STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, Sc. SUPERIOR COURT

STATE OF RHODE ISLAND	)	
	)	
VS.	)	NO: P1/2010-0644A
	)	
ROBERT DECARLO	)	

HEARD BEFORE THE HONORABLE JUSTICE FRANCIS DARIGAN

FEBRUARY 24, 2012

*****DECISION*****

APPEARANCES:

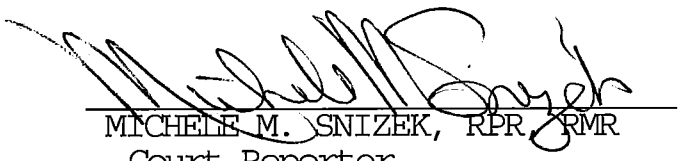
STACEY VERONI, ASSISTANT ATTORNEY GENERAL
FOR THE STATE OF RHODE ISLAND.

PETER DIBIASE, ESQUIRE
MICHAEL COLLUCCI, ESQUIRE
JOHN A. MACFADYEN, III, ESQUIRE
FOR THE DEFENDANT.

MICHELE M. SNIZEK
REGISTERED PROFESSIONAL REPORTER
REGISTERED MERIT REPORTER

CERTIFICATION

I, Michele M. Snizek, RPR, RMR, hereby certify that the succeeding pages, 1 through 17 inclusive, are a true and accurate transcript of my stenographic notes.



MICHELE M. SNIZEK, RPR, RMR
Court Reporter

(FRIDAY, FEBRUARY 24, 2012)

THE COURT: The Court has heard argument on a motion propounded by the defense to dismiss the pending indictment against the defendant, Robert DeCarlo, as a result of a motion granting relief by this court for a new trial or a mistrial of the trial that concluded some time ago. The trial of this case was an extremely difficult one because it presented issues and concerns not ordinarily found in cases of this nature. We had a recalcitrant complaining witness. We had a declaration of Fifth Amendment Right not to testify in this case, which made everybody's responsibility more difficult because there was no confrontation of the complaining witness and it was a conflagration of conflict of laws in this case, but the Court has no problem with that.

But also we had substantial pretrial motions on this case. The whole case took three weeks to try. But there were at least a week, if not more, of motions in limine, which required this Court to very carefully pick through the very many issues in this case to ensure the fact that the state of Rhode Island and this defendant would have a clear understanding of the narrow issues that this case presented, and that they would not be distracted by the issues that have heretofore been determined by this Court after full and fair hearings.

Miss Veroni has a little bit of a disadvantage because she was not trial counsel and she's here as chief of the criminal division operating from a work product made by one of the appellate lawyers in that department. So she doesn't know the nature and extent to which we took the time to parse through these many many issues. Also a good bit of the time was taken up to insure the fact, at the State's insistence, that the complaining witness, Louis Mendonca, did not become the defendant in this case by virtue of his own prior bad act, his own criminal record, and things of that nature. The defense, of course, was desirous that that record of criminal activity, both pending and that which had already occurred, be exposed to this jury as motivation for the defendant's actions on that night, but the Court in the exercise of its profound responsibility to make sure that the issues that are presented to a jury are only those that are necessary for the jury to consider with regard to the crime involved here, which was whether or not the defendant as a sworn police officer went beyond the strictures imposed upon him by law in attempting to effect an arrest on the complaining witness which resulted in his indictment by a Grand Jury on one count of simple assault and one count of felony assault. We spent a lot of time on those issues.

During the trial, as often is the case because of the nature of the defendant in this case being a police officer and because of the issues presented in this case, there were substantial hearings held outside of the hearing of the jury either at side bar or with the jury simply being excused during the course of the trial; again, to make the way smooth for the presentation of the facts that involve this case and only this case.

Now, the prosecutor assigned to this case was present for all of this; vigorously argued the State's position, and certainly with the respect to Mr. Mendonca not becoming the defendant in this case, was successful in articulating and arguing her position that most of the facts concerning this young man were irrelevant to the question of whether or not the defendant perpetrated a crime against Mr. Mendonca. During the trial there were side bars in which certain elements of evidence had been restricted by this Court after again, a full and fair argument by both the prosecutor and the defense.

