2016 IL App (2d) 150412-U
No. 2-15-0412
Order filed March 31, 2016

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. TONI MEEKEY, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of De Kalb County. Nos. 13-DT-211 13-TR-5856 Honorable Robert P. Pilmer, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Jorgensen and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred in denying defendant's motion to dismiss a charge on double-jeopardy grounds, as there was no manifest necessity for the court's previous declaration of a mistrial: at worst, defendant sought to introduce proper evidence prematurely, an error that could have been cured by a less drastic remedy.

¶ 2 Defendant, Toni Meekey, appeals the trial court's order denying her motion to dismiss on double-jeopardy grounds a charge of driving under the influence of alcohol (DUI) (625 ILCS 5/11-501(a)(2) (West 2012)). She contends that it was not manifestly necessary for the court to declare a mistrial after she violated the court's ruling preventing her from cross-examining the arresting officer about giving her a portable breath test (PBT). She argues that the relevant

statute expressly allows defendants to introduce such results. She thus contends that, at most, she was guilty of attempting to introduce the evidence prematurely and that such an error did not warrant the extraordinary measure of declaring a mistrial. We reverse.

¶ 3 Defendant represented herself at trial. Sycamore police officer John Keacher testified that he was leaving Kishwaukee Community Hospital at about 2 a.m. on May 11, 2013, when he saw a silver Chevrolet Cavalier approaching on Route 23. The car was traveling between 5 and 10 miles per hour before stopping at a green light. Keacher pulled up behind the vehicle and approached the driver, whom he identified as defendant. She said that she was lost and was looking for the Country Inn & Suites. The officer asked her if she had been drinking and she responded that she had had a couple of drinks with dinner at about 9 p.m. Keacher noticed a "moderate" odor of alcohol on her breath. She failed several field sobriety tests, and Keacher opined that she was under the influence of alcohol.

¶ 4 Keacher arrested defendant and took her to the Sycamore police station. He read her the warning to motorists and asked if she would submit to a blood or urine test. Defendant refused to acknowledge him and he informed her that ignoring him would constitute a refusal to take the test.

¶ 5 In cross-examining Keacher, defendant asked, with apparent reference to a PBT, "Isn't it true that you tried to issue a [*sic*] unauthorized exam on me after—." The prosecutor objected at that point and requested a sidebar. There, the prosecutor stated, "This is completely misleading the jury, and it's not an unauthorized test. It's just not admissible because the Courts have held that it's not reliable like the Breathalyzer." He added, "But that doesn't make it an unauthorized test. That's for probable cause alone and it's admissible at certain hearings but it's not admissible at trial, and she's deliberately misleading the jury."

¶ 6 The trial court ruled that defendant could not "inquire at all in any way, shape or form about the portable breath test device." When defendant resumed her cross-examination, she asked whether she failed the field sobriety tests. The following colloquy then occurred:

> "Q. Okay. Then what did you do once I failed them?
>
> A. At the completion of the tests I offered you a preliminary breath test or a PBT—."

¶ 7 The trial court instructed the jury to disregard the answer and told defendant to ask her next question. Instead, defendant objected, whereupon the trial court asked the jury to "go back out." The prosecutor then requested a mistrial. The trial court stated, "So I think at this point unfortunately I don't have any choice but to grant the State's request."

¶ 8 Defendant filed a *pro se* motion that sought, among other things, to bar reprosecution because there was no manifest necessity to declare a mistrial. The trial court denied the motion and defendant appeals. See Ill. S. Ct. R. 604(f) (eff. Dec. 11, 2014).

¶ 9 Defendant, now represented by the Appellate Defender, contends that the trial court erred by denying her motion to dismiss. She maintains that the trial court's initial ruling, that she could not inquire at all about the PBT, was patently wrong, as the relevant statute expressly permits defendants to introduce such evidence. She argues that she was guilty of, at most, attempting to introduce the evidence prematurely during her cross-examination of Keacher and that the trial court could have cured the error by simply instructing the jury to disregard the answer and counseling her to wait until her case-in-chief before attempting to introduce the evidence.

