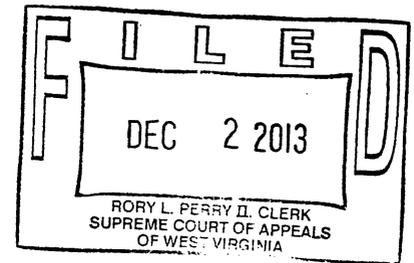


**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA**

at

**CHARLESTON, WEST VIRGINIA**

**No. 13-1111**



**Douglas Libert, Petitioner  
Below, Petitioner**

**Vs.**

**Joseph Kuhl, Magistrate in and for Wood County, West Virginia,  
Respondent**

**Wood County Circuit court  
Case Nos. 13-P-46  
The Honorable J.D. Beane**

**PETITIONER'S BRIEF ON BEHALF OF  
DOUGLAS LIBERT**

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## **ASSIGNMENT OF ERROR**

- 1. THE CIRCUIT COURT ERRED BY FAILING TO GRANT THE PETITIONER'S PETITION FOR A WRIT OF PROHIBITION WHERE THE MAGISTRATE GRANTED A MISTRIAL IN THE UNDERLYING PROCEEDING WITHOUT A MANIFEST NECESSITY TO DO SO, AFTER JEOPARDY HAD ATTACHED AND THEN INTENDED TO RE-TRY THE PETITIONER ON THE CHARGE.**

## **STATEMENT OF THE CASE**

### **A. Procedural History**

The Petitioner is charged with battery in the Magistrate Court of Wood County, West Virginia, in case number 12-M-3693. (App. Ex. 7). A jury trial was commenced on said trial on March 25, 2013. After the jury had been sworn, and upon motion by the State, Magistrate Kuhl granted a mistrial. A new trial was scheduled for June 17, 2013.

On or about April 17, 2013, the Petitioner filed a Petition for a Writ of Prohibition in case number 13-P-46 with the Circuit Court of Wood County, West Virginia, seeking to prohibit Magistrate Kuhl from trying the Petitioner a second time. (App. Ex 3).

By Order dated June 4, 2013, the Circuit Court denied the Petition. (App. Exs. 1 & 2) The Circuit Court has now stayed all proceedings in Magistrate Court until the resolution of this Appeal. The trial was recorded and a copy of that recording is attached as App. Ex. 9. Unfortunately, Magistrate Kuhl forgot to restart the recording after lunch and, therefore, the exchange regarding the mistrial is not of record.

### **B. Statement of Facts**

On or about the 30<sup>th</sup> day of September, 2012, the Petitioner was standing on his property located at 605 Elder Street, Parkersburg, West Virginia, and was engaged in

an argument with a neighbor. Another neighbor, Gary Teters, who lives across the street from the Petitioner, decided to inject himself into the conversation. Mr. Teters crossed the street and trespassed onto Mr. Libert's property. On his way over, Mr. Teters verbally threatened the Petitioner. At all times, the Petitioner was behind the fence on his property.

Mr. Teters claims that, eventually, the Petitioner spit on him and, at that point, Mr. Teters went back across the street. The Parkersburg Police Department was called and officers responded to the scene. The Petitioner had left before they arrived but the police eventually obtained a warrant for Petitioner's arrest for a battery charge and executed it upon him on October 4, 2012, in Magistrate Court Case No. 12-M-3693. (App. Ex. 7).

While the Petitioner was in his yard on that day he had a video camera. He recorded portions of the incident both before and after. However, he did not videotape the time of the alleged spitting. Nevertheless, the video does show Mr. Teters crossing the street, entering onto Petitioner's property and verbally threatening Petitioner prior to the alleged spitting. Inexplicably, Magistrate Kuhl excluded this tape from evidence at a pre-trial hearing because it did not show the alleged spitting incident even though it did depict events which immediately preceded that.

