STATE V. MINNITT: EXTENDING DOUBLE JEOPARDY PROTECTIONS IN THE CONTEXT OF PROSECUTORIAL MISCONDUCT

Roopali H. Desai

I. INTRODUCTION

On the night of June 24, 1992, three people were murdered at El Grande Market in Tucson, Arizona.[1] Although there were no witnesses, Tucson Police Detective Joseph Godoy and Sergeant Ron Zimmerling independently received tips implicating Christopher McCrimmon and Martin Soto-Fong.[2] During this time, Tucson Police Detective Mark Fuller was separately investigating McCrimmon for a restaurant robbery.[3] Detective Fuller learned through his investigation that Andre Minnitt, an associate of McCrimmon, was a likely accomplice in the restaurant robbery.[4] Both McCrimmon and Minnitt were arrested for the restaurant robbery.[5] On September 2, 1992, both men denied involvement in the murders when Detective Godoy questioned them about the crime.[6]

In August 1992, a three-time felon named Keith Woods was arrested for drug possession while on parole.[7] Facing a lengthy prison sentence, Woods offered to become an informant if the drug charges were dismissed.[8] In an unrecorded interview, Woods told Detective Godoy that he had recently met McCrimmon, who talked about participating in the El Grande Market murders.[9] Several weeks later on September 8, 1992, Woods was again interviewed by Godoy, but in a

---

1. State v. Minnitt, 55 P.3d 774, 776 (Ariz. 2002).
2. *Id.*
3. *Id*. at 777.
4. *Id*.
5. *Id*. Since McCrimmon was already a suspect in the El Grande Market murders, the information linking Minnitt to McCrimmon caused Minnitt to become a suspect in the homicides. *Id*.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* He went on to testify that the two of them later went to Minnitt's apartment, where McCrimmon and Minnitt discussed details of the murders. *Id*.

"bugged" room this time.[10] Woods formally implicated McCrimmon, Minnitt, and Fong in the El Grande Market murders during this secretly taped interview.[11]

Keith Woods' credibility was critical to the State's case against Minnitt and McCrimmon for the murders.[12] Prosecutors tried to establish his credibility in spite of the fact that he was "a convicted felon and drug addict who entered into an agreement with the State to provide testimony to avoid a lengthy prison sentence."[13] In order to bolster Woods' credibility, Detective Godoy claimed that he first learned of McCrimmon's and Minnitt's involvement in the murders during the second, taped interview.[14] In actuality, however, Detective Godoy had suspected both Minnitt and McCrimmon because he had already questioned them six days earlier.[15] Deputy County Attorney Kenneth Peasley, who prosecuted the case, insisted to the jury that Detective Godoy could not have suggested the names of McCrimmon and Minnitt to Woods, despite Peasley's knowledge that Detective Godoy had the names of the suspects prior to the taped interview with Woods.[16] Peasley's improper suggestions persisted throughout the case, beginning with his opening statement and continuing during his direct examination of Godoy, his closing argument, and again during his rebuttal statements.[17]

In their first trial, Minnitt and McCrimmon were convicted.[18] The convictions were reversed for juror coercion.[19] Each defendant was again tried separately in 1997.[20] Minnitt was retried first, resulting in a mistrial due to a hung jury.[21] Detective Godoy's false testimony and Peasley's knowledge of the falsehood in the previous trials were discovered immediately preceding McCrimmon's retrial.[22] The discovery came, perhaps inadvertently, when Peasley requested guidance from the judge about how the State could introduce information regarding McCrimmon's alleged previous involvement in the restaurant robbery, since the information was obtained confidentially from Detective Fuller during his investigation of the robbery.[23] It became apparent that

---

10. *Id.*

11. *Id.* Fong was tried, convicted, and sentenced to death based on direct evidence of his involvement in the El Grande Market murders. The Arizona Supreme Court upheld the conviction and sentence. *Id*.

