[Cite as *State v. Anderson*, 2015-Ohio-2029.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 11 MA 43
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
CHRISTOPHER L. ANDERSON	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of Common Pleas of Mahoning County, Ohio
Case No. 02 CR 854

JUDGMENT: Affirmed. Remanded.

APPEARANCES:

For Plaintiff-Appellee:

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JUDGES:

Hon. Cheryl L. Waite
Hon. Mary DeGenaro
Hon. Carol Ann Robb

Dated: May 20, 2015

[Cite as *State v. Anderson*, 2015-Ohio-2029.]
WAITE, J.

{¶1} Appellant Christopher L. Anderson appeals a February 15, 2011 Mahoning County Common Pleas Court judgment entry denying a motion to dismiss his indictment and seeking discharge from his scheduled trial. Appellant argues that fairness dictates the state should be barred from trying him a "sixth time" on the same murder charge. Appellant contends that another trial would violate both the Due Process Clause and the Double Jeopardy Clause. The state responds by arguing that previous mistrials and hung juries do not bar the state from retrying a defendant. For the following reasons, Appellant's arguments are without merit and the trial court's decision is affirmed.

Factual and Procedural History

{¶2} Appellant was charged with murdering Amber Zurcher in June of 2003. During Appellant's first trial, the trial court ruled that witnesses were barred from introducing testimony alleging that Appellant had previously bitten and strangled an ex-girlfriend. However, during one witnesses' testimony, she blurted out this information while on the stand. *State v. Anderson,* 7th Dist. No. 03 MA 252, 2006-Ohio-4618, ¶37. The evening news highlighted the witness' testimony and the trial court declared a mistrial.

{¶3} The state refiled the murder charge against Appellant. During the second trial, the trial court did permit witnesses to testify as to Appellant's alleged violence against his ex-girlfriend. In November of 2006, the jury reached a verdict and found Appellant guilty. *Id.* On appeal, we reversed the conviction after finding

that the trial court erred in admitting the testimony. The state again refiled the murder charge against Appellant.

{¶4} Appellant was tried a third time in December of 2008. The jury deliberated but was unable to reach a verdict. The state again refiled the charges. During *voir dire* in Appellant's fourth trial, a prospective juror observed Appellant's attorney fall asleep and commented in front of other jurors about this incident. The trial court dismissed the prospective jurors and continued the case. After a new *voir dire* process and selection of a new defense attorney, Appellant stood trial and the jury was once again unable to reach a verdict.

{¶5} The state again refiled the murder charge against Appellant. At this point, Appellant filed the within motion to dismiss the charges based on alleged violations of the Due Process and Double Jeopardy Clauses. The trial court denied his motion. *Id.* Appellant filed a timely appeal, which was initially allowed.

{¶6} Before briefing, the state filed a motion to dismiss the appeal. The state contended that a trial court's decision to deny a motion to dismiss on grounds of double jeopardy is not a final, appealable order. We overruled the state's motion, and the prosecutor then filed a motion for reconsideration and requested an *en banc* hearing on the issue. We denied the motion for reconsideration but granted an *en banc* hearing. However, our *en banc* panel could not reach a consensus as to whether the trial court's denial constituted a final, appealable order. Accordingly, our previous decision stood. The Ohio Supreme Court accepted jurisdiction and ruled

that, at least in this case, the denial was final and appealable, and remanded the matter for a ruling on the merits.

Assignment of Error No. 1

> The trial court erred in failing to grant appellant's motion to dismiss based upon due process grounds.

Assignment of Error No. 2

> The trial Judge erred in not dismissing the indictment as continued prosecution violates Double Jeopardy.

{¶7} As both of Appellant's assignments of errors are intertwined, they will be addressed together. To date, Appellant has arguably faced trial four times. He asserts that the protections found in the Due Process Clause prevent the state from trying him a fifth time. (Appellant mischaracterizes this as the sixth time, for reasons later explained). As the state apparently has no new evidence, Appellant believes that there is nothing to suggest that a jury will convict him. Further, Appellant posits that the process to date has been expensive and stressful for himself, his family, and his lawyer. Although he concedes that there is no bright line as to the number of times a defendant can be tried following successive mistrials, he offers caselaw from Hawaii and Iowa which address this issue in order to reach the conclusion that Appellant's murder charge should now be dismissed.

