

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA
JAN 14 2000
JAMES W. PATTERSON
CLERK

ARNOLD DEAN, JR., and
TYBREAM ROGERS,

Petitioners,

v.

THE HONORABLE JERRY D. BASS,
THE HONORABLE VIRGIL C. BLACK,
THE DISTRICT COURT OF OKLAHOMA
COUNTY, STATE OF OKLAHOMA,

Respondents.

Nos. PR-99-1326
PR-99-1327

**ORDER GRANTING WRIT OF PROHIBITION
AND DENYING MOTION FOR ORAL ARGUMENT**

Petitioners have filed Applications to Assume Original Jurisdiction and Petitions For Writ of Prohibition and/or Mandamus, requesting this Court to issue an order prohibiting their re-prosecution in a second trial of the charges set forth in a Fourth Amended Information in Oklahoma County District Court Case No. CF-96-3336. The first trial of Petitioners ended in a mistrial declared by the trial court over Petitioners' objections. Petitioners assert the doctrine of double jeopardy bars their re-prosecution. Petitioners also filed Motions to Stay the second trial, which was set to begin October 18, 1999.¹

When a mistrial is declared without a defendant's consent, this Court has long used the "manifest necessity" test to determine whether a defendant has been subsequently subjected to double jeopardy. *McClendon v. State*, 1988 OK CR 186, ¶ 4, 761 P.2d 895. In that vein, this Court has observed manifest necessity may arise from various causes or circumstances; but the circumstances must be forceful and compelling, and must be in the nature of a

¹ This Court previously entered an Order staying all District Court proceedings in Case No. CF-96-3336 and directing a Response from Respondents. After the Response was filed, Petitioners filed a joint application requesting leave to file a Reply Brief, which was granted.

cause or emergency over which neither the court nor the attorneys had control, or which could not have been averted by diligence and care.² *Sussman v. District Court of Oklahoma County*, 1969 OK CR 185, ¶ 40, 455 P.2d 724. Because we must determine whether the trial court's declaration of a mistrial in this case was supported by manifest necessity, a detailed recitation of the pertinent facts is necessary.

Petitioners are charged with three counts of Murder in the First Degree and one count of Shooting with Intent to Kill for their alleged participation as accessories with five other males. On September 13, 1999, a jury trial commenced before the Honorable Jerry D. Bass. On September 21, 1999, the jury was impaneled and sworn and evidence was presented by the State's first witness, Johnnie W. Loudermilk. On September 22, 1999, Judge Bass declared a mistrial after cross-examination of Loudermilk by Garvin Isaacs, counsel for Petitioner Dean. On September 23, 1999, Petitioners filed joint Motions to Dismiss the Fourth Amended Information based on double jeopardy grounds which were denied by the trial court. After that ruling, the aforementioned writs were filed in this Court.

Upon the commencement of the evidentiary portion of trial, the State called Loudermilk to the witness stand. Loudermilk, who had been an Oklahoma City Police Officer at the time of the alleged crimes, testified about his activities in responding to a disturbance call regarding a fight outside a nightclub in Northeast Oklahoma City. Shortly after arriving at the scene, Loudermilk heard gunfire erupt in a crowd gathered outside the club.

² The causes that can create a manifest necessity have generally come within one of the following categories: 1) illness, disability, or death of juror, accused, judge or counsel, or a member of their family, or the court reporter; 2) expiration of the term of court; 3) defective information; 4) disqualification or misconduct of a juror; 5) misconduct of counsel, or accused; 6) failure of jury to agree; 7) with the consent of accused. *Sussman*, at ¶ 41.

Loudermilk admitted he had not seen a gunman and did not know where the gunfire had come from. However, as Loudermilk approached the crowd, he observed a man squatting down next to a tan colored car. He then observed the same man raise over the edge of the car, fire a shot from an automatic handgun toward the victims' car, and then duck back down beside the car. Loudermilk saw the man do this four times, after which, the man tossed the handgun into the tan car. At that point, Loudermilk approached the vehicle and ordered the man to the ground. Loudermilk identified that man as Petitioner Dean. Loudermilk did not identify or give any testimony regarding Petitioner Rogers.

