COURT OF APPEALS
DECISION
DATED AND FILED

April 15, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP1848-CR **Cir. Ct. No. 2012CF6029**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

REGINALD R.D. BICKHAM,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL D. GUOLEE, Judge. *Affirmed and cause remanded for further proceedings*.

Before Curley, P.J., Kessler and Brennan, JJ.

¶1 PER CURIAM. This is a petition for leave to appeal.[1] Reginald R.D. Bickham appeals from an order of the circuit court denying his motion to

[1] We grant the petition.

dismiss the case against him on double jeopardy grounds.[2] Because we agree with the circuit court that prosecution of Bickham does not violate the constitutional protection against double jeopardy, we affirm the order and remand the case for further proceedings.

BACKGROUND

¶2 Bickham was charged with one count of first-degree recklessly endangering safety, contrary to WIS. STAT. § 941.30(1) (2011-12).[3] According to the criminal complaint, Bickham fired a gun multiple times at a car that was stopped at a gas station. The case proceeded to a jury trial. Bickham was represented by Assistant State Public Defender Mary Garvin Guimont.

¶3 During the testimony of the first witness (a police officer), the prosecutor, Grant Huebner, was handed a printout of an email that Assistant State Public Defender Mary Scholle had just sent to another prosecutor concerning a different defendant she was representing. The email indicated that Scholle's client had information concerning a man named "Reggie" that the client was willing to provide in exchange for some consideration on the client's pending charges. The email stated:

> [The client] has information about a homicide that occurred in the area of 10th and Atkinson last summer o[r] the summer before. People [the client] knows as "Reggie" and "Little Jig" were charged but [the client] believes they may

[2] The Honorable Michael D. Guolee issued the order denying the motion to dismiss on double jeopardy grounds that is at issue on appeal. The Honorable Ellen R. Brostrom declared the mistrial that was addressed in the motion to dismiss. In this opinion, we will refer to Judge Guolee as the circuit court and Judge Brostrom as the trial court.

[3] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

> have been acquitted. However, [the client] believes that "Reggie" now has a pending case for shooting someone who did not die from the same incident…. [The client] can identify "Reggie" from photographs.

¶4 The prosecutor requested a sidebar, which led to an in-chambers meeting with Garvin Guimont, Huebner, and the trial court. Bickham was not present for that meeting. At the conclusion of the meeting, the parties came back into court and went on the record. The trial court said:

> Mr. Huebner is going to make a record of some information that literally came into his office roughly within the last hour, maybe hour-and-a-half, at this point.
>
> The summary is, through no one's fault, it appears that the Office of the State Public Defender represents both Mr. Bickham and someone else whose interest could be adverse to Mr. Bickham. And under that state of affairs, there is no choice, this is an insurmountable conflict of interest and Ms. Garvin Guimont has to withdraw. I believe the other individual will also have that same action occur in that person's matter. Attorneys will be assigned from outside of the State Public Defender's Office.

¶5 The parties were given a chance to provide additional comments. Huebner noted that as soon as the email was received, it was immediately brought to the courtroom. Huebner continued:

> I believe [Garvin Guimont] has confirmed that there is a conflict. I don't have an issue, and I believe it is very clear, it is a conflict….
>
> … [T]here was nothing apparent from either representation or either prosecution that the two might potentially … have [an] adverse relationship, but it's enough, your Honor, that I immediately brought it to [Garvin Guimont's] attention. She immediately contacted her office, and I believe will be moving to withdraw.

Garvin Guimont said that she "agree[d] with the record that's been made." She added: "It's an insurmountable conflict. I cannot continue to represent

Mr. Bickham. I feel very badly about this in the middle of a trial, but it's not in Mr. Bickham's interest for me to continue as his lawyer."

¶6 The trial court then explained the situation to Bickham in more detail. It concluded: "Garvin Guimont has absolutely no choice. I have no choice. It's just, as she said, an insurmountable conflict…. Given that, I am going to have to declare a mistrial."

