

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	}	Case N ^o _____
Plaintiff-Appellee	}	
v.	}	On Appeal from the
	}	Mahoning County Court of Appeals,
	}	Seventh Appellate District
CHRISTOPHER ANDERSON,	}	
Defendant-Appellee	}	Court of Appeals
	}	Case N ^o 2011 MA 43

MEMORANDUM IN SUPPORT OF CLAIMED JURISDICTION OF
APPELLANT CHRISTOPHER ANDERSON

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Explanation Of Why This Case is One of Great General or Public Interest and Involves a Substantial Constitutional Question.

A person is indicted, arrested, held in jail, and put to trial 25 times over a course of 15 years, and still without a valid conviction. There cannot be a right-thinking citizen, lawyer, or judge who does not believe that this repetitious submission to trial by jury is fair or constitutional. Yet, as Ohio law presently stands, such a scenario is legal. There presently are no limitations on how many times a person can be brought to trial before the State obtains its conviction. That same person, if put to trial once but the jury cannot agree unanimously, can be put to trial again without offending the Constitution. But when the person has prepared for trial 5 times and has served almost enough time to be eligible for parole, the trolley has gone off the tracks.

Chris Anderson has served nearly 13 years in jail or prison since his arrest in August of 2002. He has not been lawfully convicted of anything. The Seventh District Court of Appeals, from which Anderson appeals, found the series of events that brings the case now to this Court to have “severely disrupted” Anderson’s life; and the time when the balance is tipped in favor of Anderson’s “due process concerns” and those concerns will “override other legitimate state interests,” that time, though it “appears to be fast advancing,” has not yet arrived. When will it arrive? After a sixth trial? After a ninth trial? After Anderson has served enough time to be eligible for parole? The Court of Appeals does not tell us and Ohio law does not tell us.

This case presents those important questions. The public will have little respect for its courts and even less for its judges as impartial arbiters if the courts allow the government to prosecute an individual repeatedly until it finally achieves success and

obtains the conviction it seeks. This case is not just about Anderson's "due process concerns." It is about Anderson's due process *rights*—an "inalienable" liberty that both the Ohio and United States Constitutions guarantee, everyone; everyone except for Chris Anderson. The case is about the due process rights—not concerns—of any citizen who might find himself or herself arrested and charged with a crime. An equally if not more important guarantee furnished by these documents is that the proceedings will be fair—not perfect, but *fair*. If the State were now to convict Anderson at a sixth trial, no one could honestly look at the conviction and say that it was fair process. Rather we could just say that after 13 years, 4 appeals, and 5 times expending the emotional and economic capital to prepare for trial, the conviction was simply *obtained*.

Many a citizen is heard to complain if a person is convicted and sentenced to death, but 13 years later remains on Death Row. The credibility of the criminal justice system is called into question even more when a man remains incarcerated for that period of time without a lawful conviction. It destroys the integrity of the courts to allow the government chance after chance, as many cracks at it as it takes to secure a conviction. As Ohio law stands now, the Defendant can take no quarter in the bill of rights. He must stand in the stocks until the government hits its target. Three attempts at the ring toss for a quarter and a chance to win a stuffed animal is satisfactory for the carnival. When a man's liberty is at stake, however, and he is tried in a system where he is to be convicted only by overwhelming proof that we call beyond all reasonable doubt, a quarter buys that State as many ring tosses as are needed to win the stuffed animal. That cannot and indeed is not what was meant by "due" process. It was not what was meant by a justice system that guarantees that justice will be administered

“without denial or delay.” This Court should accept jurisdiction, therefore and clarify what these constitutional phrases mean and how they should be applied in the courts of this state. The decision should be left not to prosecutors who might eventually tire of the task, not to judges who might be moved by a defendant’s repeated running of the gauntlet while other jurists may not be so moved. No suggestion is made here that the issue can be answered with a talismanic formula. That is, however, no reason to leave these hard questions unanswered. The record in this case reveals a heinous crime against a young woman. Anderson says he did not commit this heinous crime; the State says that he did. The State has been unable to prove this beyond a reasonable doubt after multiple attempts—evidence in and of itself of reasonable doubt. This case is about our justice system and the case presents a test for the justice system of Ohio. As our late Chief Justice once reminded us, if we do not protect the fairness of our system for the worst among us, it is guaranteed to none of us. A number of jurisdictions have said that prosecutors do not have free rein. While many of the cases talk about the inherent authority of the courts to dismiss indictments, this power comes from the Constitution. The fair play to which the courts allude is an integral part of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Ohio Constitution, Article I, Section 16.

Anderson and the citizens of this State do not seek a talismanic formula. Necessarily, this Court and the courts of this state will have to consider a number of factors. The factors employed by other jurisdictions are in some instances helpful and persuasive, and in other instances, much less so. Ohio’s Constitution is independent and this Court should develop an independent set of factors to consider and for the courts of

this State to consider.

Statement of the Case and Facts

In April, 2002 the Austintown Township Police arrived at Appellant Christopher Anderson's home to question him about the murder of Amber Zurcher ("Amber"). Anderson had been at Chippers, a local bar on the evening of April 2, 2002 where Amber and a number of friends were drinking. The group decided to go to Amber's apartment for an "after hours" party at which some people drank heavily, some engaged in sexual activity and some used drugs. When the party broke up in the wee hours of the morning, Anderson was not the last to leave. The next morning Amber was found naked and dead in her living room . The last person who left the apartment the night before claims he made certain Amber locked and dead-bolted the apartment door. As there was no sign of forced entry, whoever killed Amber must have been let into the apartment. The last person who left admitted that after he, his girlfriend and Anderson left Amber's apartment, he returned to look for something that he had "lost."

