Affirmed and Opinion filed January 13, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-01259-CR

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LLOYD CUNNINGHAM, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the County Criminal Court at Law No. 3
Harris County, Texas
Trial Court Cause No. 99-44951

O P I N I O N

Lloyd Cunningham (Appellant) appeals from the trial court's habeas corpus judgment. Appellant was charged with the offense of driving while intoxicated. On the second day of his trial, the court declared a mistrial. The State sought to prosecute Appellant in a new trial. Appellant filed a pre-trial application for writ of habeas corpus, contending that the offense should be dismissed because the Double Jeopardy Clause barred any attempt by the State to prosecute him again for the same offense. Following an evidentiary hearing, the trial court denied Appellant's requested relief. This appeal ensued.

STANDARD OF REVIEW

The burden of persuasion in a writ of habeas corpus is on the applicant to prove his allegations by a preponderance of the evidence. *See Ex parte Lafon,* 977 S.W.2d 865, 867 (Tex.App.–Dallas 1998, no pet.). In reviewing the trial court's decision, we view the evidence in the light most favorable to the ruling and accord great deference to the trial court's findings and conclusions. *See id.* Absent a clear abuse of discretion, we accept the trial court's decision whether to grant the relief requested in a habeas corpus application. *See id.*

DISCUSSION

In his application for writ of habeas corpus, Appellant contends that the Double Jeopardy Clause bars the State's prosecution of him a second time for the same offense. Specifically, Appellant argues that because prosecutorial misconduct caused the mistrial, double jeopardy bars a second trial.

Houston Police Officers Lassalle and Moury stopped Appellant as he was driving his automobile on Chimney Rock, near Memorial Drive. Believing he might be intoxicated, the two police officers each required Appellant to perform different field sobriety tests. As a result of those respective tests, Appellant was arrested for driving while intoxicated.

Prior to Appellant's trial for the offense of driving while intoxicated, Officer Moury died of natural causes. Appellant made a pre-trial motion in limine to prevent Officer Lassalle or anyone else from testifying about anything Officer Moury stated with regard to the outcome of the field sobriety test Officer Moury performed. Following a hearing on the motion, the trial court ruled that "Officer Lassalle can testify to what he saw, but may not testify as to what conclusions Officer Moury may have arrived at as a result of the field sobriety tests that Officer Moury conducted."

During the prosecutor's opening statement, she explained to the jury that Appellant's HGN test, conducted by Officer Lassalle, "revealed all six clues on this test." The prosecutor

then stated that the "evidence will show that [after Officer Lassalle's HGN test] the defendant was handed over to Officer Moury who began another series of field sobriety tests, all of which the defendant failed." Appellant objected on the grounds that the prosecutor's remark concerning Officer Moury's field sobriety test was a violation of the trial court's ruling on the pre-trial motion in limine. The objection was sustained. At a bench conference, following a lengthy colloquy, outside the presence of the jury, Appellant moved for a mistrial. The trial court denied the motion.

The State's first witness to testify was Officer Lassalle. During Officer Lassalle's direct examination, he was asked what he did following Officer Moury's field sobriety test. Officer Lassalle testified: "I looked at Officer Moury. He gave me the nod, he knew what I had seen –." Officer Lassalle was stopped mid-sentence by Appellant's objection, which was sustained by the trial court. Appellant then sought a mistrial a second time because of violations of the trial court's ruling on the motion in limine which precluded the State from introducing any evidence concerning anything communicated by Officer Moury. The trial court denied Appellant's request. Following another lengthy colloquy, outside the presence of the jury, between the trial court, the prosecutor and Appellant's counsel regarding the trial court's ruling on Appellant's motion in limine, the trial resumed. The State continued to examine Officer Lassalle, and he was later cross-examined by Appellant. The first day of trial concluded before Appellant's cross-examination of Officer Lassalle was complete. The following morning, the trial court made the following announcement to the jury:

> Please be seated. Ladies and gentlemen, as a result of some legal consideration this morning, I am going to revisit the motion made by Defense Counsel yesterday for a mistrial. I am going to grant the mistrial. This of course relieves you of your duties. You are excused, released from the instructions that I have previously given you.

