1972

Constitutional Law: Double Jeopardy - New Approach to the "Manifest Necessity Rule"

Ronald C. Brown

CONSTITUTIONAL LAW: DOUBLE JEOPARDY—NEW APPROACH TO THE "MANIFEST NECESSITY RULE"

I. INTRODUCTION

This note will examine the double jeopardy provision of the fifth amendment and the application of that provision by the federal courts through the "manifest necessity rule." It will discuss the "liberalizing" trend the federal courts have been taking in this area and the present status of the double jeopardy provision.

II. THE CASE

On January 25, 1971, the United States Supreme Court handed down the decision in *United States v. Jorn*.[1] Milton C. Jorn, the defendant, was charged with willfully assisting in the preparation of fraudulent income tax returns.[2] The federal district court[3] had impaneled a jury, and an agent for the Internal Revenue Service had testified. The Government's next five witnesses were taxpayers, who allegedly had been aided by Jorn in preparing their returns. The trial judge refused to allow the taxpayers' testimony, stating as his reason his doubt that the taxpayers had been given adequate warning of their constitutional rights when initial contact had been made by the Internal Revenue Service. The trial judge then declared a mistrial in order to give the witnesses an opportunity to consult with attorneys. The mistrial ruling was made without the consent of the defendant, and notwithstanding the fact that the first taxpayer to be called as a witness and the prosecuting attorney both stated that the taxpayers had been warned of their constitutional rights when first contacted.

The case was set for retrial. However, before the second jury was impaneled, Jorn moved for dismissal on the grounds of former jeopardy. The motion was granted and the Government took direct appeal to the United States Supreme Court.[4] Six members of the Court agreed with the district court's ruling and affirmed.

III. BACKGROUND

Former jeopardy is provided for in the fifth amendment of the United States Constitution,[5] and the United States Supreme Court in

1. 400 U.S. 470 (1971).
2. *See* 26 U.S.C. § 7206(2) (1954).
3. District of Utah.
4. Appeal was under 18 U.S.C. § 3731 (1949).
5. U.S. CONST. amend. V: "[N]or shall any person be subject for the same offense to be

Green v. United States announced the policy behind this constitutional safeguard:

> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.[6]

As important as this policy is, the fifth amendment is not an absolute bar to reprosecution, but must be balanced with society's interest "in fair trials designed to end in just judgments."[7] With a view toward balancing these interests, the United State Supreme Court stated in *United States v. Perez:*

> [T]he law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever . . . taking all circumstances into consideration, *there is a manifest necessity for the act,* or the ends of public justice would otherwise be defeated. . . . To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes . . . .[8] (emphasis added)

The "manifest necessity rule" has never been clearly defined, but, as the Court pointed out, the determination must be made upon the circumstances of each individual case. The federal courts have held in the past that a manifest necessity did exist when there was a hung jury,[9] the jurors might be biased,[10] the trial judge during the proceedings discovered the indictment was defective,[11] a juror[12] or the defendant[13]

---

twice put in jeopardy of life or limb . . . ." *But see* Note, *Double Jeopardy: The Reprosecution Problem,* 77 HARV. L. REV. 1272 (1964) which contends that the amendment's ambigious terms, coupled with its common law background, originally prohibited reprosecution only after a verdict of acquittal or conviction. The article continues to point out that the English law today retains the rule that jeopardy does not attach before verdict.

6. 355 U.S. 184, 187-88 (1947).

7. Wade v. Hunter, 336 U.S. 684, 689 (1949); *accord,* United States v. Jorn, 400 U.S. 470, 479-80 (1971). The Court said:

> "[A] criminal trial is a . . . complicated affair to manage. . . . [I]t becomes readily apparent that a mechanical rule prohibiting retrial whenever circumstances compel the discharge of a jury without the defendant's consent would be too high a price to pay for the added assurance of personal security and freedom from governmental harassment . . . . '[A] defendant's valued right to have his trial completed by a particular tribunal must in some circumstances be subordinated to the public's interest in fair trials designed to end in just judgments'."

8. 22 U.S. (9 Wheat.) 579, 580 (1824).

9. *Id.*

10. Simmons v. United States, 142 U.S. 148 (1891).

11. Simpson v. United States, 229 F. 940 (9th Cir. 1916), *cert. denied,* 241 U.S. 668 (1916).

12. United States v. Potash, 118 F.2d 54 (2d Cir. 1941), *cert. denied,* 313 U.S. 584 (1941).

became too ill to continue, the district attorney unfairly prejudiced the jury,[14] wrongful remarks on the part of the trial judge were made,[15] or the tactical needs of the military deserved consideration,[16] just to mention a few.

With the "manifest necessity rule" the courts had very little difficulty in affording valid reasons for allowing reprosecution where a mistrial had been declared for reasons other than misconduct on the part of the government or the trial judge. The 1961 case of *Gori v. United States*,[17] made the fifth amendment right even more "illusory." In that case the trial judge had declared a mistrial due to a line of questioning which he considered designed to disclose the defendant's prior crimes. The Court allowed reprosecution, basing its decision on several grounds. It reasoned that the trial judge had exercised his discretion which an appellate court would not reverse except on a clear showing of abuse, that the trial judge had acted in the best interest of the accused which was not an abuse of his discretion, and that the trial judge was in a much better position to determine the necessity of a mistrial than an appellate court.