¶ 10 A state may not put a defendant in jeopardy twice for the same offense. U.S. Const., amend. V; *Arizona v. Washington*, 434 U.S. 497, 503 (1978). Jeopardy attaches after the jury is selected and sworn. *People ex rel. Roberts v. Orenic*, 88 Ill. 2d 502, 507 (1981). Because

jeopardy attaches before the judgment becomes final, the constitutional protection embraces a defendant's right to complete his or her trial before a particular tribunal. *Washington*, 434 U.S. at 503. Thus, where a court, acting without a defendant's consent, declares a mistrial, the court deprives that defendant of his or her valued right to have a particular jury decide his or her fate. *United States v. Jorn*, 400 U.S. 470, 484 (1971). This does not necessarily preclude a second trial, however, because a defendant's right to have his or her trial completed by a particular factfinder is in some instances subordinate to the public's interest in fair trials designed to end in just judgments. *People v. Sanders*, 342 Ill. App. 3d 374, 378 (2003).

¶ 11 Accordingly, when the court declares a mistrial without the defendant's consent, the State should be allowed to retry the defendant only if there was a "manifest necessity" for declaring the mistrial. *People v. Bagley*, 338 Ill. App. 3d 978, 981 (2003).

¶ 12 The "manifest necessity" standard is a command to the trial court not to foreclose the defendant's right to have a particular tribunal decide his or her fate unless a scrupulous exercise of judicial discretion leads to the conclusion that the ends of justice would not be served by continuing the proceedings. *Id.* at 982. The Supreme Court has interpreted manifest necessity to mean a " 'high degree' " of necessity. *Washington*, 434 U.S. at 506. Thus, reviewing courts have an obligation to satisfy themselves that the trial judge exercised sound discretion in declaring a mistrial. *Id.* at 514.

¶ 13 Before declaring a mistrial, a trial court must carefully consider all of the circumstances and any reasonable alternatives to declaring a mistrial. *Bagley*, 338 Ill. App. 3d at 982. "A hasty decision, reflected by a rapid sequence of events culminating in a declaration of a mistrial, tends to indicate insufficient concern for the defendant's constitutional rights." *People v. Dahlberg*,

355 Ill. App. 3d 308, 315 (2005). Whether to declare a mistrial is within the trial court's sound discretion, and double-jeopardy concerns do not arise unless that discretion is abused. *Id.*

¶ 14 We note initially that the trial court's reason for declaring a mistrial was flawed. In response to the prosecutor's objection, the trial court ruled that defendant could not "inquire at all in any way, shape or form about the portable breath test device." However, the relevant statute expressly permits a defendant to introduce evidence concerning a PBT.

¶ 15 Section 11-501.5 of the Illinois Vehicle Code allows police to offer a PBT to a person suspected of drunk driving, "for the purpose of assisting with the determination of whether to require a chemical test." 625 ILCS 5/11-501.5(a) (West 2010). The statute further provides, "The result of a preliminary breath screening test may be used by the defendant as evidence in any administrative or court proceeding" involving a prosecution for DUI. *Id.*

¶ 16 Thus, the court's ruling that defendant could not inquire about the PBT in "any way, shape or form" was clearly wrong. Defendant concedes, perhaps unnecessarily, that it was improper to refer to the PBT during cross-examination of the State's witness, but argues that this relatively harmless violation did not warrant the extreme sanction of a mistrial.

¶ 17 We note that the statute's plain language does not restrict when a defendant may use the PBT results and we are aware of no case imposing such a restriction on defendants. Defendant apparently has in mind *People v. Brooks*, 334 Ill. App. 3d 722, 729 (2002), which held that PBT results are inadmissible in the State's case-in-chief. There, however, it was the State that sought to introduce the results. *Brooks* does not necessarily hold that a defendant may not introduce such evidence during cross-examination of a State witness. In any event, we agree with defendant that the trial court could have easily cured any error by, after instructing the jury to

disregard the officer's answer, instructing defendant to wait for her case-in-chief to introduce the evidence.