When Austintown Township Police came to question Anderson, he stated that he immediately went home after the party and did not leave. His mother confirmed this. Anderson's mother even told the police the time Anderson had come home because the family dog woke her up when Anderson entered the house and she looked at the clock. Anderson admitted to engaging in some sexual activity with Amber that evening. However, when he left the apartment with others, Amber was fine.

Amber had been strangled. A small amount of DNA was found under Amber's finger nails. When tested the DNA reveal a mixture some which was consistent with her son's DNA, some said to be consistent with Anderson and some said to be consistent

with a third unknown person. A small amount of DNA consistent with a “hickey” or love bite on Amber’s breast was also said to be consistent with Anderson’s DNA.

Two months after Amber was found dead, Anderson was arrested for the murder and has remained incarcerated since then, nearly 13 years. Anderson pled not guilty after he was indicted by the Mahoning County Grand Jury. Five times he has been brought to court to stand trial for the murder.

The first trial ended in a mistrial after a witness blurted out information about evidence which the trial court had ruled prejudicial and inadmissible. Amber’s friend, Nichole Ripple blurted out while testifying that Amber had told her Anderson was: “a freak. He tried to strangle his ex-girlfriend.” The trial court had granted the defense motion to prohibit the testimony of Donna Dripps, a woman who claimed that a year before Amber’s death, Dripps claims Anderson choked her and bit her breast. As a result of Ripple’s testimony, a mistrial was declared.

Anderson prepared for trial again. The State offered the DNA evidence outlined above and testimony from those in attendance at the party. In the aggregate, the testimony was that the partygoers ate and drank; some smoked marijuana; some tried to “score some coke.” None of the partygoers had any evidence to offer that Anderson murdered Amber. The State could not explain how Anderson could have gotten back into Amber’s apartment, in light of the evidence that her door was locked and there was no evidence of forced entry. There was some evidence that Anderson had physical contact with Amber, but no evidence as to when that was, and no evidence that Anderson murdered her. In fact, the State’s attempt to paint Anderson as a “freak” who Amber did not like and who “crashed” the party only posed more difficulty for the government. It

had no satisfactory explanation of why Amber would unlock her door to permit Anderson to enter.

To bolster this shortcoming, prior to the second trial, the State asked the trial court to permit Dripps to testify. The trial judge reversed his earlier ruling and now allowed an even more extensive version of the very testimony that had made the first trial unfair. The Court of Appeals later said that the details that Dripps gave about her encounter were “by and large irrelevant to establishing a behavioral fingerprint, because there was no corresponding evidence arising from Amber’s murder.” See, *State v. Anderson*, 7th Dist. No. 03 MA 252, 2006 Ohio 4618, 2006 Ohio App. LEXIS 4581, at ¶56. Dripps was permitted to testify to many details about the claimed attack, leaving a record that the appellate court later said gave the appearance that Anderson “was being tried for attacking Donna Dripps in addition to being tried for the murder of Amber Zurcher.” *State v. Anderson, supra*, 2006 Ohio 4618, at ¶57.

The trial judge also allowed the State request to offer the testimony of a probation officer about a claimed litany of probation violations. This apparently was to demonstrate, as the Court of Appeals later put it, that Anderson had “a guilty mind because he did not report the suspected crime to the probation officer.” *State v. Anderson, supra*, at ¶77. Anderson was convicted and the Seventh District Court of Appeals rightly labeled the Dripps and probation testimony as “extensive, largely irrelevant, and highly prejudicial.” *State v. Anderson*, 2006 Ohio 4618, at ¶84. The appellate court also said that a flight instruction was improper. The Court of appeals vacated Anderson’s conviction, and this Court declined review. *State v. Anderson*, 112 Ohio St.3d 1443, 2007 Ohio 152, 860 N.E.2d767.

Since that reversal, the State has had 2 additional opportunities to present its entire litany of evidence against Anderson—save the irrelevant and prejudicial testimony of Dripps and the probation officer. On both of those occasions, the jury has deadlocked. Anderson had to prepare for each of those trials, obviously, as well as another where the judge declared a mistrial when it appeared that Anderson's co-counsel was dozing during voir dire. Without the improper bolstering through the Dripps and probation officer testimony, and without the flight instruction, the State has been unable to convince a jury unanimously of Anderson's guilt. On the two occasions when the State presented its entire case, December of 2008 and August of 2010, the State offered the same evidence of guilt as it had before.

When the State again announced its intention to prosecute Anderson for a *sixth* time for Amber's murder, Anderson filed a motion to dismiss. He argued that continuing to prosecute him without new evidence violated the Fourteenth Amendment to the United States Constitution and Ohio Constitution, Article I, Sections 1, 2, 10, and 16. Anderson reminded the trial court that on 5 prior occasions, he had *prepared* for trial. While on 2 of those prior occasions, the State did not complete the presentation of its evidence, on 3 of those 5 occasions, the State was afforded a full opportunity to complete the presentation of its evidence. Five times over the course of 8 years Anderson had to expend the economic and emotional resources to prepare to defend himself against a charge of which he is not guilty. Anderson argued that with no new evidence that he had committed the murder, the State could not continue to force him to prepare for, and to run the gauntlet of, another trial. The trial judge overruled Anderson's motion to dismiss, and Anderson appealed to the Seventh District Court of Appeals, Seventh

Appellate District. The State filed a motion to dismiss Anderson's appeal. The Seventh District Court of Appeals found that Anderson's appeal could continue as the ruling on the motion to dismiss was a final appealable order. The State then sought *en banc* review of the panel's ruling on the dismissal motion. The entire Court then considered the issue, and divided 2 to 2, which of course left standing the original ruling that Anderson's appeal could continue. See, *State v. Anderson*, 7th Dist No. 11 MA 43, 2012 Ohio 4390, 2012 Ohio App. LEXIS 3855. The State appealed to this Court, which held that denial of the motion was in fact a final appealable order. See, *State v. Anderson*, 138 Ohio St.3d 264, 2014 Ohio 542, 6 N.E.3d 23. After remand, the Court of Appeals ruled that Anderson had not shown a due process violation—at least not yet. Anderson now asks this Court to hear the case and to declare that a person held in custody for 4,698 days, or 12 years, 10 months and 11 days and who has had to prepare for trial 5 times and be involved in 4 appeals, is protected from further prosecution by the Fourteenth Amendment to the United States Constitution and by Article I, Sections 1, 2, 10 and 16 of the Ohio Constitution.