Even though the *Gori* decision widened the area in which reprosecution was permitted, it also marked the turning point to a more "liberal view" of double jeopardy.[18] This view is indicated by the slim majority and the dissenting opinion of Mr. Justice Douglas, joined by the Chief Justice, Justices Black and Brennan, in which Justice Douglas stated, "[t]he policy of the Bill of Rights is to make rare indeed the occasions when the citizen can for the same offense be required to run the gantlet twice."[19]

The liberalizing trend continued,[20] and in 1969 the Court handed down its decision in *Benton v. Maryland*.[21] Until that time the Court had held that the double jeopardy provision of the fifth amendment was not applicable to the states,[22] but in *Benton* the Court stated:

---

13. United States v. Stein, 140 F. Supp. 761 (S.D.N.Y. 1956).

14. Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949), *cert. denied*, 338 U.S. 860 (1949).

15. United States v. Giles, 19 F. Supp. 1009 (W.D. Okla. 1937).

16. Wade v. Hunter, 336 U.S. 684 (1949).

17. 367 U.S. 364 (1961).

18. *See* Note, *Double Jeopardy: The Reprosecution Problem*, 77 HARV. L. REV. 1272, 1277 (1964).

19. 367 U.S. 364, 373 (1961).

20. *See, e.g.*, Downum v. United States, 372 U.S. 734 (1963) where the Court, Mr. Justice Douglas writing the majority opinion, refused to allow reprosecution when the jury had been discharged over the defendant's objection for failure of a key witness to appear.

21. 395 U.S. 784 (1969).

22. *See* Palko v. Conn., 302 U.S. 319 (1937).

> [W]e today find that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage, and that it should apply to the States through the Fourteenth Amendment.[23]

IV. ANALYSIS OF THE DECISION

In *Jorn* the Court has continued to widen the double jeopardy protection. The case has been characterized as, "the penultimate if not the end product of a 'trend toward reducing the occasions on which criminal defendants may be made to "run the gantlet twice".' "[24]

In *Jorn* the Court reviewed the use of discretion by the trial judge and concluded that there had been an abuse in that no effort was made to avoid a mistrial. The Court pointed out that there was reason to believe that adequate warning of constitutional rights had been given to the witnesses, and if not, a continuance would have been more in order than a mistrial. In other words, there was no demonstration of a manifest necessity for a mistrial.

The government was relying on *Gori,* but the Court pointed out that in *Gori,* reprosecution was allowed because the trial judge was acting on behalf of the defendant in declaring a mistrial, whereas, in the present case, the trial judge was acting on behalf of the witnesses, rather than the defendant. The Court pointed out that they would not consider a hypothetical situation concerning who would finally receive the benefit of the mistrial. The Court then said:

> Further, we think that a limitation on the abuse-of-discretion principle based on an appellate court's assessment of which side benefited from the mistrial ruling does not adequately satisfy the policies underpinning the double jeopardy provision. Reprosecution after a mistrial has unnecessarily been declared by the trial court obviously subjects the defendant to the same personal strain and insecurity regardless of the motivation underlying the trial judge's action.[25]

V. THE EFFECT

The discretion of a trial judge in declaring mistrials was greatly limited by the *Jorn* decision. However, there were still some questions as to his discretion when acting for the benefit of the defendant, or when the defendant had consented to the mistrial ruling.[26] These questions

---

23. 395 U.S. 784, 794 (1969).

24. United States v. Walden, 448 F.2d 925, 928 (4th Cir. 1971).

25. 400 U.S. 470, 483 (1971).

26. *See generally* Note, *Double Jeopardy--Declaration of Mistrial Without Consent of Defendant,* 32 LA. L. REV. 145 (1971).

were answered, and insight given to the future application of *Jorn*, in *United States v. Walden*,[27] decided on September 21, 1971, by the United States Court of Appeals for the Fourth Circuit.

Walden involved eleven defendants charged with substantive offenses and conspiracy to burglarize numerous banks in various Southeastern states. During the first trial, two jurors inadvertently remained in the jury room while the court was in a lunch recess. When the federal marshal discovered their absence, he went back to find them and discovered they had entered a hallway in the presence of several of the defendants. At the time, the defendants were in custody and, the trial judge assumed, were handcuffed.

When the trial judge was informed of this incident, he suggested that the defendants move for a mistrial. Counsel for the defendants requested that the prejudicial event be clarified and asked the trial judge to consider other curative measures.[28] The judge refused to do so. After a short recess, four of the defendants moved for a mistrial. The court, however, declared a mistrial as to all the defendants and denied a motion for severance made by six of the defendants who did not join in the motion for mistrial.[29]

On the second trial, the defendants were found guilty by jury verdicts and appealed, contending, among other things, that the second trial constituted double jeopardy in violation of the fifth amendment. The court of appeals agreed with the double jeopardy argument and reversed under the authority of *Jorn*.

