FILED
United States Court of Appeals
Tenth Circuit

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ROBERT L. HOECKER
Clerk

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

FRANK FICARRA,

Defendant-Appellant.

No. 90-1180
(D.C. No. 90-CR-115)
(D. Colo.)

ORDER AND JUDGMENT*

Before MCKAY, TACHA and BALDOCK, Circuit Judges.**

Two issues are before us: 1) whether a chief district judge (chief judge), upon the apparently reasonable belief that the presiding senior district judge (presiding judge) is ill, abuses his discretion in granting a "manifest necessity" mistrial when the defendant does not consent to substitution of judges, and 2) whether that chief judge in a criminal bench trial may withdraw an earlier mistrial order prior to a second trial of the defendant.

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause therefore is ordered submitted without oral argument.

We hold that the chief judge did not abuse his discretion in declaring a manifest necessity mistrial when the defendant did not consent to substitution. We further hold that the chief judge who stepped into the proceedings for the presiding judge had the power to withdraw his mistrial order. We remand for prompt continuance of the trial before the presiding judge who has since returned to the bench.

I.

This case came to us by way of original jurisdiction when defendant sought a stay of district court proceedings and a writ of prohibition in case no. 90-1177. We granted a stay of proceedings. In case no. 90-1180, defendant then appealed from the district court's order denying his motion to dismiss on double jeopardy grounds on the basis of Abney v. United States, 431 U.S. 651, 662 (1977). We transferred and reentered our stay order in the appeal (case no. 90-1180) and dismissed the original jurisdiction matter. Our jurisdiction to consider the denial of the motion to dismiss the indictment on the grounds of double jeopardy arises under the collateral order doctrine as an exception to the finality requirement under 28 U.S.C. § 1291. Abney, 431 U.S. at 656-62; United States v. Von Spivey, 895 F.2d 176, 177 (4th Cir. 1990); United States v. Lynch, 598 F.2d 132, 134 (D.C. Cir. 1978), cert. denied, 440 U.S. 939 (1979).

Defendant's criminal bench trial began on June 4, 1990. The court had begun the taking of evidence, so jeopardy attached. Lee

v. United States, 432 U.S. 23, 27 n.3 (1977) (in a bench trial, jeopardy attaches when court first hears evidence). When the court adjourned that day, the trial was virtually complete and the defendant had presented most of his case to the presiding judge. That evening, both the government and defense counsel were notified that the presiding judge was ill and hospitalized. The trial was continued to June 8. On June 8, the trial was again continued to June 13. On June 11, however, the chief judge transferred the case to himself and directed that the case would proceed, apparently having been informed by the presiding judge that the presiding judge could not continue. See rec. vol. IV at 11-12. On June 13, the chief judge sought suggestions on how the case should proceed because the presiding district judge was unable to go forward. The parties stipulated that a lengthy adjournment of up to four weeks and perhaps indefinitely would be appropriate in the hopes that the presiding judge could hear the case at a later date.

On June 18, however, the chief judge referred the parties to Fed. R. Crim. P. 25(a) and sought the defendant's consent for a substitution of judges that would allow the chief judge to review the transcript of the trial and pick up where presiding judge left off. The defendant did not consent, so the chief judge declared a mistrial on the grounds of manifest necessity after finding "it uncertain when [the presiding judge] will return to the bench in an active way or when he may in fact resume responsibility in this trial." The chief judge then set the matter for jury trial commencing on June 25.

On June 20, defendant filed a motion to dismiss on the grounds of double jeopardy. The government responded the next day, informing the chief judge that the presiding judge had returned to work. On June 21, the chief judge vacated the mistrial and reassigned the case to the presiding judge. Thereafter, the chief judge entered a minute order denying the motion to dismiss as moot. That order is the subject of this appeal.

II.

To understand the case, it is necessary to delve into the rule which informed the chief judge's exercise of discretion in part. By way of backgound, "if a presiding judge in a civil case becomes disabled prior to issuing findings of fact and conclusions of law, the a successor judge must ordinarily retry the case unless the parties stipulate otherwise." Home Placement Serv. v. Providence Journal Co., 819 F.2d 1199, 1202 (1st Cir. 1987) (relying upon "negative inference" of Fed. R. Civ. P. 63); Townsend v. Gray Line Bus Co., 767 F.2d 11, 17-18 (1st Cir. 1985) (same). In criminal jury trials, however, Fed. R. Crim. P. 25(a) provides for substitution of judges "when a presiding judge becomes ill or otherwise disabled during the course of a criminal trial." United States v. Lane, 708 F.2d 1394, 1396 (9th Cir. 1983). The rule provides:

> **Judge; Disability**
>
> **(a) During Trial.** If by reason of death, sickness or other disability the judge before whom a jury trial has commenced is unable to proceed with the trial, any other judge regularly sitting in or assigned to the court, upon certifying familiarity with the record of the trial, may proceed with and finish the trial.