¶7 Shortly after the trial court declared a mistrial, the case was transferred to a different branch of the circuit court. New counsel was appointed for Bickham and he filed a motion to dismiss based on double jeopardy grounds. The circuit court (the Honorable Michael D. Guolee) scheduled an evidentiary hearing, at which both Garvin Guimont and Huebner testified.

¶8 Garvin Guimont provided further explanation of what happened on the day the mistrial was declared. She said that she contacted her supervisors by phone and was instructed not to contact Scholle or proceed with her representation of Bickham. She said she was instructed to move to withdraw because "this was a conflict that could not be resolved or waived." Garvin Guimont said she had reached that conclusion on her own and her supervisors confirmed it. Garvin Guimont indicated that both she and Scholle were going to withdraw from their respective representations because continuing the representations would violate ethical rules. Garvin Guimont said: "I wanted to represent Mr. Bickham to the fullest. But there is no way I could knowing that they were going to bring in a witness against him that our office represents."

¶9 Garvin Guimont testified that she did not ask for or object to the trial court's decision to declare a mistrial. She also said that she, Huebner, and the trial court did not discuss alternatives to having Garvin Guimont withdraw or declaring

a mistrial. Finally, she opined that it would not have been possible for another lawyer to take over as trial counsel in the middle of the trial.

¶10 Huebner testified that he and a police detective who reviewed the email believed, based on their knowledge of other police reports, that the "Reggie" referenced in Scholle's email was Bickham. Huebner said that if the individual offering information on "Reggie" had not been represented by the Office of the State Public Defender, Huebner would have "quickly had a conference with that attorney" and "[i]f a deal could have been made, [Huebner] would have called that witness" at Bickham's trial. But under the circumstances, he said, he "didn't even have an attorney that I could talk to in order to determine any information" that was being offered, because Scholle "was moving to withdraw" from her representation of the witness.

¶11 Huebner said that he did not ask for a mistrial and, in fact, "actually would have preferred to go to trial that day" because he "had two witnesses, one of whom was a body attachments status, one of whom had been avoiding service for us." With respect to the trial court's decision to grant a mistrial, Huebner said: "I don't recall there being any alternatives discussed as none really appeared to me at that time."

¶12 The circuit court accepted the parties' testimony and made findings consistent with that testimony. Notably, it found that neither party asked for the mistrial and that the trial court "decided on its own that there w[ere] grounds for a mistrial." The circuit court also determined that both Garvin Guimont and Scholle "believe[d] they must get off the case and alternative counsel should be engaged."

¶13 The circuit court expressed concern that Bickham was not included in the discussions about how to proceed, that the discussions were held off-the-

record in chambers, and that the parties did not discuss alternatives on the record. Nonetheless, it found that "the judge's decision was the right decision." The circuit court explained: "Alternatives could have been determined, but I would find that … there [wa]s no way of getting around this problem…. There was a conflict of interest, and a mistrial had to be called for. It had to be declared."

¶14 The circuit court concluded that the prosecution was not barred by double jeopardy. Bickham subsequently filed the petition to appeal the non-final order that is now at issue before this court. By order dated September 3, 2013, we directed the parties to file briefs "addressing the merits of the double jeopardy issue."

DISCUSSION

¶15 At issue on appeal is the circuit court's order denying Bickham's motion to dismiss based on double jeopardy grounds, which necessarily requires us to consider the trial court's decision to declare a mistrial *sua sponte*. Our supreme court outlined the applicable legal standards in ***State v. Copening***, 100 Wis. 2d 700, 303 N.W.2d 821 (1981):

> When the trial court on its own volition orders a mistrial without the defendant's request or consent, or even over defendant's objection, the Fifth Amendment may, but does not necessarily, bar reprosecution…. [W]here the impetus for the mistrial comes from the court, the defendant without his acquiescence loses his right to be tried in the original forum. Thus, reprosecution will be barred unless there is a "manifest necessity" for the mistrial.

Id. at 709 (citation omitted). "The trial court's exercise of discretion in making this *sua sponte* determination is ordinarily entitled to considerable deference on review by an appellate court." ***Id.*** (italics added).