12. *Id.* Minnitt and McCrimmon were tried jointly. *Id*. Woods' credibility was critical because he offered the only direct testimony of Minnitt's and McCrimmon's involvement in the El Grande Market murders. *Id*. at 778.

13. *Id*.

14. *Id.* at 777.

15. *Id.* at 778.

16. *Id.* Peasley misled the jury by asserting that Detective Godoy could not have fed Woods the three names during the unrecorded interview and that Godoy did not even have the names of the suspects until the September 8 interview. *Id*.

17. *Id*.

18. *Id.* at 777.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 779.

23. *Id*. Fuller told Godoy about McCrimmon's involvement in the robbery and about Minnitt's possible association with McCrimmon on September 1, one day prior to

Godoy knew of McCrimmon and Minnitt prior to his interview with Woods and that Peasley knowingly misled the jury in the previous trial.[24] The jury ultimately acquitted McCrimmon of all charges after learning of the false testimony.[25] Peasley did not represent the State in Minnitt's third retrial.[26] Minnitt was convicted of all charges and sentenced to death, despite the defense's attempt to emphasize misconduct by both Detective Godoy and the prosecution in the previous trials.[27] In November 2002, the Arizona State Disciplinary Commission recommended disbarment of Peasley for his ethical violations.[28] Peasley appealed this sanction and on November 4, 2003, the Arizona Supreme Court upheld the disbarment.[29]

II. FEDERAL INTERPRETATION OF THE DOUBLE JEOPARDY CLAUSE

The Fifth Amendment to the U.S. Constitution provides that "no person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb."[30] Despite the seemingly broad protections of this double jeopardy clause, case law has made it clear that the protections are not absolute.[31]

A defendant may be retried when his conviction is simply reversed on appeal.[32] When the conviction is reversed due to insufficient evidence, however, double jeopardy bars retrial of the defendant.[33] This rule is based on the principle that if there was insufficient evidence at trial to convict the defendant in the first place, then the double jeopardy clause should protect the defendant from enduring

---

Godoy's interviews with the men and one whole week before the taped interview with Woods. *Id*.

24. *Id*.

25. *Id*.

26. *Id.* at 780.

27. *Id.* at 776.

28. Misconduct and Punishment: State Disciplinary Authorities Investigate Prosecutors Accused of Misconduct, Center for Public Integrity, available at http://www.publicintegrity.org/pm/default.aspx?sID=sidebarsb&a ID=39 (Feb. 21, 2004).

29. Arizona Supreme Court Oral Argument Case Summaries for November 4, 2003, *available at* http://www.supreme.state.az.us/argument/03summaries/nov04.03.pdf (Feb. 21, 2004). The Arizona Supreme Court upheld the Disciplinary Commission's disbarment of Peasley in November 2003 after an appeal. *Id*. Both Peasley and Godoy found employment working for a Tucson defense attorney. A.J. Flick, *Judge Tosses Out Murder Conviction*, TUCSON CITIZEN, September 13, 2003, at A1. Godoy was only given a "serious" reprimand by the Tucson Police Department for his false testimony. Enric Volante, *Cop Will Receive Reprimand for Lying at El Grande Trials*, ARIZ. DAILY STAR, June 22, 2000, at A1. Godoy resigned shortly thereafter when he was indicted by a state grand jury on four counts of perjury, but his case was ultimately dismissed with prejudice. David L. Teibel, *Ex-Cop's Perjury Charge Tossed*, TUCSON CITIZEN, July 18, 2003, at B1. Federal prosecutors declined to indict both Peasley and Godoy on charges related to perjury. Enric Volante, *Peasley Attorney Hits His Own Ethics Snag*, ARIZ. DAILY STAR, July 21, 2000, at B4.

30. U.S. CONST. amend V.

31. *Minnitt*, 55 P.3d at 780.