ARGUMENT

Proposition of Law No. 1: The Due Process Clause of the Fourteenth Amendment and Ohio Constitution, Article I, Sections 1, 2 10 and 16 bar the State from making repeated attempts over a long course of time to convict a person by simply wearing him down when there is no new evidence of guilt.

Citizens of Ohio enjoy the protections, under the Ohio and United States Constitutions, *inter alia*, of due process, equal protection, the right to defend themselves, and the right to have justice administered without denial or delay. Read together, citizens who have been indicted have a right to be put on trial in a process that is *fair*.

Judge Gerhard Gesell's holding in *United States v. Ingram*, 412 F. Supp. 384 (D. D.C. 1976) makes the point succinctly: "Apparently the Government, always a hard loser, simply wishes to keep pressing so long as juries disagree in the hope that a conviction eventually will result." He continued:

Here is a man in jail now more than seven months primarily because of an offense which the Government is unable to convince a jury he committed. *If another trial takes place there is every reason to believe the jury will again be divided or will acquit.* There is great deference shown jury determinations that result in conviction, and the same attitude should prevail when, as here, members of a jury disagree so conclusively when not even faced with conflicts in the proof. Under the circumstances of this case the verdicts themselves indicate a reasonable doubt in the minds of a substantial majority of the jury members who have heard the evidence. ... The judgment of the Court or the prosecutor as to the weight of the evidence is, under these circumstances, not entitled to outbalance the obvious.

Id., at 385-386. (Emphasis added.) Judge Gesell had dismissed the indictment after the last mistrial. When the government asked him to reconsider, he refused. Chris Anderson has been in jail far longer (almost 13 years) and has been subjected to 3 full trials, one of which was blatantly unfair, and 2 other inchoate trials. Given a number of attempts the State has been unable to convince a jury of his guilt beyond all reasonable doubt. It is evident that the likely result of a *sixth* attempt to convict Anderson will again be a hung jury. The State has no new evidence. It simply wants to continue to toss the ring until it wins the stuffed animal. This violates the provisions cited above. Anderson cannot enjoy his inalienable right to defend his liberty when he is subjected to repeated trials with insufficient evidence. See, Ohio Constitution, Article I, Section 1. He enjoys the same rights as other citizens, but he has been denied those rights. *Id.*, at Section 2. He cannot be assured the effective assistance of counsel or other trial rights secured by

Section 10. He certainly has not had justice administered without denial or delay. See, *id.*, Section 16.

To be sure, neither the Ohio nor United States Constitutions contain a specific provision to promise that no person shall be subjected to more than 3 trials, or be prosecuted over a period longer than 4 years. But neither does the Constitution contain a specific mention of the privacy that the Fourth and Ninth Amendments protect. Allowing trial after trial have placed Anderson in a position where he cannot *effectively* defend his liberty. Anderson told the trial judge that “[h]e is worn down. His family is worn down. His lawyer is worn down. *See*, OHIO CONST., art. I, §1.” The Due Process Clause is meant in part to limit the power of government to act when that action would be oppressive or unfair. *Moore v. Dempsey*, 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543 (1923), held that, even when there is no direct “state action” Due Process demands measures by the judiciary to correct an unfairness that cannot be overlooked. Ohio has recognized the authority of a trial judge to dismiss a case in the interests of justice. *See*, *State v. Busch*, 76 Ohio St.3d 613, 615, 1996 Ohio 82, 669 N.E.2d 1125. Chris Anderson has been in jail or prison for nearly 13 years. The State remains unable to convince a jury he committed. Juries do not like murders, yet the inability of twelve jurors to reach a unanimous verdict indicates a reasonable doubt. Whatever the view of the trial court or the prosecutor as to the weight of the government’s evidence, that view is not, as Judge Gesell said, entitled to outbalance the obvious. This is simply a matter of fair play. The State has no new proof; it simply wants another chance to try to convict Anderson.

Anderson pointed out to the trial court, and repeats here, that the State has employed a cadre of prosecutors for the 5 trials, while Anderson struggled, first with

court-appointed counsel, and now with the financial devastation of his family paying for counsel, and for transcripts and other expenses. To allow this prosecution to go any further violates the fair play that the Constitution says must obtain.

A number of other jurisdictions recognize the authority of a trial court to dismiss charges after successive retrials. Some rely on fundamental fairness, fair play, and substantial justice. See, e.g., *United States v. Ingram*, 412 F.Supp. 384 (D.C.1976); *State v. Moriwake*, 65 Haw. 47, 647 P.2d 705, 712 (1982); *State v. Abbati*, 99 N.J. 418, 432, 493 A.2d 513 (1985); *State v. Witt*, 572 S.W.2d 913, 917 (Tenn. 1978), and there are numerous others. *State v. Witt*, supra, held that a trial court has the authority to terminate prosecution after mistrials when the probability of another hung jury is great. That is surely the case here.