The prosecutor was well aware of the Court's rulings in these matters; particularly with regard to the lunch comment which the prosecutor surprised everybody with when posing a question to the State's witness, expert witness, who was called in to discuss appropriate practices and procedures for police officers. Proper

objection was made to the question posed to Chief Luongo and an extensive side bar discussion was had where this Court made a ruling that there was no theory under which the brief transmission engaged in by the defendant during the course of the trial heard during the course of the trial could in any way support an inference that the defendant was eating or chewing something. These transmissions were milliseconds in length for the most part, and the ones which were longer would not allow any reasonable person to draw these inferences. The prosecutor was aware of that.

The famous exposition of the rather long statement which essentially was "Bobby, stop it; you're going to kill him," which was recorded in the Grand Jury by a witness who the Court felt was shaky at best. After a full exposition of the facts and circumstances surrounding that alleged statement, the Court specifically prohibited it, and which the prosecutor was well aware before and during the course of this trial.

This Court is not going to reiterate its decision of November 29th, but fully intends to incorporate it by reference in the remarks the Court is making today. The Court gave that decision great thought and applied the law as the Court believed it should be applied in this case to the facts which this Court believed the facts to

be. Now this Court is confronted with a larger question as to whether or not the actions of this prosecutor which the Court has already indicated were inappropriate and egregious, meets the definition supplied by our case law which is our controlling apparatus in cases of this nature, in determining whether this matter ought to be dismissed under the double jeopardy standard or not.

Now, in general, as counsel knows, a criminal defendant requesting a mistrial cannot, prior to any retrial, seek a double jeopardy protection and have the charges dismissed. **State versus Mallet,** 604 A.2d 1263, RI, 1992. An exception to that rule, however, is when a prosecutor commits a egregious misconduct with the intent of provoking a defendant into seeking a mistrial. **State versus Perez**, 605 A.2d 1305, RI, 1992. Citing **State versus Gordon,** 508 A.2d 1339, RI, 1986. Such actions include bad faith conduct designed to afford the prosecution a more favorable opportunity to convict the defendant. United States Supreme Court, elaborating on its previous decision in **United States versus Dimitz**, which suggested protection from double jeopardy appropriate where a prosecutor's conduct was motivated by bad faith or was intended to harass or prejudice the defendant, clarified the standard to prohibit a new trial only if the prosecutor's actions were intended to goad

the defendant into requesting a mistrial. And that is the case that's been referenced by both sides in this matter, **Oregon versus Kennedy**, 456 US 667, at 674. 1982 case. The **Kennedy** court, in making their decision, recognized the difficulty of discerning intent. They stated that a court must make a finding of fact, "inferring the existence or nonexistence of intent from objective facts and circumstances." In his concurrence in that case Justice Powell stressed, "because subjective intent often may be unknowable, I emphasize that a court in considering a double jeopardy motion should rely primarily upon the objective facts and circumstances of the particular case," citing to Page 679 and 680. As indicated by counsel, our Rhode Island Supreme Court has embraced the **Kennedy** case as the controlling standard in these matters. **State versus O'Connor** at 936 A.2d 1216, RI, 2007, case said, "a court faced with a double jeopardy motion must examine the intent of the prosecutor. It then becomes the court's role to make a finding of fact as to the intent issue." Quoting back to **Kennedy**, as already indicated, "therefore, in deciding these cases this court must examine the objective circumstances and actions taken by both sides to infer the prosecution's intent."

Miss Veroni has represented the **Delestre** case was

hers so she is a lot more familiar with it than I. But in that case the general instruction that we have given for years and years and years to juries regarding intent which was upheld in that case is, as I quote, "you may infer, although you are not required to, that a person intends the natural and probable consequences of acts knowingly done or knowingly admitted. It is entirely up to you" -- speaking to the jury -- "however, to decide what facts to find from the evidence received at trial. That is a January, 2012, case. It doesn't seem to have an Atlantic Third cite yet to my knowledge.

Now, cases have been brought to the attention, by both sides, to this Court. And the Court has read all of them, of course, and has more than a passing familiarity with most of them. The **Oregon versus Kennedy** case, which sets the standard by which this Court must make its findings, the transgression engaged in in that case was a question asked by counsel on redirect examination of an expert witness, "Have you ever done business with this defendant before?" And the answer was, "no." The retort in the nature of a question was, "Was it because he was a crook?" Motion for mistrial granted. In my experience I would have probably tried to cure it. That's not the worst thing I've ever heard, but nonetheless the motion for mistrial was granted, but the motion for double

jeopardy was denied because it was obvious that while an inappropriate question, it was not designed to goad or provoke the Court or the defendant into making a mistrial.