¶16 Our supreme court has recognized that a trial "court's exercise of discretion in ordering a mistrial is accorded a level of deference that varies depending on the particular facts of the case." ***State v. Seefeldt***, 2003 WI 47, ¶13, 261 Wis. 2d 383, 661 N.W.2d 822. ***Seefeldt*** explained:

> At one end [of the spectrum] are those cases in which the basis for the mistrial is the unavailability of critical prosecution evidence or there is reason to believe that the prosecutor is using the State's superior resources to harass the defendant or to achieve a tactical advantage. In such cases, an appellate court applies the strictest scrutiny to a trial judge's mistrial order.
>
> At the other end of the spectrum are cases in which the basis for the mistrial is the trial judge's belief that the jury is unable to reach a verdict…. Great deference is accorded to a trial court's exercise of discretion because the trial judge is best able to assess the risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors.

Id., ¶¶25-26 (internal citations omitted). "Regardless of the level of deference to be applied, an appellate court must, at a minimum, satisfy itself that the circuit court exercised sound discretion in ordering a mistrial." ***Id.***, ¶13.

¶17 In this case, the parties debate whether the "strictest scrutiny" should be applied. Bickham acknowledges that "[t]ypically, the strict scrutiny standard is only applied to situations in which the prosecution requests the mistrial and the defense objects," which was not the case here, where Bickham admits that "there were no motions for mistrial and no objections." Nonetheless, Bickham argues:

> [S]trict scrutiny should be applied to the court's *sua sponte* ruling to determine whether a manifest necessity existed for the mistrial because, while neither party moved for the mistrial, the State's advantaged acquiescence unequivocally establishes "reason to believe that the prosecutor [was] using the State's superior resources … to achieve a tactical advantage." If the record establishes the mistrial achieved a tactical advantage for the State over Bickham, Bickham

> argues an appellate court must apply the strictest scrutiny to a trial judge's *sua sponte* mistrial order.

(Citation omitted; ellipses and second set of brackets in original.) Bickham asserts that the State "seemed simply to defer to trial counsel and her superiors' unexamined conclusion that an irreconcilable, non-waivable conflict existed," and argues that "the prosecution had a concomitant duty to take reasonable investigative steps to 'save' Bickham's tribunal or else both the State and defendant are 'ill-served.'"[4] (Citation omitted.)

¶18 In contrast, the State argues that "[t]he record does not establish that the State achieved any tactical advantage as a result of the mistrial ruling" and points out that Bickham "offers only speculation why the State's prospects might be improved at a second trial." The State urges this court to reject Bickham's argument that strict scrutiny should be applied, asserting that the State "did not do anything improper that prompted [the] defense to withdraw from the case or cause the court to grant a mistrial."

¶19 We conclude that it is unnecessary to determine the precise level of deference to apply to the trial court's decision to grant a mistrial in this case. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989)

[4] In the context of arguing for the application of strict scrutiny, Bickham asserts that he was denied "his fundamental right to appear at each critical stage of the proceeding." As the State points out, this issue was not raised in the trial court, and this court does not generally consider issues that are first raised on appeal. *See* ***State v. Schulpius***, 2006 WI 1, ¶26, 287 Wis. 2d 44, 707 N.W.2d 495. More importantly, this case is before this court on a petition to appeal a non-final order denying a motion to dismiss the case on double jeopardy grounds, and the only issue we directed the parties to brief was "the merits of the double jeopardy issue." We decline to address in this interlocutory appeal whether Bickham's constitutional rights were violated when he was not present for the in-chambers discussion. For the same reasons, we do not address Bickham's argument—also raised for the first time on appeal—that he was "effectively abandoned by and proceeding without counsel" at the time the mistrial was declared. (Bolding and capitalization omitted.)

("[C]ases should be decided on the narrowest possible ground."). Even applying strict scrutiny to the trial court's decision to declare a mistrial, we agree with the circuit court that the trial court "exercised 'sound discretion' in declaring a mistrial." *See* ***Seefeldt***, 261 Wis. 2d 383, ¶28 (citation omitted). We therefore affirm the circuit court order denying Bickham's motion to dismiss on double jeopardy grounds.