{¶8} Appellant acknowledges that many state courts have held that the Double Jeopardy Clause does not apply when there is a manifest necessity for a mistrial. He urges, however, that this case requires application of the Due Process

Clause. While conceding that no direct language in either the Due Process Clause or the Double Jeopardy Clause support his arguments, Appellant argues that for almost twelve years he has suffered the anxiety of not knowing whether he will be found guilty and sentenced to prison. He claims that the constant fear of the process has hampered his life, exhausted him, and subjected him to embarrassment. He also alleges (with no evidence to substantiate this claim) that an innocent person has a greater chance of being convicted when subjected to multiple trials. Accordingly, Appellant urges that "fundamental fairness" dictates the state should be prevented from trying him again.

{¶9} In response, the state consolidates the factors from the Hawaii and Iowa cases cited by Appellant, and applies each factor to the facts of this case. The state uses these sixteen combined factors to argue that Appellant is not entitled to dismissal of the indictment. The relevant facts discussed by the state are: not all of Appellant's trials were completed; there is highly incriminating evidence against Appellant; Appellant has been convicted once; there has been no evidence of misconduct or bad faith on the part of the state; and, Appellant has not shown that he has been actually prejudiced by the delay.

{¶10} The state highlights the fact that Ohio law is clear. Neither a jury's failure to reach a verdict nor a mistrial bars the state from retrying the matter. The state notes that the Ninth District has emphasized that a state is equally entitled to finality in a case, which is only obtained through a final jury verdict. The state also

urges that a trial court's ruling on a pre-trial motion is given great deference. Thus, the state argues that the trial court did not err in denying Appellant's motion.

{¶11} Generally, the Double Jeopardy Clause does not bar retrial following a mistrial. *State v. Hubbard,* 150 Ohio App.3d 623, 2002-Ohio-6904, 782 N.E.2d 674, ¶50*,* citing *Oregon v. Kennedy*, 456 U.S. 667, 671, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982). The Ohio Supreme Court has declared a narrow exception to this rule exists only when the defendant has been goaded into seeking a mistrial by the prosecutor's conduct. *Hubbard* at ¶50, citing *State v. Loza,* 71 Ohio St.3d 61, 70, 641 N.E.2d 1082 (1994). To fall within this exception, the prosecutor's conduct must reflect that the state "engaged in an 'intentional act of deception.' " *Hubbard* at ¶50, citing *Loza* at 71. It is undisputed that there are no allegations of such conduct, here.

{¶12} Despite the fact that no actions here can be characterized as prosecutorial misconduct, Appellant does argue in general fashion that the state has had ample opportunity to obtain a conviction here, and continued prosecution of the matter is simply an "exercise of power" intended to "wear down" the accused, his family and friends. He cites to a number of federal cases that outline rights found in both the Due Process and Double Jeopardy Clauses. And he makes broad factual assertions that are unsupported in this record. He also does raise very troubling concerns as to how certain rights and responsibilities must be balanced, the most glaring of these appears to be deciding just how long a defendant may be incarcerated while going through the criminal process and yet subject to no conviction.

{¶13} It appears that there is no clearly analogous Ohio case where we may look for guidance. As earlier discussed, Ohio clearly allows retrial following mistrial and/or hung jury. Our body of law does not, however, address the number of retrials which may be permitted.

{¶14} In 2002, the Ninth District ruled in a case where a defendant was convicted after three mistrials. *State v. Roper,* 9th Dist. 20836, 2002-Ohio-7321, ¶87. The *Roper* court looked to law from other states and, most importantly for our purposes, reviewed the Hawaii and Iowa caselaw on which Appellant relies in the matter before us. After applying the factors listed in *State v. Moriwake*, 65 Haw. 47, 55, 647 P.2d 705 (1982) and *State v. Lundeen*, 297 N.W.2d 232, 236 (Iowa App.1980), the Ninth District held in *Roper* that trying the defendant four times did not violate the Double Jeopardy Clause or Due Process Clause. *Id. at* ¶90.

{¶15} The *Moriwake* factors included:

> 1) the severity of the offense charged; 2) the number of prior mistrials and the circumstances of the jury deliberation therein, so far as is known; 3) the character of prior trials in terms of length, complexity and similarity of evidence presented; 4) the likelihood of any substantial difference in a subsequent trial, if allowed; 5) the trial court's own evaluation of the relative case strength; and 6) the professional conduct and diligence of respective counsel, particularly that of the prosecuting attorney.

Roper at ¶85, citing *Moriwake* at 55.

