Circuit Court for Baltimore County
Case No. 03K16001517

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1732

September Term, 2016

DONALD O'NEILL

v.

STATE OF MARYLAND

Woodward, C.J.,
Graeff,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

PER CURIAM

Filed: September 8, 2017

*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.

On the beginning of the second day of Donald O'Neill's (appellant) trial for attempted murder and related offenses, prior to the reception of any evidence or testimony, the Circuit Court for Baltimore County dismissed a juror due to illness and, because there were no alternates, declared a mistrial with appellant's consent. After a short recess, however, appellant moved to dismiss the charges against him for violation of the Double Jeopardy Clause.[1] The circuit court denied the motion and subsequently granted appellant's motion for an interlocutory appeal and a stay of proceedings. On appeal, appellant seeks our review of the court's denial of the motion to dismiss. Finding no error, we affirm.

Appellant contends that there was no manifest necessity for the mistrial because the court failed to inquire as to appellant's amenability to proceeding with eleven jurors. He compares this case with *State v. Kenney*, 327 Md. 354 (1992), and *Reemsnyder v. State*, 46 Md. App. 249 (1980). Essentially, appellant argues that there was no manifest necessity for a mistrial because there was a reasonable alternative of proceeding with eleven jurors. Alternatively, the court could have inquired into the ill juror's prognosis and waited to ascertain whether the juror's condition improved such that she could have served later. The State maintains that the court committed no error, mainly because appellant consented to the declaration of a mistrial.

[1] The Double Jeopardy Clause, part of the Fifth Amendment of the Constitution, provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb[.]"

The Court of Appeals explained in *Hubbard v. State*, 395 Md. 73, 88-89 (2006), that, among other things, the Double Jeopardy Clause prohibits successive prosecutions for the same offense. The Court recognized that an accused has a "'valued right to have the trial concluded by a particular tribunal[,]'" but that right "'is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury.'" *Id.* at 89 (quoting *Arizona v. Washington*, 434 U.S. 497, 505 (1978)). If a court grants a mistrial "**over the objection of the defendant**, double jeopardy principles will not bar a retrial if there exists 'manifest necessity' for the mistrial." *Simmons v. State*, 436 Md. 202, 213 (2013) (emphasis added). "It is well-established[,]" however, "that the grant of a mistrial upon a defendant's request **or consent does not preclude a retrial**." *Harrod v. State*, 423 Md. 24, 35 (2011) (emphasis added).

In this case, on the morning of the second day of trial, the court advised counsel that a juror had left a message with chambers indicating that she was too sick to appear. The court remarked that, if it dismissed the juror, "we have to start all over again." Defense counsel agreed. The juror was present, however, and the court questioned her with the parties present. Following questioning, the court dismissed the juror with the parties' consent and, after a short recess, declared a mistrial. Defense counsel asked if the court would select a new jury that day and inquired if potential jurors were available. After a short recess, the court informed counsel that potential jurors were available, and counsel made preparations to select a new jury.

After an approximately thirty-minute recess, defense counsel moved to dismiss the case on double jeopardy grounds. In denying appellant's motion, the trial court remarked

that the parties had been in agreement as to the dismissal of the juror and the declaration of a mistrial. Furthermore, the court observed that at no point did appellant object and that prior to questioning the juror, defense counsel acknowledged that they would have to start over again if the court dismissed the juror. From our review of the record, we agree that defense counsel consented to the declaration of a mistrial. For that reason, we perceive no error in the trial court's denial of the motion to dismiss, and there is no constitutional bar to retrying appellant.

Additionally, the cases upon which appellant relies are inapposite. In *Reemsnyder*, *supra*, this Court determined that there was a manifest necessity for the declaration of a mistrial when a juror experienced breathing difficulties during deliberations on a Friday evening and was admitted to the hospital for observation. 46 Md. App. at 250-54. The following Monday, the juror was still under observation, and the court dismissed him. *Id.* at 254-55. Prior to dismissing the juror, the court conducted an inquiry with Reemsnyder as to whether he would be willing to permit eleven jurors to deliberate; he refused. *Id.*

Appellant contends that he was not apprised of the possibility of proceeding with eleven jurors, and defense counsel asserts that he did not have the opportunity to discuss the issue with him. On appeal, appellant asserts that he "may well have decided to proceed with 11 jurors." Appellant concedes, however, that in speaking with the prosecutor during the recess prior to the declaration of a mistrial, he represented that he would not be willing to proceed with eleven jurors. Moreover, there is no requirement that the court conduct an inquiry with a defendant to ensure he or she understands the possibility of proceeding with fewer than twelve jurors.

In *Kenney*, *supra*, the Court of Appeals held that a trial court did not need to conduct a personal inquiry of a defendant in order for him or her to waive the right to a twelve-person jury. 327 Md. at 357, 361. Appellant contends that the Court of Appeals cautioned that a defense lawyer may not make this decision over the objection of his or her client and that "'the defendant ordinarily has the ultimate decision when the issue at hand involves a choice that will inevitably have important personal consequences for him or her, and when the choice is one a competent defendant is capable of making.'" *Id.* at 362 (quoting *Treece v. State*, 313 Md. 665, 674 (1988)). The Court also observed, in that same case, however, that "[i]t is certainly true that '[w]hen a defendant is represented by counsel, it is counsel who is in charge of the defense and his say as to strategy and tactics is generally controlling.'" *Id.* (quoting *Parren v. State*, 309 Md. 260, 265 (1987)). In this case, appellant was present during the proceedings in which the court questioned the juror and declared a mistrial, and he never objected to or questioned his counsel's agreement with these actions.[2]

In sum, because appellant consented to the dismissal of the juror and to the declaration of a mistrial, the trial court did not err in denying his motion to dismiss on double jeopardy grounds.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[2] We will not review appellant's argument as to questioning the ill juror concerning her ability to return or her prognosis. Appellant failed to raise this issue at trial, and there was no discussion of when, or if, the juror's condition would improve. *See* Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court[.]").