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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 23-330 – *State of West Virginia v. Kevin Scott Dickens*

BUNN, Chief Justice, dissenting, joined by Justice Flanigan:

By affirming the circuit court's sua sponte declaration of a mistrial, which the court made without receiving input from the parties and without the careful consideration required to declare a mistrial, the majority completely disregards the constitutional protection of the Double Jeopardy Clause that should prevent Mr. Dickens from being "subject for the same offence to be twice put in jeopardy of life or limb[.]" U.S. Const. amend. V; *see also* W. Va. Const. art. III, § 5. The circuit court abused its discretion and ignored procedural protections in declaring a mistrial, and the record demonstrates that there was no manifest necessity requiring a mistrial. Accordingly, I dissent.

1. Factual Background. As the majority recites, Mr. Dickens was indicted for first-degree murder and three counts of wanton endangerment following the shooting death of Jeremy Peters. Trial began on January 3, 2023. On January 10, 2023, the court recognized that one juror was ill.

The majority's recitation of the facts, however, leaves out a significant hearing that occurred the week before the court declared a mistrial. On January 12, 2023, in a hearing in chambers outside of the presence of the jury, the court lambasted the prosecution, noting that it was "extraordinarily concerned" with the State's failures during the trial. The court listed a litany of the prosecution's shortcomings, including a "late [West

Virginia Rule of Criminal Procedure] 16 disclosure" and an "amended witness list that [was] filed two times," and alluded to "everything that has occurred thus far in the courtroom," ruminating that the court "can't help but come to the conclusion in my mind that the State is either woefully unprepared or is not competent to try this matter."

The court also expressed frustration with the prosecution's inability to perform the "extraordinarily elementary" evidentiary task of "laying foundations and marking exhibits." The court further lamented, "I had to remind you of what questions to ask on more than one occasion . . . ." Continuing, the court noted that the prosecution was for "the highest crime that can be charged in the State of West Virginia . . . and I have grave concerns." The court inquired, "And I need to ask the State if the State is prepared and competent to try this case?" After asking the Prosecuting Attorney about her marking of exhibits, the court stated,

> I have major concerns, major concerns. I have due process concerns. I have constitutional concerns. I have competency concerns. And, frankly, if we keep having stumbling the way that they are happening out in that courtroom, [Prosecuting Attorney], we're going to be coming back here and we're going to be dealing with this in another manner.
>
> I have major concerns in regard to preparedness and competency.

The defense attorney then noted some of his concerns, identifying that the State's lack of competency could prejudice his client insofar as "the jury almost feels a

need to overprotect" the victim; defense counsel stated that, at that point in trial, he was not moving for a mistrial.

> The court concluded the hearing, stating
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> > All of this, cumulatively, is extraordinarily concerning. . . . And I have a very real concern that the State is unprepared or is not competent to try this.
> >
> > Something needs to change and you better figure out what it is. I don't know if it's, you know, you've got to pick up an evidence book. I don't know what you have to do, [Prosecuting Attorney], but something's got to change. [1]

On January 17, 2023, the next scheduled day of trial after the hearing during which the circuit court excoriated the prosecution's performance, as the majority details, the circuit court held a remote hearing to inform the parties it was sua sponte declaring a mistrial. It noted that one prosecutor, the court reporter, Mr. Dickens, the defense attorney, the judge, a law enforcement officer, and one of the jurors tested positive for COVID-19. The court stated "So, I have done some research on this matter, as I know will not surprise any of you that that's where I turn in circumstances like this. And folks, I'm going to, upon the [c]ourt's own motion, declare a mistrial in this matter." The court recognized that there had been no testimony for several days, and anticipated that the court was "not going to be

[1] This Court later suspended the Prosecuting Attorney's law license for three years, in part based upon her conduct and violations of the West Virginia Rules of Professional Conduct in this case. *See Law. Disciplinary Bd. v. Taylor*, No. 23-133, 2024 WL 4767010, at *10 (W. Va. Nov. 13, 2024) (memorandum decision).

having testimony from that point on for, you know, several more days, if we are capable of getting everybody in a symptom-free environment." The court went on to explain that it had "to be concerned about the health conditions of jurors as they sit in the jury box, and with this taking as many of us out, quite frankly, as what it has, I do have significant concerns for the health and safety of the jurors." Again, the court reaffirmed that "upon the [c]ourt's motion, I'm going to declare a mistrial based upon juror safety."

