

NO. 2009-2208

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 91324

STATE OF OHIO,

Plaintiff-Appellant/Cross-Appellee

-vs-

WILLIAM N. DAVIS,

Defendant-Appellee/Cross-Appellant

**APPELLANT'S RESPONSE TO APPELLEE/CROSS-APPELLANT'S ARGUMENTS IN
SUPPORT OF JURISDICTION**

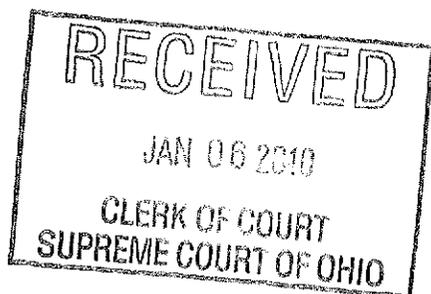
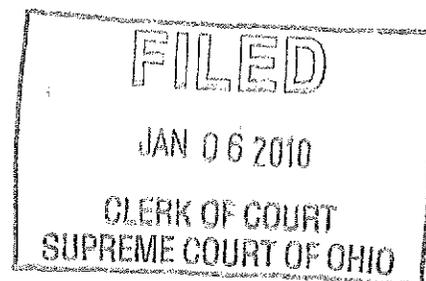
Counsel for Plaintiff-Appellant/Cross-Appellee

WILLIAM D. MASON
Cuyahoga County Prosecutor

T. ALLAN REGAS (0067336)
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

Counsel for Defendant-Appellee/Cross-Appellant

KATHRYN SZUDY
250 East Broad Street, 14th Floor
Columbus, Ohio 43215



ORIGINAL

TABLE OF CONTENTS

EXPLANATION OF WHY APPELLEE'S CROSS APPEAL DOES NOT CASE INVOLVE A
SUBSTANTIAL CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC INTEREST 1

STATEMENT OF THE CASE AND FACTS 2

LAW AND ARGUMENT 4

APPELLEE/CROSS-APPELLANT'S PROPOSITION OF LAW IN HIS CROSS-APPEAL
In determining whether a trial judge exercised sound discretion in declaring
a mistrial, a reviewing court must consider factors such as whether the trial
judge heard the opinions of the parties about the propriety of the mistrial;
whether the trial judge considered alternatives to a mistrial; and whether the
trial judge acted deliberately, instead of abruptly. U.S. Const., Amend. V;
Section 10, Article I of the Ohio Constitution.

CONCLUSION 8

SERVICE 8

**EXPLANATION OF WHY APPELLEE'S CROSS APPEAL DOES NOT CASE INVOLVE A
SUBSTANTIAL CONSTITUTIONAL QUESTION OR ISSUE OF GREAT PUBLIC INTEREST**

In this case, the Eighth District Court of Appeals determined that the trial court properly declared a mistrial in Cross-Appellant Davis's trial, wherein it found that the trial court did not abuse its discretion. Cross-Appellant William Davis now complains that this Court should accept jurisdiction over his proposition of law, arguing that this Court has not stated the law that applies to the review of a declaration of a mistrial by a court. However, this Court has longstanding precedent that follows federal law as to the standard of review of a trial court's declaration of a mistrial and this Court should not accept this matter in order to adopt law in a consolidated syllabus as proposed by Cross-Appellant in his sole proposition of law, especially where the trial court in this matter and the reviewing court adhered to Cross-Appellant's proposed standards of law

Cross-Appellant complained to the appellate court that he was subject to double jeopardy where the first trial in this matter resulted in a mistrial. He was not. He now asks this Court to hold as law the following as stated in his proposition of law: that the trial judge must hear the opinions of the parties about the propriety of the mistrial; that the trial judge considered alternatives to a mistrial; and that the trial judge acted deliberately, instead of abruptly. However, when reviewing the record in this case, it is apparent that the trial court acted deliberately in determining whether or not to declare a mistrial; it provided an opportunity for both the State and Cross-Appellant to state their opinions as to a mistrial, and it considered alternatives to the declaration of the mistrial. Because Cross-

Appellant has not demonstrated that there is a question of substantial constitutional interest or one of great public interest, but where he merely disagrees with the appellate court's application of established law to the facts of his case, this Court should not accept jurisdiction of Cross-Appellant's proposition of law.

I. STATEMENT OF THE CASE AND FACTS

Appellee was found guilty of 8 counts of rape of child under the age of thirteen in violation of R.C. 2907.02(A)(1)(b), nineteen counts of rape with force in violation of R.C. 2907.02(A)(2), one count of rape under age of ten with force in violation of R.C. 2907.02(A)(2), and three counts of Gross Sexual Imposition in violation of R.C. 2907.05(A)(4). He was sentenced to life imprisonment for the prolonged period of sexual abuse of his minor victims, identified by the appellate court and within the State's filings within this Court as D.S. and D.T.

In this case, a panel of twelve was sworn-in as a deliberating panel. The next day, juror number 6 was removed for cause, opening statements had not yet occurred. No alternate jurors had been seated. This is because several prospective jurors were removed for cause and all preemptory challenges were exhausted. Juror number 6 was assaulted over the evening break just after impaneling and could not continue to serve.

