

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

Appeal from Beaufort County
The Honorable Carmen T. Mullen, Circuit Court Judge
Appellate Case No. 2014-001692

RECEIVED

MAR 29 2018

SC SUPREME COURT

THE STATE,

Respondent,

v.

BRYAN REARICK,

Appellant

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. Under existing case law, denial of a motion to dismiss on double jeopardy grounds is interlocutory and not immediately appealable because creating a new category of interlocutory appeals will potentially lead to multiple appeals from lower court decisions involving constitutional rights, and Appellant has an alternative remedy. (Appellant's Issue II).

II. The circuit court did not abuse its discretion in finding manifest necessity to order a mistrial. (Appellant's Issue I).

STATEMENT OF THE CASE

The Beaufort County Grand Jury indicted Appellant Bryan Rearick in July 2010 on one count of felony driving under the influence, resulting in death. The matter was called for a bench trial on January 30, 2014, before the Honorable Carmen T. Mullen.

After hearing pre-trial motions and several witnesses, the circuit court declared a mistrial, and subsequently denied Appellant's Motion to Bar Prosecution on double jeopardy grounds. This appeal followed.

STATEMENT OF THE FACTS

In July 2010, the Beaufort County Grand Jury indicted Appellant Bryan Rearick on one count of felony driving under the influence, death results, arising from a fatal auto accident on May 20, 2010. The case was called for a bench trial on January 30, 2014, before the Honorable Carmen T. Mullen, Circuit Court Judge.

Prior to trial, Appellant moved to dismiss the case based on the State's failure to produce a videotape of the scene from the arresting officer's vehicle. Trooper Summers of the S.C. Highway Patrol testified he was called to the accident scene by someone from the Beaufort County Sheriff's Department, and the videoing equipment in his patrol car initiated when he activated his blue lights on the way to the scene. When he arrived, vehicles and personnel from the Beaufort County Sheriff Department, emergency services and the fire department were already there, so he had to park his patrol car some distance from the actual scene. He testified he may have deactivated the video equipment in his patrol car because any video would only include the emergency vehicles, and the individuals involved in the accident were already inside ambulances on scene. Other than obtaining identification information, Trooper Summers did not interview or otherwise deal with those individuals at the scene. (Trial Transcript [TT], pp. 9-32; Record on Appeal [R.], pp. ____).

On cross-examination, Appellant's counsel questioned Trooper Summers about the contents of his accident report, as well as a videotaped interview he provided to the Department of Public Safety about the case, copies of which Appellant received before trial. Counsel noted the report indicated "there were a number of other Beaufort County deputies [at the accident scene]." (TT, pp. 33-38; R., pp. ____).

Appellant argued the failure to produce a videotape from Trooper Summer's vehicle violated Rule 5 and Brady¹ because it may have included exculpatory evidence regarding Appellant's conduct and demeanor at the accident scene via Trooper Summer's remote microphone. The circuit court indicated a videotape from Trooper Summer's vehicle was not required under the circumstances, and denied the motion to dismiss on that basis, but expressed concern about the possibility Beaufort County deputies at the scene may have videotaped Appellant's conduct, and those videotapes either were not available, or had not been provided to Appellant. When Appellant moved to dismiss the case based on the failure to provide videotapes from the Beaufort County deputies, the court took the motion under advisement. (TT, pp. 39-45; R., pp. ____).²

When trial testimony began, the State presented multiple witnesses regarding the chain of custody of Appellant's blood drawn at the hospital after the accident, and the forensic analysis indicating Appellant's blood alcohol content was 0.148 at that time. (TT, pp. 76-148; R., pp. ____). The State then called Trooper Scott Ashe, who was part of the accident reconstruction team that worked on the case. Trooper Ashe testified about the accident reconstruction investigation and the team's conclusions regarding the speed of both vehicles at the point of impact, where the impact occurred, and the path of both vehicles prior to and after the impact. (TT, pp. 148-172; R., pp. ____).