Although the court had already ruled, the court then inquired whether anyone would like to put anything on the record. Defense counsel immediately objected, noting that he and an attorney for the prosecution had "actually discussed and agreed on the idea of just simply pressing the pause button for a week." Defense counsel explained that "there are legions of reasons that [the mistrial] is not beneficial to my client." He contended that nothing would be different in a month, based on "Covid protocols[,]" noting that "this is now just a part of our lives in trying cases and so forth." Further, defense counsel indicated his client was not concerned "as far as the jury being in limbo with this case." He also noted that he felt "confident that [Mr. Dickens] would . . . prefer to keep the case alive than worry about things of that nature, because quite honestly, there's nothing in contest of consequence there."

Defense counsel, in an apparent attempt to assuage the court's earlier concern about the jury conducting independent research, also put on the record that he was not concerned about this issue in relation to a brief continuance because he had done "a media

search," and determined there was "very little" public information that could pollute the jury. He also noted that, "I would really like to think that . . . by next week, there is a good likelihood that we can all be up and running." Counsel also intimated that he could discuss "all the ways that a mistrial prejudices my client from a variety of different directions, but that's --" when the court interrupted him.

Before defense counsel began to recite other ways that his client might be prejudiced by a mistrial, the court interrupted and refused to reconsider its ruling or to entertain any argument:

> I've already ruled. This is a situation where if you would like to place objections on the record, you're welcome to, or we can convene a hearing to do that . . . that's not on video. It might be a little bit easier to do it that way, but I have concerns. We've had several jury trials that we haven't had Covid issues come out of. This one, you know, we've had a lot, and you know, moving forward, you know, we go from there. But I've already ruled on this.

The court continued, stating "I think that it is in the best interest of the general public at this point, and the jurors, and the [c]ourt, and parties at this point, that I have made the decision, frankly, that I have made."

Defense counsel then requested that the charges be dismissed because jeopardy attached, explaining that "[m]y client has been held for over a year on this, and has done nothing to cause this error. There have been other grounds for mistrial, that have already come up. Again, nothing caused by the defense." The court denied the motion,

stating "Your motion is denied, [counsel]. I have done a lot of research in regard to this, and this is not something that was caused by the State, this is something that was caused by a virus, and I'm denying your motion."

Two prosecutors were present for the hearing. When the court then inquired as to whether the State had anything "to place on the record" after the court issued the ruling, both prosecutors reported that they had nothing. Notably, they did not object or correct defense counsel's characterization of his agreement with the prosecution suggesting that the court pause the trial for a week. The court entered an order following the hearing, which the majority recites, declaring a mistrial and denying Mr. Dickens's motion for a dismissal due to double jeopardy.

2. Mistrials and Double Jeopardy. I first observe that the constitutional protection against being subject to a trial twice for the same offense is a building block of the Rule of Law. The Supreme Court of the United States has reiterated the importance of the double jeopardy protection in the Fifth Amendment to the United States Constitution, explaining that "jeopardy attaches before the judgment becomes final" and the defendant has a "'valued right to have his trial completed by a particular tribunal.'" *Arizona v. Washington*, 434 U.S. 497, 503 (1978) (quoting *United States v. Jorn*, 400 U.S. 470, 484 (1971), and describing the origin of this quotation in n.11). The Supreme Court has explained the importance of the prohibition on repeated prosecutions:

> The reasons why this "valued right" merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.

Id. at 503-05 (footnotes omitted).

Certainly, there are times where a jury must be discharged before the trial ends, and the defendant's "valued right to have the trial concluded by a particular tribunal 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 505. The prosecution shoulders the "heavy" burden to justify the mistrial, as this right "is frustrated by any mistrial[.]" *Id.* "The prosecutor must demonstrate 'manifest necessity' for any mistrial declared over the objection of the defendant." *Id.* Explaining manifest necessity, the Supreme Court emphasized the "high degree" of necessity required to declare a mistrial:

> The words "manifest necessity" appropriately characterize the magnitude of the prosecutor's burden. For that reason Mr. Justice Story's classic formulation of the test has been quoted over and over again to provide guidance in the decision of a wide variety of cases. Nevertheless, those words do not describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge. Indeed, it is manifest that the key word "necessity" cannot be interpreted literally; instead, contrary to the teaching of Webster, we assume that there are degrees of necessity and we

> require a "high degree" before concluding that a mistrial is appropriate.