The State passed the witness and Isaacs began his cross-examination. During the latter course of the cross-examination, Isaacs inquired whether Loudermilk had worked closely with Lou Keel of the District Attorney's Office. (September 21, 1999, Trial Transcript at 78). Loudermilk replied that Keel had previously been the Assistant District Attorney in charge of prosecuting this case and he had reported to Keel when he came to court for the preliminary hearing. Loudermilk also stated he had met with Keel prior to testifying at the preliminary hearing. (Tr. 80).

Isaacs then inquired whether it was true Keel had declined to file rape charges against Loudermilk. (Tr. 81). The State immediately objected to the question, which was sustained by the trial court. Loudermilk did not answer the question. The attorneys approached the bench for a conference outside the hearing of the jury, wherein Isaacs argued he was entitled to show Loudermilk's potential bias, i.e., he was a State's witness who Keel had declined to file charges against. (Tr. 82). The State responded that Isaacs' question was not asked in good faith and requested the court to admonish Isaacs in front of the jury.

Isaacs then requested to make an offer of proof, which the trial court allowed. The following was offered outside the hearing of the jury,

Isaacs: Mr. Loudermilk, Mr. Keel declined to file rape charges against you, did he not?

Loudermilk: I'm not sure.

Isaacs: You are sure that you were investigated and the case was taken to the District Attorney's Office for prosecution, were you not?

Loudermilk: I'm aware of that, yeah.

Isaacs: And that Mr. Keel reviewed it?

Loudermilk: I'm not sure who reviewed it.

Isaacs: But you are aware that Mr. Keel declined to file those charges, are you not?

Loudermilk: No, I'm not.

Isaacs: The DA's Office, this DA's Office?

Loudermilk: Yes.³

(Tr. 83). Isaacs also requested a copy of the District Attorney's file on the rape investigation for use in cross-examination to attack Loudermilk's potential bias. When asked by the trial court why he was seeking discovery in the middle of trial, Isaacs responded "[b]ecause somebody violated their *Brady* duty."⁴ The trial court sustained the State's objection, directed Isaacs to go into a different line of questioning, and advised the attorneys the matter would be taken up later. (Tr. 84).

The trial reconvened with an admonishment by the trial court to the jury to disregard the last question asked by Isaacs. Isaacs resumed his cross-examination of Loudermilk by asking where he was employed. Loudermilk replied he was still a police officer, but was currently a security manager for

³ The referral to the District Attorney's Office of the rape charges against Loudermilk was made in May 1997 and declined by Keel on May 22, 1997. The preliminary hearing in this case was held on September 13 and November 12, 1996.

⁴ *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). In *Brady*, the Supreme Court held that suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to

Arvest United Bank. Isaacs then asked Loudermilk whether he would lose his right to carry a firearm if he was convicted of a felony. Loudermilk replied that was correct. (Tr. 85). Isaacs also asked Loudermilk whether he would lose his right to carry a firearm if he violated one of the provisions of the federal Firearms Disability Act. Loudermilk replied that was also true. (Tr. 86).

Isaacs then asked Loudermilk whether he had previously been employed with the Kickapoo Tribal Police and Loudermilk replied he had worked for the Kickapoo Nation as a tribal officer. Isaacs asked whether, while employed by the Kickapoo Nation, there had been numerous domestic violence complaints made against him. The State immediately objected and Loudermilk did not answer the question. (Tr. 87). The parties again approached the bench where the following transpired outside the hearing of the jury,

The court: What is the point?

Isaacs: It's interest in the outcome. He – this all goes to his –

The court: What question were you –

Isaacs: -- to his bias.

The court: No, what question were you going to ask?

Isaacs: Numerous domestic violence complaints which culminated in his being terminated from the force.

The court: What's that got to do with this case?

