

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

UNPUBLISHED
November 15, 2012

v

AARON SMITH,

Defendant-Appellee.

No. 307755
Wayne Circuit Court
LC No. 10-005266-FH

Before: MURPHY, C.J., and O'CONNELL and WHITBECK, JJ.

PER CURIAM.

The prosecution appeals as of right from the trial court's order dismissing charges against defendant Aaron Smith. After the first trial court declared a mistrial, the second trial court dismissed the charges because, in the trial court's opinion, double jeopardy principles barred retrying Smith. We reverse and remand.

I. FACTS

A. BACKGROUND FACTS

The trial court granted a mistrial after reversing its ruling on a statement that Smith gave to the police. The charges in this case arose out of an incident in April 2010. Officers Shawn Hunter, Melissa Adams, and Toran Crawford were in a marked police car when Officer Hunter heard five or six gunshots. After approaching the area from where Officer Hunter thought he heard the gunshots, the officers saw Smith in an alley. Officer Hunter testified that Smith turned and saw the police car, and then began running down the alley. Officer Toran and Officer Adams each testified that they saw Smith with a gun. Officer Toran testified that he saw Smith make a throwing motion with his hand, but that he did not see the gun come out of Smith's hand or see it land. Officers searched a nearby field and found a gun about 50 to 75 feet from where the officers detained Smith.

Officer Calvin Washington testified that, when he spoke with Smith at the police station, Smith waived his constitutional rights and stated that he wanted to make a statement. Smith

answered four questions, and then refused to answer any more. The prosecution charged Smith with felon in possession of a firearm¹ and possession of a firearm during the commission of a felony.²

B. THE STATEMENT

Defense counsel filed a motion in limine that sought to admit the first four questions and answers in Smith's statement. The trial court ruled that Smith could not admit evidence of his responses to Officer Washington's questions, but that the questions were admissible. In its opening statement, the prosecution told the jury that it would hear evidence that Smith made a statement to police in which admitted he was in the area, claimed that he was running because he heard gunshots, and denied that he had a gun. In Smith's opening statement, defense counsel stated that Smith voluntarily spoke with the police and denied that the gun the police found was his.

At trial, Officer Washington testified that he interviewed Smith, and that Smith made a written statement. Defense counsel challenged the admission of Smith's written statement, arguing that it implicated Smith's right to silence because it showed that he refused to answer the rest of Officer Washington's questions. The trial court adjourned at the prosecution's request.

C. THE MISTRIAL

When the trial continued, the prosecution argued that Smith's written statement was admissible in its entirety as a statement against Smith's interests, because it placed him at the location of the gunshots. The trial court ruled that Smith's questions, answers, and the written statement were not incriminating and were inadmissible hearsay.

Smith moved for a mistrial, arguing that the ruling violated his rights to due process because the prosecution had already argued the significance of and presented evidence of Smith's statements. Smith argued that the trial court's ruling would prevent him from arguing or relying on the same statement in his closing. The trial court denied Smith's motion, stating that there was no basis for a mistrial.

The trial court then moved off the record for five minutes. When it returned to the record, the trial court explained that

[B]ecause the jurors have heard that there was an interrogation session, because the jurors have heard that the Constitutional Rights were given and that a statement was forthcoming that . . . cannot be redacted from the minds of the jurors or from the record and that since the Court has ruled that the statement is not admissible at this junction, that there must be a mistrial granted.

¹ MCL 750.224f.

² MCL 750.227b.

Defense counsel challenged the trial court's ruling, arguing that it was no longer requesting a mistrial, and that the trial court had already ruled on counsel's motion. The trial court stated that it was declaring a mistrial sua sponte.

D. PROCEDURAL HISTORY AND DISMISSAL

In January 2011, the trial court held a hearing and determined that it could retry Smith because jeopardy had not attached. In April 2011, the trial court reassigned the case. Defense counsel filed a motion to dismiss in May 2011. The second trial court denied the motion in June 2011, but granted Smith a stay for an interlocutory appeal. This Court denied Smith's application for leave to appeal because the issue did not require immediate review.³

The trial court held a second special pretrial hearing on November 17, 2011. Defense counsel moved the trial court to reconsider Smith's motion to dismiss. Defense counsel argued that Smith did not consent to the mistrial, there was no manifest necessity to grant the mistrial, and that the trial court must dismiss the case because jeopardy had attached. The trial court granted Smith's motion to dismiss, determining that defense counsel had not consented to the mistrial and there was no manifest necessity to grant the mistrial.

II. DOUBLE JEOPARDY

A. STANDARD OF REVIEW

"A double jeopardy challenge presents a question of constitutional law that this Court reviews de novo."⁴

B. LEGAL STANDARDS

The Fifth Amendment of the United States Constitution protects a criminal defendant from being "twice put in jeopardy of life or limb" ⁵ The Michigan Constitution contains a parallel provision that this Court construes consistently with the Fifth Amendment.⁶ This provision protects a criminal defendant against multiple prosecutions for the same offense.⁷ The

³ *People v Aaron Smith*, unpublished order of the Court of Appeals, issued August 11, 2011 (Docket No. 304799).