A jury trial on this matter was started on March 25, 2013. The Petitioner was represented by the undersigned Counsel, Mr. Eric Powell, Esq. The State of West Virginia was represented by Nancy McGhee and Megan Underwood, Assistant Prosecuting Attorneys. During his opening statement, the undersigned informed the jury of the existence of the videotape and informed them that they would not see it "because of the judge's ruling". The undersigned did not tell the jury which side was the proponent of the evidence. (App. Ex. 9).

The State timely objected to counsel's remark and a bench conference was held. During the conference, the Magistrate clarified that no further mention of the videotape

should be made. At the end of the conference, Magistrate Kuhl instructed the jury to disregard Counsel's remark about the videotape. The State of West Virginia did not move for a mistrial at that time. (App. Ex.9).

The undersigned completed his opening statement and the State called its first witness, Gary Teters. During his testimony, Mr. Teters mentioned that the Petitioner had his video camera on his shoulder while Mr. Teters crossed the street. Apparently, Counsel for the State had not instructed him not to mention this. (App. Ex. 9).

The trial adjourned for lunch during Mr. Teters testimony. Upon the parties return, the State of West Virginia made an untimely motion for a mistrial based on Counsel's mere mention of the videotape during his opening statement. While the State expressed concern over prejudice to their case as a result of the remark, they neither proffered or admitted any evidence that the jury was prejudiced or could not follow the Court's instruction to disregard the remark. Over defense counsel's objection, Magistrate Kuhl granted the State's Motion, declared a mistrial and scheduled a new trial on the battery charge for June 17, 2013.

### **SUMMARY OF ARGUMENT**

Counsel's remark to the jury was neutral and did not indicate to the jury whose case the video tape favored. Upon objection, the Magistrate gave a curative instruction to the jury advising them to disregard counsel's remark. At that time, the State did not move for a mistrial and acquiesced in the continuance of the trial. The State then presented a witness, the alleged victim, who mentioned the video tape in his testimony. After the lunch break, the State moved for a mistrial because of counsel's remark. The State made no showing of prejudice to their case or the jury as a result of counsel's remark. They simply speculated that the remark may have prejudiced the jury but did not request to poll or question the jury at that time. Magistrate Kuhl also did not question the jury or identify any specific prejudice. He simply granted the motion over

the objection of defense counsel. Magistrate Kuhl did not have a manifest necessity for granting the mistrial and failed to explore other options.

### STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner believes oral argument is necessary as:

- 1) All parties have not waived oral argument,
- 2) The appeal is not frivolous,
- 3) The dispositive law has been authoritatively decided but is applied on a case-by-case basis, and
- 4) Petitioner is unaware if the facts and legal arguments are adequately presented in the briefs since they have not all been filed.

Petitioner further believes that the case is appropriate for Rule 20 argument as it involves a constitutional question of double jeopardy regarding a court ruling.

### ARGUMENT

W.Va. Code §62-3-7 states, in relevant part, that:

“...And in any criminal case the court may discharge the jury, when it appears that they cannot agree in a verdict, or that there is manifest necessity for such discharge.”

“This power of the trial court must be exercised wisely, absent the existence for manifest necessity, a trial courts’ discharge of the jury without rendering a verdict has the effect of an acquittal of the accused and gives rise to a plea of double jeopardy.” State v. Williams, 172 W.Va. 295, 305 S.E. 2d 251 (1983).

"...[O]ne is in jeopardy when he has been placed on trial on a valid indictment, before a court of competent jurisdiction, has been arraigned, has pleaded and a jury has been impaneled and sworn. He is then in danger of conviction and punishment." Brooks v. Boles, 153 S.E. 2d 526 (W.Va. 1967).

Pursuant to Brooks and Williams, the Petitioner cannot be retried if Magistrate Kuhl did not have a "manifest necessity" for discharging the jury.

"The manifest necessity in a criminal case permitting the discharge of a jury without rendering a verdict may arise from various circumstances. Whatever the circumstances, they must be forceful to meet the statutory prescription." State v. Catlett, 536 S.E. 2d 728 (W.Va. 2000).