Isaacs: It shows he wants to curry favor in this case. His testimony in this case must be satisfied (sic) to the District Attorney's Office. He wants to stay in law enforcement. If he loses his commission, [i.e., *right to carry a firearm*] it shows how he manipulates the system.

(Tr. 87-88)(Italics not in original). The court sustained the State's objection.

Isaacs then made an offer of proof outside the hearing of the jury by asking Loudermilk whether he had been terminated from the Kickapoo Tribe in January of 1999. Loudermilk replied that was correct. After questioning Loudermilk about various details regarding a domestic abuse incident, Isaacs

punishment, irrespective of the good faith or bad faith of the prosecution.

asked whether the investigation had been reported by a detective to the Oklahoma County District Attorney's Office, who had declined to file charges. Loudermilk replied that was also correct.⁵ (Tr. 90). Isaacs asked whether he knew he would lose his ability to carry a firearm if he was convicted of domestic abuse. Loudermilk replied "yes" and further admitted he understood the District Attorney's Office had the authority to prosecute him. (Tr. 93).

Isaacs then requested the court to allow him to question Loudermilk regarding these matters, claiming it showed bias and "goes to the guts of why a witness is motivated to testify a certain way." (Tr. 94). The State contended the evidence was irrelevant, but offered to get Lou Keel and allow Isaacs to put him on the stand. When the court stated he did not see any connection regarding the testimony, Isaacs replied, "Judge, he is getting a walk from the DA's Office. He got a walk on the rape charge. He got a walk on these two domestic violence cases. I think the jury is entitled to know this close relationship that he has with Lou Keel who is the DA that's involved in this case. It's probative of the truthfulness of the witness, his interest, his motive." The court sustained the State's objection and directed Isaacs to move to a different line of questioning. (Tr. 95).

The trial reconvened and Isaacs asked Loudermilk if he was the same individual who was a defendant in FD-99-823, Vicky J. Loudermilk, plaintiff, versus Johnnie W. Loudermilk. Loudermilk replied he was. When Isaacs asked if that was a pending divorce case in Oklahoma County, the State objected on relevance. Once again the parties approached the bench for a conference. After Isaacs argued the evidence went to the bias of the witness, the court sustained

⁵ The referral to the District Attorney's Office of domestic violence charges against Loudermilk was made in November 1998, one month before the first jury trial of this matter. That trial ended in a mistrial by agreement of all the parties due to an emergency in Petitioner Rogers' family.

the State's objection and excused the jury for the day.

After the jury had left the courtroom, the court entertained the parties' arguments regarding the propriety of Isaacs' proposed questions. Isaacs argued his line of cross-examination was proper because of his right to prove Loudermilk's potential bias and further asserted there had been a *Brady* violation by the State because nothing had been turned over regarding the rape investigation of Loudermilk.

The court asked when the evidence had been discovered and District Attorney, Marc Pate, responded he did not have any such information. Isaacs countered that while Pate may not have any information, he was under a legal duty to discover it from within the District Attorney's office and provide it to the defense. The court asked Isaacs why he had waited until trial to assert an alleged *Brady* violation, and Isaacs responded by asking why the State had not turned over the evidence. (Tr. 99). When the court inquired of Pate if the District Attorney had declined to file such charges, Pate responded he had never seen any evidence regarding a rape investigation.

The court then addressed the cross-examination regarding Loudermilk's divorce and related victim protective orders. The court determined there had not been a *Brady* violation regarding these matters because they involved civil proceedings with no involvement or input from the District Attorney's Office. Therefore, the court sustained the State's objection on that line of questioning. (Tr. 103-04). However, as far as the rape investigation was concerned, the court elected to adjourn the argument and directed both counsel to appear the next morning for further argument. The court again asked Isaacs why, if he had evidence he knew the State had not turned over, he had not raised the alleged

Brady violation earlier. Isaacs replied he had raised the issue earlier by filing three separate motions requesting all evidence that was exculpatory or *Brady* in nature.⁶ (Tr. 104).

