

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
SENECA COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE,

CASE NO. 13-14-21

v.

RAYMOND F. PLOTT,

OPINION

DEFENDANT-APPELLANT.

Appeal from Seneca County Common Pleas Court
Trial Court No. 13-CR-0142

Judgment Affirmed

Date of Decision: March 16, 2015

APPEARANCES:

Gene P. Murray for Appellant

Brian O. Boos for Appellee

WILLAMOWSKI, J.

{¶1} Defendant-appellant Raymond F. Plott brings this appeal from the judgment of the Common Pleas Court of Seneca County, Ohio, denying his motion to dismiss a retrial. For the reasons that follow, we affirm the trial court’s judgment.

Relevant Procedural History

{¶2} Plott was indicted on August 29, 2013, on two counts of rape, felonies of the first degree in violation of R.C. 2907.02(A)(2), B. He pled not guilty and the case proceeded to a jury trial, during which the State offered testimony of the alleged victim, among other witnesses. The jury was unable to reach a unanimous verdict on either count of the indictment. Therefore, the trial court declared a mistrial and discharged the jury “without prejudice to the State of Ohio.” (R. at 38.) A new jury trial was scheduled, but Plott filed a motion to dismiss, arguing that it would violate the Double Jeopardy Clause of the Fifth Amendment to the Constitution of the United States.¹ The trial court overruled the motion and the instant appeal followed.

¹ Plott attempted to appeal the trial court’s judgment entry prior to filing his motion to dismiss. (R. at 49.) We dismissed the appeal for lack of jurisdiction on April 10, 2014. His appeal is now based on the authority of *State v. Anderson*, 138 Ohio St.3d 264, 2014-Ohio-542, ¶ 42-43, which held that a denial of a motion to dismiss on double-jeopardy grounds is a final appealable order.

Assignment of Error

{¶3} Due to the lengthy and complex phrasing of Plott's assignment of error,² we summarize it for the purpose of this opinion. Plott argues that the trial court's denial of his motion to dismiss a retrial violates the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

² Below we quote Plott's assignment of error in its entirety:

IN A CONSTRUCTIVE VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION, APPLICABLE TO THE STATES THROUGH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE TRIAL COURT REVERSIBLY ERRED BY DENYING THE DEFENDANT'S MOTION TO DISMISS, ON GROUNDS THAT THE ALLEGED VICTIM TESTIFIED (AT THE JURY TRIAL) THAT THERE WAS NO CELL PHONE CALL PLACED FROM HER CELL PHONE NUMBER, ON JULY 6, 2013 TO THE FEMALE COHABITANT WITNESS OF THE DEFENDANT, WHEN IT IS RESPECTFULLY SUBMITTED AS FACT BY THE DEFENDANT AND HIS FEMALE COHABITANT WITNESS THAT AN EXCULPATORY INCOMING TELEPHONE CALL FROM THE CELL PHONE OF THE ALLEGED VICTIM DID OCCUR; AND HAS SO RESULTED AS BEING UNAVAILABLE TO THE DEFENSE IN A RE-TRIAL OF THE CASE, BY THE TRIAL COURT'S DECISION EFFECTUALLY RENDERING THE SAID CELL PHONE CALL RECORD AS UNATTAINABLE BY THE DEFENSE, EXCEPT BY A WARRANT FOR IT SOUGHT BY THE STATE, AS EVIDENCE FAVORABLE TO THE DEFENDANT, AND ABSOLUTELY DISCOVERABLE AND MANDATED AS SUCH, WITH THE STATE OBLIGATED TO PRODUCE SAME UNDER CRIM. R. 16(B) (5).

