

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA

v.

MARCELLAS HOFFMAN

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CR. NO. 01-169-2

MEMORANDUM

ROBERT F. KELLY, SR. J.

JUNE 10, 2002

On May 14, 2002, this Court issued an Order denying Defendant's Motion to Dismiss the Indictment on Double Jeopardy Grounds. A review of the docket reveals that an appeal was taken on June 5, 2002, therefore, the Court sets forth its reasoning for denying the motion below.

I. BACKGROUND

Defendant Marcellas Hoffman ("Defendant") was indicted on a five count indictment which included the following charges: (1) Count 1- conspiracy, in violation of Title 21, United States Code, Section 846; (2) Count 2- carrying a firearm during and in relation to a drug felony, in violation of Title 18, United States Code, Section 924(c); (3) Count 3- brandishing a firearm during and in relation to a drug felony, in violation of Title 18, United States Code, Section 924(c); (4) Count 4- discharging a firearm during and in relation to a drug felony, in violation of Title 18, United States Code, Section 924(c); and (5) Count 5- felon in possession of a firearm, in violation of Title 18, United States Code, Section 922(g). Defendant pled not guilty to all charges and the case was scheduled for trial.

Defendant's trial began on February 25, 2002, and this Court conducted a Rule 404(b) evidentiary hearing as to whether the Government should be able to introduce evidence of the Defendant's prior drug transactions with one of the Government's witnesses, Juan Rosado ("Rosado")¹. In support of this motion, the Government argued that since the Defendant and Rosado had conducted drug operations on eight or nine occasions in the past, none of which are the subject of the present indictment, that those events should be allowed to be admitted into evidence in order to establish that the Defendant was in the business of selling drugs and that the Defendant and Rosado had developed a relationship which included a certain level of trust. This Court denied the Government's motion and precluded the Government from specifically making reference to the Defendant's prior drug deals with Rosado, as those events are not part of the present indictment. The Court acknowledged that it was proper to include evidence as to the fact that Defendant and Rosado had met on prior occasions ², however, the Court precluded the Government from introducing evidence that the Defendant and Rosado had conducted drug transactions together.

On February 26, 2002, the second day of trial, the Government, outside of the presence of the jury, renewed its 404 (b) motion regarding the introduction of evidence with respect to the Defendant's prior drug transactions with Rosado and his organization. This Court denied the motion. (R. at 5). The Government then put Rosado on the stand. On direct

¹ Rosado was indicted for his participation in the events which are the subject of the case sub judice, however, Rosado entered into a plea agreement and agreed to testify for the Government.

² The Court made this ruling because there was an issue of identification. See Defendant's Motion to Suppress Identifications.

examination, the Government asked Rosado to explain in detail his Philadelphia drug business and its operations. As part of this line of questioning, the special assistant U.S. attorney asked Rosado where he normally met with his customers to which Rosado responded that the place is called “Porky’s Point”, which is the same place where the Defendant met Rosado in the current case. (R. at 24). Rosado was further questioned about his knowledge of the Defendant and the history of the two individuals, ie., where they met, how long, and the surrounding environment. (Id.) The Defendant then requested a sidebar and moved for a mistrial stating that the Government’s questions regarding Rosado’s past exceeded the Court’s earlier 404 (b) ruling. (R. at 25). The Court denied the motion but cautioned the Government to avoid asking questions regarding drug transactions which are not part of the present charges against Defendant. (Id.) The Government then posed the following question to Rosado, “Without telling us why you met [Defendant] - -” at which the Court interrupted the Government and called a sidebar. (R. at 28). At sidebar, the Defendant again moved for a mistrial asserting that the jury could infer by the Government’s line of questioning that the Defendant’s prior meetings with Rosado were in fact drug transactions. (R. at 28-29). The Government responded that it was trying to comply with the Court’s ruling to exclude the prior meetings, but, that the Government had not had a chance to meet with Rosado to instruct him not to testify about his prior drug transactions with Defendant since Rosado was in federal custody. (Id.) This Court granted Defendant’s motion for a mistrial after concluding that the jury could infer that the prior meetings between Rosado and the Defendant were drug transactions, thus nullifying the Court’s earlier ruling excluding that evidence. (R. at 31).

II. DISCUSSION

Defendant contends that retrial is barred by Oregon v. Kennedy, 456 U.S. 667 (1982), and argues that his indictment must be dismissed as his retrial would constitute double jeopardy. In support of his motion, Defendant argues that the Government was attempting to provoke a mistrial by its line of questioning to Rosado regarding his past with the Defendant, thus circumventing the Court's earlier ruling to exclude certain evidence regarding Defendant's prior drug deals with Rosado. The Government responds that, to the contrary, the Kennedy holding mandates that the Defendant be retried as there is no evidence to support a finding that the Government provoked the Defendant into moving for a mistrial or in any other way engaged in prosecutorial misconduct.

The Double Jeopardy Clause of the Fifth Amendment³ is the source of the general principle that "the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial." Arizona v. Washington, 434 U.S. 497, 505 (1978). However, because the defendant's interest in finality must be balanced against "the public's interest in fair trials," it has long been the case that not all reprosecutions are barred. Wade v. Hunter, 336 U.S. 684, 689 (1949). If the defense consents to a mistrial, such as in the case *sub judice*, re-trial is permitted. United States v. Tateo, 377 U.S. 463, 467 (1964). The Supreme Court, however, has carved out a narrow exception to this rule which may bar retrial if the trial court makes a finding of fact that the prosecutor intentionally provoked the Defendant into moving for a mistrial. Kennedy, 456

³ "No person shall * * * be subject for the same offence to be twice put in jeopardy of life or limb * * *." U.S. Const. Amend. V. The double jeopardy clause of the Fifth Amendment applies to states through the due process clause of the Fourteenth Amendment. Benton v. Maryland, 395 U.S. 784.

U.S. 667, 676 (internal citations omitted). This narrow exception does not apply to this case.

In Kennedy, the Supreme Court explained the narrow exception in which double jeopardy may apply to bar retrial of a defendant after requesting mistrial:

“Prosecutorial conduct that might be viewed as harassment or overreaching, *even if sufficient to justify a mistrial on defendant's motion, therefore, does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause.* ... Only where the governmental conduct 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 675-76 (emphasis added).

The Kennedy Court further emphasized the strict standard necessary to bar retrial:

“[W]e do hold that the circumstances under which such a defendant may invoke the bar of double jeopardy in a second effort to try him *are limited* to those cases *in which the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial.*” *Id.* at 679 (emphasis added).

After applying the standard as set forth in Kennedy, this Court finds that the exception does not apply in this case as the Government’s conduct was not intended to provoke the Defendant to move for a mistrial. Rather, the Government’s questioning of the witness effectively nullified the Court’s earlier ruling regarding the admission of testimony regarding the nine prior drug transactions between the Defendant and the witness. This Court granted the Defendant’s motion for a mistrial since jury could infer that there was information about the prior meetings that they were not allowed to know. Although the Government could have possibly avoided the mistrial by instructing Rosado before he took the stand not to mention the prior drug transactions with Defendant, this conduct was not intended to provoke Defendant to move for a

mistrial. Therefore, this Court finds that the Government's conduct did not rise to the level of prosecutorial misconduct necessary to invoke double jeopardy as it did not intend to provoke a mistrial, and, thus, the Double Jeopardy clause does not bar retrial of Defendant.

III. CONCLUSION

For all the foregoing reasons, this Court denied Defendant's Motion to Dismiss the Indictment on Double Jeopardy Grounds.