

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO	:	
Plaintiff-Appellee,	:	Case No. 17CA3799
v.	:	
TIMOTHY W. LUTE,	:	<u>DECISION AND</u>
Defendant-Appellant.	:	<u>JUDGMENT ENTRY</u>
	:	RELEASED 05/17/2018

APPEARANCES:

Timothy Young, Ohio Public Defender, and Peter Galyardt, Assistant Ohio Public Defender, Columbus, Ohio, for defendant-appellant.

Mark E. Kuhn, Scioto County Prosecuting Attorney, and Jay Willis, Scioto County Assistant Prosecuting Attorney, Portsmouth, Ohio, for plaintiff-appellee.

Hoover, P.J.

{¶1} Defendant-appellant, Timothy Lute (“Lute”), appeals the judgment of the Scioto County Court of Common Pleas which overruled his motion to dismiss; convicted him of kidnapping with a firearm specification, a sexual motivation specification, and a sexually violent predator specification; and sentenced him to five years in prison. On appeal, Lute contends that the trial court erred in denying his motion to dismiss because the Ohio Constitution’s protection against double jeopardy barred a third trial in his case. For the following reasons, we find that the trial court did not violate Lute’s double jeopardy rights by pursuing a third trial after receiving the cause on remand by Decision and Judgment Entry filed November 28, 2016. Further, we refuse to extend the protections afforded under the Ohio Constitution to provide the requested relief. Accordingly, we affirm the judgment of the trial court.

I. Facts and Procedural History

{¶2} Lute was indicted on five counts: (1) rape with a firearm specification and a sexually violent predator specification; (2) kidnapping with a firearm specification; (3) kidnapping with a firearm specification, sexual motivation specification, and sexually violent predator specification; (4) felonious assault with a firearm specification and a sexually violent predator specification; and (5) having a weapon while under a disability.

{¶3} Despite concerns regarding Lute's competency, the trial court ultimately found Lute competent to stand trial. The first trial resulted in a hung jury and a mistrial. In this first trial, Lute testified in his own defense.

{¶4} The State then elected to proceed with a second trial. In this trial, a different attorney represented Lute; and Lute did not testify. The jury returned guilty verdicts on the rape count, the first kidnapping count, and the having a weapon under a disability count. The trial court entered judgment on the verdicts and sentenced Lute to an aggregate and mandatory ten-year term of imprisonment. Lute was also classified as a Tier III sex offender as a result of the convictions.

{¶5} Lute appealed the judgment of the second trial. In his first assignment of error, Lute contended that his trial counsel rendered ineffective assistance and that certain irregularities prevented him from receiving a fair trial. Specifically, Lute alleged that he did not have the opportunity to present additional evidence in support of his case, including testifying in his own defense.

{¶6} After reviewing the record, this Court determined that Lute's constitutional rights had been violated when the trial court improperly prohibited him from testifying in his own defense. Although Lute waited until both parties had rested to raise his desire to testify, the trial

court's need to maintain control over the presentation of evidence and to bring the trial to a timely conclusion did not outweigh the defendant's substantive right to testify in his own defense. Accordingly, we reversed the trial court's judgment and remanded the matter for further proceedings consistent with our opinion. *See State v. Lute*, 2016-Ohio-7978, 76 N.E.3d 664 (4th Dist.) ("*Lute I*").

{¶7} After the State commenced a third trial, Lute filed a motion to dismiss. In his motion, Lute contended that the Double Jeopardy Clause of the United States Constitution and Section 10, Article I of the Ohio Constitution barred retrial because the trial court had improperly induced a mistrial. The trial court did not find Lute's argument persuasive and overruled his motion to dismiss.

{¶8} Thereafter, Lute entered an Alford/No Contest plea to Count Two of the Indictment: Kidnapping, a felony of the first degree. He agreed to and received a negotiated sentence of five years in prison, and all other counts were dismissed. This appeal followed.