⁴ *People v Smith*, 478 Mich 292, 298; 733 NW2d 351 (2007).

⁵ US Const, Am V; *People v Szalma*, 487 Mich 708, 715-716; 790 NW2d 662 (2010).

⁶ Const 1963, art 1, § 15; *Szalma*, 487 Mich at 716.

⁷ *People v Lett*, 466 Mich 206, 213-214, 215; 644 NW2d 743 (2002).

trial court implicates this right when it declares a mistrial after the jury is empanelled and sworn.⁸

However, the Double Jeopardy Clause does not automatically bar a second trial when the trial court declares a mistrial.⁹ “It is well settled, for instance, that where a defendant requests *or* consents to a mistrial, retrial is not barred” unless the prosecution provoked the defendant to request a mistrial.¹⁰ If defense counsel argues that a mistrial is warranted but refuses to expressly consent to a mistrial, the defendant has “consented to discontinuance of the trial by expressly objecting to its continuance.”¹¹ By moving the trial court for a mistrial, the defendant waives his or her double jeopardy claim unless prosecutorial misconduct provoked the motion.¹² A waiver is an intentional relinquishment of a known right.¹³ A defendant’s waiver “extinguishe[s] any error.”¹⁴

C. APPLYING THE STANDARDS

It is very clear from the facts of this case that defense counsel did not consent to the mistrial. However, it is equally clear that defense counsel *requested* a mistrial. We conclude that defense counsel’s request waived his double jeopardy claim.

This case is very analogous to this Court’s decision in *People v Tracey*. In that case, the trial court allowed a complainant to testify about a statement in front of the jury despite defense counsel’s objection.¹⁵ Neither defense counsel nor the prosecution requested a mistrial.¹⁶ However, defense counsel stated that he did not want to go forward with the trial.¹⁷ The trial

⁸ *Id.* at 215; *United States v Scott*, 437 US 82, 87; 57 L Ed 2d 65; 98 S Ct 2187 (1978).

⁹ *Lett*, 466 Mich at 215.

¹⁰ *Id.* (emphasis supplied).

¹¹ *People v Tracey*, 221 Mich App 321, 327; 561 NW2d 133 (1997); see *People v Echavarria*, 233 Mich App 356, 366; 592 NW2d 737 (1999).

¹² See *Oregon v Kennedy*, 456 US 667, 672; 102 S Ct 2083; 72 L Ed 2d 416 (1982); *People v Dawson*, 431 Mich 234, 253; 427 NW2d 886 (1988); *People v Gaval*, 202 Mich App 51, 53; 507 NW2d 786 (1993).

¹³ *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011).

¹⁴ *Id.*

¹⁵ *Tracey*, 221 Mich App at 323.

¹⁶ *Id.*

¹⁷ *Id.*

court declared a mistrial sua sponte, reasoning that the prosecution's failure to disclose the evidence was intentional prosecutorial misconduct and deprived the defendant of a fair trial.¹⁸

On appeal, this Court determined that the prosecution did not engage in misconduct.¹⁹ However, we determined that the defendant "clearly indicated that he did not want to continue the trial" by moving for a dismissal and indicating that he did not want to go forward with the trial.²⁰ We then concluded that the defendant waived his double jeopardy interests by requesting a mistrial.²¹ Neither defense counsel nor the prosecution moved the trial court for a mistrial, but this Court determined the defendant unequivocally consented to discontinue the trial, even though he did not formally consent to the mistrial.²²

Here, defense counsel moved the trial court to declare a mistrial. As in *Tracey*, Smith's rights to due process were implicated when the trial court erroneously admitted evidence. As in *Tracey*, the trial court sua sponte declared a mistrial because the circumstances deprived the defendant of a fair trial. And even more clearly than in *Tracey*, Smith expressly objected to continuing the trial. Defense counsel made a formal motion for a mistrial, arguing similar due process concerns as those that led the trial court to reconsider the motion sua sponte only five minutes later. We conclude that Smith unequivocally consented to the discontinuance of the trial. Thus, we conclude that Smith waived his double jeopardy interests by requesting a mistrial, even though he later challenged the trial court's grant of a mistrial.

Because we have determined that Smith consented to the mistrial, we need not determine whether the trial court based its mistrial on manifest necessity.²³ Smith's waiver extinguished any error.²⁴ For these reasons, we reverse the trial court's dismissal of the charges against Smith, and remand for retrial.

Reversed and remanded. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ William C. Whitbeck

¹⁸ *Id.*

¹⁹ *Id.* at 325.

²⁰ *Id.* at 327.

²¹ *Id.* at 329.

²² *Id.*

²³ See *Id.* at 327-329 (this Court reversed when the defendant consented to the mistrial, even though there was no manifest necessity for the mistrial).

²⁴ *Dawson*, 431 Mich at 253; *Kowalski*, 489 Mich at 503.