

No. 1-10-0313

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e) (1).

FIRST DIVISION
DATE: March 31, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS)	
)	Appeal from the
Plaintiff-Appellee,)	Circuit Court of
)	Cook County.
v.)	
)	No. 05 CR 26444
RICHARD PETERSON,)	
)	Honorable
Defendant-Appellant.)	Mary M. Brosnahan,
)	Judge Presiding

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Lampkin and Rochford concurred in the judgment.

O R D E R

HELD: Retrial after reversal of the defendant's conviction for trial error would not violate constitutional double jeopardy principles.

The defendant, Richard Peterson, filed this interlocutory appeal to challenge the trial court's denial of his motion to dismiss the case against him on double jeopardy grounds. See Ill. Sup. Ct. R. 604(f) (eff. July 1, 2006). For the reasons that

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follow, we affirm the trial court's denial of the defendant's motion to dismiss.

The defendant's first trial is described in detail in this court's prior decision disposing of his direct appeal. See *People v. Peterson*, No. 1-07-0900 (2008) (unpublished under Supreme Court Rule 23). Put briefly, the defendant was convicted of attempted first degree murder in connection with his stabbing his live-in girlfriend, but, on appeal, his conviction was reversed and the cause remanded for retrial due to the introduction of a statement the defendant made to invoke his right to silence in the face of police questioning. *Peterson*, No. 1-07-0900, slip op. at 10-17 (discussing *Doyle v. Ohio*, 426 U.S. 610 (1976)). As this court explained, the defendant had objected to the introduction of the statement--"I ain't got nothing to say, you want me to make your job easy?"--but the trial court overruled the objection and denied the defendant's later motion for a mistrial, with the prosecutor's agreement that she would not inquire further. *Peterson*, No. 1-08-0900, slip op. at 8-9. The prosecution later referred to the defendant's statement in closing argument. *Peterson*, No. 1-08-0900, slip op. at 9.

On appeal, after reciting the principle that due process prohibits evidence inviting a negative inference from a defendant's

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invocation of his right to silence, this court concluded that the defendant's comment constituted an invocation of his right to silence and thus that the statement should not have been presented to the jury. *Peterson*, No. 1-08-0900, slip op. at 14-15. This court further determined that the error was not harmless, but we refrained from stating that the State's evidence was insufficient to convict the defendant. *Peterson*, No. 1-08-0900, slip op. at 16.

On remand before a new trial judge, the defendant filed a motion to dismiss the charges against him based on double jeopardy. The trial judge concluded that there was no prosecutorial misconduct and that the reversal of the defendant's conviction was due to trial court error. The court therefore denied the defendant's motion, and he filed this appeal.

On appeal, the defendant reprises his assertion that double jeopardy bars his retrial. The double jeopardy clause of the fifth amendment bars a criminal defendant from being twice prosecuted for the same offense. *People ex rel. City of Chicago v. Hollins*, 368 Ill. App. 3d 934, 942, 859 N.E.2d 253 (2006) (citing U.S. Const., amend V; *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982)). Double jeopardy, however, does not guarantee that the State will subject a defendant to only one proceeding. *Hollins*, 368 Ill. App. 3d at 942 (quoting *Kennedy*, 456 U.S. at 672). Rather, where a trial ends

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in a mistrial on a defendant's motion, "the defendant's election to terminate the criminal proceedings foregoes his or her right to have a decision rendered by the first trier of fact, making retrial permissible." *Hollins*, 368 Ill. App. 3d at 942. A "limited" and "narrow" exception to this rule exists where a prosecutor provokes a defendant's motion for a mistrial. *Hollins*, 368 Ill. App. 3d at 942. This exception applies, however, only if "the prosecutor's actual intent was to 'goad' the defendant into moving for a mistrial;" a prosecutor's harassment, overreaching, or bad faith are not sufficient to trigger the exception. *Hollins*, 368 Ill. App. 3d at 942, quoting *Kennedy*, 456 U.S. at 675-76.

The defendant argues that the prosecutor here committed the type of misconduct that can trigger the double jeopardy bar to retrial. We disagree. As the State observes in its brief, and as the trial judge observed when it denied the defendant's motion to dismiss, there is no indication that the prosecutor at defendant's trial engaged in any prosecutorial misconduct whatever, much less that the misconduct was so egregious that it constituted an attempt to subvert the defendant's trial. In fact, in presenting the evidence of the defendant's statement to police, the prosecutor acted with the approval of the trial court judge. Thus, the defendant's conviction was reversed not for prosecutorial

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misconduct, but for trial error. Because the defendant's conviction was reversed for trial error, not for prosecutorial misconduct, double jeopardy is no bar to further proceedings. See *People v. Marchbanks*, 125 Ill. App. 3d 796, 799 (1984) ("Illinois reviewing courts have similarly rejected extension of this concept of double jeopardy from circumstances where a mistrial has been declared to those in which a defendant has been granted a new trial because of trial error").

The judgment of the circuit court is affirmed.

Affirmed.