Is there a holding that the Due Process Clause permits five trials but not six; six trials but not seven; eight trials but not nine? No. But the question of whether the proceedings are no longer fair does not rest solely on a mechanical application that involves counting the number of mistrials that have occurred or the number of months that have passed. The Hawaii Supreme Court in *Moriwake*, supra, and other courts have listed factors to be considered. They are just that, factors. There can be no precise formula. Under every standard of justice, except the one employed by the Court of Appeals here, 13 years of incarceration, 5 trials and 4 appeal preparations without a valid conviction cry out for constitutional relief. The *Moriwake* court in Hawaii found that the case there had been properly dismissed by the trial judge after 2 mistrials due to hung juries where the same evidence was expected in any future trial. The Court's syllabus in that case at ¶11 provides: "In most cases, serious consideration should be

given to dismissing an indictment with prejudice after a second hung jury mistrial.” Juries do not like murders, yet the inability of twelve jurors to reach a unanimous verdict indicates a reasonable doubt.

Here, the government’s continuing attempts to force Anderson to run the gauntlet again and again have placed him in a position where he cannot effectively defend his liberty. He has been denied release and placed in such a position that he cannot effectively prepare to make his defense. He has been denied justice, and the delay has been intolerable.

Proposition of Law No. 2: A manifest necessity to declare a mistrial upon a deadlocked jury does not afford the State the ability to retry a defendant again and again until a verdict is achieved.

Oppressive practices violate the principles of fair play and substantial justice associated with our constitutional criminal justice system and greatly increase the risk that innocent individuals will be found guilty. See, e.g., *Carsey v. United States*, 129 U.S. App. D.C. 205, 392 F.2d 810 (D.C. Cir. 1967). Many opinions say that the Double Jeopardy Clause of the federal Constitution—and, by implication, the corresponding provision of the Ohio Constitution—is inapplicable because there was a manifest necessity for the declaration of a mistrial. With due respect, the Appellant says that the office of the Double Jeopardy Clause *must* include relief here. The Double Jeopardy Clause accords the accused the “valued right to have his trial completed by a particular tribunal.” See, *Wade v. Hunter*, 336 U.S. 684, 689, 69 S.Ct. 834, 93 L.Ed. 974 (1949). This Appellant has had three “particular” panels.

Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957), provides insight into the *function* of the Double Jeopardy Clause. The Clause’s underlying idea

is that:

The 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*.

Id., at 187-88. (Emphasis added.) Rightly conceived, the Clause protects two values, both of which are imperiled by the government's "repeated attempts to convict an individual for an alleged offense" and both of which arise from the fact that the government has more "resources and power" than an individual defendant.

The first value is the defendant's "finality" interest. Repeated attempts to convict an individual compel a defendant to live, as Christopher Anderson has done for almost 13 years, "in a continuing state of anxiety and insecurity." Once accused of a crime, a defendant "must suffer the anxiety of not knowing whether he will be found criminally liable and whether he will have to suffer a prison term." Without double jeopardy protection, a defendant's ability to conduct his life would be hampered by the fear of what has occurred here: renewed and continued exposure to the "embarrassment, expense and ordeal" of trial. *Green*, 355 U.S., at 187.

The second value that the Clause can serve is to prevent the government from "enhancing the possibility that even though innocent, a defendant may be found guilty." *Green v. United States*, 355 U.S., at 188. Repeated trials create "an unacceptably high risk that the Government, with its superior resources, would wear down a defendant." See, *United States v. DiFrancesco*, 449 U.S. 117, 130, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980). The imbalance in resources between the defense and the prosecution is so great

that a defendant will not receive a fair trial if subjected to repeated attempts at prosecution, and the Clause protects a person from “the harassment traditionally associated with multiple prosecutions.” *See, United States v. Wilson*, 420 U.S. 332, 352, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975).

The Court of Appeals, with respect, labored hard if not well to find a way to say that Anderson is nearing the brink but not there yet. The Court noted that the record “does not reflect an egregious number of procedures nor an unduly onerous process” and that “[n]othing in the record indicates that there was undue delay in setting or holding any one trial.” *State v. Anderson*, 2015 Ohio 2029, ¶30. That may or may not be true, but the cumulative effect is undeniable. Incredibly the appellate court took into account the State’s claim that it “did obtain conviction during one trial,” *State v. Anderson*, 2015 Ohio 2029, ¶37. The trial in which that conviction was obtained was so unfair that the same Court of Appeals *vacated* the conviction. Where the Court got the idea that “most witness testimony has been favorable to the state,” *id.*, is baffling. None of the drunken partygoers, the bulk of the State’s “evidence,” could do any more than put Anderson at the same party which they attended, could not place him as the last person to see Amber alive, and in fact one of them was the last person among the State’s witnesses to see Amber alive. Next the Court of Appeals observes the obvious: “Appellant has clearly never been acquitted”. *State v. Anderson*, 2015 Ohio 2029, ¶37. If he had he would not be in jail for 13 years. Just as obvious is “the fact that two trials resulted in hung juries leads credence to the fact that evidence exists to convince some jurors of guilt beyond a reasonable doubt.” *Id.* That’s the nature of a hung jury, of course. The Court of Appeals did not mention that in all of these years and all of these trials, the only jury that

unanimously convicted Anderson by proof beyond a reasonable doubt—the only standard under our Constitution for conviction—was one that had been tainted by extraneous and prejudicial information designed to convince jurors that they should find Anderson guilty not because of the State’s overwhelming evidence that he murdered Amber but because he was a probation-violating, woman strangling freak. Proof of the correctness of the reversal and the weakness of the State’s evidence is in the fact that two juries who heard just the State’s evidence without the prejudicial, immaterial gossip, have refused to convict.

Conclusion

This case presents important questions about our criminal justice system, the answers to which Ohio law does not presently provide. This Court should accept this case and answer these questions after briefing and argument.

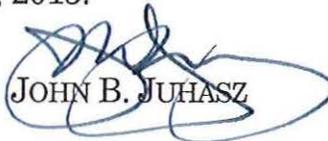
Respectfully submitted,



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Certificate of Service

I certify that a true copy of the foregoing was sent by regular United States Mail and by electronic mail to Ralph M. Rivera (0082063), Counsel of Record for Appellee, Mahoning County Prosecutor’s Office, 21 West Boardman Street, Youngstown, Ohio 44503 this 31st day of July, 2015.



