ARIZONA v. WASHINGTON

SUPREME COURT OF THE UNITED STATES
434 U.S. 497
February 21, 1978

OPINION: Mr. Justice STEVENS…In 1971 respondent was found **guilty of murdering** a hotel night clerk. In 1973, the Superior Court of Pima County, Ariz., ordered a new trial because **the prosecutor had withheld exculpatory evidence from the defense**. The Arizona Supreme Court affirmed the new trial order in an unpublished opinion.

Respondent's second trial began in January 1975. During the voir dire examination of prospective jurors, the prosecutor made reference to the fact that some of the witnesses whose testimony the jurors would hear had testified in proceedings four years earlier. Defense counsel told the prospective jurors "that there was evidence hidden from [respondent] at the last trial." In his opening statement, he made this point more forcefully:

> "You will hear testimony that notwithstanding the fact that we had a trial in May of 1971 in this matter, that the prosecutor hid those statements and didn't give those to the lawyer for George saying the man was Spanish speaking, didn't give those statements at all, hid them.
>
> "You will hear that that evidence was suppressed and hidden by the prosecutor in that case. You will hear that that evidence was purposely withheld. You will hear that because of the misconduct of the County Attorney at that time and because he withheld evidence, that the Supreme Court of Arizona granted a new trial in this case."

After opening statements were completed, the prosecutor moved for a mistrial…[T]he trial judge expressed the opinion that evidence concerning the reasons for the new trial, and specifically the ruling of the Arizona Supreme Court, was **irrelevant** to the issue of guilt or innocence and therefore inadmissible. Defense counsel asked for an opportunity "to find some law" that would support his belief that the Supreme Court opinion would be admissible. After further argument, the judge stated that he would withhold ruling on the admissibility of the evidence and denied the motion for mistrial. Two witnesses then testified.

Normally, an admitted statement or evidence would have to be prejudicial in addition to irrelevant for its admission to have made any difference. Perhaps this additional description of the statements of defense counsel is just an oversight at this point in the opinion.

The following morning the prosecutor renewed his mistrial motion. Fortified by an evening's research, he argued that there was no theory on which the basis for the new trial ruling could be brought to the attention of the jury, that the **prejudice** to the jury could not be repaired by any cautionary instructions, and that a mistrial was a "manifest necessity." Defense counsel…argued that his comment was invited by the prosecutor's reference to the witnesses' earlier testimony and that any prejudice could be avoided by curative instructions. During the extended argument, the trial judge expressed his concern about the possibility that an erroneous mistrial ruling would preclude another trial.

Ultimately the trial judge granted the motion, stating that his ruling was based upon defense counsel's remarks in his opening statement concerning the Arizona Supreme Court opinion. The trial judge **did not expressly find** that there was "manifest necessity" for a mistrial; nor did he expressly state that he had considered alternative solutions and concluded that none would be adequate. The Arizona Supreme Court refused to review the mistrial ruling.

Respondent then filed a petition for writ of habeas corpus in the United States District Court for the District of Arizona, alleging that another trial would violate the Double Jeopardy Clause. After reviewing the transcript of the state proceeding, and hearing the arguments of counsel, the Federal District Judge noted that the Arizona trial judge had not canvassed on the record the possibility of alternatives to a mistrial and expressed the view that before granting a mistrial motion the judge was required "to find that manifest necessity exists for the granting of it." Because the record contained no such finding, and because the federal judge was not prepared to make such a finding himself, he granted the writ. He agreed with the State, however, that defense counsel's opening statement had been improper.

The Ninth Circuit also characterized the opening statement as improper, but affirmed because, absent a finding of manifest necessity or an explicit consideration of alternatives, the court was unwilling to infer that the jury was prevented from arriving at a fair and impartial verdict. In a concurring opinion, two judges noted that, while the question of manifest necessity had been argued, most of the argument on the mistrial motion had concerned the question whether the opening statement was improper. They concluded that, "absent findings that manifest necessity existed, it…[was] quite possible that the grant of mistrial was based on the fact that the impropriety of counsel's conduct had been established without reaching the question whether there could, nevertheless, be a fair trial."

We are persuaded that the Court of Appeals applied an inappropriate standard of review to mistrial rulings of this kind, and attached undue significance to the form of the ruling. We therefore reverse.

A State may not put a defendant in jeopardy twice for the same offense. The constitutional protection against double jeopardy unequivocally prohibits a second trial following an acquittal. The public interest in the finality of criminal judgments is so strong that an acquitted defendant may not be retried even though "the acquittal was based upon an egregiously erroneous foundation." If the innocence of the accused has been confirmed by a final judgment, the Constitution conclusively presumes that a second trial would be unfair.