Id. at 505-06 (footnotes omitted).[2] Additionally, the court "must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *Porter v. Ferguson*, 174 W. Va. 253, 257, 324 S.E.2d 397, 401 (1984) (quoting *Washington*, 434 U.S. at 514).

West Virginia Rule of Criminal Procedure 26.3, originally effective September 1, 1995, provides the procedure a court must follow before pronouncing a mistrial: "Before ordering a mistrial, the court shall provide an opportunity for the state and for each defendant to comment on the propriety of the order, including whether each party consents or objects to a mistrial, and to suggest any alternatives." Two years earlier, a nearly identical version of this Rule was added to the Federal Rules of Criminal Procedure.[3] The 1993 Advisory Committee's Notes regarding the adoption of the federal

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[2] This Court's pronouncements and West Virginia Code reiterate the requirement of manifest necessity. Pursuant to West Virginia Code § 62-3-7, "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." Like the Supreme Court's declaration that a mistrial requires a high degree of necessity, this Court has determined that the manifest necessity "must be forceful to meet the statutory prescription." Syl. Pt. 1, *State ex rel. Brooks v. Worrell*, 156 W. Va. 8, 190 S.E.2d 474 (1972) (quoting Syl. Pt. 2, *State v. Little*, 120 W. Va. 213, 197 S.E. 626 (1938)).

[3] The 1993 version of Federal Rule of Criminal Procedure 26.3 contained a similar provision to the West Virginia Rule of Criminal Procedure 26.3. The federal rule has since been amended but only "to make [the Rule] more easily understood and to make style and

Rule explained that the Rule was "designed to reduce the possibility of an erroneously ordered mistrial which could produce adverse and irretrievable consequences."[4] The Advisory Committee's Notes cited two appellate cases reversing the trial court due to double jeopardy violations, *United States v. Dixon*, 913 F.2d 1305 (8th Cir. 1990), and *United States v. Bates*, 917 F.2d 388 (9th Cir. 1990), recognizing that, in these cases, "the appellate courts concluded that the trial court had acted precipitately and had failed to solicit the parties' views on the necessity of a mistrial and the feasibility of any alternative action." Fed. R. Crim. P. 26.3 advisory committee's note to 1993 adoption. Explaining that "the new Rule [was] designed to remedy that situation[,]" the Advisory Committee explained that, among other benefits,

> The Rule ensures that a defendant has the opportunity to dissuade a judge from declaring a mistrial in a case where granting one would not be an abuse of discretion, but the defendant believes that the prospects for a favorable outcome before that particular court, or jury, are greater than they might be upon retrial.

Id.

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terminology consistent throughout the rules" and the "changes are intended to be stylistic only." Fed. R. Crim. P. 26.3 advisory committee's note to 2002 amendments.

[4] When considering West Virginia Rules of Criminal Procedure patterned after similar federal rules, we may examine the advisory committee's notes of the federal rule when considering how to apply them. *See, e.g.*, *State ex rel. Appleby v. Recht*, 213 W. Va. 503, 510-11, 583 S.E.2d 800, 807-08 (2002) (per curiam) (collecting cases regarding the advisory committee's notes to the Federal Rules of Criminal Procedure).

3. **The majority gives the circuit court undeserved discretion.** The majority discounts the circuit court's failure to follow the procedural protections set forth in West Virginia Rule of Criminal Procedure 26.3 that require it to solicit input from the parties. As noted above, the Rule was put in place to avoid this very issue. Given the importance of the constitutional right at stake, a trial court's discretion must be carefully employed when considering potential double jeopardy violations. Syl. Pt. 2, *State ex rel. Brooks v. Worrell*, 156 W. Va. 8, 190 S.E.2d 474 (1972). Yet, the majority further unnecessarily reduces the amount of scrutiny it employs in reviewing the circuit court's abrupt decision, brushing over the agreement of the parties to pause the trial, and wholly ignoring the circuit court's harsh criticism of the State's performance leading up to the sua sponte declaration of a mistrial.