After Trooper Ashe completed his testimony and was excused by the court, Appellant's counsel advised the court the State had referred to some documents during Trooper Ashe's testimony that were not in the materials turned over to her. The solicitor

¹Brady v. Maryland, ____ U.S. ____ (____)

²The Court also took under advisement motions regarding admissibility of Appellant's breath alcohol content, and ruled statements he made to Trooper Summer at the hospital were admissible. (TT, pp. 47-73; R., pp. ____).

stated his file indicated the complete accident reconstruction (MAIT) file was turned over to the defense via a CD, a MAIT fact sheet, and a MAIT diagram and aerial. After reviewing the CD in the defense file, it appeared Trooper Ashe's notes of June 30, 2010, were not on the defense's CD. The court recessed for the day, and instructed the solicitor to ascertain exactly what was not included in the discovery provided to the defense, as well as the identities of any Beaufort County deputies present at the scene of the accident and whether they had videotapes from the scene. (TT, pp. 172-180; R., pp. ____).

When court reconvened the following week, the court indicated additional documents were turned over to the defense on Friday after court recessed, and some were provided that morning before court began. The State located and turned over a Beaufort County Sheriff's Department report listing all deputies who worked the accident scene. The documents left out of the MAIT report CD were provided to defense counsel on Friday afternoon, which included Trooper Ashe's notes and some vehicle recall information regarding both vehicles involved in the accident. Counsel indicated she would like to have the new information reviewed by her accident reconstruction expert. (TT2, pp. 5-7; R., pp. _____).

Rather than moving for a continuance or mistrial to afford an opportunity to review and investigate the new information, Appellant again sought dismissal, arguing the case had been pending for three and a half years, and the deputies would not remember what happened the night of the accident. The State argued the deputies might remember what happened that night, and a continuance would be more appropriate. While expressing concern about the defense receiving material in the middle of trial, the court noted the solicitor trying the case was the fifth person assigned to the case, and

he had done everything the court requested to diligently track down what evidence might be available. (TT2, pp. 7-10; R., pp. ____).

When court reconvened the next day, the solicitor informed the court no videos of the accident scene were ever logged in by either the Highway Patrol or the Sheriff's Department, and provided affidavits to that effect. Appellant again moved for dismissal, arguing the failure to provide the Beaufort County report listing the deputies at the scene violated his due process rights by depriving him of the opportunity to interview them about what they saw and heard that night. The State again argued a continuance would be the appropriate remedy. (TT2, pp. 11-16; R., pp. ____).

The court thoroughly considered the ramifications of granting a dismissal, continuance or mistrial, and found the circumstances did not warrant dismissal. She found there was no prosecutorial misconduct in connection with failure to give Appellant the information from the MAIT notes and the Beaufort County report. Rather, the case had been assigned to five different solicitors in the three and a half years it was pending, and the current solicitor acted diligently to track down all the information when he learned Appellant did not have it. (TT2, pp. 16-19; R., pp. ____).

The court further found a continuance would not be appropriate, particularly because Appellant had waived his right to a jury trial based on the information available to him at the time, and the new information might impact that decision. She also expressed concern about not have sufficient information as the fact finder to determine the true facts of the case. Based on those findings, the court declared a mistrial to afford Appellant the opportunity to conduct further investigation based on the new information

discovered during trial, as well as to exercise his right to a jury trial if he wanted to do so in light of the new information. (TT2, pp. 19-23; R., pp. ____).

Appellant subsequently moved to bar further prosecution of the case on double jeopardy grounds, asserting there was no manifest necessity to grant a mistrial. (Defendant's Motion to Bar Prosecution filed February 13, 2014, State's Response to Defendant's Motion to Bar Prosecution filed March 5, 2014; R., pp. ____). After a hearing, the circuit court denied the motion, finding: 1) a continuance was not appropriate because Appellant did not have sufficient time to fully investigate the information revealed during trial, and the opportunity to cross-examine certain witnesses was lost; 2) Appellant's decision to waive a jury trial might have been different if he had known about the new information; 3) dismissal of the case was not in the public interest given the nature of the charge and the evidence presented by the State prior to the mistrial; and 4) the circumstances created a high degree of necessity to declare a mistrial to avoid undue prejudice to Appellant in trial preparation and waiver of a jury trial. (April 8, 2014 Hearing Transcript, pp. 1-10, Order filed July 24, 2014; R., pp. ____). This appeal followed.