Because jeopardy attaches before the judgment becomes final, the constitutional protection also embraces the defendant's "valued right to have his trial completed by a particular tribunal." The reasons why this "valued right" merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed.

Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.

Unlike the situation in which the trial has ended in an acquittal or conviction, retrial is not automatically barred when a criminal proceeding is terminated without finally resolving the merits of the charges against the accused. **Because of the variety of circumstances that may make it necessary to discharge a jury before a trial is concluded, and because those circumstances do not invariably create unfairness to the accused, his valued right to have the trial concluded by a particular tribunal is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury.** Yet in view of the importance of the right, and the fact that it is frustrated by any mistrial, the prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate "manifest necessity" for any mistrial declared over the objection of the defendant.

So far, I am getting the idea that even if it is the defendant's attorney that causes the mistrial, the prosecutor must seriously consider whether he is better off proceeding. For, if he wins a motion and obtains a new trial, unless there was a "manifest necessity" for a new trial, the prosecutor runs the risk of a double jeopardy victory for the defendant. That does not seem fair to the prosecutor. It also makes you wonder. Does a defense attorney have an obligation to knowingly inject prejudicial information into a trial, hoping the prosecutor will seek a mistrial and hoping a granted mistrial was not "manifestly necessary" so as to then win a double jeopardy argument? It seems the defense cannot lose, for if the prosecutor decides to proceed instead of taking the foregoing risk, then the jury has heard potentially improper evidence that favors the defendant! We need to talk to a criminal defense attorney, don't we!

The words "manifest necessity" appropriately characterize the magnitude of the prosecutor's burden. For that reason Mr. Justice Story's classic formulation of the test has been quoted over and over again to provide guidance in the decision of a wide variety of cases. Nevertheless, those words do not describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge. Indeed, it is manifest that the key word "necessity" cannot be interpreted literally; instead, contrary to the teaching of Webster, we assume that there are degrees of necessity and we require a "high degree" before concluding that a mistrial is appropriate…

At one extreme are cases in which a prosecutor requests a mistrial in order to buttress weaknesses in his evidence. Although there was a time when English judges served the Stuart monarchs by exercising a power to discharge a jury whenever it appeared that the Crown's

evidence would be insufficient to convict, the prohibition against double jeopardy as it evolved in this country was plainly intended to condemn this "abhorrent" practice…

Thus, the strictest scrutiny is appropriate when the basis for the mistrial is the unavailability of critical prosecution evidence, or when there is reason to believe that the prosecutor is using the superior resources of the State to harass or to achieve a tactical advantage over the accused.

Picture a prosecutor who knows a key witness will not be available to testify when needed. Defense counsel does not then know this. Coincidently, defense counsel has taken a risk of a mistrial by producing questionable evidence. All comes to light. What is a judge to do? Criminal trials aren't as simple as they may appear, are they?

At the other extreme is the mistrial premised upon the trial judge's belief that the jury is unable to reach a verdict, long considered the classic basis for a proper mistrial. The argument that a jury's inability to agree establishes reasonable doubt as to the defendant's guilt, and therefore requires acquittal, has been uniformly rejected in this country. Instead, without exception, the courts have held that the trial judge may discharge a genuinely deadlocked jury and require the defendant to submit to a second trial. This rule accords recognition to society's interest in giving the prosecution one complete opportunity to convict those who have violated its laws.

Moreover, in this situation there are especially compelling reasons for allowing the trial judge to exercise broad discretion in deciding whether or not "manifest necessity" justifies a discharge of the jury. On the one hand, if he discharges the jury when further deliberations may produce a fair verdict, the defendant is deprived of his "valued right to have his trial completed by a particular tribunal." But if he fails to discharge a jury which is unable to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors. If retrial of the defendant were barred whenever an appellate court views the "necessity" for a mistrial differently from the trial judge, there would be a danger that the latter, cognizant of the serious societal consequences of an erroneous ruling, would employ coercive means to break the apparent deadlock. Such a rule would frustrate the public interest in just judgments. The trial judge's decision to declare a mistrial when he considers the jury deadlocked is therefore accorded great deference by a reviewing court.

We are persuaded that, along the spectrum of trial problems which may warrant a mistrial and which vary in their amenability to appellate scrutiny, the difficulty which led to the mistrial in this case also falls in an area where the trial judge's determination is entitled to special respect.

In this case the trial judge ordered a mistrial because the defendant's lawyer made improper and prejudicial remarks during his opening statement to the jury. Although respondent insists that evidence of prosecutorial misconduct was admissible as a matter of Arizona law, and therefore that the opening statement was proper, we regard this issue as foreclosed by respondent's failure to proffer any Arizona precedent supportive of his contention and by the state court's interpretation of its own law, buttressed by the consistent opinion of the Federal District Court and the Court of Appeals. We therefore start from the premise that defense counsel's comment was improper and may have affected the impartiality of the jury.