JOHN B. JUHASZ

STATE OF OHIO)
)
MAHONING COUNTY)

IN THE COURT OF APPEALS OF OHIO

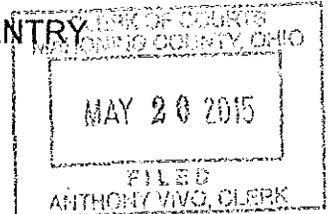
SS:

SEVENTH DISTRICT

STATE OF OHIO)
)
PLAINTIFF-APPELLEE)
)
VS.)
)
CHRISTOPHER L. ANDERSON)
)
DEFENDANT-APPELLANT)

CASE NO. 11 MA 43

JUDGMENT ENTRY



For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. This matter is remanded to the trial court for further proceedings according to law and consistent with this Court's Opinion. Costs to be taxed against Appellant.

C. L. White
Mary P. Jensen

Carol Ann Low
JUDGES.



2011 MA
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JUDENT

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Appendix -000001

WAITE, J.

{¶1} Appellant Christopher L. Anderson appeals a February 15, 2011 Mahoning County Common Pleas Court judgment entry denying a motion to dismiss his indictment and seeking discharge from his scheduled trial. Appellant argues that fairness dictates the state should be barred from trying him a "sixth time" on the same murder charge. Appellant contends that another trial would violate both the Due Process Clause and the Double Jeopardy Clause. The state responds by arguing that previous mistrials and hung juries do not bar the state from retrying a defendant. For the following reasons, Appellant's arguments are without merit and the trial court's decision is affirmed.

Factual and Procedural History

{¶2} Appellant was charged with murdering Amber Zurcher in June of 2003. During Appellant's first trial, the trial court ruled that witnesses were barred from introducing testimony alleging that Appellant had previously bitten and strangled an ex-girlfriend. However, during one witnesses' testimony, she blurted out this information while on the stand. *State v. Anderson*, 7th Dist. No. 03 MA 252, 2006-Ohio-4618, ¶37. The evening news highlighted the witness' testimony and the trial court declared a mistrial.

{¶3} The state refiled the murder charge against Appellant. During the second trial, the trial court did permit witnesses to testify as to Appellant's alleged violence against his ex-girlfriend. In November of 2006, the jury reached a verdict and found Appellant guilty. *Id.* On appeal, we reversed the conviction after finding

that the trial court erred in admitting the testimony. The state again refiled the murder charge against Appellant.

{¶4} Appellant was tried a third time in December of 2008. The jury deliberated but was unable to reach a verdict. The state again refiled the charges. During *voir dire* in Appellant's fourth trial, a prospective juror observed Appellant's attorney fall asleep and commented in front of other jurors about this incident. The trial court dismissed the prospective jurors and continued the case. After a new *voir dire* process and selection of a new defense attorney, Appellant stood trial and the jury was once again unable to reach a verdict.

{¶5} The state again refiled the murder charge against Appellant. At this point, Appellant filed the within motion to dismiss the charges based on alleged violations of the Due Process and Double Jeopardy Clauses. The trial court denied his motion. *Id.* Appellant filed a timely appeal, which was initially allowed.

{¶6} Before briefing, the state filed a motion to dismiss the appeal. The state contended that a trial court's decision to deny a motion to dismiss on grounds of double jeopardy is not a final, appealable order. We overruled the state's motion, and the prosecutor then filed a motion for reconsideration and requested an *en banc* hearing on the issue. We denied the motion for reconsideration but granted an *en banc* hearing. However, our *en banc* panel could not reach a consensus as to whether the trial court's denial constituted a final, appealable order. Accordingly, our previous decision stood. The Ohio Supreme Court accepted jurisdiction and ruled

that, at least in this case, the denial was final and appealable, and remanded the matter for a ruling on the merits.

Assignment of Error No. 1

The trial court erred in failing to grant appellant's motion to dismiss based upon due process grounds.

Assignment of Error No. 2

The trial Judge erred in not dismissing the indictment as continued prosecution violates Double Jeopardy.

{¶7} As both of Appellant's assignments of errors are intertwined, they will be addressed together. To date, Appellant has arguably faced trial four times. He asserts that the protections found in the Due Process Clause prevent the state from trying him a fifth time. (Appellant mischaracterizes this as the sixth time, for reasons later explained). As the state apparently has no new evidence, Appellant believes that there is nothing to suggest that a jury will convict him. Further, Appellant posits that the process to date has been expensive and stressful for himself, his family, and his lawyer. Although he concedes that there is no bright line as to the number of times a defendant can be tried following successive mistrials, he offers caselaw from Hawaii and Iowa which address this issue in order to reach the conclusion that Appellant's murder charge should now be dismissed.

{¶8} Appellant acknowledges that many state courts have held that the Double Jeopardy Clause does not apply when there is a manifest necessity for a mistrial. He urges, however, that this case requires application of the Due Process

Clause. While conceding that no direct language in either the Due Process Clause or the Double Jeopardy Clause support his arguments, Appellant argues that for almost twelve years he has suffered the anxiety of not knowing whether he will be found guilty and sentenced to prison. He claims that the constant fear of the process has hampered his life, exhausted him, and subjected him to embarrassment. He also alleges (with no evidence to substantiate this claim) that an innocent person has a greater chance of being convicted when subjected to multiple trials. Accordingly, Appellant urges that "fundamental fairness" dictates the state should be prevented from trying him again.

{¶9} In response, the state consolidates the factors from the Hawaii and Iowa cases cited by Appellant, and applies each factor to the facts of this case. The state uses these sixteen combined factors to argue that Appellant is not entitled to dismissal of the indictment. The relevant facts discussed by the state are: not all of Appellant's trials were completed; there is highly incriminating evidence against Appellant; Appellant has been convicted once; there has been no evidence of misconduct or bad faith on the part of the state; and, Appellant has not shown that he has been actually prejudiced by the delay.