The next morning, the hearing resumed outside the presence of the jury. The court began the hearing with the following statement,

Yesterday we wound up with Mr. Isaacs trying to go into three separate areas with the defendant (sic) Loudermilk as to his testimony concerning deals that he may or may not have had with the District Attorney's Office, also a firing by the Kickapoo Tribe and a VPO filed by the witness's former wife, and I suppose heard in this courthouse.

Mr. Pate, I asked you yesterday to let me know what the – at this point I didn't know what this rape charge and what these alleged charges were and everything was about.

Now, Mr. Isaacs says that it's a *Brady* violation. If it's a *Brady* violation this case is over. We start a new trial. What can you tell me?

(September 22, 1999, Trial Transcript at 3).

Pate responded by claiming "it was all a lie." Pate claimed there were no rape charges presented and there were no deals with anybody. Pate contended he had checked with the first assistant, (presumably Keel), and with everybody in sex crimes and that what Isaacs was claiming was "totally untrue." (Tr. 4). Pate then requested the court to make Isaacs come forward and make a good faith showing as to why he had made the allegation in front of the jury.

Isaacs claimed his information was work product and requested to disclose it to the court in private, outside the presence of the District Attorney's Office. The court agreed and excused the District Attorneys from the courtroom.

⁶ In pretrial motions, Petitioner Dean filed a Motion for Disclosure of Impeaching Evidence, a Motion to Dismiss for Failure to Turn Over Exculpatory Evidence, and another Motion for Discovery specifically regarding the entire investigative and personnel files of John Loudermilk. Petitioners' request for Loudermilk's personnel records regarding his termination from the Oklahoma City Police Department was quashed and the State's Motion in Limine was sustained which prohibited Petitioners from inquiring about Loudermilk's termination for improper conduct with a prostitute. (September 20, 1999, Tr. 3). Petitioners' Joint Motion for Impeaching Evidence had been previously sustained.

During the hearing, evidence was provided to the court that established a report alleging a rape and sexual assault by Loudermilk had been presented to Keel, and that Keel had elected not to file charges against Loudermilk based on Keel's belief the incident had been consensual and "no crime per statute." (Tr. 22). Counsel for Petitioners argued that information had not been provided to them, despite the fact the court had sustained their motion for impeachment evidence of any witness called by the State. The following then transpired,

The Court: If you're alleging a *Brady* violation, this trial is at an end.

Mr. Isaacs: I'm alleging a *Brady* violation. I'm not asking for a mistrial. I'm asking that the Court dismiss the charges.

The Court: I can't -- you know, I can't. I mean, if you're alleging a *Brady* violation I have got to mistry this case.

(Tr. 24).

The court then recessed and allowed the District Attorneys to return to the courtroom. Argument resumed and Isaacs recounted,

. . . charges were filed in June, preliminary hearing was held September the 13th, the first day of the preliminary hearing. On that day, Mr. Keel met with Johnnie Loudermilk and with Anthony Sherfield. Sometime subsequent to that date a charge was referred to the District Attorney's Office, wherein it was alleged that Mr. Loudermilk had raped a woman. Mr. Keel reviewed that charge and declined to file the charge and then in the process of filing motions in this case we made three specific motions requesting exculpatory evidence asking for turnover of documents pertaining to Mr. Loudermilk.

(Tr. 29). Isaacs argued such failure to turn over the information constituted a constitutional violation and the court should grant a dismissal of all charges against Petitioner Dean. Isaacs closed by stating he was not asking for a mistrial and that he was inclined to go ahead with the trial if the court was not inclined to dismiss the case. The court then concluded,

All right. I'm not going to dismiss the case, but I'm not going to continue the trial either. I'm going to declare a mistrial at this point in time.

(Tr. 31).

The District Attorney then inquired, "Judge, may we know what this item is? I mean, I don't know what it is that was presented. So, I mean, as far as the grounds for a mistrial." The court responded,

Well, Mr. Isaacs and Mr. Toure both have alleged *Brady* violations. We have had – we have had three times in front of the jury yesterday items brought up, that depending on how the ruling comes down on this court either one of two things happening: Either we have got a *Brady* violation or Mr. Isaacs has stunk up the jury in real plain vernacular.