Fed. R. Crim. P. 25(a). A defendant may waive the constitutional right to have the same judge proceed throughout the trial, either by express consent or by failing to object. Simons v. United States, 119 F.2d 539, 544 (9th Cir.) (pre-Rule 25(a)), cert. denied, 314 U.S. 616 (1941); State v. McKinley, 455 N.E.2d 503, 506-07 (Ohio 1982) (construing state rule similar to Rule 25(a)). When the defendant consents to substitution and the trial proceeds, double jeopardy concerns are not implicated. See Whalen v. Ford Motor Credit Co., 684 F.2d 272, 278 n.11 (4th Cir.), cert. denied, 459 U.S. 910 (1982). When the defendant objects to substitution of judges, however, "[r]ule 25(a) cannot be validly applied, and . . . the death or disability of the judge requires that a mistrial be granted." 2 C. Wright, Federal Practice & Procedure, § 392 at 403 (1982 & 1990 Supp.); Bailey v. State, 397 N.E.2d 1024, 1027 (Ind. App. 1979), see also State v. Davis, 564 S.W.2d 876, 878 (Mo. 1978).

Although by its terms Rule 25(a) applies only to jury trials, it has been mentioned in the context of a criminal bench trial. In United States v. Sundstrom, 489 F.2d 859, 862 (2d Cir. 1973), cert. denied, 419 U.S. 934 (1974), the Second Circuit indicated that when a district judge, acting as the trier of fact, is disabled prior to the resolution of factual matters, a mistrial would be required. Thus, when the presentation of evidence is incomplete, or factual matters are pending in a bench trial, the proper remedy is a mistrial. Id.; Bailey, 397 N.E.2d at 1026-27.

Rule 25(a) plainly does not apply to criminal trials in which the judge is the trier of fact, and it is clear that, absent consent of the defendant, substitution of judges prior to the resolution of factual questions in a criminal bench trial is impermissible. See Sundstrom, 489 F.2d at 862; cf. Fed. R. Civ. P. 63. Still, we are satisfied that the chief judge did not commit reversible error by considering Rule 25 alternatives, particularly given the defendant's unequivocal rejection of them.

III.

The substance of defendant's double jeopardy argument is that the chief judge did not exercise sound discretion in declaring a mistrial. See United States v. Perez, 22 U.S. (9 Wheat) 579, 580 (1824) (formulation of manifest necessity test). We review the mistrial order in this case for a "high degree" of necessity, and an exercise of "sound discretion" given defendant's constitutionally protected interest in having the case resolved in a single proceeding. Arizona v. Washington, 434 U.S. 497, 506, 514-515 (1978). Our review is plenary and we may look at the entire record, not merely the declaration of mistrial. United States v. Bauman, 887 F.2d 546, 549-50 (5th Cir. 1989), cert. denied, 110 S. Ct. 1128 (1990). We are particularly attentive to the defendant's interest in having his case resolved by the original trier of fact, the presiding judge. See Illinois v. Somerville, 410 U.S. 458, 471 (1973). In the absence of an "important countervailing interest of proper judicial administration," however, double jeopardy would bar retrial of the defendant. Id.; United States v. Sartori, 730 F.2d 973, 976-77 (4th Cir. 1984) (judge recused and declared mistrial after parties twice declined recusal; retrial barred); United States v. Crotwell, 896 F.2d 437, 441 (10th Cir. 1990) (mistrial granted solely for judicial economy; retrial barred).

The manifest necessity standard is not to be applied mechanically; the facts and circumstances of the case must be considered with "attention to the particular problem confronting the trial judge." Arizona v. Washington, 434 U.S. at 506. The mistrial declaration should be scrutinized based upon the facts known to the district judge after a reasonable inquiry at the time of the mistrial decision. See Wade v. Hunter, 336 U.S. 684, 691-92 (1949). This case does not call for the strictest scrutiny, though, given the complete lack of fault by the government. Rather, the case is more akin to the declaration of a mistrial when a jury is deadlocked or juror bias is involved; such circumstances generally occur independently of the parties. Id. at 509. In such circumstances, we give the trial judge's finding of manifest necessity a high degree of respect. Crotwell, 896 F.2d at 440; Bauman, 887 F.2d at 549-50;