{¶10} The state highlights the fact that Ohio law is clear. Neither a jury's failure to reach a verdict nor a mistrial bars the state from retrying the matter. The state notes that the Ninth District has emphasized that a state is equally entitled to finality in a case, which is only obtained through a final jury verdict. The state also

urges that a trial court's ruling on a pre-trial motion is given great deference. Thus, the state argues that the trial court did not err in denying Appellant's motion.

{¶11} Generally, the Double Jeopardy Clause does not bar retrial following a mistrial. *State v. Hubbard*, 150 Ohio App.3d 623, 2002-Ohio-6904, 782 N.E.2d 674, ¶50, citing *Oregon v. Kennedy*, 456 U.S. 667, 671, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982). The Ohio Supreme Court has declared a narrow exception to this rule exists only when the defendant has been goaded into seeking a mistrial by the prosecutor's conduct. *Hubbard* at ¶50, citing *State v. Loza*, 71 Ohio St.3d 61, 70, 641 N.E.2d 1082 (1994). To fall within this exception, the prosecutor's conduct must reflect that the state "engaged in an 'intentional act of deception.'" *Hubbard* at ¶50, citing *Loza* at 71. It is undisputed that there are no allegations of such conduct, here.

{¶12} Despite the fact that no actions here can be characterized as prosecutorial misconduct, Appellant does argue in general fashion that the state has had ample opportunity to obtain a conviction here, and continued prosecution of the matter is simply an "exercise of power" intended to "wear down" the accused, his family and friends. He cites to a number of federal cases that outline rights found in both the Due Process and Double Jeopardy Clauses. And he makes broad factual assertions that are unsupported in this record. He also does raise very troubling concerns as to how certain rights and responsibilities must be balanced, the most glaring of these appears to be deciding just how long a defendant may be incarcerated while going through the criminal process and yet subject to no conviction.

{¶13} It appears that there is no clearly analogous Ohio case where we may look for guidance. As earlier discussed, Ohio clearly allows retrial following mistrial and/or hung jury. Our body of law does not, however, address the number of retrials which may be permitted.

{¶14} In 2002, the Ninth District ruled in a case where a defendant was convicted after three mistrials. *State v. Roper*, 9th Dist. 20836, 2002-Ohio-7321, ¶87. The *Roper* court looked to law from other states and, most importantly for our purposes, reviewed the Hawaii and Iowa caselaw on which Appellant relies in the matter before us. After applying the factors listed in *State v. Moriwake*, 65 Haw. 47, 55, 647 P.2d 705 (1982) and *State v. Lundeen*, 297 N.W.2d 232, 236 (Iowa App.1980), the Ninth District held in *Roper* that trying the defendant four times did not violate the Double Jeopardy Clause or Due Process Clause. *Id.* at ¶90.

{¶15} The *Moriwake* factors included:

- 1) the severity of the offense charged;
- 2) the number of prior mistrials and the circumstances of the jury deliberation therein, so far as is known;
- 3) the character of prior trials in terms of length, complexity and similarity of evidence presented;
- 4) the likelihood of any substantial difference in a subsequent trial, if allowed;
- 5) the trial court's own evaluation of the relative case strength; and
- 6) the professional conduct and diligence of respective counsel, particularly that of the prosecuting attorney.

Roper at ¶85, citing *Moriwake* at 55.

{¶16} The *Lundeen* factors included:

(1) weight of the evidence of guilt or innocence; (2) nature of the crime involved; (3) whether defendant is or has been incarcerated awaiting trial; (4) whether defendant has been sentenced in a related or similar case; (5) length of such incarceration; (6) possibility of harassment; (7) likelihood of new or additional evidence at trial; (8) effect on the protection to society in case the defendant should actually be guilty; (9) probability of greater incarceration upon conviction of another offense; (10) defendant's prior record; (11) the purpose and effect of further punishment; and (12) any prejudice resulting to defendant by the passage of time.

Roper at ¶86, citing *Lundeen* at 236.

{¶17} The *Roper* Court noted that in both *Moriwake* and *Lundeen* a new trial was approved despite the fact that no new evidence was anticipated. *Roper, supra*, at ¶87. And similar to the instant case, one of the mistrials in *Roper* resulted from a witness who inadvertently provided improper testimony. *Id.* at ¶89.

{¶18} In 2009, the Tenth District heard a case where the defendant was convicted after his third trial. *State v. Whiteside*, 10th Dist. No. 08AP-602, 2009-Ohio-1893, ¶12. He appealed his conviction alleging that these three attempts to convict violated the Double Jeopardy Clause. *Id.* at ¶14. In applying *Roper*, *Moriwake*, and *Lundeen*, the Tenth District held that retrying a defendant following

two trials that resulted in hung juries did not violate the Double Jeopardy Clause. *Id.* at ¶21.

¶19 Our review of the various factors found in *Moriwake* and *Lundeen* reveal that they appear to be somewhat repetitive, and address questions either not present in this matter (such as the defendant's own prior record), addressed in Ohio by sentencing statutory schemes (purpose and effect of punishment), or readily apparent (seriousness of the crime and the effect on protection to society if defendant is guilty). Thus, we decline to adopt these courts' factors as our own. Further, *Moriwake* and *Lundeen* are factually distinguishable from this case. In *Moriwake*, the defendant was tried twice and both trials ended in a mistrial. *Moriwake* at 49. Unlike Appellant, the defendant never had a trial end in conviction and both of the trials were mirror images of one another, with no additional witnesses, evidence, or defenses. *Id.* at 57. In this case, Appellant has been convicted once and, due to procedural rulings, certain evidence was permitted in one trial but not in others.

