STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

V

Appeal No. 2017AP002323-CR
Circuit Court Case No. 2013CF003283

MICKEY MILLER,

Defendant-Appellant.

ON APPEAL FROM A NON-FINAL ORDER
ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT,
HON. JEFFREY A. CONEN PRESIDING,
DENYING A MOTION TO DISMISS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATEMENT OF THE ISSUE

Does the combination of police failure to disclose the existence of evidence and the prosecution's failure to disclose to the defense once it knew of its existence constitute governmental misconduct so egregious as to bar the re-trial here of Mickey Miller after a defense-requested mistrial?

The trial court answered: no.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Miller takes no position on oral argument but believes publication is warranted since a decision here would apply an established rule of law to a factual situation significantly different from that in published opinions.

STATEMENT OF THE CASE

Miller was charged in a criminal complaint dated July 22, 2013, with one count of armed robbery and one count of false imprisonment. (R: 1) A trial was commenced on Aug. 25, 2014, and a jury sworn, attaching jeopardy.

In the defense opening statement, Miller's counsel told the jury that while a suspect other than Miller had been identified by police, no identification procedures had been conducted with the victim R.H. that included that suspect, calling into the question the validity and thoroughness of the police investigation into the matter. In essence, it was the theory of defense.

On the morning of day two of the trial on Aug. 26, 2014, the prosecutors met with state witness/complainant R.H. and learned before putting her on the stand that she had, indeed, viewed a photo array containing the suspect other than Miller discussed in the defense opening statement and made no identification of that person. The state did not disclose this new development to the defense and put R.H. on the stand. As expected, she testified that she had Identified Miller through a photo array as her assailant and again identified him in court as the same. The state did not

bring up the existence of the non-identification of the suspect at the heart of the defense theory of defense in its direct examination of R.H.

The circumstances of the state finally revealing to the defense that its theory of defense was essentially baseless were these: in its cross-examination of R.H., the defense asked her if the police ever told her that a police officer suspected that a person other than Miller had assailed her. The state objected to the question on hearsay ground, arguments were heard on the objection and only during a recess in the trial following that objection was it revealed to the defense and court that R.H. had disclosed to the state prior to her testimony that she had eliminated the second suspect in a police-administered photo array procedure. (R: 70: p. 31) (R: 69: p. 1-15)

The defense moved for a mistrial based on this failure to disclose the existence of a second photo array procedure that undermined its theory of the case as presented in its

opening statement, and it was granted without prejudice.

The defense later moved the court to dismiss the matter with prejudice on double jeopardy ground. (R:31) Several days of evidentiary hearings were held in which testimony was taken from the two assistant district attorneys who prosecuted the case, the defense attorney who tried the case for Miller and seven officers and detectives from the Milwaukee Police Department. Part of those evidentiary hearings included revelations from a Milwaukee Police Department Internal Affairs investigation into the matter that the prosecutors in the case knew just before they put victim-witness R.H. on the stand to testify that she had viewed this second photo array. (R: 52)

One of the prosecutors in the case testified during these evidentiary hearings examining the issue that this failure to disclose the existence of the showing of a second photo array to R.H. left the defense "no choice" but

to request a mistrial. (R: 73: p. 47)

None of the numerous Milwaukee Police Department officers who testified at the hearings in connection with this issue acknowledged he or she showed this second array to R.H. nor admitted they knew who did. However, P.O. Michael Valuch testified that whoever showed the second array to R.H. violated department policy regulations by failing to prepare a supplement report regarding such an event. (R: 71: p. 29)

The trial court denied the defense motion to dismiss with prejudice on this double jeopardy issue. (R: 77)

ARGUMENT

THE COMBINATION OF POLICE FAILURE TO REPORT AND PROSECUTION FAILURE TO TIMELY DISCLOSE CONSTITUTES THE NECESSARY "EGREGIOUS" GOVERNMENTAL MISCONDUCT THAT TRIGGERS THE DOUBLE JEOPARDY BAR TO RE-TRIAL HERE.

The general rule that the double jeopardy clause does

not bar a re-trial when a defendant successfully makes the request does not apply in this situation because the state's non-disclosure and police violation of department rules left the defense with no other choice.

At issue on this appeal is the one exception to the rule governing defense-requested mistrials. "That exception allows a defendant to invoke the double jeopardy bar when his mistrial request is compelled by government misconduct so egregious that he must abandon his right to take his case to the first trier of the facts." United States v. Rivera, 802 F.2d 593, 597 (2nd Cir. 1986), *citing* Oregon v. Kennedy, 456 U.S. 667, 673 (1982). Kennedy held that "(o)nly where the governmental misconduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." Id. at 676.

The double jeopardy clause of both the Wisconsin and

United States Constitution protects Miller's right to have his trial completed by a particular tribunal and protects him from repeated attempts by the state, "with all its resources and power," to convict him for an alleged offense, State v. Jaimes, 2006 WI App 93, par. 7; State v. Hill, 2000 WI App 259, par. 10, thereby sparing Miller from "embarrassment, expense, anxiety, and continuing insecurity."

The combination of police misconduct here—and subsequent failure to own up to it through evidentiary hearings held to get to the bottom of the issue—and the subsequent silence of the prosecution upon discovery of such evidence constitutes "egregious" conduct under this case law. This is not a case where the defense had to make a strategic choice as to whether or not to request a mistrial. The failure to have this case tried by a particular tribunal must be credited to the state.

The state's action here—failure to timely disclose--was intentional in "the sense of a culpable state of mind in the nature of an awareness

that (its) activity would be prejudicial" to Miller. Jaimes at par. 8. The prosecution knew it had to tell the defense what it learned prior to putting R.H. on the stand and failed this basic duty to disclose, all with an awareness that the information it was withholding was prejudicial to Miller's theory of defense announced in its opening statement to the jury. As such, this state action was designed to "prejudice the defendant's rights to successfully complete the criminal confrontation at the first trial, *i.e.* to harasss him by successive prosecutions." Id.

CONCLUSION

Because this second prosecution of Miller after a defense-requested mistrial violates his right to be free from double jeopardy, the complaint and information should be ordered dismissed with prejudice.

Dated at Milwaukee WI this 11th day of June, 2018.

Electronically signed by:
LAW OFFICE OF SCOTT F ANDERSON

Scott F Anderson

_____

By: SCOTT F ANDERSON
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CERTIFICATION OF CONFORMITY WITH 809.19(8)(b)

I, Scott F. Anderson, hereby certify that this brief conforms to the rules in accordance with s. 809.19(8)(b) for a brief and appendix produced with proportional serif font. The length of this brief is 1,295 words, according to the word count function of the word processor available in Microsoft Word.

Electronically signed by:
Scott F Anderson

_____
SCOTT F ANDERSON
State Bar No. 1013911

CERTIFCATION OF COMPLIANCE WITH S. 809.19(12)

I, Scott F. Anderson, hereby certify that I have submitted an electronic copy of the brief, excluding the appendix, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

Dated this _____ day of June, 2018.

Electronically signed by: Scott F Anderson

_____
SCOTT F ANDERSON
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CERTIFICATION OF CONFORMITY WITH S. 809.19(2)(a)

I hereby certify that filed with this brief, as a part of the paper version of the brief, is an appendix that complies with 809.19(2)(a) and that contains: (1) a table of contents; (2) the findings or opinions of the trial court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first and last name initials instead of full names of persons, specifically including

juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

I am not filing an electronic version of the appendix.

Electronically signed by:
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TABLE OF CONTENTS TO APPENDIX