

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
DECEMBER 14, 2018
STATE OF NORTH DAKOTA

**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

Mandie Le Ekstrom,

Petitioner,

vs.

The Honorable Susan L. Bailey, Judge of the
District Court, East Central Judicial District,

and

The City of West Fargo,

Respondents.

SUPREME COURT NO.

District Court No. 09-2018-CR-581

**PETITION FOR SUPERVISORY WRIT
AND BRIEF IN SUPPORT**

Luke T. Heck (#08133)
lheck@vogellaw.com
Matthew S. Dearth (#08394)
mdearth@vogellaw.com
VOGEL LAW FIRM
Attorneys for Petitioners
218 NP Avenue
PO Box 1389
Fargo, ND 58107-1389
Telephone: 701.237.6983

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STATEMENT OF JURISDICTION

[¶1] The Defendant, Mandie Le Ekstrom (“Ms. Ekstrom”), petitions this Court to exercise their supervisory jurisdiction under N.D.C.C. § 27-02-04, which provides, “in the exercise of its original jurisdiction, [the Court] may issue writs of *habeas corpus*, *mandamus*, *quo warranto*, *certiorari*, and injunction.” “In the exercise of its appellate jurisdiction, and in its superintending control over inferior courts, it may issue such original and remedial writs as are necessary to the proper exercise of such jurisdiction.” *Id.* This Court also holds authority pursuant to N.D. Const. art. VI, § 2. This case involves the application of double jeopardy, it is appropriate for the Court to exercise its supervisory authority and original jurisdiction. *See Day v. Haskell*, 2011 ND 125, ¶ 6, 799 N.W.2d 355, 358 (citing *State v. Robideaux*, 475 N.W.2d 915, 916 (N.D.1991) (“a supervisory writ is one way to adequately protect the defendant's interest against being placed in “risk” of double jeopardy”))).

STATEMENT OF THE ISSUES

[¶2] Whether the District Court erred in denying Ms. Ekstrom’s Motion to Dismiss on double jeopardy grounds?

STATEMENT OF THE CASE

[¶3] Ms. Ekstrom petitions this Court for supervisory writ directing the district court to vacate its October 29, 2018 Order denying her Motion to Dismiss. App. 100. The Order stems from Ms. Ekstrom’s October 9, 2018 Jury Trial, which resulted in a mistrial due to conduct attributable the City of West Fargo (“the City”). *See* app. 6-70. The October 29, 2018 Order is not supported by the law or facts of this matter, and Ms. Ekstrom petitions this Court to prevent the injustice that would result in her being placed twice in jeopardy for the same offense, in violation of her federal and state constitutional protections.

STATEMENT OF THE FACTS

[¶4] On February 2, 2018, Ekstrom was cited for Driving Under the Influence, a misdemeanor-level offense. App. 4. Ekstrom entered a plea of not guilty and demanded a jury trial, which commenced on October 9, 2018. App. 5.

[¶5] At the Pretrial Conference, the City advised the district court regarding the documentary evidence it planned to submit as exhibits at trial. App. 11, l. 1-6. Specifically, the City advised the Court it would be offering: 1) the Approved Method of Chemical Testing for the Intoxilyzer 8000; 2) List of Breath Alcohol Approved Chemical Breath Testing Devices; 3) List of Breath Alcohol Certified Chemical Test Operators; and 4) the relevant documentary evidence pertaining to Designees of the State Toxicologist/Director of the State Crime Laboratory. Id.

[¶6] Ms. Ekstrom moved the Court to instruct the City not to discuss the specific results of the chemical breath test in its opening statement, and that the specific results not be discussed prior the chemical breath test's admission into evidence. App. 17, l. 20-25; app. 18, l. 1-12. The City did not object to this motion. Id. at l. 11-12. During this discussion, the City's sole witness, West Fargo Police Sergeant Randy Burkhartsmeier ("Sgt. Burkhartsmeier"), was present in the courtroom and was even previously cautioned by the court during the conference in regards to testimony. App. 16, l. 7-10. After the Pretrial Conference, a jury was empanelled and sworn in.