¶20 In *Lundeen*, the defendant was charged with four counts of an offense on the basis of four separate county attorney's information filings. The four charges were not consolidated for trial. *Lundeen* at 234. When the defendant was acquitted on the first charge, the trial court dismissed the three remaining counts. *Id.* The trial court reasoned that the state had lost on its strongest case and a trial on the remaining counts would end in the same result. *Id.*

{¶21} Despite the differences between these two cases and the matter at bar, certain of the combined *Moriwake* and *Lundeen* factors do provide a useful tool for analysis of Appellant's claims. While we decline to directly adopt these tests, which clearly derive from other states' body of law on the issue, some factors contained within these cases do highlight important considerations as we analyze the matter before us.

{¶22} Again, we note that not all of the factors are relevant to Appellant or to the law in Ohio. And it is readily apparent that he is charged with a severe crime and failure to prosecute may result in a negative societal impact. A few of these factors do bear heavily on Appellant's constitutional arguments. Chief among these are: 1) whether the defendant has been incarcerated awaiting trial and the length of the incarceration; 2) the number and character of prior trials; 3) the professional conduct and diligence of respective counsel (in Ohio, especially the prosecutor); and 4) an evaluation of the evidence as it appears from the record. Finally, we also must delve into other prejudice to the defendant, if it appears on the record.

Defendant's Incarceration

{¶23} The record reflects that Appellant has been incarcerated for the entire length of this process: almost twelve years. Initially, due to many factors including the severity of the crime, bond was set at \$1,000,000. Sometime in 2008, on his motion, Appellant's bond was reduced to \$500,000. Apparently, he was unable to post bond and has remained incarcerated. There can be no question that this fact presents the most troubling aspect of this case. No one will argue that this is not a

substantial amount of time to remain in jail without the finality of a conviction. As Appellant so eloquently argues, one of our most fundamental rights is that of liberty. We note, also, that had Appellant already been convicted, his sentence would result in a mandatory fifteen years to life imprisonment. Hence, it is theoretically possible that he has already spent the bulk of the minimum sentence, here, incarcerated.

{¶24} However, we also note that this one fact alone cannot override all others. No one right exists in a vacuum and, already discussed, justice demands the victim and her survivors, as well as the citizens of the state, itself, are equally entitled to the ends of justice. Hence we turn to the next factor in order of its importance.

Number and Character of Prior Trials

{¶25} Appellant was indicted on August 29, 2002. He was brought to trial for the first time on May 27, 2003. On May 30, 2003, the trial court declared a mistrial based on an unsolicited comment made by one of the witnesses during the state's case. Although the record does not provide the actual date, it is clear the state immediately refiled the charge.

{¶26} The second trial began on November 29, 2003. Following his guilty verdict, Appellant was sentenced on December 4, 2003. On September 5, 2006, Appellant's conviction was reversed. Again, the record does not reveal the date, but the murder charge appears to have been refiled immediately.

{¶27} Appellant's third trial began on December 8, 2008. On December 18, 2008, the jury failed to reach a verdict, resulting in a hung jury. Appellant was immediately notified he would be tried again. Before this fourth trial began, on

Appellant's motion his bond was modified from \$1,000,000 to \$500,000. However, as earlier discussed, it does not appear that he posted bond.

{¶28} During pre-trial in his fourth trial, one of the potential jurors commented on the fact that Appellant's attorney had fallen asleep during *voir dire*. Although Appellant characterizes this as a mistrial, the judgment entry specifically states that the trial court ordered a continuance, not a mistrial. Thus, we cannot characterize the trial that followed as an entirely new proceeding. Following a new *voir dire* process and selection of new defense counsel, this trial was completed and the jury again failed to reach a verdict.

{¶29} The state filed a notice of intention to refile on October 22, 2010. On February 15, 2011, Appellant filed his motion to dismiss, which was denied by the trial court. On March 17, 2011, Appellant filed a notice of appeal. A panel of this Court initially found the denial of the motion to dismiss was a final, appealable order. On the state's request, we sat *en banc* on this limited issue. Our *en banc* panel was unable to reach a consensus and the case went to the Ohio Supreme Court. On February 19, 2013, the Ohio Supreme Court held that this denial did, in fact, constitute a final, appealable order. Accordingly, the case was remanded for a ruling on the merits.

{¶30} Hence, Appellant was subject to three complete trials, one of which resulted in conviction and two of which ended in hung juries. He was subject additionally to mistrial that occurred partially through his first attempt at trial. One of the trials resulting in a hung jury was delayed by the necessity of seating a new jury.

Appellant erroneously refers to the continuance as a mistrial and thus claims this caused a fifth trial, which is clearly not the case. Hence, in looking at relevant Ohio law, as found in *Hubbard, Roper* and *Whiteside*, this record does not reflect an egregious number of procedures nor an unduly onerous process. Nothing in the record indicates that there was undue delay in setting or holding any one trial. Nothing in the record indicates delay in refiling charges. We note that he was actually convicted during one of his trials. And only three proceedings, including the trial resulting in a guilty verdict, were fully concluded. The first attempt at trial was only partially completed when the necessity of mistrial occurred. And despite Appellant's mischaracterization, only one mistrial occurred. Based purely on our body of law as it currently exists, nothing in this set of facts leads us to conclude that dismissal of the murder charge is warranted.

Professional Conduct and Diligence of Counsel

{¶31} Because we acknowledge there is more to Appellant's fundamental fairness argument than simply counting the number of earlier proceedings, and because there can be no bright line test for the particular rights and issues that are involved, a review of the actions of both counsel is next required. This is particularly true as we have already noted that in Ohio, the only exception to the rule that retrial is not barred by Double Jeopardy is based on serious prosecutorial misconduct. See *Hubbard* and *Loza, supra*. As earlier stated, Appellant concedes this is not the case, but goes on to generally denounce the actions of the prosecutor in refiling these charges as a bullying tactic.