32. United States v. Ball, 163 U.S. 662, 672 (1896).

33. Burks v. United States, 37 U.S. 1, 18 (1978).

a second trial for the same offense.[34] The double jeopardy clause, however, does not bar retrial if evidence is erroneously admitted at trial to give the impression that there is sufficient evidence, when in actuality there is insufficient evidence.[35] Despite the fact that without the erroneously admitted evidence there might be insufficient evidence to sustain a conviction, the double jeopardy clause is not invoked and retrial is permitted.[36] Erroneously admitted evidence is considered mere trial error and is a basis for allowing retrial.[37] Where there is mere trial error that can be remedied in a new trial, double jeopardy does not bar retrial.[38] Furthermore, erroneously admitted evidence and prosecutorial misconduct are not necessarily interrelated. In other words, there is no presumption that erroneously admitted evidence is prompted by prosecutorial misconduct.[39] This distinction allows for the inference that, although double jeopardy protection does not apply in cases where evidence is erroneously admitted, it may apply in cases involving prosecutorial misconduct, since they are not considered one and the same.[40]

The U.S. Supreme Court has ruled that double jeopardy will bar retrial in cases of prosecutorial misconduct, but the federal doctrine is only well developed in the context of mistrials.[41] Initially, double jeopardy did not bar retrial if the mistrial was not of manifest necessity,[42] or if it was the result of the defendant's motion.[43] This standard prompted and encouraged prosecutors to engage in improper conduct in order to incite a defendant's request for mistrial.[44] Prosecutors recognized that the defendant had two equally damaging options.[45] The defendant

---

34. *Id*.

35. Lockhart v. Nelson, 488 U.S. 33 (1988). The State in this case admitted into evidence and relied on a conviction of the defendant that had been pardoned in order to re-sentence him as a habitual offender. *Id.*

36. *Id.* at 40–42.

37. *Id.* at 40 (noting that "ordinary 'trial errors' as the 'incorrect receipt or rejection of evidence' . . . 'implies nothing with respect to the guilt or innocence of the defendant,' but is simply 'a determination that [he] has been convicted through a judicial *process* which is defective is some fundamental respect'").

38. *Id.* at 40–42.

39. *Id.* at 34 ("Nothing in the record suggests any misconduct in the prosecutor's submission of the evidence.").

40. *Id*. at 36 n.2 ("There is no indication that the prosecutor . . . was attempting to deceive the court. We therefore have no occasion to consider what the result would be if the case were otherwise."); *see also* United States v. Quinn, 901 F.2d 522, 530–31 (6th Cir. 1990) (noting the *Lockhart* Court's reliance on the facts that the erroneous admission of evidence was "ordinary" trial error and lacked prosecutorial misconduct).

41. Rick A. Bierschbach, *One Bite at the Apple: Reversals of Convictions Tainted by Prosecutorial Misconduct and the Ban on Double Jeopardy*, 94 MICH. L. REV. 1346, 1359 (1996).

42. Arizona v. Washington, 434 U.S. 497, 505 (1978); *see also* Bierschbach, *supra* note 41, at 1360.

43. United States v. Scott, 437 U.S. 82, 93 (1978); United States v. Jorn, 400 U.S. 470, 485 (1971); United States v. Tateo, 377 U.S. 463, 467 (1964); *see also* Bierschbach, *supra* note 41, at 1360.

44. Oregon v. Kennedy, 456 U.S. 667, 673 (1982); *see also* Bierschbach, *supra* note 41, at 1360.

45. *Kennedy*, 456 U.S. at 673.

could move for a mistrial, which would subject him to retrial if granted, or the defendant could tolerate the misconduct, which would likely bias the trial against him.[46] The U.S. Supreme Court in *Oregon v. Kennedy* "recognize[d] the necessity of protecting a defendant's double jeopardy interests from subversion by intentional prosecutorial misconduct."[47] The Court held that "a defendant may invoke the bar of double jeopardy . . . to those cases in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial."[48] Although the *Kennedy* decision extended double jeopardy protection to mistrials resulting from prosecutorial misconduct, it was a narrow holding.[49] Prosecutorial misconduct, under *Kennedy*, is defined as intentional misconduct to provoke a motion for mistrial from the defendant.[50] A retrial of a defendant, therefore, is permitted if the mistrial was the result of merely negligent prosecutorial misconduct, or mere trial error.[51]