¶ 18 We also note that defendant did not literally violate the court's ruling. The court informed defendant that she could not "inquire at all in any way, shape or form about the portable breath test device." She then asked an open-ended question and the State's witness volunteered the answer. While defendant admitted that the question was intended to elicit that response, it was not unreasonable for defendant to think that she had complied with the court's ruling.

¶ 19 Moreover, the mistrial ruling was made quickly and with virtually no consideration of other alternatives. See *Dahlberg*, 355 Ill. App. 3d at 314-15. The trial court's entire consideration of the issue, "So I think at this point unfortunately I don't have any choice but to grant the State's request," did not allow for consideration of less drastic alternatives.

¶ 20 In short, the State cannot meet its burden to show that there was a " 'high degree' " of necessity for a mistrial (*Washington*, 434 U.S. at 506) where the mistrial declaration was based on an erroneous evidentiary ruling that defendant skirted but did not directly violate and where the decision was made hastily and without consideration of any alternatives.

¶ 21 The State argues that defendant was not attempting to introduce PBT "results," but was attempting to improperly cross-examine the officer by implying that he had lied by not mentioning the test on direct examination. There are several problems with this argument.

¶ 22 First, the prosecutor never objected on that basis in the trial court. The prosecutor objected to defendant's characterization of the test as "unauthorized," but proceeded to take the position that any evidence concerning the test was inadmissible. The trial court agreed with the latter position and never addressed the more specific objection. In any event, the prosecutor

never objected that defendant was trying to falsely imply that the witness lied. Had this objection been raised, it is likely that a remedy, such as a jury instruction, could have been devised without the necessity of declaring a mistrial. Second, the argument is based largely on speculation. The trial court cut off defendant's line of questioning early on, so it is not clear from the record what defendant's ultimate objective was.

¶ 23 Finally, the State provides no authority in support of its argument that the questioning was improper. Defendant conceded that her question was designed to elicit the response that the officer gave her a PBT. The statute allows a defendant to use the "result of a preliminary breath screening test" (625 ILCS 5/11-501.5(a) (West 2010)), and there is no concomitant prohibition against reference to the fact of giving such a test. As a practical matter, to lay a foundation for the admission of the PBT results, a defendant would have to establish that the test was given in the first place. It would be illogical to hold that a defendant may introduce the results of the test but could not establish that the test was in fact given.

¶ 24 While a defendant's possible misuse of the statute is concerning, that was not the basis for the mistrial ruling here. The ruling was made on the basis that defendant violated the ruling that defendant could not mention the PBT at all, and, accordingly, there was no consideration of alternative remedies that might have addressed the objection the State now raises.

¶ 25 The State also appears to argue that the trial court's ruling was literally correct because the court was prohibiting defendant only from bringing up the PBT during the State's case-in-chief. The State cites *Brooks* for the holding that "testimony regarding a defendant's refusal to submit to a PBT *** is inadmissible in the State's case in chief." *Brooks*, 334 Ill. App. 3d at 729. While conceding that the case is "factually distinguishable from the instant case," the State urges us to "apply the holding in *Brooks* to this matter." As noted, *Brooks* is distinguishable

because the *State* attempted to introduce the results. By contrast, the statute expressly allows defendants to use the results.

¶ 26 The record also does not support the State's argument. The prosecutor specifically stated that the results were "not admissible at trial," and the trial court ruled that defendant could not "inquire at all in any way, shape or form about the portable breath test device." There is no reason to believe that the prosecutor and the trial court were referring only to the State's case-in-chief. In any event, we perceive no prejudice to the State from defendant's reference to the test on cross-examination of the State's witness rather than waiting to recall the officer during her own case. As the results would have been admissible during defendant's case, any error could likely have been cured without declaring a mistrial. Because there was no manifest necessity for declaring a mistrial, the trial court erred by denying defendant's motion to bar reprosecution on double-jeopardy grounds. *Dahlberg*, 355 Ill. App. 3d at 312.

¶ 27 The order of the circuit court of De Kalb County is reversed.

¶ 28 Reversed.