{¶132} There is nothing in this record leading us to find any type of misconduct on the part of the prosecutor. The charges appear to have been promptly refiled. No mistrial, continuance or hung jury can be attributed to any action or inaction on the part of the state. While Appellant admits this is true, he believes that by merely continuing to refile the charges this amounts to some sort of misconduct.

{¶133} It is readily apparent on the record, however, that Appellant's "fundamental fairness" argument cuts both ways. Appellant's first attempt at trial ended in mistrial solely because that was the only fundamentally fair outcome for Appellant. His second full trial ended in conviction. Despite the length of time that passed during his appeal following conviction, no one will argue that it was not fundamentally fair that Appellant, through counsel, pursue his successful appeal.

{¶134} Because his appeal was successful, the matter was remanded, leading to two more refilings by the prosecutor and to two hung jury decisions. During the last of these, Appellant's lawyer fell asleep during *voir dire*. This misstep was noticed and discussed by the proposed jurors. It was unquestionably fundamentally fair to continue the matter until an entirely new jury panel, untainted by the incident, could be seated. And we doubt Appellant would argue that it was not fundamentally fair to allow him this period of continuance to obtain new, competent counsel.

{¶135} Thus, while none of this twelve-year period can be in any way attributed to the "fault" of either the prosecutor, Appellant or his various counsel, it is clear that it has occurred because of the very issue as to "fundamental fairness" on which Appellant relies in seeking dismissal of his indictment. The State of Ohio and its

citizens have a duty to seek justice for this crime, its victim and her family. Appellant has a right to a full and fair trial. The goal is to impinge on Appellant's rights, including his liberty interests, as little as possible in the process. While this process has been a long one to date, the record reflects that it is due, in part, to ensuring that Appellant will receive a process that is fair and untainted.

Evaluation of the Evidence

{¶36} Also of importance in our review of whether fundamental fairness requires dismissal of the indictment is whether the evidence in the record appears to lead to a conclusion that dismissal is warranted, perhaps on other grounds. We note that the trial court refused to dismiss the charges against Appellant. While the dismissal was sought solely based on the number of times Appellant has been retried and not specifically on the basis that the state had no evidence on which to convict, this issue is inherent in Appellant's request for dismissal. He claims that as two trials resulted in a hung jury and the state appears to have no new evidence, there is no likelihood that the state can obtain a conviction on retrial.

{¶37} As earlier discussed, the state's response is that they did obtain conviction during one trial, and while there is apparently no new evidence pending, there is DNA evidence linking Appellant to the murder victim and most witness testimony has been favorable to the state. Appellant has clearly never been acquitted, and the fact that two trials resulted in hung juries leads credence to the fact that evidence exists to convince some jurors of guilt beyond a reasonable doubt.

Other Prejudice to the Defendant

{¶38} An evaluation of fundamental fairness would be incomplete without a review as to how Appellant would be prejudiced by retrial. Clearly we are aware of the prejudice inherent in the incarceration for twelve years of a suspect who has not been convicted of a crime. Appellant's entire argument circles back to this fact. However, it must be noted that his argument otherwise is devoid of evidence of other harm.

{¶39} We do not make light of a twelve-year incarceration and all the inherent harm this implies. But in addressing the question that confronts us, whether the trial court erred by not dismissing the charges against Appellant and discharging him from scheduled trial, we must also note that this record is devoid of evidence of other, more specific, harm. Appellant's brief is full of vague, unsubstantiated claims as to his embarrassment and exhaustion. But Appellant has not provided any evidence that witnesses have become unavailable or that the lapse of time has had an effect on the DNA evidence. He does not allege that his own memory has lapsed. While we certainly agree that his life cannot help but be severely disrupted, we do so with the understanding that this record reveals that it is possible for a jury to convict him. He has once been subject to conviction, and the fact that jurors twice have been unable to agree to convict or acquit does show that some jurors are convinced of guilt beyond a reasonable doubt. Ohio law permits retrial after mistrial or hung juries, even multiple times. This record shows no misconduct on the part of the state, no undue delay at any juncture and no reason to find the trial court otherwise abused its

discretion in refusing to dismiss these charges. At the same time, Appellant presents a compelling argument that no defendant should be subject to an unlimited number of retrials and at some point (which appears to be fast advancing) the balance will tip towards finding that Appellant's due process concerns override other legitimate state interests. Ultimately, we hold that on careful review of the record before us, we cannot say that it reveals any error on the part of the trial court in refusing to dismiss the charges at this time.

Conclusion

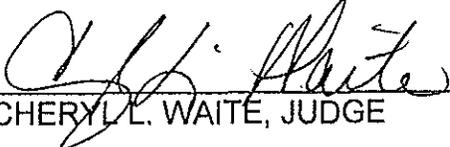
{¶40} This case presents a highly unusual, and highly emotionally charged, set of facts. Although we are well aware that Appellant has been incarcerated throughout this entire process, we find nothing in the record to suggest that the state has at any point acted in bad faith. Under Ohio law, in the absence of misconduct on the part of the state, a mistrial or hung jury does not bar retrial or retrials. We note that at every step, the process has moved as quickly as possible. There has been no undue delay in the refiling of charges or setting of new trial dates. Some of the delays here can be attributed solely to the process, itself. Appellant has twice successfully availed himself of the appellate process and the trial court has been zealous throughout in protecting Appellant's rights at trial. While we recognize that, at some point, continued retrial will present too onerous a burden on Appellant's rights, that time has not yet come. Based on all of the above, Appellant's assignments of error are overruled and the decision of the trial court to deny Appellant's motion to dismiss the indictment is affirmed. This matter is remanded to

the trial court for further proceedings according to law and consistent with this Opinion.

DeGenaro, J., concurs.

Robb, J., concurs.

APPROVED:


CHERYL L. WAITE, JUDGE