Circuit Court for Montgomery County
Case No. 131614C

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 744

September Term, 2018

AINSWORTH McLEOD

v.

STATE OF MARYLAND

Fader, C.J.,
Graeff,
Reed,

JJ.

PER CURIAM

Filed: October 3, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

The State charged Ainsworth McLeod, the appellant, with possession of marijuana with intent to distribute and with conspiracy to possess marijuana with intent to distribute. Shortly before his jury trial in the Circuit Court for Montgomery County, the court granted a motion in limine precluding the State from revealing the existence of a confidential informant. When a State witness revealed the existence of the informant during cross-examination, Mr. McLeod moved for a mistrial, which the court granted. Subsequently, when the State sought to retry Mr. McLeod on the same charges, he filed a motion to dismiss in which he argued that doing so would violate his rights under the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. The court denied the motion, and Mr. McLeod appealed. Because we hold that the circuit court did not err in so ruling, we will affirm.

BACKGROUND[1]

Factual Background

Based on information received from a confidential informant, the Drug Interdiction Team of the Montgomery County Police Department's Special Investigations Division suspected Mr. McLeod of illegal drug distribution. The Drug Interdiction Team arranged a controlled purchase of marijuana between Mr. McLeod and the confidential informant at the Montgomery Mall in Bethesda.

On the date of the controlled purchase, Mr. McLeod called Gregory Martin, who was identified in testimony as a "mule" for Mr. McLeod, and asked him whether he

[1] The facts stated in this Background section are taken from testimony introduced at Mr. McLeod's aborted trial.

"want[ed] to make some money." Mr. Martin said that he did. Mr. Martin, acting at Mr. McLeod's instructions, drove to a location where a man he did not know approached his vehicle, gave him several hundred dollars and a small bag of marijuana, and then placed a duffel bag containing a much larger amount of marijuana inside the trunk. Mr. Martin then drove to another location where he met up with Mr. McLeod, who was driving a separate vehicle. The two drove in separate vehicles to the Montgomery Mall where, unknown to either of them, the Drug Interdiction Team had set up a surveillance unit.

Once they arrived at the mall, Messrs. McLeod and Martin each exited their vehicles and engaged in a brief conversation. Mr. McLeod then walked into the mall, followed shortly afterward by Mr. Martin. While they were in the mall, Detective Scott Carson conducted a canine scan of the exterior of Mr. Martin's vehicle, during which the canine alerted to the presence of marijuana. Meanwhile, Detective Chad Bleggi, an officer assigned to the Drug Interdiction Team, entered the mall and approached Mr. Martin. After detecting a "pronounced and powerful odor of fresh marijuana coming off of" Mr. Martin, Detective Bleggi placed him under arrest.

After his arrest, Mr. Martin consented to a search of his vehicle, from which officers recovered 18.6 pounds of marijuana.[2] Mr. Martin told Detective Bleggi that Mr. McLeod had arranged for him to meet a third individual, who had placed the duffel bag of marijuana

[2] The State charged Mr. Martin with the same offenses as Mr. McLeod, but nol prossed those charges after Mr. Martin testified at Mr. McLeod's trial.

in his trunk. Shortly after Mr. Martin's arrest, Detective Carson and another detective arrested Mr. McLeod as he attempted to return to his vehicle.

Mr. McLeod's First Trial

Mr. McLeod's jury trial began on September 26, 2017. After jury selection, his counsel made an oral motion in limine to preclude the State from adducing any evidence about the confidential informant.[3] Mr. McLeod argued that the State had refused to identify the informant, thus precluding him from being able to speak to the informant in advance of trial, and, therefore, "any reference to . . . confidential informants is completely inappropriate." The court granted the motion in part, ruling that the State could adduce general evidence that Mr. McLeod had come to the attention of police "during the course of an investigation," but could not reference the existence of the confidential informant.

The State complied with that ruling until the cross-examination of its final witness, Detective Carson. During the cross-examination, defense counsel inquired as to why police had not sought search warrants to conduct a forensic examination of two cell phones that had been recovered from Mr. Martin during his arrest. Asked if he thought it would have benefitted his analysis "to look at the information contained on those phones," Detective Carson responded: "I don't believe so. This was very cut and dry. We were in contact with the defendant through an informant."

[3] Mr. McLeod had previously filed a motion to compel discovery of the confidential informant's identity, but withdrew the motion because the State initially indicated that it would not use any statements involving the informant at trial.

Mr. McLeod's counsel objected and moved for a mistrial. The court granted the motion, remarking that a mistrial was necessary "because the confidential informant scenario could not be used." The State promptly declared its intention to retry the case, promising that next time it would disclose the confidential informant's identity.

The Hearing on the Motion to Dismiss

In January 2018, Mr. McLeod filed a motion to dismiss the case and bar retrial on double jeopardy grounds. Mr. McLeod asserted that the State had instructed Detective Carson to mention the confidential informant, and that he acted "purposely and with the intent of causing a mistrial." Mr. McLeod claimed the State's conduct forced him to seek the mistrial, and therefore he could not be retried.

The court held a hearing on the motion at which Detective Carson testified, among other things, that (1) he did not know about the prohibition against mentioning the informant, (2) the State had not instructed or asked him to mention the informant, (3) his testimony about the informant "was purely a mistake" and "was not in any way, shape or form intended to cause a mistrial," and (4) "there was no discussion between" the prosecutor and himself about the informant.