{¶16} The *Lundeen* factors included:

> (1) weight of the evidence of guilt or innocence; (2) nature of the crime involved; (3) whether defendant is or has been incarcerated awaiting trial; (4) whether defendant has been sentenced in a related or similar case; (5) length of such incarceration; (6) possibility of harassment; (7) likelihood of new or additional evidence at trial; (8) effect on the protection to society in case the defendant should actually be guilty; (9) probability of greater incarceration upon conviction of another offense; (10) defendant's prior record; (11) the purpose and effect of further punishment; and (12) any prejudice resulting to defendant by the passage of time.

Roper at ¶86, citing *Lundeen* at 236.

{¶17} The *Roper* Court noted that in both *Moriwake* and *Lundeen* a new trial was approved despite the fact that no new evidence was anticipated. *Roper, supra,* at ¶87. And similar to the instant case, one of the mistrials in *Roper* resulted from a witness who inadvertently provided improper testimony. *Id*. at ¶89.

{¶18} In 2009, the Tenth District heard a case where the defendant was convicted after his third trial. *State v. Whiteside,* 10th Dist. No. 08AP-602, 2009-Ohio-1893, ¶12. He appealed his conviction alleging that these three attempts to convict violated the Double Jeopardy Clause. *Id.* at ¶14. In applying *Roper, Moriwake,* and *Lundeen,* the Tenth District held that retrying a defendant following

two trials that resulted in hung juries did not violate the Double Jeopardy Clause. *Id.* at ¶21.

{¶19} Our review of the various factors found in *Moriwake* and *Lundeen* reveal that they appear to be somewhat repetitive, and address questions either not present in this matter (such as the defendant's own prior record), addressed in Ohio by sentencing statutory schemes (purpose and effect of punishment), or readily apparent (seriousness of the crime and the effect on protection to society if defendant is guilty). Thus, we decline to adopt these courts' factors as our own. Further, *Moriwake* and *Lundeen* are factually distinguishable from this case. In *Moriwake,* the defendant was tried twice and both trials ended in a mistrial. *Moriwake* at 49. Unlike Appellant, the defendant never had a trial end in conviction and both of the trials were mirror images of one another, with no additional witnesses, evidence, or defenses. *Id.* at 57. In this case, Appellant has been convicted once and, due to procedural rulings, certain evidence was permitted in one trial but not in others.

{¶20} In *Lundeen,* the defendant was charged with four counts of an offense on the basis of four separate county attorney's information filings. The four charges were not consolidated for trial. *Lundeen* at 234. When the defendant was acquitted on the first charge, the trial court dismissed the three remaining counts. *Id.* The trial court reasoned that the state had lost on its strongest case and a trial on the remaining counts would end in the same result. *Id.*

{¶21} Despite the differences between these two cases and the matter at bar, certain of the combined *Moriwake* and *Lundeen* factors do provide a useful tool for analysis of Appellant's claims. While we decline to directly adopt these tests, which clearly derive from other states' body of law on the issue, some factors contained within these cases do highlight important considerations as we analyze the matter before us.

{¶22} Again, we note that not all of the factors are relevant to Appellant or to the law in Ohio. And it is readily apparent that he is charged with a severe crime and failure to prosecute may result in a negative societal impact. A few of these factors do bear heavily on Appellant's constitutional arguments. Chief among these are: 1) whether the defendant has been incarcerated awaiting trial and the length of the incarceration; 2) the number and character of prior trials; 3) the professional conduct and diligence of respective counsel (in Ohio, especially the prosecutor); and 4) an evaluation of the evidence as it appears from the record. Finally, we also must delve into other prejudice to the defendant, if it appears on the record.

Defendant's Incarceration

{¶23} The record reflects that Appellant has been incarcerated for the entire length of this process: almost twelve years. Initially, due to many factors including the severity of the crime, bond was set at $1,000,000. Sometime in 2008, on his motion, Appellant's bond was reduced to $500,000. Apparently, he was unable to post bond and has remained incarcerated. There can be no question that this fact presents the most troubling aspect of this case. No one will argue that this is not a

substantial amount of time to remain in jail without the finality of a conviction. As Appellant so eloquently argues, one of our most fundamental rights is that of liberty. We note, also, that had Appellant already been convicted, his sentence would result in a mandatory fifteen years to life imprisonment. Hence, it is theoretically possible that he has already spent the bulk of the minimum sentence, here, incarcerated.

{¶24} However, we also note that this one fact alone cannot override all others. No one right exits in a vacuum and, already discussed, justice demands the victim and her survivors, as well as the citizens of the state, itself, are equally entitled to the ends of justice. Hence we turn to the next factor in order of its importance.