Appellant contends that the prosecutor's conduct in making the objectionable remark during her opening statement and in soliciting the objectionable testimony by Officer Lassalle was "deliberate misconduct" and that a re-trial by the State is barred because of the

"prosecutor's intentional or reckless misconduct as envisioned by the Texas and United States Constitution."

During the evidentiary hearing on Appellant's writ of habeas corpus, the State presented testimony from the prosecutor in Appellant's first trial and Officer Lassalle. The State sought to establish what the intent of the prosecutor was in making the objectionable remark during her opening statement.[1] The prosecutor testified that her intent was to "inform the jury that another officer was there at the scene." She also testified that she intended to rely only on Officer Lassalle's opinion in proving that Appellant failed Officer Moury's field sobriety test. She testified that she did not mean to suggest to the jury during her opening statement that Appellant failed Officer Moury's field sobriety test based upon anything communicated by Officer Moury. The prosecutor testified that she intended to show the jury that Officer Lassalle witnessed the field sobriety test being conducted and that he personally observed Appellant fail the field sobriety test conducted by Officer Moury.

The State then sought to establish that the objectionable testimony by Officer Lassalle was not solicited by the prosecutor. The State questioned the prosecutor about what her intent was in asking the following question during Officer Lassalle's direct examination: "After that, what did you decide to do. After the tests were done, what did you decide to do?"[2] The prosecutor responded by testifying that "[m]y intent was to determine if he had enough evidence or observed enough to decide to arrest the defendant. That was the only answer that I was looking for." She further testified that in asking the question, the only opinion she was seeking concerning the sufficiency of the evidence to arrest the defendant was Officer Lassalle's.

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[1] Recall that during the prosecutor's opening statement, she remarked that "[t]he evidence will show that [after Officer Lassalle's HGN test] the defendant was handed over to Officer Moury who began another series of field sobriety tests, all of which the defendant failed."

[2] Recall that following this question, Officer Lassalle testified that "I looked at Officer Moury. He gave me the nod, he knew that I had seen –."

Officer Lassalle testified that prior to his testimony in the first trial, the prosecutor explained to him that "we just had a motion and that you will absolutely only be able to testify to what you saw. I said, I understood." Officer Lassalle testified, however, that he understood the admonishment to only exclude anything that Officer Moury verbally said to him, which, to him, did not include a non-verbal nod. He further testified in that in making the objectionable remark, "I wasn't trying to make reference to the fact that he made an opinion himself, but that he had given me the okay to place him under arrest."

Following the writ hearing, the trial court ruled from the bench as follows:

> I think that *Bauder*[3] controls all of this. Obviously, I think that a mistrial was properly granted. I do not believe that [the objectionable remark and testimony] [were] made necessarily by the deliberate or reckless conduct of the prosecutor. So, the relief sought under the Writ in this case is denied.

"Where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to re-prosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error." *Ex parte Bauder*, 974 S.W.2d 729, 732 (Tex.Crim.App. 1998) (quoting *United States v. Jorn*, 400 U.S. 470, 485, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971)). This rule is fully consistent with the interests protected by the Double Jeopardy Clause. "The defendant may reasonably conclude that a continuation of the tainted proceeding would result in a conviction followed by a lengthy appeal and, if a reversal is secured, by a second prosecution. In such circumstances, a defendant's mistrial request has objectives not unlike the interests served by the Double Jeopardy Clause—the avoidance of the anxiety, expense, and delay occasioned by multiple prosecutions." *Id*. (quoting *United States v. Dinitz*, 424 U.S. 600, 608, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976)). The question is whether the defendant made the choice. The issue may not be resolved by the standards for a waiver. "Traditional waiver concepts have little relevance where the defendant must determine whether or not to request

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[3] *See Ex parte Bauder*, 974 S.W.2d 729 (Tex.Crim.App. 1998).

or consent to a mistrial in response to judicial or prosecutorial error. 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." *Id.* (citation omitted).