Ruling from the bench, the court denied Mr. McLeod's motion. The court credited Detective Carson's testimony "that he did not know about [the] prohibition against saying the word informant" and found that there had been no collusion between the detective and the prosecutor. Notably, the court found significant that (1) the State did not elicit the testimony during Detective Carson's direct testimony, and (2) the court's ruling on the motion in limine came immediately before trial and, therefore, it was "unfortunate that we

really didn't get a chance to tell this police officer" about the prohibition. The court stated that it would take "an analytical leap in order to find that this was any bad faith or conspiracy." Declining to take that leap, the court denied the motion. Mr. McLeod appealed.[4]

DISCUSSION

Mr. McLeod contends that the circuit court erred in denying his motion to dismiss. We "review[] without deference a trial court's conclusion as to whether the prohibition on double jeopardy applies." *Scott v. State*, 454 Md. 146, 167 (2017); *see Giddins v. State*, 393 Md. 1, 15 (2006) (whether double jeopardy bars a retrial "is a question of law" that we review de novo). We review the court's factual findings for clear error. *Johnson v. State*, 452 Md. 702, 731 (2017).

Mr. McLeod maintains that the motions court applied the wrong legal standard in denying his motion to dismiss. According to Mr. McLeod, "instead of determining whether the prosecution goaded the defense into requesting a mistrial," the court erroneously "concluded that there was no 'bad faith or conspiracy' involved in the mention of the confidential informant and 'no collusion or plan.'" He claims, moreover, that the court "refuse[d] to consider the prosecution's failure to inform" Detective Carson of the prohibition, which he contends is "proof" that the State "intended on goading the defense into requesting a mistrial."

[4] The denial of a motion to dismiss on grounds of double jeopardy is an immediately appealable order. *See Nicholson v. State*, 157 Md. App. 304, 309-10 (2004).

The State posits that the court "addressed the relevant legal standard" by examining "whether the detective's testimony was intended to provoke a mistrial." The State argues that the court correctly found that "there is no evidence that the detective's testimony was intended to provoke a mistrial." We agree with the State.

The Double Jeopardy Clause, which is applicable to the states through the Due Process Clause of the Fourteenth Amendment, *Benton v. Maryland*, 395 U.S. 784, 787 (1969), "protects a criminal defendant from repeated prosecutions for the same offense." *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982); *see Scott*, 454 Md. at 167 ("Under the prohibition of double jeopardy, a court cannot subject a defendant to multiple trials and sentences for the same offense."). Ordinarily, "the grant of a mistrial upon a defendant's request or consent does not preclude a retrial." *Johnson*, 452 Md. at 732. A limited exception applies when the State "deliberately intended to provoke" a mistrial by engaging in conduct "intended to 'goad' the defendant into moving for a mistrial." *Giddins*, 163 Md. App. at 339 (quoting *Kennedy*, 456 U.S. at 676) (emphasis in *Giddins* removed). The intent of the prosecutor is critical in analyzing whether the State's misconduct falls within the exception. *Giddins*, 163 Md. App. at 338. Indeed, "[p]rosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, . . . does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause." *Id.* (quoting *Kennedy*, 456 U.S. at 675-76) (emphasis in *Giddins* removed); *see also Johnson*, 452 Md. at 731 (Even if a motion for mistrial was "necessitated by prosecutorial or judicial error," it does not prohibit

a retrial absent conduct "attributable to prosecutorial or judicial overreaching." (quoting *United States v. Jorn*, 400 U.S. 470, 485 (1971) (plurality opinion))).

Here, the motions court appropriately considered the circumstances that led up to Mr. McLeod's motion for mistrial, and concluded, in substance, that the State had not intentionally goaded him into making that request. That conclusion was premised largely on the court's factual findings that (1) Detective Carson was not aware of the prohibition against mentioning the confidential informant, (2) the prosecutor had not acted with bad faith in its failure to inform the detective of the prohibition, and (3) Detective Carson's offending remark was not the product of any plan hatched by the State. To the contrary, the court found the reference to the informant to be an "unfortunate" consequence of the short time between its ruling on the motion in limine and the start of the trial, observing that the State "really didn't get a chance to tell" Detective Carson of the ruling. Because the record supports the motions court's factual findings, especially as they concern the critical issue of the State's intent, we cannot deem them clearly erroneous. *Middleton v. State*, 238 Md. App. 295, 304 (2018).

Mr. McLeod asserts that the motions court improperly discounted the State's failure to inform Detective Carson of the testimonial prohibition, and contends that the failure serves "as proof that the prosecution intended" to goad the defense into seeking a mistrial. We are not persuaded. The court considered Mr. McLeod's contention, but reached a different inference from the evidence before it. We have no basis on which we could set aside the court's inference and, therefore, must defer to its findings. *See Mason v. State*,

225 Md. App. 467, 476 (2015) ("[W]e defer to the fact finder's inferences from the evidence when the evidence supports different inferences.").

Nor do we find any merit to Mr. McLeod's claim that the court applied an incorrect legal standard in determining that there had been no "bad faith or conspiracy" and "no collusion or plan" involving the State and Detective Carson. To be sure, the test is whether the State intentionally goaded the defense into requesting a mistrial, but we discern no error in the motions court's analysis. Notably, it was Mr. McLeod's motion to dismiss that raised the possibility of collusion or coordinated action between the prosecution and the detective. Moreover, whether the State acted in bad faith and whether Detective Carson's blurted admission was the product of collusion between him and the prosecutor went to the heart of the issue before the court.

We conclude that the motions court's factual findings were not clearly erroneous and that it did not commit legal error in determining that the Double Jeopardy Clause does not bar retrial. We therefore affirm the denial of Mr. McLeod's motion to dismiss.

ORDER OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS ASSESSED TO THE APPELLANT.