Number and Character of Prior Trials

{¶25} Appellant was indicted on August 29, 2002. He was brought to trial for the first time on May 27, 2003. On May 30, 2003, the trial court declared a mistrial based on an unsolicited comment made by one of the witnesses during the state's case. Although the record does not provide the actual date, it is clear the state immediately refiled the charge.

{¶26} The second trial began on November 29, 2003. Following his guilty verdict, Appellant was sentenced on December 4, 2003. On September 5, 2006, Appellant's conviction was reversed. Again, the record does not reveal the date, but the murder charge appears to have been refiled immediately.

{¶27} Appellant's third trial began on December 8, 2008. On December 18, 2008, the jury failed to reach a verdict, resulting in a hung jury. Appellant was immediately notified he would be tried again. Before this fourth trial began, on

Appellant's motion his bond was modified from $1,000,000 to $500,000. However, as earlier discussed, it does not appear that he posted bond.

{¶28} During pre-trial in his fourth trial, one of the potential jurors commented on the fact that Appellant's attorney had fallen asleep during *voir dire.* Although Appellant characterizes this as a mistrial, the judgment entry specifically states that the trial court ordered a continuance, not a mistrial. Thus, we cannot characterize the trial that followed as an entirely new proceeding. Following a new *voir dire* process and selection of new defense counsel, this trial was completed and the jury again failed to reach a verdict.

{¶29} The state filed a notice of intention to refile on October 22, 2010. On February 15, 2011, Appellant filed his motion to dismiss, which was denied by the trial court. On March 17, 2011, Appellant filed a notice of appeal. A panel of this Court initially found the denial of the motion to dismiss was a final, appealable order. On the state's request, we sat *en banc* on this limited issue. Our *en banc* panel was unable to reach a consensus and the case went to the Ohio Supreme Court. On February 19, 2013, the Ohio Supreme Court held that this denial did, in fact, constitute a final, appealable order. Accordingly, the case was remanded for a ruling on the merits.

{¶30} Hence, Appellant was subject to three complete trials, one of which resulted in conviction and two of which ended in hung juries. He was subject additionally to mistrial that occurred partially through his first attempt at trial. One of the trials resulting in a hung jury was delayed by the necessity of seating a new jury.

Appellant erroneously refers to the continuance as a mistrial and thus claims this caused a fifth trial, which is clearly not the case. Hence, in looking at relevant Ohio law, as found in *Hubbard, Roper* and *Whiteside*, this record does not reflect an egregious number of procedures nor an unduly onerous process. Nothing in the record indicates that there was undue delay in setting or holding any one trial. Nothing in the record indicates delay in refiling charges. We note that he was actually convicted during one of his trials. And only three proceedings, including the trial resulting in a guilty verdict, were fully concluded. The first attempt at trial was only partially completed when the necessity of mistrial occurred. And despite Appellant's mischaracterization, only one mistrial occurred. Based purely on our body of law as it currently exists, nothing in this set of facts leads us to conclude that dismissal of the murder charge is warranted.

Professional Conduct and Diligence of Counsel

{¶31} Because we acknowledge there is more to Appellant's fundamental fairness argument than simply counting the number of earlier proceedings, and because there can be no bright line test for the particular rights and issues that are involved, a review of the actions of both counsel is next required. This is particularly true as we have already noted that in Ohio, the only exception to the rule that retrial is not barred by Double Jeopardy is based on serious prosecutorial misconduct. See *Hubbard* and *Loza, supra*. As earlier stated, Appellant concedes this is not the case, but goes on to generally denounce the actions of the prosecutor in refiling these charges as a bullying tactic.

{¶32} There is nothing in this record leading us to find any type of misconduct on the part of the prosecutor. The charges appear to have been promptly refiled. No mistrial, continuance or hung jury can be attributed to any action or inaction on the part of the state. While Appellant admits this is true, he believes that by merely continuing to refile the charges this amounts to some sort of misconduct.

{¶33} It is readily apparent on the record, however, that Appellant's "fundamental fairness" argument cuts both ways. Appellant's first attempt at trial ended in mistrial solely because that was the only fundamentally fair outcome for Appellant. His second full trial ended in conviction. Despite the length of time that passed during his appeal following conviction, no one will argue that it was not fundamentally fair that Appellant, through counsel, pursue his successful appeal.

{¶34} Because his appeal was successful, the matter was remanded, leading to two more refilings by the prosecutor and to two hung jury decisions. During the last of these, Appellant's lawyer fell asleep during *voir dire*. This misstep was noticed and discussed by the proposed jurors. It was unquestionably fundamentally fair to continue the matter until an entirely new jury panel, untainted by the incident, could be seated. And we doubt Appellant would argue that it was not fundamentally fair to allow him this period of continuance to obtain new, competent counsel.