The double jeopardy clause as developed by the U.S. Supreme Court protects defendants from being retried when a conviction has been reversed on appeal for insufficient evidence[52] or when a mistrial is granted for prosecutorial misconduct.[53] The federal constitutional case law, however, has yet to address a defendant's protection from double jeopardy when a conviction is reversed on appeal for prosecutorial misconduct.[54]

III. ARIZONA BRIDGES THE GAP IN DOUBLE JEOPARDY JURISPRUDENCE

Although the Arizona Constitution provides the same basic protection against double jeopardy as provided in the Fifth Amendment, the Arizona Supreme Court has established a more expansive application of the double jeopardy clause under the state constitution.[55] The court's decisions in *Pool v. Superior Court*[56] and

---

46. *Id*. at 686; *see also* Bierschbach, *supra* note 41, at 1361.

47. Bierschbach, *supra* note 41, at 1359.

48. *Kennedy*, 456 U.S. at 679.

49. *Id.*; *see also* David Kader, et al., *The Arizona Supreme Court: Its 2000–2001 Decisions*, 34 ARIZ. ST. L.J. 369, 476 (2001).

50. *Kennedy*, 456 U.S. at 679; *see also* Bierschbach, *supra* note 41, at 1361.

51. *Kennedy*, 456 U.S. at 679.

52. Burks v. United States, 37 U.S. 1, 18 (1978); *see also* Bierschbach, *supra* note 41, at 1346.

53. *Kennedy*, 456 U.S. at 679; *see also* Bierschbach, *supra* note 41, at 1347.

54. Bierschbach, *supra* note 41, at 1346–47.

55. The U. S. Constitution states: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The Arizona Constitution states: "No person shall be . . . twice put in jeopardy for the same offense." ARIZ. CONST. art. 2, § 10.

56. 677 P.2d 261 (Ariz. 1984). The trial court granted the defendant's motion for mistrial due to prosecutorial misconduct. The State sought to try the defendant on a new indictment. The defendant's motion to dismiss based on double jeopardy was denied and he brought a special action with the Arizona Supreme Court. The court accepted jurisdiction and reversed the lower court's decision to deny defendant's motion for dismissal on double jeopardy grounds. *Id.*

State v. Jorgenson[57] provide that "the right of a defendant to be free from double jeopardy should not be determined by which court correctly determines that misconduct infected the trial."[58]

A court's grant of a mistrial does not bar retrial, except in cases involving mistrials due to prosecutorial misconduct. The law set forth by the U.S. Supreme Court in *Kennedy* requires a finding of intentional misconduct to bar retrial of the defendant. The Arizona Supreme Court has held that this standard is too narrow, and that retrial should be barred when the prosecutor intentionally engages in conduct that he "knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal."[59] The court reasoned that prosecutors may engage in misconduct to avoid acquittal or to harass the defendant and, therefore, the application of double jeopardy protections cannot be limited only to circumstances where the defendant actually moves for mistrial during the trial itself.[60] When a prosecutor's misconduct is "so prejudicial to the defendant that it cannot be cured by means short of a mistrial," regardless of whether the prosecutor intended to provoke a mistrial, the double jeopardy clause of the Arizona Constitution should bar retrial.[61]

Prior to the year 2000, Arizona's highest court had not considered whether double jeopardy applied in cases of prosecutorial misconduct as the basis for a reversal on appeal.[62] The Arizona Supreme Court's decision in *Jorgenson*, however, bridged this significant gap.[63] The defendant in *Jorgenson* had moved for a mistrial based on prosecutorial misconduct, but the trial judge denied the motion. On appeal, the Arizona Supreme Court reasoned that "the fact that the original trial judge erroneously denied a mistrial, thus requiring reversal on appeal, cannot put a defendant in a worse position than if the judge had correctly granted the mistrial motion. Surely a defendant whose mistrial motion was erroneously denied . . . should have the same constitutional protection as one whose motion was correctly granted."[64] Thus, the court extended the double jeopardy protections of the state constitution to bar retrial of defendants whose convictions were reversed on appeal due to prosecutorial misconduct.[65]