(Tr. 31). When Isaacs requested an explanation as to how he had "stunk up the jury," the court responded, "I said depending on how I view this, it's going to come down on one side or the other, all right?" (Tr. 31). When Isaacs requested the court to reconsider his decision to mistry the case, the court replied, "No, not at this time."

On September 24, 1999, the parties appeared in Judge Bass' courtroom for Petitioners' joint Motion to Dismiss the Fourth Amended Information. Before Petitioners were allowed to argue their motion, the court announced it had set forth its reason for declaring a mistrial. Petitioners objected to the court setting forth any reasons at that time, arguing the mistrial had already been declared and the only thing before the court was Petitioners' Motion to Dismiss. Nevertheless, the court stated the following,

. . . the reasons that I mistried this case is that there was a motion in limine concerning Officer Loudermilk's firing from the Oklahoma City Police Department. Judge Black heard that and ruled that it was not admissible.

The same motion was reurged and I again sustained the motion as evidence not admissible and not relevant as to this trial. I can't remember the specific date which I made that ruling.

During the course of the trial, Mr. Isaacs proceeded, in front of the jury during cross-examination of Loudermilk, without prior notice to this Court or explanation concerning the motion in limine and without providing discovery to the District Attorney according to 22 OS 2001 (sic) evidence which had to be directly – deal directly with the firing incident.

That had to do directly with the firing incident, in direct violation of the Court's ruling on the motion in limine. This misconduct on the part of Mr. Isaacs was followed by questioning concerning the firing by the – by the tribal police and I do not remember particularly about the tribal police, a situation clearly that I believe not admissible under the facts of the case. Did you have a copy of the – of this tribal police report.

Mr. Pate: No, sir.

The Court: All right. That would have been a violation of discovery, clearly not admissible. Mr. Isaacs then attempted, in questioning Loudermilk about a temporary restraining order for the third time in front of the jury, allegedly entered by Mr. Loudermilk's wife against Officer Loudermilk. That was clearly inadmissible in my opinion and not relevant to this case, all three clearly heard by the jury, and the Court then recessed for the day.

We resumed that following morning and had hearing where a purported – there was a – the District Attorney had purportedly declined charges on Officer Loudermilk and the document that the Court had sealed and has issued a protective order was shown to the Court and as of this time is not an authenticated document, but was shown to the Court and sealed by this Court. As that document pretends to show that the contact between Officer Loudermilk and this individual was of consensual nature, it is my belief –

* * * *

This case was not mistried because of *Brady*, not mistried because – but it was mistried because of by bringing these issues in front of the jury by Mr. Issacs when he willfully and grossly violated the rules of evidence of the State of Oklahoma and the United States.

I specifically find that no actions of the State caused the mistrial. Your motion to dismiss is overruled. This case will be returned to Judge Black as the original Trial Judge.

(September 24, 1999, Tr. 7 - 10).

Expressing shock at the court's ruling, Isaacs responded by stating he had complied with the Discovery Code by turning over all exhibits he intended to introduce into evidence. However, Isaacs countered the Discovery Code does not require him to turn over work-product he had compiled in anticipation of cross-examining a witness. Isaacs continued by agreeing the court had previously ruled he could not ask Loudermilk about his termination from the Oklahoma Police Department, but claimed he had not violated that order; rather, he had

asked Loudermilk about his bias in the case.

Isaacs claimed the District Attorney's Office had a duty to turn over evidence of the rape investigation, but failed to do so and had even claimed no such evidence existed. Isaacs concluded by arguing a defendant has a right to cross-examine the witnesses against him, and his questions to Loudermilk were proper bias questions designed to show the jury Loudermilk might have a reason to slant his testimony for the State. The court overruled Isaacs' motion to dismiss.