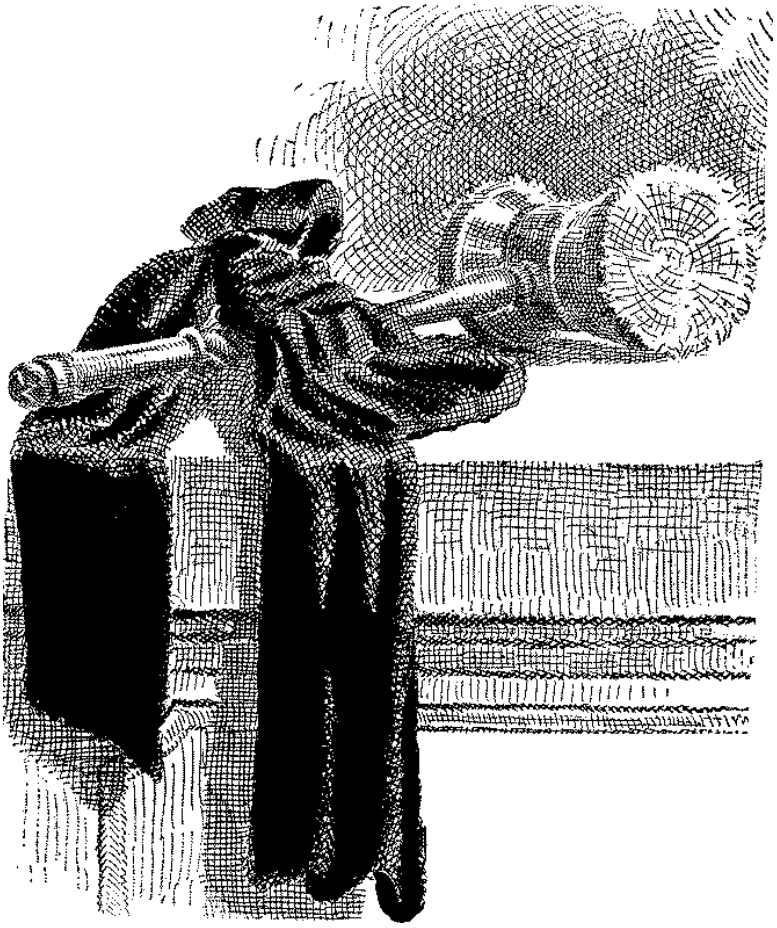
We recognize that the extent of the possible bias cannot be measured, and that the District Court was quite correct in believing that some trial judges might have proceeded with the trial after giving the jury appropriate cautionary instructions. In a strict, literal sense, the mistrial was not "necessary." Nevertheless, the overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one or more jurors may have been affected by the improper comment…

An improper opening statement unquestionably tends to frustrate the public interest in having a just judgment reached by an impartial tribunal. Indeed, such statements create a risk, often not present in the individual juror bias situation, that the entire panel may be tainted. The trial judge, of course, may instruct the jury to disregard the improper comment. In extreme cases, he may discipline counsel, or even remove him from the trial …Those actions, however, will not necessarily remove the risk of bias that may be created by improper argument. **Unless unscrupulous defense counsel are to be allowed an unfair advantage, the trial judge must have the power to declare a mistrial in appropriate cases. The interest in orderly, impartial procedure would be impaired if he were deterred from exercising that power by a concern that any time a reviewing court disagreed with his assessment of the trial situation a retrial would automatically be barred.**

OK. The fog appears to be clearing. It appears that a mistrial inappropriately ordered by a trial judge may well result in a double jeopardy victory for the defendant. But, it appears the majority has adopted a rule of substantial deference to the trial judge, such that, if the judge was right to order a new trial, double jeopardy will not be an available tool for the defendant.

The adoption of a stringent standard of appellate review in this area, therefore, would seriously impede the trial judge in the proper performance of his "duty, in order to protect the integrity of the trial, to take prompt and affirmative action to stop…professional misconduct."

There are compelling institutional considerations militating in favor of appellate deference to the trial judge's evaluation of the significance of possible juror bias. He has seen and heard the jurors during their voir dire examination. He is the judge most familiar with the evidence and the background of the case on trial. He has listened to the tone of the argument as it was delivered and has observed the apparent reaction of the jurors. In short, he is far more "conversant with the factors relevant to the determination" than any reviewing court can possibly be. Our conclusion that a trial judge's decision to declare a mistrial based on his assessment of the prejudicial impact of improper argument is entitled to great deference does not, of course, end the inquiry. As noted earlier, a constitutionally protected interest is inevitably affected by any mistrial decision. The trial judge, therefore, "must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." In order to ensure that this interest is adequately protected, reviewing courts have an obligation to satisfy themselves that, in the words of Mr. Justice Story, the trial judge exercised **"sound discretion"** in declaring a mistrial.