[¶7] Following opening statements, the City called Sgt. Burkhartsmeier to testify. App. 25, l. 24-25; app. 26, l. 21, 1. During his testimony, the City introduced the four aforementioned documentary exhibits into evidence to lay foundation for the chemical

breath test. App. at 36-43. Then, without first offering the chemical test into evidence, the City questioned Sgt. Burkhartsmeier regarding the test administered to Ms. Ekstrom:

[City Attorney] Q: Take us through what happened during Ms. Ekstrom's test.

[Sgt. Burkhartsmeier] A: For this test, on her first sample she provided a valid sample which was a reading of .167, I believe.

App. at 43, l. 15-18. Ms. Ekstrom objected and moved for a mistrial. Id. at l. 19-25; app. 44, l. 1-3. The court reserved its ruling on the Motion and allowed the City to proceed. App. 44, 4-8. The City then offered the chemical breath test into evidence. App 45, l. 1-7. Ms. Ekstrom objected pursuant to N.D.C.C. § 39-20-07(5) and Ell v. Dir., Dep't of Transp., 2016 ND 164, 883 N.W.2d 464, specifically noting that the City failed to offer the relevant Installation and Repair Checkout documentation completed by a field inspector, as well as the relevant Ethanol Breath Standard Analytical Report for the Intoxilyzer 8000 used to obtain the chemical test from Ms. Ekstrom. Id. at l. 8-14.

[¶8] The jury was excused for lunch, and oral argument ensued regarding the admissibility of the chemical breath test. App. 45-59. Ms. Ekstrom conducted *voir dire* of Sgt. Burkhartsmeier to assist in the determination. App. at 60-66. The court sustained Ms. Ekstrom's objection and denied admission of the chemical test into evidence. App. at 66, l. 16-20. The court then questioned the City regarding its intent on offering expert testimony, or the additional foundational documents for the test's admission. Id. at l. 21-25; app. 67, l. 1-22 The City indicated it had no intention of offering expert testimony or the necessary foundational documentation. Id. The court then addressed the prior mistrial motion with Ms. Ekstrom. App. 67, l. 23-25; app. 68, l. 1-19. The City was provided an opportunity to be heard on the mistrial, but provided no argument or objection to the mistrial. App. 68, l. 20-22. The court then granted the mistrial. App. 68-69.

[¶9] Contemporaneous with the mistrial, the court ordered that the City had ten days to schedule and notice a new trial date. App. 69, l. 6-10. Ms. Ekstrom objected on double jeopardy grounds, moved to dismiss the charge, and was instructed to file a Motion to address the same. Id. at l. 18-25; App. at 70, l. 1-10. A Motion to Dismiss and Brief in Support was filed by Ms. Ekstrom. App. 72. The City filed a responsive brief, and a Motion Hearing was held on October 29, 2018. App. 83, 88-99. The district court denied Ms. Ekstrom's Motion to Dismiss. App. 97, l. 4; App. 100.

LAW AND ARGUMENT

I. The court erred in denying Ms. Ekstrom's Motion to Dismiss.

[¶10] The district court erred in denying Ms. Ekstrom's Motion to Dismiss on double jeopardy grounds. Further, the mistrial was a direct result of the City's testimonial and evidentiary errors, barring further the prosecution of Ms. Ekstrom and requiring dismissal of the DUI charge. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits successive prosecutions and punishments for the same offense. The Double Jeopardy Clause of the Fifth Amendment is applicable to the States through the Fourteenth Amendment. Day v. Haskell, 2011 ND 125, ¶ 7, 799 N.W.2d 355 (citing State v. Linghor, 2004 ND 224, ¶ 19, 690 N.W.2d 201). North Dakota constitutional and statutory provisions provide equivalent protections mirroring the Fifth Amendment. See N.D. Const. art. I, § 12; N.D.C.C. § 29-01-07; Linghor, at ¶ 19. Double jeopardy attaches in a criminal case when the jury is empanelled and sworn. State v. Berger, 235 N.W.2d 254, 257 (N.D.1975); Day, at ¶ 8.