The **Dimitz** case, the judge banished counsel for the defense from the courtroom because of what he considered to be inappropriate comments during his opening statement; very first thing the jury hears. Mistrial granted; double jeopardy not granted. The **Beltre** case; a trooper on the stand testified when talking about questioning a defendant said, quoting from my mind, "that was his," the defendant's, "opportunity to profess his innocence and he chose not to do that." Move for mistrial; granted. Motion for double jeopardy denied. In the **Casas** case a relatively inexperienced prosecutor, according to the case itself, in opening statement made a statement that that person was already told by the court not to make during the opening, and it was something to the effect that you will see that the police have been investigating this defendant for years for drug activity. Motion to pass; granted. Motion for double jeopardy; denied. Motion for goading; first words out of the mouth of prosecution in opening statement; retrial.

The **Delestre** case, in my reading of it, is more of a problem with regard to instructions more than anything

else. The **Mallet** case, again, was an opening statement error by the prosecution combined with a surprise witness in discovery, violation of Rule 16. The **O'Connor** case, a fairly recent case, one of the problems with that case was a witness was asked a question, "and what business did you call the defendant about?" The witness said, "Drug business." That statement surprised not only the state but the defense. Motion for mistrial granted. Double jeopardy denied. **State versus Perez**, surprise witness surprised both sides. Same result.

The Court also looked to the well-known case of **State versus DiPrete,** in which the trial judge dismissed 22 indictments in that case for alleged Brady violations in discovery, violations under Rule 16. Rule 16 at the time, and I think still does, called for one of the remedies of a trial judge where those violations are extreme, to dismissal of the case. The case was appealed by the State to the Supreme Court. The Supreme Court overturned the trial judge on a three to two decision and said that the Court had no general supervisory provision to be able to dismiss a case; that taking that action was too extreme, and the dissent of Justice, the late Justice Bourcier and Justice Lederberg pointed out Rule 16 provides for that remedy and really the Court should have judged the trial judge's action on an abuse of discretion

standard, not general supervisory powers. But the message was clear in that case that the Supreme Court of this state as well as the United States frowns upon the drastic action of dismissing an indictment, an indictment for any number or kinds of reason.

I think the **State versus Diaz** case, which says, and I quote, "the Fifth Amendment bar on retrials as interpreted by the United States Supreme Court constitutes a series of drastic remedies that may well allow a guilty defendant to go absolutely free because of a procedural miscalculation by a trial judge or by the prosecution." **State versus Mallet,** in upholding the **Kennedy** standard, the court said, "we, the court, declined to expand the Kennedy rule," and said, and I quote, "we believe that the protection afforded in this area by the government and interpreted by the United States Supreme Court strikes an adequate balance between the rights of a criminal defendant and the public interest in bringing to justice those who have committed serious crimes."

Now, the recitation of cases that I've just engaged in for the record indicates that Rhode Island has considered instances of this nature in the past, but the instances that they have considered generally and almost totally concern one, possibly two examples of

prosecutorial acts of misconduct. The defense in this case in their memo was claiming some nine instances of misconduct by the prosecution. And the defense in this case has tried artfully to fashion its argument along the terms indicated that are those which are necessary for this Court to afford relief in determining the goading and provoking aspect of the prosecutorial misconduct in this case. And the defense has struggled to make those definitions fit the conduct of the prosecutor here. Miss Veroni in her presentation said well, Judge, you've already made a determination on intent by saying, "an overzealous and improper comments made by a seasoned prosecutor bent more on conviction than justice." The Court did say that. What is more important in any trial, whether it involves Mr. DeCarlo, the Providence Police, or Joe Doe, as we like to say in the law, what is more important than the concept of attempting to achieve justice.

I'm just completing 28 years of service to this court, and I have to say, that I have never seen in my years more egregious conduct conducted by the state in any criminal case that I have had the opportunity to deal with. In this case we have the famous, "Bobby, stop it; you're going to kill him" -- absolutely uncontroverted failure of any hopes of a defense to get a fair trial

from a jury. The prosecutor participated in those hearings where the Court specifically determined that that statement would not be included at trial for the legal reasons that are in the record.