II. Assignment of Error

{¶9} Lute assigns the following error for our review:

The trial court erred when it denied Timothy Lute's double-jeopardy motion to dismiss. Fifth, Sixth, and Fourteenth Amendments, United States Constitution; Article I, Sections 10 and 16, Ohio Constitution. May 9, 2017 Judgment Entry (denying motion to dismiss); May 4, 2017 Hearing Tr.

III. Law and Analysis

{¶10} When reviewing the denial of a motion to dismiss an indictment on the grounds of double jeopardy, we apply a de novo standard of review. *State v. Mutter*, 150 Ohio St.3d 429, 2017-Ohio-2928, 82 N.E.3d 1141, ¶ 13.

{¶11} The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person "shall be subject for the same offence to be twice put in

jeopardy of life or limb.” Article I, Section 10 of the Ohio Constitution affords Ohio citizens the same protection: “No person shall be twice put in jeopardy for the same offense.” Both Double Jeopardy Clauses “protect against three abuses: (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.’ ” *Mutter* at ¶ 15, quoting *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), *overruled on other grounds*.

{¶12} Although *Lute* also cites to the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution as well as to Article I, Section 16 of the Ohio Constitution, the Court must analyze *Lute*’s double jeopardy claim under the federal and Ohio Double Jeopardy Clauses. *See State v. Anderson*, 148 Ohio St.3d 74, 2016-Ohio-5791, 68 N.E.3d 790, ¶ 26, quoting *United States v. Lanier*, 520 U.S. 259, 272, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997), fn. 7 (“ ‘[I]f a constitutional claim is covered by a specific constitutional provision, * * * the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process.’ ”).

{¶13} While the Double Jeopardy Clause protects defendants from successive prosecutions for a single offense, society also has an interest “ ‘in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury.’ ” *State v. Glover*, 35 Ohio St.3d 18, 20, 517 N.E.2d 900 (1988), quoting *Arizona v. Washington*, 434 U.S. 497, 505, 98 S.Ct. 824, 54 L.Ed.3d 717 (1978). Thus, the State may retry a defendant when a trial court declares a mistrial after the jury fails to reach a verdict. *State v. Lovejoy*, 79 Ohio St.3d 440, 445–446, 683 N.E.2d 1112 (1997). Likewise, the State may also retry a defendant after a conviction is reversed on appeal. *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, 903 N.E.2d 284, syllabus.

{¶14} For double jeopardy purposes, “[j]eopardy attaches, so as to preclude subsequent criminal proceedings, at different points in time depending on nature of the proceeding in question.” *State v. Gustafson*, 76 Ohio St.3d 425, 435, 668 N.E.2d 435 (1996). Where a criminal defendant invokes the right to trial by jury, jeopardy may attach after the jury is empaneled and sworn. *Crist v. Bretz*, 437 U.S. 28, 36, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978). In other situations, jeopardy based on having undergone an initial criminal trial attaches after acquittal or conviction. *Gustafson* at 435.

{¶15} In the absence of an acquittal or a termination based on legally insufficient evidence in the case, no interest protected by the Double Jeopardy Clause precludes a retrial when reversal is predicated on trial error alone. *Glover* at 20. Where a judgment is reversed for error and remanded for further proceedings, the lower court may take the cause up at the point where the first error was committed and, as in other cases, proceed to final judgment. *Wilson v. Kreusch*, 111 Ohio App.3d 47, 51, 675 N.E.2d 571 (2d Dist.1996), quoting *Montgomery Cty. Commrs. v. Carey*, 1 Ohio St. 463, 1853 WL 51 (1853); see also *State v. Schafer*, 3d Dist. Defiance No. 4-08-07, 2008-Ohio-6183, ¶ 18; *State v. Hultz*, 9th Dist. Wayne No. 07CA0043, 2008-Ohio-4153, ¶ 8; *State v. Allen*, 2014-Ohio-1806, 10 N.E.3d 192, ¶ 29 (10th Dist.).

