

**[J-218-98]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**EASTERN DISTRICT**

COMMONWEALTH OF PENNSYLVANIA, : No. 0002 E.D. Appeal Docket 1998  
: :  
Appellant : Appeal from the Judgment of Superior  
: Court entered October 21, 1996 at  
: 1534PHL95 reversing the Order of the  
v. : Court of Common Pleas, Philadelphia  
: County, Criminal Division, entered March  
: 23, 1995 at 257-259 January Term, 1983.  
RAYMOND MARTORANO, :  
: :  
Appellee :  
: ARGUED: October 22, 1998  
: :

COMMONWEALTH OF PENNSYLVANIA, : No. 0003 E.D. Appeal Docket 1998  
: :  
Appellant : Appeal from the Judgment of Superior  
: Court entered October 21, 1996 at  
: 1533PHL95 reversing the Order of the  
v. : Court of Common Pleas, Philadelphia  
: County, Criminal Division, entered March  
: 23, 1995 at 1381-1383 October Term,  
ALBERT DAIDONE, : 1982.  
: :  
Appellee :  
: :  
: ARGUED: October 22, 1998

OPINION

MADAME JUSTICE NEWMAN

DECIDED: November 10, 1999

The Commonwealth appeals an Order of the Superior Court that reversed an Order of the Court of Common Pleas of Philadelphia County (trial court) denying Raymond

Martorano and Albert Daidone's (collectively, Appellees) Motions to Dismiss on double jeopardy grounds. We affirm.

#### FACTUAL AND PROCEDURAL HISTORY

On July 31, 1984, after an extremely lengthy, highly publicized jury trial, Appellees were convicted of first degree murder and criminal conspiracy in the killing of union organizer John McCollough. Evidence from the trial established that Appellees recruited Willard Moran to kill McCullough, and that they planned the execution, assisted in its preparation, and helped Moran flee from the murder scene. The jury deadlocked in the penalty phase, and the trial court imposed a sentence of life imprisonment.

On direct appeal, the Superior Court reversed Appellees' convictions and granted Appellees a new trial on the ground of pervasive prosecutorial misconduct, including blatantly disregarding the trial court's evidentiary rulings, disparaging the integrity of the trial court in front of the jury, and repeatedly alluding to evidence that the prosecutor knew did not exist. On remand, Appellees filed Pre-trial Motions to Dismiss based on the Double Jeopardy Clauses of the Pennsylvania and United States Constitutions. They argued that the extensive prosecutorial misconduct in the first trial barred a retrial. The trial court denied the motions, but on appeal the Superior Court reversed, holding that a retrial would constitute double jeopardy.

## DISCUSSION

In this appeal, the Commonwealth argues that the Superior Court erred in applying Commonwealth v. Smith, 532 Pa. 177, 615 A.2d 321 (1992), to bar retrial on double jeopardy grounds where the alleged prosecutorial misconduct involved neither the intentional concealment of exculpatory evidence nor overreaching designed to provoke a mistrial. We disagree.

Prior to the United States Supreme Court's decision in Oregon v. Kennedy, 456 U.S. 667, 102 S.Ct. 2083 (1982), this Court followed federal law in recognizing two types of prosecutorial misconduct that would implicate double jeopardy principles:

First there is the prosecutorial misconduct which is designed to provoke a mistrial in order to secure a second, perhaps more favorable, opportunity to convict the defendant. [Citing United States v. Dinitz, 424 U.S. 600, 611, 96 S.Ct. 1075, 1081 (1976)]. Second there is the prosecutorial misconduct undertaken in bad faith to prejudice or harass the defendant. [Citing Lee v. United States, 432 U.S. 23, 32, 97 S.Ct. 2141, 2147 (1977); Dinitz, 424 U.S. at 611, 96 S.Ct. at 1081-82]. In contrast to prosecutorial error, overreaching is not an inevitable part of the trial process and cannot be condoned. It signals the breakdown of the integrity of the judicial proceeding, and represents the type of prosecutorial tactic which the double jeopardy clause was designed to protect against.

Commonwealth v. Starks, 490 Pa. 336, 341, 416 A.2d 498, 500 (1980). In Kennedy, though, the United States Supreme Court appeared to limit the scope of federal double jeopardy protection, holding that, "the circumstances under which . . . a defendant [who has successfully moved for a mistrial] 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." Kennedy, 456 U.S. 667, 679, 102 S.Ct. 2083, 2091.