Thus, if a trial judge acts irrationally or irresponsibly, his action cannot be condoned. But our review of this record indicates that this was not such a case. Defense counsel aired improper and highly prejudicial evidence before the jury, the possible impact of which the trial judge was in the best position to assess. The trial judge did not act precipitately in response to the prosecutor's request for a mistrial. On the contrary, evincing a concern for the possible double jeopardy consequences of an erroneous ruling, he gave both defense counsel and the prosecutor full opportunity to explain their positions on the propriety of a mistrial. We are therefore persuaded by the record that the trial judge acted responsibly and deliberately, and accorded careful consideration to respondent's interest in having the trial concluded in a single proceeding. Since he exercised "sound discretion" in handling the sensitive problem of possible juror bias created by the improper comment of defense counsel, the mistrial order is supported by the "high degree" of necessity which is required in a case of this kind. **Neither party has a right to have his case decided by a jury which may be tainted by bias; in these circumstances, "the public's interest in fair trials designed to end in just judgments" must prevail over the defendant's "valued right" to have his trial concluded before the first jury impaneled.**

Additionally, wouldn't it be grossly unfair to reverse a trial judge's mistrial order and give the defendant a good shot at a double jeopardy victory **based upon his own attorney's misconduct!**

One final matter requires consideration. The absence of an explicit finding of "manifest necessity" appears to have been determinative for the District Court and may have been so for the Court of Appeals. If those courts regarded that omission as critical, they required too much. Since the record provides sufficient justification for the state-court ruling, the failure to explain that ruling more completely does not render it constitutionally defective.

Review of any trial court decision, is of course, facilitated by findings and by an explanation of the reasons supporting the decision. No matter how desirable such procedural assistance may be,

it is not constitutionally mandated in a case such as this. The basis for the trial judge's mistrial order is adequately disclosed by the record, which includes the extensive argument of counsel prior to the judge's ruling. The state trial judge's mistrial declaration is not subject to collateral attack in a federal court simply because he failed to find "manifest necessity" in those words or to articulate on the record all the factors which informed the deliberate exercise of his discretion.

The judgment of the Court of Appeals is Reversed.

CONCURRENCE: Mr. Justice BLACKMUN concurs in the result.

DISSENT: Mr. Justice WHITE…[Not Provided.]

DISSENT: Mr. Justice MARSHALL/BRENNAN…**The Court today holds that another trial of respondent, following a mistrial declared over his vehement objection, is not prohibited by the Double Jeopardy Clause.** To reach this result, my Brethren accord a substantial degree of deference to a trial court finding that the Court simply assumes was made but that appears nowhere in the record. Because of the silence of the record on the crucial question whether there was "manifest necessity" for a mistrial, I believe that another trial of respondent would violate his constitutional right not to be twice put in jeopardy for the same offense. I therefore dissent.

My disagreement with the majority is a narrow one. I fully concur in its view that the constitutional protection of the Double Jeopardy Clause "embraces the defendant's 'valued right to have his trial completed by a particular tribunal,'" since a second prosecution inevitably "increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted." For these reasons, I also agree that, where a mistrial is declared over a defendant's objections, a new trial is permissible only if the termination of the earlier trial was justified by a "manifest necessity" and that the prosecution must shoulder the "heavy" burden of demonstrating such a "high degree" of necessity. Nor do I quarrel with the proposition that reviewing courts must accord substantial deference to a trial judge's determination that the prejudicial impact of an improper opening statement is so great as to leave no alternative but a mistrial to secure the ends of public justice. Where I part ways from the Court is in its assumption that an "assessment of the prejudicial impact of improper argument" sufficient to support the need for a mistrial may be implied from this record. As the courts below found, it is not apparent on the face of the record that termination of the trial was justified by a "manifest necessity" or was the only means by which the "ends of public justice" could be fulfilled. *United States v. Perez*…

Had the court here explored alternatives on the record, or made a finding of substantial and incurable prejudice or other "manifest necessity," this would be a different case and one in which I would agree with both the majority's reasoning and its result. On this ambiguous record, however, the absence of any such finding—and indeed of any express indication that the trial court applied the manifest-necessity doctrine leaves open the substantial possibility that there was in fact no need to terminate the proceedings. While the Court states that a "high degree" of necessity is required before a mistrial may properly be granted, its reading of the record here is inconsistent with this principle.

I would therefore affirm the judgment of the Court of Appeals.