I. Under existing case law, the denial of a motion to dismiss on double jeopardy grounds is interlocutory and not immediately appealable because creating a new category of interlocutory appeals will potentially lead to multiple appeals from lower court decisions involving constitutional rights, and Appellant has an alternative remedy. (Appellant's Issue II).

Appellant contends the circuit court's Order denying his double jeopardy motion should be reviewed by this Court even though it is not a final decision in the underlying criminal case. His contention is based solely on the reasoning in Abney v. United States, 431 U.S. 651 (1977), a reasoning Appellant concedes this Court rejected in State v. Miller, 289 S.C. 426, 346 S.E.2d 705 (1986).³

In South Carolina, a criminal defendant's right to appeal is governed by statute, and he may not appeal until sentence has been imposed. Miller, 346 S.E.2d at 426-427; S.C. Code Ann. §14-3-330 (1976) (appellate court jurisdiction); *see also* State v. Issac, 405 S.C. 177, 747 S.E.2d 677, 680 (2013) (denial of a motion for immunity from prosecution under Protection of Persons and Property Act is analogous to denial of double jeopardy claim, and is therefore, not immediately appealable) (citing Miller). Absent a specialized statute, "the immediate appealability of an interlocutory or intermediate order depends on whether the order falls with [§14-3-330]." State v. Samuel, 411 S.C. 602, 769 S.E.2d 662, 663 (2015). Under §14-3-330, "an order denying a double jeopardy claim is not immediately appealable." Miller, 346 S.E.2d at 427.

Like Appellant, the defendant in Miller argued Abney and other federal court cases overruled the state rule requiring a final decision to trigger appellate court jurisdiction by holding decisions involving double jeopardy claims are final and can be

³Appellant indicates he intends to move to argue against the precedent of Miller. Unless this Court overrules Miller, however, it governs the outcome of this case.

immediately appealed in the federal courts. This Court held, however, the federal cases, including Abney, were based on federal statutory law, “and have no application to state court appeals.”⁴ Id.⁵

Appellant refers to the “gotcha” nature of Miller, and argues requiring him to wait until conviction and sentencing in the second trial is “repellant” because it obviates his right not to be tried a second time for the same offense.⁶ If the state rule precluded an appeal completely, this argument might have merit. The rule does **not** deprive Appellant of his right to appellate review of his double jeopardy claim, however, it simply requires him to wait for appellate review just like every other criminal defendant who believes his federal constitutional rights were violated in some way. If the appellate court determines his double jeopardy right was violated, any conviction and sentence from the second trial will be rendered null and void, thereby giving effect to that right.

Appellant is essentially asking this Court to create a separate appellate path because his issue is premised on a constitutional claim. Appellant’s analysis could apply equally to constitutional rights other than double jeopardy. If a defendant’s constitutional right to remain silent was violated, he has the right not to have unconstitutionally obtained statements used against him at trial, so he should be able to immediately appeal

⁴The specific reference to Abney in Miller completely belies Appellant’s contention Miller “is based on case law that antedates Federal Double Jeopardy Protection being part of a state defendant’s due process rights.” (Brief of Appellant, p. 19).

⁵Other states have reached the same conclusion. *See Paul v. People*, 105 P.3d 628, 631-632 (Colo. 2005) (pre-trial order denying motion to dismiss on double jeopardy grounds not immediately appealable); *State v. Salzman*, 119 Or.QApp. 217, 850 P.2d 1122, 1125-1136 (1993) (Abney did not dictate a constitutional mandate for interlocutory appeals); *People ex rel. Mosley v. Carey*, 74 Ill.2d 527, 387 N.E.2d 325, 329-330 (1979) (same); *State v. Fisher*, 2 Kan.App.2d 353, 579 P.2d 167, 168-170 (1978) (same).