This Court initially followed the new Kennedy standard, declaring in Commonwealth v. Simons, 514 Pa. 10, 16, 522 A.2d 537, 540 (1987), that, “henceforth double jeopardy will attach only to those mistrials which have been intentionally caused by prosecutorial misconduct.” The Court in Simons, however, expressly acknowledged this Court’s ability to “establish greater protection for our state citizens than provided by the United States Supreme Court.” Id. Five years later in Smith, the Court did just that.

The procedural history of Smith is similar to the case at bar. Smith was convicted at his first trial, and on appeal this Court reversed and remanded due to the erroneous admission of hearsay testimony. Prior to retrial, Smith filed a Motion to Dismiss, alleging that the Commonwealth had committed misconduct in withholding exculpatory evidence, and therefore a retrial would amount to double jeopardy. The trial court denied the motion, and the Superior Court affirmed.

On appeal, this Court recognized that, “[u]nder the holding of Commonwealth v. Simons, . . . [Smith] would not be entitled to discharge to avoid double jeopardy, for the violation was not based on a ‘claim that the prosecutor intended to provoke a mistrial.’” Smith, 532 Pa. 177, 180, 615 A.2d 321, 322 (quoting Simons, 514 Pa. 10, 20, 522 A.2d 537, 542). Thus, the Court abandoned the Simons standard and returned to the pre-Kennedy rule:

We now hold that the double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial,

but also when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial.

Smith, 532 Pa. 177, 186, 615 A.2d 321, 325.

The Commonwealth argues that double jeopardy will bar a retrial only where the factual circumstances are akin to those presented in Smith, i.e., only where the Commonwealth conceals exculpatory evidence and/or conceals other prejudicial misconduct. This argument is untenable.

Although it may have been the particular circumstances of the Smith case that prompted the Court to re-evaluate its decision in Simons, there is no doubt that the Court intended the Smith rule to be one of general application. Indeed, the Smith rule represents nothing more than a return to the standards that this Court utilized prior to Kennedy, which plainly applied in circumstances far different from those in Smith. See, e.g., Commonwealth v. Virtu, 495 Pa. 59, 432 A.2d 198 (1981) (prosecutor's bad faith attempt to force defendant to assert his Fifth Amendment privilege in front of the jury was grounds for barring retrial). Furthermore, we find no language in Smith to indicate that concealment of evidence is the only type of prosecutorial misconduct that may be "intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial." To the contrary, the holding of Smith appears to be deliberately nonspecific, allowing for any number of scenarios in which prosecutorial overreaching is designed to harass the defendant through successive prosecutions or otherwise deprive him of his constitutional rights.

The prosecutorial misconduct in the case at bar clearly meets the Smith standard. Here, the prosecutor acted in bad faith throughout the trial, consistently making reference to evidence that the trial court had ruled inadmissible, continually defying the trial court's rulings on objections, and, in a tactic that can only be described as Machiavellian, repeatedly insisting that there was fingerprint evidence linking Appellees to the crime when the prosecutor knew for a fact that no such evidence existed. See Commonwealth v. Martorano and Daidone, 453 Pa. Super. 550, 555-59, 684 A.2d 179, 182-84 (1996) (describing numerous instances of prosecutor's misconduct). While such misconduct does not involve concealment of evidence as in Smith, it nonetheless evinces the prosecutor's intent to deprive Appellees of a fair trial; to ignore the bounds of legitimate advocacy; in short, to win a conviction by any means necessary. This is precisely the kind of prosecutorial overreaching to which double jeopardy protection applies.

We agree with the Superior Court that, "a fair trial is not simply a lofty goal, it is a constitutional mandate,' . . . [and] [w]here that constitutional mandate is ignored and subverted by the Commonwealth, we cannot simply turn a blind eye and give the Commonwealth another opportunity." Commonwealth v. Martorano and Daidone, 453 Pa. Super. 550, 559-60, 684 A.2d 179, 184 (1996) (citation omitted). Accordingly, we affirm the Order of the Superior Court and discharge Appellees on double jeopardy grounds.

Mr. Justice Saylor files a Dissenting Opinion in which Messrs. Justices Castille and Nigro join.