INDEED, THE PROVIDING OF THE PERTINENT CELL PHONE RECORD WOULD RENDER THE RE-TRIAL OF THIS CASE AS AN EFFECTUAL NON-STARTER, BY DIRECTLY SHOWING THAT THE ALLEGED VICTIM WAS NOT BEING TRUTHFUL IN TESTIFYING UNDER OATH, AS SHE ACQUIRED HER PHYSICAL INJURIES NOT FROM THE DEFENDANT-APPELLANT ON JULY 7, 2013, BUT FROM AN ALTERCATION WITH HER MALE ACQUAINTANCE, AND MOST POINTEDLY, DURING A CELL PHONE CALL ARISING FROM SAME, AS IT HAPPENED, AND QUITE LITERALLY AT THE HANDS OF ANOTHER PERSON, OTHER THAN THE DEFENDANT-APPELLANT, ON JULY 6, 2013 AT APPROXIMATELY 3:35 A. M.

(App't Br. at iii.)

Law and Analysis

{¶4} The Double Jeopardy Clause “prohibits (1) a second prosecution for the same offense *after acquittal*, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.” (Emphasis added.) *State v. Gustafson*, 76 Ohio St.3d 425, 432, 1996-Ohio-299, 668 N.E.2d 435 (1996), citing *United States v. Halper*, 490 U.S. 435, 440, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989). But double jeopardy does not preclude a second prosecution for the same offense after a mistrial declared by the trial court based on the fact that the jury could not reach a verdict on any of the charges. *State ex rel. Bevins v. Cooper*, 138 Ohio St.3d 275, 276, 2014-Ohio-544, ¶ 7; *State v. Thompson*, 2d Dist. Montgomery No. 26280, 2014-Ohio-5583, ¶ 6-12.

{¶5} The Tenth District Court of Appeals observed that

[t]he United States Supreme Court has consistently held that a retrial following a mistrial because of a deadlocked jury does not violate double jeopardy.

In *Richardson v. United States* [468 U.S. 317, 325-326, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984)], the court stated:

“[T]he protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy. * * * Since jeopardy attached here when the jury was sworn, * * * petitioner’s argument necessarily assumes that the judicial declaration of a mistrial was an event which terminated jeopardy in his case and which allowed him to assert a valid claim of double jeopardy.

“[W]e reaffirm the proposition that a trial court’s declaration of a mistrial following a hung jury is not an event that terminates the

original jeopardy to which the petitioner was subjected. The Government, like the defendant, is entitled to resolution of the case by verdict from the jury, and the jeopardy does not terminate when the jury is discharged because it is unable to agree. Regardless of the sufficiency of the evidence at petitioner's first trial, he has no valid double jeopardy claim to prevent his retrial."

State v. Crago, 93 Ohio App.3d 621, 633, 639 N.E.2d 801 (10th Dist.1994), quoting *Richardson supra*. The Tenth District Court of Appeals referred to "the long line of cases holding that a retrial following a 'hung jury' does not violate double jeopardy" and quoted the United States Supreme Court's holding affirming that line of cases. *Id.* at 633.

"We are entirely unwilling to uproot this settled line of cases * * *.

* * *

"We think that the principles governing our decision in *Burks* [*v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978)], and the principles governing our decisions in the hung jury cases, are readily reconciled when we recognize that the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy. * * *"

Id. at 633-634, quoting *Richardson supra*.

{¶6} Because it is well-settled that a new trial after a hung jury does not violate the Double Jeopardy Clause, the trial court did not err in denying Plott's

motion to dismiss the retrial on double jeopardy grounds.³ Accordingly, the assignment of error is overruled.

Conclusion

{¶7} Having reviewed the arguments, the briefs, and the record in this case, we find no error prejudicial to Appellant in the particulars properly assigned and argued. The judgment of the Common Pleas Court of Seneca County, Ohio, is therefore affirmed.

Judgment Affirmed

SHAW and PRESTON, J.J., concur.

/jlr

³ Plott fails to establish how the issues of credibility of the victim's testimony and the alleged evidentiary dispute form the basis for a motion to dismiss on double jeopardy grounds. In so far as Plott attempts to argue credibility of witnesses or evidentiary issues for his upcoming trial, these issues are not ripe for review. Pursuant to *Anderson*, 138 Ohio St.3d 264, 271, 2014-Ohio-542, ¶ 42-43, the sole issue we can review at this time is whether this future trial violates Plott's right not to be put in jeopardy twice for the same offense.