Defendant makes much of the fact that within three days of the mistrial declaration the presiding judge returned to work, at least part-time to handle brief in-chambers conferences, and was scheduling criminal cases for trial in late-July. It is well settled that illness of a judge, counsel or juror may be grounds for a manifest necessity mistrial. Von Spivey, 895 F.2d at 178 (illness of defense counsel); Lynch, 598 F.2d at 135-36 (illness of trial judge); see also Gori v. United States, 367 U.S. 364, 372-73 (1961) (Douglas, J., dissenting) (noting that a manifest necessity mistrial would be appropriate "when there is a breakdown in judicial machinery such as happens when a judge is stricken, or a juror has been discovered to be disqualified to sit, or when it is impossible or impractical to hold a trial at the time and place set"); Bauman, 887 F.2d at 549 (parenthetically noting that "manifest necessity for mistrial exists, where, for example, judge or juror cannot attend because of illness or death"); Cherry v. Director, State Bd. of Corrections, 635 F.2d 414, 419 (5th Cir.) (en banc) (noting "common practice of declaring a mistrial when, for good reason, a judge or juror ceases to attend"), cert. denied, 454 U.S. 840 (1981). Defendant places too little weight upon the factors leading up the mistrial order. Although this was a one or two day case, the presiding judge had twice continued the trial due to his illness. He had been hospitalized. When the mistrial was granted, the chief judge was fully aware that the presiding judge had been ill for two weeks and could not resume the trial. A protracted continuance with no firm date of return for the trier of fact may well have been viewed as impractical. Cf. United States v. Williams, 717 F.2d 473, 475 (9th Cir. 1983).

Merely because the chief district judge lacked the clairvoyance to foresee the fortunate prompt return of the presiding judge to his duties does not render inadequate the chief judge's exercise of discretion. Illness of the trier of fact, with no firm estimate of when this case would be resolved, constitutes a high degree of necessity.

The chief judge did consider some alternatives to declaring a mistrial. Though perhaps not constitutionally required, such a practice is desirable. United States v. Jaramillo, 745 F.2d 1245, 1246 n.2 (9th Cir. 1984), cert. denied, 471 U.S. 1066 (1985). He inquired whether the defendant would consent to a substitution of judges. Both counsel agreed that a four-week adjournment would have been preferable to a mistrial declaration. Perhaps the district court should have explained why it rejected this alternative given the gravity of a mistrial decision. Cf. Lynch, 598 F.2d at 136. But such an agreement does not preclude the district court from declaring a manifest necessity mistrial. See Lynch, 598 F.2d at 134. As explained by the Fifth Circuit: "The availability of alternatives less draconian than a mistrial does not necessarily preclude prosecution, as reasonable judges may differ concerning proper curative measures." Bauman, 887 F.2d at 550. This is precisely the case for application of that rule; the exercise of sound discretion by different judges very well may result in different outcomes when the circumstances reasonably support various alternatives, and we cannot say that the discretion exercised in this case was irrational or irresponsible, Arizona v. Washington, 434 U.S. at 514-15.

IV.

"A mistrial is equivalent to no trial; it is a nugatory proceeding." 58 Am. Jur. 2d, New Trial § 10 (1989); United States v. Whaley, 830 F.2d 1469, 1478 (7th Cir. 1987), cert. denied, 486 U.S. 1009 (1988). Had this been a jury trial, the original trier of fact likely would have been released and the grant of a mistrial could not have been undone; retrial would have been necessary. But this was a bench trial, and the chief judge sought to reconsider and rescind the mistrial declaration upon learning three days later of the return of the presiding judge to his duties on a part-time basis. A party may withdraw a motion for a mistrial. United States v. Evers, 569 F.2d 876, 878 (5th Cir. 1978); United States v. Greenbank, 491 F.2d 184, 188 (9th Cir.), cert. denied, 417 U.S. 934 (1974). And a court, after granting a defendant's motion for a mistrial, may set aside the mistrial order upon contemporaneous withdrawal of the mistrial motion by the defendant. Burnett v. Kerr, 835 F.2d 1319, 1322 (10th Cir.), cert. denied, 488 U.S. 830 (1988); United States v. Gigax, 605 F.2d 507, 515 (10th Cir. 1979). Although the space of three days between the declaration of the mistrial and setting it aside gives us pause, we hold that the chief judge's order was effective. This conclusion is warranted because this is a bench trial and the presiding judge is now available to resume the trial (same trier of fact) and the defendant earlier expressed preference for this alternative, indicating that he would not be prejudiced by the delay inherent in this alternative. See rec. vol. I, doc. 5 at 1-2, ¶¶ 3-5. Accordingly the district court's denial of the motion to dismiss on double jeopardy grounds is AFFIRMED and the case is REMANDED to the presiding judge for resumption of the defendant's criminal trial. The mandate shall issue in five days from the date of this order.

Entered for the Court

Bobby R. Baldock
Circuit Judge