After empanelling a jury but prior to opening statements, the parties were left without alternate jurors, the jurors were at or near the end of their service, some jurors had conflicts going into the following week, and one of the twelve jurors was assaulted by a boyfriend on the evening following the voir dire and could not continue to serve. Before

the order of mistrial, Cross-Appellant through counsel stated the trial court's *sua sponte* order declaring a mistrial prejudiced the State of Ohio. He did not object to the order declaring a mistrial when given the opportunity to place objections upon the record. The trial court voiced its concern with Cross-Appellant's strategy of agreeing to dismiss a juror after impaneling twelve and then claim the State of Ohio was "prejudiced" if the balance of the panel were dismissed. The court stated: "[y]ou're setting this up for ineffective assistance of counsel. I don't appreciate that." Finally, at least two jurors voiced concern about returning for service the following week. The court declared a mistrial concerning the availability of jurors.

The Eighth District Court of Appeals stated the following facts as significant for its resolution of Appellee's assignment of error based upon a claim of double jeopardy:

{¶ 25} In reviewing the facts of the jury discharge in light of the statutory and case law surrounding double jeopardy, we cannot say that the court abused its discretion in determining there was a manifest necessity for a second jury. By declaring a mistrial at an early stage of the proceedings, the court attempted to thwart the possibility of a mistrial after evidence had been presented and testimony given. In the instant case, opening statements were not yet made, and the risk of proceeding with 11 jurors and no alternates outweighed any possible prejudice to defendant by impaneling another jury.

{¶ 26} Admittedly, whether to discharge the jury is a close call under the facts of this case. However, "[w]hen applying the abuse of discretion standard, a reviewing court is not free to merely substitute its judgment for that of the trial court." *In re Jane Doe 1* (1991), 57 Ohio St.3d 135, 137-38. The trial court acted within its discretion by discharging the jury; therefore, double jeopardy does not bar defendant's retrial.

II. LAW AND ARGUMENT

This Court need not accept jurisdiction of Cross-Appellant's proposition of law where the law in Ohio is not unsettled, there does not exist conflict among the various districts, and where Cross-Appellant merely disagrees with the Appellate Court's application of the proper law to the facts of his case.

This Court has long held, in accord with federal constitutional law, in *State v. Widner* (1981), 68 Ohio St.2d 188, 189-90, 429 N.E.2d 1065, 66 that:

[U]nder controlling precedent of the United States Supreme Court, the question of whether, under the double jeopardy clause, there can be a second trial, after a mistrial has been declared, sua sponte, depends on whether (1) there is a "manifest necessity" or a "high degree" of necessity for ordering a mistrial, or (2) "the ends of public justice would otherwise be defeated." See *Arizona v. Washington* (1978), 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed.2d 717; *United States v. Dinitz* (1976), 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267; *Illinois v. Somerville* (1973), 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425. See, also, *United States v. Jorn* (1971), 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543. The foregoing concept of "the ends of public justice" has also been more precisely described as "the public's interest in fair trials designed to end in just judgments." *Wade v. Hunter* (1949), 336 U.S. 684, 689, 69 S.Ct. 834, 837, 93 L.Ed. 974.

In evaluating whether the trial judge acted properly in declaring a mistrial, the court has been reluctant to formulate precise, inflexible standards. Rather, the court has deferred to the trial court's exercise of discretion in light of all the surrounding circumstances:

" * * * We think, that in all cases of this nature, the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances, which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes. * * * But, after all, they have the right to order the discharge; and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests, in this, as in other cases, upon the responsibility of the

Judges, under their oaths of office." (Emphasis added.) *United States v. Perez* (1824), 22 U.S. (9 Wheat. 579, 580) 6 L.Ed. 165. See, also, *United States v. Clark* (C.A. 2, 1979), 613 F.2d 391, certiorari denied 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (a second prosecution is not barred on double jeopardy grounds when the trial judge had no reasonable alternative to ordering a mistrial in the first trial).

Following *Widner*, this Court stated the review of a declaration of mistrial as being:

In evaluating whether the declaration of a mistrial was proper in a particular case, this court has declined to apply inflexible standards, due to the infinite variety of circumstances in which a mistrial may arise. *Widner*, supra, 68 Ohio St.2d at 190, 22 O.O.3d at 431, 429 N.E.2d at 1066. See, also, *United States v. Jorn* (1971), 400 U.S. 470, 480, 91 S.Ct. 547, 554, 27 L.Ed.2d 543. **This court has instead adopted an approach which grants great deference to the trial court's discretion in this area, in recognition of the fact that the trial judge is in the best position to determine whether the situation in his courtroom warrants the declaration of a mistrial.** *Widner*, supra. See, also, *Wade v. Hunter* (1949), 336 U.S. 684, 687, 69 S.Ct. 834, 836, 93 L.Ed. 974. In examining the trial judge's exercise of discretion in declaring a mistrial, a balancing test is utilized, in which the defendant's right to have the charges decided by a particular tribunal is weighed against society's interest in the efficient dispatch of justice. *State v. Calhoun* (1985), 18 Ohio St.3d 373, 376, 18 OBR 429, 432, 481 N.E.2d 624, 627; *United States v. Scott* (1978), 437 U.S. 82, 92, 98 S.Ct. 2187, 2194, 57 L.Ed.2d 65. " * * * [A] defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." *Wade v. Hunter*, supra, 336 U.S. at 689, 69 S.Ct. at 837. Where the facts of the case do not reflect unfairness to the accused, the public interest in insuring that justice is served may take precedence. *Arizona v. Washington*, supra, 434 U.S. at 505, 98 S.Ct. at 830.