This case is very similar to Catlett. In Catlett, one of the State's experts mentioned the existence of excluded evidence. As in this case, he apparently did not give any details as to the content of that evidence. Counsel for the Defendant objected and asked for and received a curative instruction. He also moved for a mistrial, but that was denied.

On appeal, the Defendant asked the Court to reverse his conviction for the trial court's failure to grant a mistrial. Our Court denied him relief, stating:

"This Court has also stated that ordinarily where objections to questions or evidence by a party are sustained by the trial court during the trial and the jury instructed not to consider such matter, it will not constitute reversible error...Given the fact that the circuit court gave a curative instruction in this case which the parties agreed to, we do not find that the circuit court abused its discretion by denying the appellant's motion for a mistrial."

Generally speaking, it is improper to declare a mistrial because of an isolated incident of alleged Counsel misconduct which has been remedied by a curative

instruction to the jury. See State v. Sherrod, No: 11-1121 (W.Va. Sup. Ct., November 16, 2012) (Memorandum Decision); State v. Creamer, No: 11-0848 (W.Va. Sup. Ct., April 16, 2012) (Memorandum Decision); State v. Farmer, 406 S.E 2d 458 (W.Va. 1991) and State v. Catlett, supra.

"Where the prosecutor claims that the defense has by its actions prejudiced the jury, he is entitled to obtain a mistrial, without double jeopardy barring a retrial, if it can be shown (1) that the conduct complained of was improper and prejudicial to the prosecution, and (2) that the record demonstrates the trial court did not act precipitously and gave consideration to alternative measures that might alleviate the prejudice and avoid the necessity of terminating the trial. Arizona v. Washington [434 U.S. 497, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978)]." Keller v. Ferguson, 355 S.E. 2d 405 (W.Va. 1987).

"A court must explore alternatives before a mistrial for manifest necessity can be granted" U.S. v. Jorn, 400 U.S. 470, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971).

First, the State did not make a showing of prejudice to their case. Their argument that Counsel's remarks were prejudicial are pure speculation and nothing in the context of Counsel's remark suggested who was the proponent of the evidence, who objected to its admission or whose side of the case the videotape favored, if either.

The State could point to no conduct of any juror suggesting bias one way or the other and made no request to question or poll the jury to determine if any actual prejudice existed. The State's motion was untimely and failed to point out any intervening occurrence which was the fault of defense counsel or the court which exacerbated the situation. The only further mention of the videotape was made by the State's first witness.

In State v. Williams, supra, the Welch Daily News ran an article about the Defendant's trial on the first day of the trial. The article gave details regarding a third party's statement to the police and also recounted some comments attributed to the

prosecutor. The next day, Counsel for the Defendant moved for a mistrial based on the article. Counsel declined an offer by the Court to question the jury and the Court denied the motion for a mistrial. On appeal, this Court upheld the lower court's denial of the motion for a mistrial, stating;

Here, however, no showing was made at the time the motion for mistrial was tendered that any member of the jury had in fact seen or read the offensive article, we do not think that prejudice to the accused can be presumed from the mere opportunity during trial to read or to hear about objectionable media reports. See *McHenry v. U.S.*, 276 F. 761 (D.C. Cir. 1921); *Sundahl v. State*, 154 NE. 550, 48 N.W. 2d 689 (1951). Rather, a defendant who seeks a mistrial on the ground that the jury has [172 W. Va. 305] been improperly influenced by prejudicial publicity disseminated during trial must make some showing to the trial court at the time the motion is tendered that the jurors have in fact been exposed to such publicity. In the absence of a showing of juror exposure to prejudicial publicity during the courts of trial, it will be presumed that the jurors followed the trial court's instruction to avoid or to ignore such publicity. *Wayne v. Com.*, 219 Va. 683, 251 S.E. 2d 202, cert. denied, 442 S.S. 924, 99 S. Ct. 2850, 61 L.Ed.2d 292(1979).