{¶35} Thus, while none of this twelve-year period can be in any way attributed to the "fault" of either the prosecutor, Appellant or his various counsel, it is clear that it has occurred because of the very issue as to "fundamental fairness" on which Appellant relies in seeking dismissal of his indictment. The State of Ohio and its

citizens have a duty to seek justice for this crime, its victim and her family. Appellant has a right to a full and fair trial. The goal is to impinge on Appellant's rights, including his liberty interests, as little as possible in the process. While this process has been a long one to date, the record reflects that it is due, in part, to ensuring that Appellant will receive a process that is fair and untainted.

Evaluation of the Evidence

{¶36} Also of importance in our review of whether fundamental fairness requires dismissal of the indictment is whether the evidence in the record appears to lead to a conclusion that dismissal is warranted, perhaps on other grounds. We note that the trial court refused to dismiss the charges against Appellant. While the dismissal was sought solely based on the number of times Appellant has been retried and not specifically on the basis that the state had no evidence on which to convict, this issue is inherent in Appellant's request for dismissal. He claims that as two trials resulted in a hung jury and the state appears to have no new evidence, there is no likelihood that the state can obtain a conviction on retrial.

{¶37} As earlier discussed, the state's response is that they did obtain conviction during one trial, and while there is apparently no new evidence pending, there is DNA evidence linking Appellant to the murder victim and most witness testimony has been favorable to the state. Appellant has clearly never been acquitted, and the fact that two trials resulted in hung juries leads credence to the fact that evidence exists to convince some jurors of guilt beyond a reasonable doubt.

Other Prejudice to the Defendant

{¶38} An evaluation of fundamental fairness would be incomplete without a review as to how Appellant would be prejudiced by retrial. Clearly we are aware of the prejudice inherent in the incarceration for twelve years of a suspect who has not been convicted of a crime. Appellant's entire argument circles back to this fact. However, it must be noted that his argument otherwise is devoid of evidence of other harm.

{¶39} We do not make light of a twelve-year incarceration and all the inherent harm this implies. But in addressing the question that confronts us, whether the trial court erred by not dismissing the charges against Appellant and discharging him from scheduled trial, we must also note that this record is devoid of evidence of other, more specific, harm. Appellant's brief is full of vague, unsubstantiated claims as to his embarrassment and exhaustion. But Appellant has not provided any evidence that witnesses have become unavailable or that the lapse of time has had an effect on the DNA evidence. He does not allege that his own memory has lapsed. While we certainly agree that his life cannot help but be severely disrupted, we do so with the understanding that this record reveals that it is possible for a jury to convict him. He has once been subject to conviction, and the fact that jurors twice have been unable to agree to convict or acquit does show that some jurors are convinced of guilt beyond a reasonable doubt. Ohio law permits retrial after mistrial or hung juries, even multiple times. This record shows no misconduct on the part of the state, no undue delay at any juncture and no reason to find the trial court otherwise abused its discretion in refusing to dismiss these charges. At the same time, Appellant presents

a compelling argument that no defendant should be subject to an unlimited number of retrials and at some point (which appears to be fast advancing) the balance will tip towards finding that Appellant's due process concerns override other legitimate state interests. Ultimately, we hold that on careful review of the record before us, we cannot say that it reveals any error on the part of the trial court in refusing to dismiss the charges at this time.

Conclusion

{¶40} This case presents a highly unusual, and highly emotionally charged, set of facts. Although we are well aware that Appellant has been incarcerated throughout this entire process, we find nothing in the record to suggest that the state has at any point acted in bad faith. Under Ohio law, in the absence of misconduct on the part of the state, a mistrial or hung jury does not bar retrial or retrials. We note that at every step, the process has moved as quickly as possible. There has been no undue delay in the refiling of charges or setting of new trial dates. Some of the delays here can be attributed solely to the process, itself. Appellant has twice successfully availed himself of the appellate process and the trial court has been zealous throughout in protecting Appellant's rights at trial. While we recognize that, at some point, continued retrial will present too onerous a burden on Appellant's rights, that time has not yet come. Based on all of the above, Appellant's assignments of error are overruled and the decision of the trial court to deny Appellant's motion to dismiss the indictment is affirmed. This matter is remanded to

the trial court for further proceedings according to law and consistent with this Opinion.

DeGenaro, J., concurs.

Robb, J., concurs.