[¶11] The purpose of the Double Jeopardy Clause is that "[the City] 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.'" Day at ¶ 6 (quoting Green v. United States, 355 U.S. 184, 187-88 (1957)) (emphasis added). "Finally, and most importantly, rules against reprosecution, after either prior acquittal or prior conviction, prevent the prosecutor from using criminal prosecutions to inflict unnecessary suffering upon defendants." State v. Allesi, 216 N.W.2d 805, 813 (N.D. 1974). A criminal trial warps the defendant's life and consumes his money. Id. The Constitution allows this ordeal to be imposed only once and for reasonable cause, not repeatedly at the prosecutor's whim.' Id. (citations omitted).

A. Double jeopardy bars retrial following prosecutorial overreach.

[¶12] The acts and omission by the City bar the retrial of Ms. Ekstrom, regardless that she moved for the mistrial. The Double Jeopardy Clause does not always prohibit retrial when the first trial has terminated before a verdict is rendered. State v. Voigt, 2007 ND 100, ¶ 12, 734 N.W.2d 787, 791 (citing Allesi at 814). Mistrials declared with the defendant's consent generally do not bar later prosecution. Voigt at ¶ 18. However, in circumstances where the defendant has moved for a mistrial as the result of misconduct attributable to the government, then double jeopardy bars retrial. See id.; see also Allesi at 816-17 (noting an exception to retrial when a mistrial motion was the result of prosecutorial overreaching). Where a mistrial is provoked by prosecutorial overreach, and would afford the prosecution a more favorable opportunity to convict the defendant, double jeopardy protects a defendant from a second prosecution. Oregon v. Kennedy, 456 U.S. 667, 674 (1982). "Harassment of an accused by successive prosecutions or

declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches.” Downum v. United States, 372 U.S. 734, 736 (1963) (citing Gori v. United States, 367 U.S. 364, 369 (1961)) (emphasis added). Each case in which a double jeopardy violation is asserted must turn upon its own facts. Linghor, 2004 ND 224, ¶ 19, 690 N.W.2d 201.

[¶13] To find prosecutorial overreaching, the government must have, through gross negligence or intentional misconduct, caused aggravated circumstances to develop which seriously prejudiced the defendant, causing her reasonably to conclude that a continuance of the tainted proceeding would result in conviction. U.S. v. Dinitz, 424 U.S. 600, 611 (1976), n.38 (Stevens, J., concurring). “Although mere negligence by the prosecutor is not the type of overreaching contemplated by Dinitz, if the prosecutorial error is motivated by bad faith or undertaken to harass or prejudice the defendant, then prosecutorial overreaching will be found.” United States v. Martin, 561 F.2d 135, 139 (8th Cir. 1977) (citing Lee v. United States, 432 U.S. 23, 34, (1977); see also United States v. Civella, 688 F.2d 575, 576 (8th Cir. 1982) (acknowledging prosecutor’s gross negligence as basis for double jeopardy)).

[¶14] In Martin, the Eighth Circuit held that because prosecutorial overreaching had preceded the defendant’s successful motion for a mistrial, the federal Double Jeopardy Clause barred the defendant’s retrial. 561 F.2d at 139-41. The mistrial was granted after the prosecuting attorney had violated a pretrial ruling prohibiting the prosecution from presenting testimony which was regarded as highly prejudicial to the defendant. Id. at 141. In the present case, the City clearly acknowledged it would not elicit the specific result of the Intoxilyzer test until it was admitted into evidence. This acknowledgement

was made in front of the City's sole witness, Sgt. Burkhartsmeier. Yet, the City did precisely what it knew was forbidden - it asked a question that directly (and predictably) elicited testimony about the chemical breath test result. App. at 43, l. 15-18. The City deliberately asked a question for which a highly prejudicial answer was foreseeable – that of the inadmissible chemical test result. There is no other reasonable interpretation to the phrase “take us through what happened during [Ms. Ekstrom's] test” other than that which Sgt. Burkhartsmeier made at the time, that of a request by the City to testify to the results of Ms. Ekstrom's chemical breath test. The City made no attempt to caution, remind, or clarify to the officer to avoid discussing the specific results.