Since in many instances it would be impossible for a defendant to show actual juror exposure to prejudicial publicity without a direct inquiry of the jurors themselves, we believe the proper methods of making such a showing is a poll of the jury at the time the motion for a mistrial is made. In *State v. Williams*, supra, we cited with approval the following language from § 3.5(f) of the American Bar Association's Standards Relating to Fair Trial and Free Press:

"If it is determined that material disseminated during trial raises serious questions of possible prejudice, the court may on its own motion or shall on motion of either party question each juror, out of the presence of the others, about his exposure to that material." [Emphasis supplied.]

160 W.Va. at 24, 230 S.E.2d at 746. If it appears from examination that none of the jurors were actually exposed to the prejudicial publicity, the court need make no further

inquiry. U.S. v Hankish, 502 F.2d 71 (4<sup>th</sup> Cir. 1971). If any of the jurors indicate that they have in fact read the prejudicial article, then the court should proceed with the individual examination of each juror mandated by State v. Williams, supra, to determine the effect of such exposure upon the juror's ability to render an impartial verdict in the case and to ascertain the corrective measures necessary to afford the defendant a fair trial.

Here however, counsel for the appellant did not request that an inquiry be made of the individual jurors. Indeed, as we noted earlier, counsel expressly declined to make such an inquiry. Instead he acquiesced in the continuation of the trial. The State asserts that by declining the opportunity to poll the jury at the time the motion for a mistrial was made, the appellant waived his right to object to the possible prejudicial effect of the publicity on the impartiality of the jury. We agree.

As in Williams, the State also acquiesced in the continuance of the trial and the court gave a curative instruction. When the motion for mistrial was made, the State showed no prejudice on the part of any juror and it is clear that no juror actually saw the videotape or was prejudiced by the mere mention of it. Also as in Williams, prejudice to the State should not "be presumed from the mere opportunity during trial to read or to hear about" the videotape.

Finally, the State made no request to poll or question the jury to establish any actual prejudice. Therefore, as in Williams, it should be "presumed that the jurors followed the trial court's [curative] instruction."

The trial court failed to explore alternatives to granting a mistrial. Over objection of defense counsel, he summarily granted the motion. While the defense agrees that the curative instruction should have been given, it also contends that should have been the end of it.

"The right to obtain a mistrial based on manifest necessity arising out of improper questioning by the parties should not be easily obtainable. We echo the sentiments expressed in *Oregon v. Kennedy*, and recognize that some degree of latitude must be accorded to attorneys for both sides in the clash of the adversary criminal process. Other courts have come to much the same conclusion and have applied the double jeopardy bar where the defense attorney's remarks were either not sufficiently prejudicial or, if they were, the court acted precipitously by not considering alternatives that would have cured the prejudice, E.g. *Spaziano v. State*, 429 S. 2d 1344 (Fla. App. 1983) (mis-statement of evidence in opening remarks..." ) *Keller*, supra.

The most egregious factor in this scenario is that Counsel's remark would never have occurred were it not for a frivolous motion to exclude it by the State and an erroneous ruling granting that motion by the court. The State objected to the video on the ground that it only depicted the events immediately leading up to the alleged incident and not the incident itself. Ironically, the State then called its first witness, Gary Teters, and asked him to testify about the events immediately leading up to the alleged spitting incident. All of this was on the videotape but somehow the tape was not relevant while Mr. Teters' testimony was. The only discernible difference between the two is that the videotape is objective, depicts the actual events and is not subject to interpretation or the bias, misstatement or outright possible deception of the partiality of the alleged victim. Moreover, once the State introduced Mr. Teters' testimony, the videotape was then admissible to impeach his testimony. By its own actions, the State cured any improper remark by Counsel for the Defendant.

A somewhat analogous issue arose in *State ex rel. Dandy v. Thompson*, 134 S.E. 2d 730 (W.Va. 1964). In *Dandy*, the Court initially allowed into evidence some cigarettes which the Defendant had moved to suppress. After subsequent testimony was admitted, the Court changed its mind and decided it had committed error in admitting the cigarettes. Over the objection of defense counsel, who had asked only to have the evidence stricken, the court declared a mistrial. (Importantly, the Court also

relied on the absence of the Defendant at a hearing during trial as a ground for mistrial).