{¶16} In *Lute I*, this Court found that the denial of Lute’s constitutional right to testify in his own defense affected his substantial rights. *Lute I* at ¶ 32; Crim.R. 52(A). Since it appeared that the error in denying Lute’s testimony in the second trial had, or potentially had, some impact on the jury, we could not conclude that the trial court’s error was harmless beyond a reasonable doubt. *Id.* at ¶ 32. Accordingly, we reversed the judgment of the trial court and remanded the cause for further proceedings consistent with our opinion. *Id.* at ¶ 34.

{¶17} In his assignment of error, Lute alleges that “a second prosecution for the same offense after conviction” is at issue in this case. Although jeopardy attaches after conviction, we reversed the judgment of the trial court as set forth in *Lute I*. Because the State is permitted to retry a defendant after a conviction is reversed on appeal, the third trial did not violate Lute’s double jeopardy rights. *Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, 903 N.E.2d 284, at syllabus.

{¶18} Lute also mischaracterizes *Lute I* as a mistrial. As previously explained, we remanded the case solely upon trial error. Again, the third trial did not violate Lute’s double jeopardy rights because the State is permitted to retry a defendant when reversal is predicated on trial error alone. *Glover*, 35 Ohio St.3d at 20, 517 N.E.2d 900.

{¶19} Additionally, Lute contends that the Ohio Constitution can afford more protection than the United States Constitution. Because the trial court denied him the right to testify on his own behalf and violated his right to have a particular tribunal decide the full case, Lute asks this Court to apply the Ohio Constitution to bar retrial.

{¶20} The Supreme Court of Ohio has consistently recognized that “[t]he protections afforded by the two Double Jeopardy Clauses are coextensive.” *State v. Martello*, 97 Ohio St.3d 398, 2002-Ohio-6661, 780 N.E.2d 250, ¶ 7, citing *Gustafson*, 76 Ohio St.3d at 432, 668 N.E.2d 435. Principles of stare decisis require that we follow precedent unless there is a “special justification” to depart from it. *See Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003–Ohio–5849, 797 N.E.2d 1256, ¶¶ 1, 44 (“Stare decisis is the bedrock of the American judicial system. Well-reasoned opinions become controlling precedent, thus creating stability and predictability in our legal system.”). The Supreme Court of Ohio defined “special justification” in *Galatis*: “[I]n Ohio, a prior decision of the Supreme Court may be overruled where (1) the

decision was wrongly decided at that time, or changes in circumstances no longer justify continued adherence * * *, (2) the decision defies practical workability, and (3) abandoning the precedent would not create an undue hardship for those who have relied upon it. *Id.* at ¶ 48.

{¶21} Here, there is insufficient justification to depart from precedent. First, Lute fails to establish that jeopardy attached in the second trial to implicate the Double Jeopardy Clauses. Second, Lute fails to cite any argument or case law in support of his contention that this Court *should* apply the Ohio Constitution to bar retrial in this case. Instead, Lute cites to cases that state courts *may* grant Ohioans “greater rights than those secured by the federal Constitution.” *See Arnold v. Cleveland*, 67 Ohio St.3d 35, 42, 616 N.E.2d 163 (1993); *State v. Mole*, 149 Ohio St.3d 215, 2016-Ohio-5124, 74 N.E.3d 368, ¶ 20. Because a retrial is an adequate remedy to the violation of Lute’s right to testify in his own defense, we refuse to expand the protections afforded under the Ohio Constitution to provide the requested relief.

{¶22} In *Lute I*, we reversed the trial court judgment and remanded for further proceedings after finding that the trial court violated Lute’s right to testify in his own defense. The trial court then remedied its error by providing Lute the opportunity to testify in a third trial. Accordingly, we find that the trial court did not err in denying Lute’s motion to dismiss.

IV. Conclusion

{¶23} Having determined that Lute’s claims lack merit, we overrule his assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED. Appellant shall pay the costs.

The Court finds that reasonable grounds existed for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellee to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellee to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Harsha, J. and McFarland, J.: Concur in Judgment and Opinion.

For the Court,

By: _____
Marie Hoover, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.