The majority relies on *United States v. Wecht*, 541 F.3d 493 (3d Cir. 2008), to justify its conclusion that even if the court violated Rule 26.3, the reviewing court may still find no abuse of discretion by the trial court. While the majority acknowledges that failure to follow the rule "in most instances . . . will suggest the circuit court failed to exercise sound discretion" and that some resulting "loss of deference" is appropriate, it nonetheless brushes off the circuit court's failure as, essentially, inconsequential. The majority describes the circuit court's declaration of a mistrial with no input or considerations from the parties as merely "an inexact procedure" rather than a glaring dereliction to provide Mr. Dickens with required procedural protections. Despite relying on *Wecht*, the majority overlooks that the *Wecht* court found that appellate scrutiny is

"elevate[d]" when the trial court "violates Rule 26.3 or makes other significant procedural errors in reaching that conclusion." *Wecht*, 541 F.3d at 507.

Furthermore, the majority's reliance on *Wecht*'s reasoning—essentially discounting the impact of a Rule 26.3 failure—is misplaced. The trial court in *Wecht* considered a markedly different scenario from the one contemplated by the circuit court here. The *Wecht* court, in finding no double jeopardy violation despite Rule 26.3 violation, recognized the trial court's decision was based on a deadlocked jury, requiring increased deference to its decision to declare a mistrial. *See id.* at 505-06 (recognizing that "[t]he Supreme Court has made it clear that appellate scrutiny decreases when the mistrial is based on a deadlocked jury," and that the appellate court "accord[s] considerable deference to a [trial] court's judgment as to the existence of a deadlocked jury that manifestly necessitates a mistrial").

In contrast, in the situation presented in the instant case, the Court should undertake a stringent degree of review because the circuit court abandoned procedural protections even when the parties proposed a joint plan to avoid the mistrial and the State failed to justify the necessity of a mistrial. Although the circuit court repeatedly declared that it had done "research," the court only allowed defense counsel to make a partial record of objections and did not entertain the reasonable alternatives set forth by the defense counsel and agreed upon by the State. The court did not even mention the Rules of Criminal Procedure and proceeded to its brash ruling just days after strongly suggesting that the State

was botching its prosecution against Mr. Dickens. These circumstances were not deserving of the same deference as a deadlocked jury.

In *United States v. Dennison*, the United States Court of Appeals for the First Circuit demonstrated the proper way to consider whether a mistrial led to double jeopardy in the face of a COVID-19 diagnosis by a chief witness. 73 F.4th 70 (1st Cir. 2023). The *Dennison* court affirmed the district court's issuance of a mistrial in May 2022 due to a chief government witness testing positive for COVID-19. *Id*. at 72. The *Dennison* district court's process of issuing the mistrial, and the First Circuit's subsequent analysis of this process, is instructive in explaining how the majority's analysis fails. In *Dennison*, the prosecution's main witness, a federal agent who was also the case agent (the main agent sitting through the trial), tested positive for COVID-19 during the first morning recess of trial, after he had already partially testified while wearing a facemask. *Id.* at 73. The district court made a record of its options in light of the positive COVID-19 test, including telling the jury that the witness tested positive, yet "tentatively" concluded that a mistrial was appropriate. *Id.* at 73-74. The court then recognized that Rule 26.3 required the trial court to inquire with the parties as to both their positions and any suggested alternatives. *Id.* at 74. The First Circuit commended the court for "wisely solicit[ing] the views of counsel" before declaring a mistrial, also noting that the defense counsel did not "propose to the court any mitigating measures short of a mistrial[,]" and the prosecution "equivocated" while "expressing concern[,]" but ultimately "defer[ring] to the judgment of the court." *Id*.

Regarding the standard of review employed, the *Dennison* court explained that reviewing for abuse of discretion after a court declares a mistrial was not a "rubber stamp":

> Abuse of discretion is a deferential standard of review, but it is not without some bite. It is not meant to provide a rubber stamp for the district court's discretionary determinations. Rather, when reviewing a trial court's declaration of a mistrial, we assess whether that decision reflected "a scrupulous exercise of judicial discretion," *United States v. Jorn*, 400 U.S. 470, 485, 91 S. Ct. 547, 27 L.Ed.2d 543 (1971), and was justified by a "high degree" of necessity, *Washington*, 434 U.S. at 506, 98 S. Ct. 824.