But "the defendant's valued right to complete his trial before the first jury would be a hollow shell if the inevitable motion for mistrial were held to prevent a later invocation of the bar to double jeopardy in all circumstances." *Id.* (quoting *Oregon v. Kennedy*, 456 U.S. 667, 673, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982)). If the circumstances prompting the mistrial were attributable to a prosecutor's using "manifestly improper methods . . . deliberately or recklessly," which "render trial before the jury unfair to such a degree that no judicial admonishment can cure it, an ensuing motion for mistrial by the defendant cannot fairly be described as the result of his free election." *Id.* Such a motion would not prevent a defendant from invoking the double jeopardy bar to retrial. *See id.*

Thus, the questions presented in this case are whether (1) Appellant was required to move for mistrial because the prosecutor deliberately or recklessly crossed "the line between legitimate adversarial gamesmanship and manifestly improper methods" that rendered trial before the jury unfair to such a degree that no judicial admonishment could have cured it, or (2) Appellant's motion for mistrial was a choice he made in response to ordinary reversible error in order to avoid conviction, appeal, reversal, and retrial. *See Ex parte Bauder*, 974 S.W.2d at 732. The Court of Criminal Appeals has also held that a second trial will be barred when the deliberate or reckless conduct by the prosecutor was intended to induce a motion for mistrial by the defendant. *See Bauder v. State*, 921 S.W.2d 696, 699 (Tex.Crim.App. 1996); *see also Crow v. State*, 968 S.W.2d 480, 482 (Tex.App.–Houston [1st Dist.] 1998, pet. ref'd).

In this case, we are easily able to conclude that the objectionable remark made by the prosecutor during her opening statement was not intended to induce a motion for mistrial by

Appellant, nor was it made deliberately or recklessly by the prosecutor in an effort prevent Appellant from receiving a fair trial. There was no evidence presented during the evidentiary hearing to suggest that the prosecutor desired to induce a motion for mistrial during the first few moments of her opening statement. To the contrary, the record shows that the prosecutor did not want a mistrial at any stage of Appellant's first trial. There was also no evidence presented during the evidentiary hearing to suggest that the remark was uttered by the prosecutor either deliberately or recklessly for the purpose of preventing Appellant from receiving a fair trial. While the remark can be interpreted as a comment on Officer Moury's opinion on whether Appellant failed the filed sobriety test, the record shows that the prosecutor intended to place testimony before the jury to show two things: (1) that Appellant failed the test that Officer Lassalle conducted, and (2) Officer Lassalle saw Officer Moury administer several tests which, in Officer Lassalle's opinion, Appellant failed. The record of Appellant's first trial shows that Officer Lassalle did indeed provide such testimony before the mistrial was granted. The trial court's order on the motion in limine did not appear to preclude this testimony.

Further, the objectionable testimony by Officer Lassalle at trial was not deliberately or recklessly solicited by the prosecutor. The question by the prosecutor was worded as follows: "After that, what did *you* decide to do? After the tests were done, what did *you* decide to do?" (emphasis added). The prosecutor's question inquired about Officer Lassalle's actions after the field sobriety tests were completed. Not even a strained interpretation of the prosecutor's question would result in a finding that the prosecutor was deliberately or recklessly soliciting an inadmissible hearsay response from Officer Lassalle concerning Officer Moury's actions.

We hold that the remark does not show that the prosecutor deliberately or recklessly crossed the line between legitimate adversarial gamesmanship and manifestly improper methods that rendered the trial before the jury unfair to such a degree that no judicial admonishment could have cured it. *See Ex parte Bauder*, 974 S.W.2d at 732; *see also Crow*,

968 S.W.2d at 480 (double jeopardy did not attach where prosecutor's objectionable conduct in slapping the defendant on the back for dramatic emphasis during closing argument because it was not done intentionally or deliberately to provoke the defendant into moving for a mistrial).

The habeas corpus judgment of the trial court is affirmed.

PER CURIAM

Judgment rendered and Opinion filed January 13, 2000.
Panel consists of Justices Yates, Fowler, and Frost.
Do Not Publish — TEX. R. APP. P. 47.3(b).