On appeal, our court stated:

"However, as in the instant case, where the reason relied upon for discharging the jury, after the trial had begun and before a verdict, was an erroneous ruling of the court, a manifest necessity does not exist so as to meet the requirements of Code, 1931, 62-3-7...

Where the ground upon which the court relied to discharge the jury was a circumstance over which the court had control and which, by the exercise of due diligence, it could have prevented, no manifest necessity existed which would warrant the declaration of a mistrial.

It is not altogether, and at all times, within the discretion of the court to stop the prosecution and still hold the accused to answer to the same offense on a future charge. It may discharge the jury under peculiar circumstances in cases of necessity, for circumstances of such nature that neither the court nor the attorney nor the parties have any control over them. But to warrant this course there should be some emergency over which neither court nor attorney has control... we all agree that a defendant ought in no case to be put on a second trial for the same offense where the jury has been discharged over defendant's objection, because the court did not like the conduct of counsel or because the court may feel it has erred in prior rulings.

We are of the opinion that the trial court abused its discretion in discharging the jury and declaring a mistrial for the reason that it had erroneously permitted, over the objection of the petitioner, certain evidence to be introduced. If this were the only basis for the court's action, the petitioner would be entitled to the relief he herein seeks."

The Court went on to uphold the declaration of a mistrial on the separate ground that the Defendant was not present at a critical stage of the proceeding.

In this case, the grounds for a mistrial may not be the erroneous ruling of the Court, but it clearly stems from one. Counsel's remarks were brief, neutral and subsequently condoned by the State's actions. Petitioner should not again be held to trial as it would violate his Double Jeopardy rights.

W.Va. Code §53-1-1 states:

"The writ of prohibition shall lie as a matter of right in all cases of usurpation and abuse of power, when the inferior court has not jurisdiction of the subject matter in controversy, or having such jurisdiction, exceeds its legitimate powers."

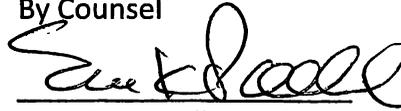
For the reasons set forth above, Petitioner contends that Magistrate Kuhl exceeded his legitimate powers in granting the mistrial and, therefore backs jurisdiction to retry the Defendant. Pursuant to State ex rel. Sulton v. Mazzone, 210 W.Va. 331, 557 S.E. 2d 385 (2001), Petitioner further alleges:

1. He has clear legal right to the relief sought,
2. There is a legal duty on the part of the Respondent to do the thing sought to be compelled,
3. Petitioner has no other adequate remedy at law,
4. Magistrate Kuhl exceeded his legitimate powers in granting the mistrial, and would do so again by retrying the Petitioner,
5. Further prosecution of the Petitioner would constitute a substantial abuse of discretion tantamount to a clear misapplication of applicable law,
6. No superior relief can be granted by an appeal after prosecution, and
7. The trial court's ruling is clearly erroneous as to the declaration of a mistrial.

**CONCLUSION**

Wherefore, Petitioner moves the Court to reverse the ruling of the Circuit Court of Wood County, West Virginia, and issue a Writ of Prohibition directing the Magistrate Court of Wood County to dismiss the charge of battery against the Petitioner, prohibit said Court from again forcing the defendant to trial on this matter and release him from further prosecution thereon.

Respectfully submitted,  
Douglas Libert,  
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DOUGLAS LIBERT,

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v.

Wood County Circuit Court

JOSEPH KUHL, Magistrate in  
And for Wood County, WV,

Case No. 13-P-46

Respondent.

**CERTIFICATE OF SERVICE**

I, Eric K. Powell, hereby certify that on November 27, 2013, I have caused to be served upon the parties hereto listed below, a true and accurate copy of the attached *Petitioner's Brief* by sending the same by U.S. Postal Service on same date to all the parties listed below with actual filing of same with the Clerk of the Circuit Court on November 27, 2013.

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