⁶It is unclear exactly what a “gotcha” nature means as applied to Miller.

the denial of his motion to suppress the statements, rather than proceed with trial and wait for appellate review in the event of a conviction and sentence. Likewise, if evidence against the defendant was seized in violation of his constitutional right to be free from unreasonable searches and seizures, he should be able to immediately appeal the denial of his motion to suppress the evidence. If these defendants proceed to trial and are convicted, then prevail on those issues on appeal, they face the possibility of re-trial, but if the evidence at issue constituted the State's only evidence against them, they would not be retried, and arguably, never should have been tried. In short, the exception could quickly become the rule in criminal cases.

Finally, Appellant is not without an immediate remedy. A colorable double jeopardy claim is one of the very few circumstances justifying federal court intervention in ongoing state criminal proceedings. Gilliam v. Foster, 63 F.3d 287, 289-290 (4th Cir. 1995).⁷ Thus, if Appellant believes he can present a "colorable" double jeopardy claim in this case, he may take his claim to federal court via a federal habeas petition.

The merits of Appellant's double jeopardy claim are no doubt governed by, and will be decided under, applicable federal law. The law governing appealability in South Carolina, however, is governed by state law, not federal law, and under the law as it currently exists, the circuit court denial of Appellant's double jeopardy claim is interlocutory and not immediately appealable. Therefore, the appeal should be dismissed without prejudice to Appellant's right to raise the issue in the event of a conviction and sentence at the second trial.

⁷The Court expressly recognized South Carolina's procedural rules do not permit an interlocutory appeal of a double jeopardy claim. Id. at 291.

II. The circuit court did not abuse its discretion in finding manifest necessity to order a mistrial. (Appellant's Issue I).

Assuming for purposes of argument the appeal proceeds, Appellant contends the circuit court erred in declaring a mistrial during the first trial, and then denying his motion to bar the second trial, asserting the mistrial was not manifestly necessary. In support of this argument, Appellant misconstrues the record regarding the discovery issues raised during the first trial.

“The decision to grant or deny a mistrial is within the sound discretion of the trial court.” State v. Brown, 389 S.C. 84, 697 S.E.2d 622, 627-628 (Ct. App. 2012). An appellate court will not overturn the trial court's decision regarding a mistrial absent an abuse of discretion amounting to an error of law. Id.

A mistrial should only be granted in the event of manifest necessity, or the ends of public justice are served by the mistrial. Id. Before granting a mistrial, the trial court should consider and exhaust other methods to cure possible prejudice. Id.

In this case, Appellant cherry-picks testimony and statements to support his contention the only problems at trial were caused by the State's disorganization and ineptitude. He also misconstrues the circuit court's comment regarding a trial being “a search for the truth,” which he contends “was an admission that the state was so disorganized, and its lack of preparation showed it could not prove appellant's guilt beyond a reasonable doubt.” (Brief of Appellant, pp. 13-14). To the contrary, when the record is viewed in its entirety, it indicates the circuit court knew the State had sufficiently laid out its case against Appellant, and the mistrial was declared to afford Appellant more time to prepare his defense.

Basically, the two things “missing” from the discovery the State provided to Appellant were a portion of the MAIT file, consisting of Trooper Ashe’s notes and some vehicle recall information, and a Beaufort County Sheriff’s Office report listing deputies dispatched to the accident scene. As a threshold matter, the MAIT file was contained on a CD, and the record indicates the missing documents were in the middle of a very large file on the CD. Appellant’s counsel received a copy of the CD, referenced as the “complete” MAIT file, and there is no indication anyone in the Solicitor’s Office knew the CD provided contained anything less than the “complete” file. When the State learned at trial part of the file was missing from Appellant’s CD, the solicitor quickly provided copies of the actual documents to counsel, who could then forward them to Appellant’s expert for consideration.⁸ (TT, pp. 160-162; 173-178, TT2, pp. 4-5; R., pp. ____).