The court of appeals held that, "[t]he manifest necessity doctrine as restated in *Jorn* demands a thorough inquisition by the trial judge into all the facts and painstaking consideration of all possible cures short of trial abortion."[30] In *Walden* the trial judge not only failed to perform this duty, but refused to do so. The court pointed out that the two viewing jurors could have been questioned as to their impressions of the incident since they could have correctly understood the event. The court also felt that the two jurors could have been replaced with two

27. 448 F.2d 925 (4th Cir. 1971).

28. Counsel for the defendants specifically requested that the two viewing jurors be questioned as to their impressions of the incident or that the two jurors be removed and two alternates placed on the panel. One attorney went so far as to inform the trial judge that if a mistrial was declared without the consent of all the defendants there would be problems with double jeopardy upon retrial.

29. The trial judge felt the incident was prejudicial because it would suggest to the two viewing jurors that the defendants were being held in custody for prior crimes. *See* Holmes v. United States, 284 F.2d 716 (4th Cir. 1960) where conviction was reversed because a court official inadvertently told the jury of the defendant's past criminal record.

30. 448 F.2d 925, 930 (4th Cir. 1971).

alternates, or the trial could have proceeded with less than twelve jurors.

The court of appeals then considered the four defendants who formally moved for mistrial. The court noted that such a motion normally prevents double jeopardy claims against reprosecution, but also pointed out that the motion was by the trial judge rather than the defendants. This fact, coupled with the time element and the trial court's stated belief that fatal error had been committed, negated any "voluntariness" in the motion:

> Instead we adopt the middle ground of inquiring into the circumstances surrounding the formal entry of the motion. Certainly if a judge uses his authority to intimidate the accused into consenting (something which did not occur here) there is no real waiver. . . . But short of such judicial overreaching, it seems to us that when a motion for mistrial is invited by the court with intimation that the perceived error is fatal according to a decision called to counsels' attention by the court, and little time has been granted to consider whether such a motion should be made, the result of freedom for some and imprisonment for others should not depend simply upon which of multiple defendants made the motion.[31]

One final point should be made about *Walden*. The trial judge was undoubtedly acting in the best interest of the defendants, not the witnesses, as in *Jorn*. However, the court of appeals held that the judge's motivation was no longer a valid consideration into the problem of reprosecution. "We think that *Jorn* all but eliminates trial judge motivation as an element to be considered in determining whether an aborted trial bars reprosecution."[32]

VI. CONCLUSION

In closing, it can be seen that the "manifest necessity rule" announced in *Perez* is still valid today; however, the *Jorn* and *Walden* decisions have narrowed considerably the trial judge's discretion in applying the rule to a given factual situation. No longer can there be reprosecution simply because the defendant formally moves, or consents to, a mistrial; nor can retrial be had because the judge was acting in the best interest of the defendant. The trial judge must now make a thorough inquisition into all the surrounding facts and circumstances and exhaust all other curative measures before he declares a mistrial.

The dissenting opinion of Mr. Justice Douglas in *Gori* in 1961 stated, "[t]he policy of the Bill of Rights is to make rare indeed the

---

31. *Id.* at 930.
32. *Id.* at 928.

occasions when the citizen can for the same offense be required to run the gantlet twice."[33] This view has now been accepted by the Court. Due to the *Jorn, Walden* and *Benton* cases those occasions are "rare indeed."

RONALD COLE BROWN

CONSTITUTIONAL LAW: PAROLEE'S RIGHT TO COUNSEL AT A PAROLE REVOCATION HEARING

I. INTRODUCTION

Recently, the Court of Appeals for the Second Circuit held in *Bey v. Connecticut State Board of Parole*[1] that a parolee has the right to have counsel at a parole revocation hearing. This note examines the problem of whether or not a parolee is entitled to counsel at such proceedings.

II. THE CASE

Bey had been released from prison on a finding by the parole board that there was a "reasonble probability that [he would] live and remain at liberty without violating the law and . . . [that his] release [was] not incompatible with the welfare of society."[2] Less than six months later he was arrested and reincarcerated because of his activities during the time he was on parole. The only account of Bey's conduct while he was on parole came to the parole board at the time of the revocation hearing in a report by his parole officer. The report cited certain sexual activities of Bey and his possession of a weapon (a knife was found in his closet) as parole violations. Although Bey had performed the duties required of him on three different jobs during his parole, he had disappointed, annoyed and disturbed his employers and eventually his parole officer.[3] It was a totality of events and not any one event that led his parole officer to consider him "mentally incapable of accepting the responsibilities of parole."[4]

Bey was given reasonable notice of the charges against him and was

33. 367 U.S. 364, 373 (1961).

1. 443 F.2d 1079 (2d Cir. 1971).
2. *Id.* at 1080-81.
3. *Id.* at 1081.
4. *Id.* at 1082.