¶20 Bickham argues that the record does not establish that there was a manifest necessity because the trial court and the parties failed to consider alternatives to a mistrial. He concedes that "it would not have been possible" for a replacement attorney to step in and represent Bickham in the middle of the trial, but he asserts that it was not necessary for Garvin Guimont to immediately withdraw. He argues that the trial court "could and should have considered" the following actions:

> 1. Grant a short adjournment or recess while directing the State (or its agents) to meet with and evaluate the witness and proffered information following appointment of new counsel here for the witness; and
>
> 2. Disclose to the court the results of the State's investigation and whether this individual was even useful to the prosecution after consideration of their mental status, credibility, and reliability, including their prior criminal history and any current addictions; and
>
> 3. Evaluate whether and how the potential conflict might ripen into an actual conflict of interest for counsel while she represented Bickham at trial; and
>
> 4. Explore waiver of "conflict-free" counsel from Bickham; and
>
> 5. Assuming the usefulness of the new witness, determine whether the State would seek to introduce evidence from the [witness] at the ongoing trial and whether any of this evidence would be admissible under [WIS. STAT.] §§ 904.03 or 971.31(2).

Bickham also suggests that emergency counsel from outside the Office of the State Public Defender could have been appointed "to assume representation of the witness [which] would likely have removed the potential conflict of interest for Garvin[] Guimont (i.e., the perceived potential dangers of 'same firm' representation of person with adverse interests) without need for her to withdraw or the trial to be aborted."

¶21 The alternatives that Bickham suggests are based on the assumption that there may not have been a conflict and if there was, it could be waived. The problem with this analysis is that Garvin Guimont and her supervisors had already unequivocally determined that there was an actual conflict that could not be waived and, therefore, Garvin Guimont was bound to withdraw pursuant to SCR 20:1.7. That rule provides:

> **Conflicts of interest current clients. (a)** Except as provided in par. (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> **(b)** Notwithstanding the existence of a concurrent conflict of interest under par. (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

> (4) each affected client gives informed consent, confirmed in a writing signed by the client.

¶22 Applying SCR 20:1.7 to the facts here, it is clear why the trial court agreed with Garvin Guimont that she had a non-waivable conflict. As the State explains, the Office of the State Public Defender is treated as a single law firm and SCR 20:1.10 "imputes disqualification under SCR 20:1.7 to all lawyers associated with a firm." That firm was representing both Bickham and the witness at the same time. The firm's representation of the witness, which included seeking consideration for testifying against Bickham, was "directly adverse" to Bickham. *See* SCR 20:1.7(a)(1). Further, the facts suggest that the representation of either or both clients could be "materially limited by the lawyer's responsibilities" to the other client. *See* SCR 20:1.7(a)(2).

¶23 While conflicts can potentially be waived pursuant to SCR 20:1.7(b), waiver is possible only under certain conditions. Two of those conditions do not appear to be satisfied here. First, the lawyers would have to "reasonably believe[]" they could provide "competent and diligent representation to each affected client." *See* SCR 20:1.7(b)(1). Garvin Guimont testified that she believed there was "no way" that she could continue to represent Bickham. Second, the representation may "not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal." *See* SCR 20:1.7(b)(3). Here, the witness was seeking to incriminate Bickham in exchange for consideration from the State on other charges against the witness. The interests of the witness and Bickham involved the same criminal litigation.

¶24 In summary, we are convinced that Garvin Guimont had a non-waivable conflict and that the trial court did not erroneously exercise its

discretion when it declared a mistrial due to the fact that Garvin Guimont was withdrawing from the case in order to comply with ethical rules. As Bickham concedes, it would not have been reasonable for another defense attorney to immediately step in and proceed with the trial. Under the circumstances, it was reasonable to conclude that a mistrial was a manifest necessity. While we agree with the circuit court's observation that the trial court could have made a more complete record, including explaining why other courses of action were not viable, we also agree that a mistrial was necessary once Garvin Guimont withdrew her representation.

¶25 For the foregoing reasons, we affirm the circuit court's order denying Bickham's motion to dismiss the charges against him on double jeopardy grounds.

By the Court.—Order affirmed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.