State v. Glover (1988), 35 Ohio St.3d 18, 19, 517 N.E.2d 900. (Emphasis added.)

Further, the Sixth Circuit Court of Appeals has rejected a more rigid standard of review than that set forth by the U.S. Supreme Court in *Arizona v. Washington* as adopted by this Court. See, *Ross v. Petro* (C.A. 6 2008), 515 F.3d 653, 662 ("That the "scrupulous exercise of judicial discretion" standard is not part of the clearly established federal law is confirmed by the fact that the term makes no appearance in *Arizona v. Washington*, which represents not only a more recent, but also a more thorough, treatment of the governing standards.")

Cross-Appellant now complains to this Court that the standard of review in determining whether a trial court properly declared a mistrial is not settled in Ohio. It is. However, he proposes that this Court accept his Proposition of Law, which reads, "In determining whether a trial judge exercised sound discretion in declaring a mistrial, a reviewing court must consider factors such as whether the trial judge heard the opinions of the parties about the propriety of the mistrial; whether the trial judge considered alternatives to a mistrial; and whether the trial judge acted deliberately, instead of abruptly. U.S. Const., Amend. V; Section 10, Article I of the Ohio Constitution." This is merely a restatement of the factors that were considered by the U.S. Supreme Court in *Arizona v Washington* and which are a part of Ohio law through this Court's decision's in *Widner* and *Glover*.

To adopt the proposition of law suggested by Cross-Appellant would be to simply restate those factors used by the U.S. Supreme Court. Further, the factors used in that decision do constitute a list of all factors to be considered in review of a trial court's decision to declare a mistrial. By adopting the suggested proposition of law, this Court would be unnecessarily restricting the factors that a reviewing Court could use to determine whether a trial court abused its discretion in declaring a mistrial. Appellant seeks not to have this Court review this matter because he wishes to see this Court adopt a more consolidated statement of syllabus law as seen in his proposition of law; rather, he seeks to have this Court review this matter because he disagrees with the application of the law by the appellate court.

In this matter, the standards that Appellant seeks within the proposition of law would not affect the outcome in this matter because the trial court did hear the State's and Cross-Appellant's opinions as to the propriety of a mistrial. It considered alternatives to the grant of mistrial. Finally, it did not act with haste or undue emotion. Cross-Appellant seeks to have this Court reiterate long-standing precedent because he disagrees with the appellate courts' resolution of his claim that prosecution was barred by double jeopardy principles. Because there is no conflict in the law; because the law in this area has been clearly stated by this Court; and because the appellate court did not misapply precedent in its review of this matter, this Court should decline jurisdiction of Cross-Appellant's proposition of law.

Appellant complained in his appeal that the trial court was rash in its declaration of mistrial. However, the record reflects that the trial court deliberated upon the circumstances, it exercised its discretion, and did not err in declaring a mistrial; especially in this case where no statements had been made to the jury and no evidence was taken. The record in this matter reflects that the parties were left without alternate jurors, the jurors were at or near the end of their service, some jurors had conflicts going into the following week, and one of the twelve jurors was assaulted by a boyfriend on the evening following the voir dire and could not continue to serve. O.R.C. 2945.36(A) applied to these facts and the dismissal of the jury could not be held against the State and the victims of this horrible sexual abuse.

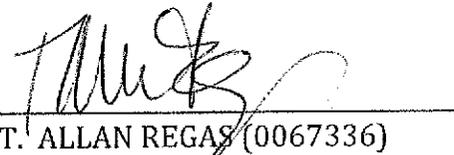
III. CONCLUSION

Because the law is clear as to the standard of review after a trial court declares a mistrial, and because Cross-Appellant does not show any error occurred in the review of the trial court's decision to declare a mistrial, but rather merely disagrees with the appellate court's application of law to the facts, the State asks that this Court not accept jurisdiction of Cross-Appellant's sole proposition of law.

Respectfully submitted,

WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR

BY:


T. ALLAN REGAS (0067336)
Assistant Prosecuting Attorney
1200 Ontario Street, 9th Floor
Cleveland, Ohio 44113
216.443.7800

SERVICE

A copy of the foregoing Appellant's Response to Appellee/Cross-Appellant's Arguments in Support of Jurisdiction has been mailed this 5th day of January 2010, to Kathryn Szudy, 250 East Broad Street, 14th Floor, Columbus, Ohio 43215.


Assistant Prosecuting Attorney