of the erroneously admitted evidence. *Id.* at 34.

Second, several courts have extended the rationale of *Oregon v. Kennedy* to bar retrial after a reversal of a conviction when the prosecutor's misconduct is committed secretly, and is not discovered until after the trial has been completed, and thus could not provide the basis for a mistrial motion but would effectively have prevented an acquittal. There, as here, the appellant seeks a reversal of his conviction, but double jeopardy still bars retrial. Such misconduct typically has involved violations of *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, including nondisclosure of exculpatory evidence, subornation of perjury, and other clandestine tactics of which the defense is unaware. See *United States v. Wallach*, 979 F.2d 912 (2d Cir. 1992) (suggesting in dicta that extension of *Oregon v. Kennedy* is warranted when prosecutor engages in covert misconduct for the purpose of preventing an acquittal that the prosecutor believed was likely in absence of misconduct); *United States v. Catton*, 130 F.3d 805 (7th Cir. 1997) (leaving question open but suggesting that *Wallach*'s dictum may be sound); *State v. Marti*, 784 A.2d 1193 (N.H. 2001) (following *Wallach*). See also *State v. Lettice*, 585 N.W.2d

171 (Wis. App. 1998) (barring retrial where prosecutor engages in flagrant misconduct by bringing false criminal charges against defendant's lawyer on eve of trial to gain adjournment and unnerve lawyer). The rationale of *Oregon v. Kennedy* is appropriately applied to this appellate reversal, for otherwise, a prosecutor anticipating an acquittal would face a double jeopardy bar only if she engages in misconduct that is sufficiently visible to provoke a successful mistrial motion, but not if she engages in misconduct of which the defendant is unaware until after conviction. Moreover, by not extending the Double Jeopardy bar to these situations, courts would be rewarding prosecutors for their shrewdness in keeping misconduct and its motivation hidden from the defendant during the trial, fearful that the defendant would be acquitted without the misconduct.

Third, as suggested by the dictum in *Adames*, several courts have applied the Double Jeopardy Clause to bar retrial following a conviction when, as here, the prosecutor engaged in deliberate and pervasive misconduct for the purpose of denying a defendant his constitutional right to a fair trial. These courts have reasoned that where a prosecutor has in bad faith intentionally ignored the bounds of legitimate advocacy to win a conviction by any means necessary, this is precisely the kind of prosecutorial overreaching to which the Double Jeopardy Clause applies. See *State v. Rogan*, 984 P.2d 1231, 1249 (Haw. 1999) (prosecutor's misconduct was "so egregious, from an objective standpoint" that re-prosecution is barred by double jeopardy); *Commonwealth v. Martorano*, 741 A.2d 1221 (Pa. 1999) ("prosecutor's intent to deprive [defendant] of a fair trial; to ignore the bounds of legitimate advocacy; in short, to win a conviction by any means necessary...is precisely the kind of prosecutorial overreaching to which double jeopardy protection applies"); *Commonwealth v. Smith*, 615 A.2d 321 (Pa. 1992) (prosecutor's overreaching "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”).

The *Amicus* recognizes that few trials are flawless and error-free, and that the double jeopardy bar to retrial usually should not attach following a reversal on appeal for “ordinary trial error.” *Adames, supra* at 93. As in *Rogan*, however, the instant trial did not involve “ordinary trial error.” As the Appellate Division found in reversing his conviction, the appellant’s trial was an extreme example of prosecutorial overreaching. In such case, the appellant should not have to shoulder the burden to persuade this Court that the prosecutor’s extreme misconduct caused a breakdown in the judicial process. See *Matter of Potenza v. Kane*, 79 A.D.2d 467, 475 (4th Dept. 1981) (defendant must satisfy a “heavy burden” to show that the prosecutor’s misconduct was “so egregious that the judicial process itself has broken down”). The burden of another trial cannot fairly be attributed to the appellant’s preference to terminate his trial because of the prosecutor’s misconduct. By contrast, in the instant case the burden of retrial is solely attributable to the prosecutor’s misconduct. And this Court should impose on the prosecutor the burden of explaining why the interest in re-trying the defendant after a trial riddled with misconduct has not been “superseded by an overriding necessity to protect the integrity of the judicial process.” *Ibid.*

A fair trial is not simply an abstract and aspirational concept. A fair trial is a constitutional imperative. A public prosecutor has the constitutional and ethical duty to respect and protect that imperative responsibly and professionally. And when that imperative has been cynically ignored and subverted by a prosecutor, as in appellant’s trial, then this Court’s dictum in *Adames* that “some prosecutorial error may be so egregious or provocative as to warrant the

interposition of the double jeopardy bar” should be invoked to deny the prosecutor another opportunity to prosecute the case.

CONCLUSION

THIS COURT SHOULD INVOKE THE DOUBLE JEOPARDY CLAUSE OF ARTICLE I, SECTION 6 OF THE NEW YORK STATE CONSTITUTION TO BAR REPROSECUTION OF APPELLANT.

Respectfully submitted,

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