[¶15] The City then, after Ms. Ekstrom noted the deficiencies in her mistrial motion, tried to offer the chemical breath test record into evidence, without required foundational documents as required by N.D.C.C. § 39-20-07(5) and this Court's holding in Ell. Ms. Ekstrom objected to its introduction; the Court sustained the objection, and then even offered the City an opportunity to advise the court that it would produce the necessary documentation. However, the City's clear ability to seek an alternative means to cure the inadmissibility, it chose to do nothing, and further provided no response to the mistrial, let alone an objection. See State v. Rolfson, 2018 ND 51, ¶ 11, 907 N.W.2d 780 (affirming trial court's decisions allowing admission of additional foundation documents upon State's request). Simply put, if mistrials consented to by a defendant don't bar retrial, nor should mistrials at the consent of, and solely caused by, the government.

[¶16] The City's numerous errors here far outweigh mere negligence, and plainly extend to the standard of gross negligence arising to prosecutorial overreach. The City's conduct resulted in what would have amounted to obvious error had the court not

declared a mistrial. N.D.R.Crim.P. 52(b); see also State v. Steen, 2015 ND 66, ¶ 7, 860 N.W.2d 470 (To establish obvious error, defendant must show error that is plain and affects substantial rights). In eliciting testimony plainly inadmissible under N.D.C.C. § 39-20-07(5) and unfairly prejudicial, the City's actions are comparable in severity to violating the rule barring admissibility for preliminary breath tests under N.D.C.C. § 39-20-14(3). As this Court recently held in State v. Rende, prosecutorial errors regarding well-settled case law on admissibility are highly-suspect and should not be viewed favorably:

An accidental or inadvertent disclosure does not mitigate a violation of N.D.C.C. § 39-20-14(3). The State offered the video. The State should have been aware that the test result was revealed by Rende (inaccurately) in the video. The State should have been aware the test result was statutorily inadmissible and should have taken steps to edit Rende's comments about the result by the defendant from the video.... The State aggravated the error by soliciting testimony, which this Court previously determined to be irrelevant and inadmissible, that implied Rende had failed the preliminary breath test.

2018 ND 33, ¶ 12, 905 N.W.2d 909, 912 (emphasis added).

[¶17] The City's errors in this case are analogous to the errors in Rende. However, the City's conduct here is more egregious because of its deliberate decision not to make any attempt to salvage its position. The City and its witness had fair notice of the Court's admonishment prior to trial. It also had clear options, even an opportunity to produce the documentation through inference of the district court, at its disposal to cure its errors. The mistrial and subsequent rescheduling of a new trial indisputably would provide the City "a more favorable opportunity to convict" Ms. Ekstrom. The prosecution was faced with exclusion of its key evidence against Ms. Ekstrom, but remained irreverent; and now seeks to cause further disruption and financial expense to Ms. Ekstrom by attempting to subject her to a second trial. Such conduct clearly demonstrates provocation to the

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CERTIFICATE OF SERVICE

STATE OF NORTH DAKOTA)
) SS
COUNTY OF CASS)

Katherine Johnson, being first duly sworn, does depose and say: she is of legal age and not a party to or interested in the above-entitled matter.

On December 14, 2018, affiant caused the following document(s):

**Petition for Supervisory Writ and Brief in Support; and
Appendix to Petition for Supervisory Writ**

to be served electronically to the following:

Elle Molbert
emolbert@ohnstadlaw.com

Sarah Wear
swear@ohnstadlaw.com

Stephen Hanson
shanson@ohnstadlaw.com

Judge Susan L. Bailey
SBailey@ndcourts.gov

Katherine Johnson
Katherine Johnson

Subscribed and sworn to before me this 14 day of December, 2018.

Lori Thrall
Notary Public, Cass County, North Dakota

(SEAL)