Id. at 78. In affirming the district court, the First Circuit emphasized, repeatedly, that the district court considered its options before determining a mistrial was necessary, noting that "[w]here . . . the district court fully considers, but reasonably rejects, lesser alternatives to a mistrial, we will not second-guess its determination." *Id.* (quoting *United States v. McIntosh*, 380 F.3d 548, 556 (1st Cir. 2004) (alteration in *Dennison*)). It also likened the district court to a quarterback, scoping possible plays:

> When confronted with the need to decide whether to declare a mistrial, the district court — like a quarterback in the red zone — must scan the field and mull all of the available options. Considering the myriad challenges posed at the relevant time by the virulence of the COVID-19 pandemic, we think that rejecting the alternatives discussed above was an appropriate exercise of the court's discretion.

Id. at 79.

While the *Dennison* court ultimately affirmed the trial court's declaration of a mistrial based on the chief witness's mid-trial COVID-19 diagnosis, it explained that,

although the defendant challenged the length of time the district court spent discussing the mistrial, courts "are more concerned with the scope and quality of the district court's reflection" than the time spent discussing the issue, and noted that there, the district court did not "rush[] headlong to abort a trial without endeavoring 'to ascertain the [defendant's] attitude or wishes with regard to the possibility of a mistrial.'" *Id.* at 82 (quoting *United States v. Toribio-Lugo*, 376 F.3d 33, 39 (1st Cir. 2004) (second alteration in *Dennison*)).[5]

Unlike the district court in *Dennison*, which considered possible alternatives and the parties' arguments before issuing a mistrial, here the circuit court entered the hearing, issued an edict that the court had made up its mind, and ignored the parties' agreement proffered by defense counsel to adjourn for a week. The circuit court further ignored defense counsel's concerns of the prejudice that could befall the defendant at that point in trial, even after it had, one week earlier, expressed deep concern about the State's ability to adequately prosecute the case. And when asked by the court whether the State had anything to place on the record, in response, the prosecution had nothing to add and no justification for the mistrial, as was its burden when the defendant objected. *See Washington*, 434 U.S. at 505.

[5] The *Dennison* court also found that it was not an abuse of discretion to not order a continuance, particularly as the defendant did not raise this issue "as an alternative to a mistrial" until the appeal. *United States v. Dennison*, 73 F.4th 70, 80 & n.5 (1st Cir. 2023).

The majority's decision to exercise a "less stringent" standard of review is untenable when (1) a defendant's constitutional right not to be tried for the same crime twice is at stake, and (2) the circuit court refused to entertain any reasonable alternatives to self-declaring a mistrial. The majority's approach also completely ignores that the circuit court, only a few days before declaring the mistrial, berated the State for its inadequate trial performance. The timing and harshness of the court's criticism of the State coupled with its failure to consider any alternative arrangements suggests that the sua sponte mistrial may have been a means to allow the State an unconstitutional second chance, yet the majority does not even address this.

4. The record demonstrates no manifest necessity existed for the mistrial. Finally, the majority fails to observe that the circumstances and record do not demonstrate the manifest necessity of mistrial. Rather, the majority's entire justification for its decision appears to be that people had COVID-19, and, as an appellate court, we cannot second guess the trial court. While COVID-19 was still certainly a concern at the time of Mr. Dickens's first trial in 2023, it was no longer the uncertain territory it was in March of 2020. While at times, illness can lead to the manifest necessity to declare a mistrial, such "unforeseeable circumstances" still must make the trial's "completion impossible." *See State ex rel. Dandy v. Thompson*, 148 W. Va. 263, 268-69, 134 S.E.2d 730, 734 (1964). The parties' request to pause the trial for only a week, particularly as defense counsel noted he was already almost symptom-free, demonstrates that no manifest necessity required a mistrial. Yet, the court did not even entertain these arguments, and the State—who had the

burden—failed to show the mistrial was necessary, failing to offer any reason at all to support a mistrial.

In sum, the majority recognizes an important right in the Constitutions of both West Virginia and the United States, yet inexplicably refuses to provide Mr. Dickens with the benefit of this right under, at best, questionable circumstances. While the majority recites many of the Supreme Court's pronouncements on double jeopardy, it fails to protect Mr. Dickens from a violation caused by the circuit court. I dissent. I am authorized to state that Justice Flanigan joins me in this dissenting opinion.