On behalf of Petitioner Rogers, Mr. Toure inquired whether the court was saying the State should not have turned over the information regarding the rape investigation of Loudermilk. The court replied, "No, I'm not." (Tr. 15). Toure responded that while Petitioner Dean had the information, Petitioner Rogers did not, and the District Attorney was guilty of prosecutorial misconduct by failing to turn over the impeachment evidence pursuant to the court's discovery order. Toure contended the declaration of a mistrial prejudiced Petitioner Rogers, because he had not been involved in any of the contested matters.

The State contends Isaacs' questioning of Loudermilk violated a pre-trial evidentiary order and was a deliberate violation of the Oklahoma Evidence Code, which created the "manifest necessity" requiring a mistrial. Finally, the State also contends Judge Bass properly found the State had not withheld *Brady* material.

Petitioners counter the mistrial was declared *sua sponte*, over their objection, and more importantly, was not justified by manifest necessity. Petitioners also argue the trial court's decision to declare the mistrial was based on a perceived *Brady* violation by the State regarding impeachment evidence concerning Loudermilk and was therefore an abuse of discretion

because other options were available other than declaring a mistrial. As such, Petitioners contend double jeopardy bars the State from proceeding further against them. After a review of the record, we agree with Petitioners.

Despite the trial court's attempt to justify the reasons for the mistrial two days after the fact, the record is clear that at the time a mistrial was declared, the court believed there had been a *Brady* violation by the State. The court alluded to that perception twice. Moreover, at the time a mistrial was declared, the court had just held an in camera conference, not to discuss Isaacs' alleged misconduct, but whether Isaacs had evidence to support his claim the State had violated its *Brady* obligation.⁷

Before declaring a mistrial, the record reveals no warning by the trial court that Isaacs had violated a pretrial evidentiary order or that his questions were bordering on causing a mistrial. In fact, at the time the court declared a mistrial, the record reveals its own uncertainty whether a *Brady* violation had even occurred. If, as the trial court determined two days later, there had not been a *Brady* violation by the State, there obviously was no need for a mistrial. If, as the trial court determined two days later, Isaacs' questioning of Loudermilk had been improper, there is nothing in the record to explain why an admonishment by the trial court could not have cured any perceived error.

This Court has long held that an admonishment, such as the trial court earlier gave in this trial, is presumed to cure most errors, unless the error was so prejudicial it undoubtedly would taint the verdict. *See Koehler v. State*, 1986 OK CR 110, ¶ 5, 721 P.2d 426, and *Robedeaux v. State*, 1993 OK CR 57, ¶ 24, 866

⁷ We have resolved this matter on the basis a lack of manifest necessity. While the initial evidentiary rulings by Judge Bass appear to be correct because Isaacs' questions of Loudermilk fail to show relevance to his testimony in this case, we do not reach the merits of the proposed bias cross-examination questions and this opinion in no way infers our approval of such.

P. 2d 417. Moreover, if anyone would have been prejudiced by Isaacs' questioning it would have been the State; however, the State never objected to Isaacs' questions claiming he had violated a pretrial order on a motion in limine, nor did the State ever request a mistrial. See *McClendon v. State*, 1988 OK CR 186, ¶ 6, 761 P.2d 895. Simply put, we find nothing in the record over which neither the court nor the attorneys had control, or which could not have been averted by diligence and care. See *Sussman v. District Court of Oklahoma County*, 1969 OK CR 185, ¶ 40, 455 P.2d 724.

Based on the record before us, we **FIND** the jury was unnecessarily discharged and the declaration of a mistrial was not a manifest necessity. The retrial of Petitioners is therefore barred by the double jeopardy clause of both our state and federal constitutions.

IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 14th day
of January, 2000. **NOT PARTICIPATING**

RETA M. STRUBHAR, Presiding Judge

GARY L. LUMPKIN, Vice Presiding Judge

CHARLES A. JOHNSON, Judge

CHARLES S. CHAPEL, Judge

STEVE LILE, Judge

ATTEST:

Clerk