---

57. 10 P.3d 1177 (Ariz. 2000). The defendant was tried and convicted. The Arizona Supreme Court reversed the conviction based on prosecutorial misconduct. On remand, the defendant moved to dismiss based on double jeopardy. The superior court granted the motion and the State brought a special action challenging the dismissal. The court accepted jurisdiction and upheld the lower court's decision to dismiss on double jeopardy grounds. *Id.*

58. *Id.* at 1180; *see also* Kader, *supra* note 49, at 477.

59. *Pool*, 677 P.2d at 271–72.

60. *Id.* at 270.

61. *Id.*

62. Bierschbach, *supra* note 41, at 1347.

63. State v. Jorgenson, 10 P.3d 1177, 1179 (Ariz. 2000).

64. *Id*.

65. *Id*.

IV. *MINNITT* FURTHER EXTENDS THE ARIZONA DOCTRINE OF DOUBLE JEOPARDY

Prior to *Minnitt*, Arizona case law held that double jeopardy protection attached in cases where a mistrial was or should have been granted because of a prosecutor's misconduct, committed with "indifference to a significant resulting danger of mistrial or reversal," and that structurally impaired the trial.[66] In *Minnitt*, the defendant did not request a mistrial in his original trial or in his second trial,[67] because the prosecutor's misconduct was concealed during these trials.[68] The defendant claimed that double jeopardy barred his third trial because of prosecutorial misconduct in the previous two trials.[69] The State argued, however, that since the defendant did not raise the issue of prosecutorial misconduct during the first two trials, and since the third trial was free of any misconduct, the third trial was not barred by the double jeopardy clause and the conviction was valid.[70] The Arizona Supreme Court held that if a mistrial motion could not have been requested because the prosecutorial misconduct was concealed, but the misconduct would have prompted a mistrial had it been known, any subsequent trial of the defendant is retroactively barred by the double jeopardy clause of the state constitution.[71]

The court held that later discovery of such prosecutorial misconduct, albeit after subsequent retrials, will invoke the protections of the double jeopardy clause.[72] Any convictions obtained in a retrial, therefore, must be vacated.[73] The court reasoned that "where a prosecutor engages in egregious conduct clearly sufficient to require a mistrial but manages to conceal his conduct until after trial, the same circumstances are presented as in *Pool* and *Jorgenson* and the same reasoning applies."[74] The defendant should not be subject to multiple trials simply because the prosecutor was successful in concealing his misconduct.[75] Prosecutorial misconduct, regardless of whether it is known at the time of trial, "raises concerns over the integrity and fundamental fairness of the trial itself" and cannot be remedied through retrial.[76]

V. CONCLUSION

As *Minnitt* demonstrates, Arizona has continued to strengthen protections of the double jeopardy clause in cases of prosecutorial misconduct. Moreover, *Minnitt* gives convicted criminals an opportunity to be set free if, on appeal, the defendant can prove the prosecution engaged in serious misconduct at trial and,

---

66. State v. Minnitt, 55 P.3d 774, 781 (Ariz. 2002).
67. *Id.*
68. *Id.*
69. *Id.* at 776.
70. *Id.* at 780.
71. *Id.* at 782.
72. *Id.*
73. *Id.* at 783.
74. *Id.* at 782.
75. *Id.*
76. *Id.* at 781.

furthermore, that the misconduct was concealed. Any sufficiently egregious prosecutorial misconduct that is discovered and proven, albeit after the trial's completion, should render a defendant's conviction invalid and invoke double jeopardy protection to bar retrial. *Minnitt* makes clear that a prosecutor cannot avoid the double jeopardy ramifications of his own misconduct by simply concealing that misconduct until a trial is complete.