Significantly, in the face of Appellant’s assertion the missing documents were critical, his trial counsel cross-examined Trooper Ashe after he referred to the documents, agreed to release Trooper Ashe from his subpoena, and then raised the missing documents only “as a matter of housekeeping.” (TT, pp. 170-173; R., pp. ____). Clearly, counsel was able to proceed without the documents, and had an opportunity to provide them to the expert after she received them.

Regarding the Sheriff’s deputies at the scene, it was clear the State never sought them out, interviewed them, or intended to present them as part of the State’s case. It was undisputed Appellant was driving at the time of the accident, and the State presented

⁸It is impossible to determine from this record whether the information contained in the documents made any difference in the expert’s conclusions.

evidence his blood alcohol content exceeded the legal limit at that time.⁹ The Sheriff's deputies at the scene were simply irrelevant to the State's case.

More importantly, Appellant's counsel knew well before trial there were deputies at the scene because Trooper Summer referred to deputies at the scene (just not by name) in his incident report, which counsel received in the discovery documents and used when cross-examining him. (TT, pp. 29-37; R., pp. ____). At the same time he rails against the State for not providing the names of the deputies during discovery, Appellant ignores the fact his counsel had ample opportunity to have her investigator get the information from the Sheriff's Office, or specifically request it from the Solicitor's Office, prior to trial. A defendant should not be able to sit on an alleged discovery issue, only to use it to claim a Rule 5/Brady violation at trial.

The record reflects the circuit court carefully considered all the information regarding the missing information, and weighed all possible alternatives to address the issue, before declaring a mistrial. It is clear the court weighed its roles as the fact-finder and judge very carefully, and was particularly concerned about the potential impact of the information on Appellant's waiver of his right to a jury trial. (TT2, pp. 16-23, Order Denying Defendant's Motion to Bar Prosecution, pp. 3-5; R., pp. ____).

The court determined a continuance would not protect Appellant's right to a jury trial and to adequately prepare his defense in light of the new information. The court

⁹Appellant's assertions the blood alcohol content evidence was inadmissible because the State failed to obtain a warrant prior to drawing his blood, and the State could not establish the chain of custody for the blood, are nothing more than red herrings. Appellant consented to the blood draw, and the State established the chain to the extent practical.

further determined dismissal would not serve the interests of public justice in light of the serious nature of the alleged offense, and the victim's death.

Significantly, prior to declaring a mistrial, the court noted if Appellant's counsel failed to move for a continuance or mistrial rather than dismissal, "it's very possible that if he is convicted that this would come back in a post conviction relief," and while counsel might be pursuing a strategy, "it is very likely that [she] would be overturned on a PCR." (TT2, p. 16; R., p. ____). In denying Appellant's double jeopardy motion, the court also found dismissal was not appropriate "due to the evidence presented by the State at the time the mistrial was declared." (Order Denying Defendant's Motion to Bar Prosecution, p. 5; R., p. ____). This clearly indicates the court believed the State had met its burden of proof, if the trial continued, the court was likely to find Appellant guilty, and a mistrial was manifestly necessary primarily to protect Appellant's rights.

The circuit court did not abuse its discretion in declaring a mistrial based on manifest necessity. There was no prosecutorial misconduct regarding the missing information, and the court acted to protect Appellant's rights. Therefore, if this Court considers the issue in this interlocutory appeal, the circuit court's ruling should be affirmed.

CONCLUSION

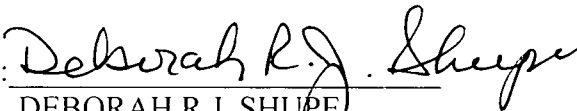
Based on the foregoing, Respondent submits Appellant's conviction and sentence should be affirmed.

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PROOF OF SERVICE

I, Sally B. Ellison, certify I served the Initial Brief of Respondent and Designation of Matter on Appellant by depositing two copies in the United States mail, postage prepaid, addressed to:

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I further certify all parties required by Rule to be served have been served.

This 23rd day of March, 2016.


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