The prospect of whether or not the defendant was eating during those transmissions was specifically prohibited by the Court after an extensive side bar, during which the Court told the prosecutor that you may not inquire in that regard or make any reference to that whatsoever with regard to the radio transmission. Three times. The prosecutor urged the jury in final argument to decide for themselves, listen to the tape; you determine whether he was eating something or not -- completely contradictory to the ruling of this Court, and within the absolute knowledge of this prosecutor that that area was not to be explored.

The third major transgression was the gross mischaracterization by the prosecutor of the profile of the complaining witness in this case. This Court spent hours, if not days parsing through what could be exposed with regard to this young arrestee with regard to his past activity, his immigration status, and whatever. Long arguments and discussions were held regarding it. And yet, the prosecutor, with full knowledge that the defendant had been convicted by a judge of the District

Court of assault upon Sergeant Lapierre, indicated to the jury that he's a simple scared 20 year old kid who didn't do anything wrong that night. He didn't do anything. The prosecutor also knew he was under arrest for felony assault in Massachusetts and led the Massachusetts State Police for over an hour, if not more, on a chase through a heavily wooded area very similar to the facts of the case that we worked so hard to prevent disclosing to this jury. Any one of these examples by itself would have been sufficient for this Court to grant a mistrial because of those activities. But it didn't end there. The prosecutor made what this Court believes to have made an excessive "call to duty," exhorting the jury not to put up with police brutality. We let people like this get away with this or something to that effect, then any cowboy can be on a police force. This was a case in which the law was a law of nuance. This was not a case where it was a simple matter of somebody allegedly hitting somebody on the head with a flashlight. The Court laid out specific legal instructions to the jury as to how they were to look at the actions of Sergeant DeCarlo on that might and to judge those actions according to the standards that the Court took so much time to detail in its instructions.

The characterization of Providence Police witnesses

in this case that this same prosecutor used to present to the Grand Jury to secure the indictment and then vilified them in examination, refused to call them in her own case, which I suppose is her right as a trial strategy, but then denigrating them before the jury by saying they were akin to Sergeant Schultz on Hogan's Heroes; they knew nothing, they saw nothing, they heard nothing, but they had the best seat in the house, which was a complete mischaracterization of the testimony of the officers that she outlined. Each officer gave his observations which should have been allowed to be considered by this jury. The veracity and credibility of those witnesses should have been allowed to go before that jury without this mischaracterization in the closing argument, and also because of the fact that she used the very testimony of these same people in part to secure the indictment.

The characterization during the course of the trial and in final argument of determining that -- saying to this jury, well, if Mendonca assaulted Lapierre, it was only the shove of an open palm, or something to that effect, when she knew he had been convicted by a judge of competent jurisdiction in the District Court after a full trial, and that that matter was at that very moment on appeal to this court where it still remains on appeal, to my knowledge.

And last, certainly not least, or maybe least, the mischaracterization in final argument of the lighting conditions at that lower parking lot indicating to the jury that there was a search light, there was strobe lights, there were this, there were that which, while to some extent would be tolerated as, in this Court's view, was a complete mischaracterization of any of the testimony of the witnesses who testified regarding that evening. Minor transgression, but nonetheless one of a litany.

Now, the cases also say, some of the older cases, that there must be a manifest necessity for having a mistrial, and that in the words of the **Kennedy** case, that the prosecutor has to goad or provoke the defense into making these motions; that even though it's necessary for the defense to move to pass, that that, in and of itself, is not enough. Then the State reiterates my own words to me when I said that the prosecutor was over zealous and made improper comments by a seasoned prosecutor bent more on conviction than justice. This Court tries not to embarrass attorneys and has not so in 28 years. That comment is accurate, but it doesn't indicate anything other than the reality of the situation of this case. That sentence in my view supports more than denigrates my position on this matter.

Every case that we try in these courtrooms, no matter how big in the eyes of the public or how small, deserves absolute justice. The State and the Government have to provide that sense of justice, fairness, and equanimity to the defense. As the cases say, they may strike hard blows, but they may not strike foul blows. In this case we've had a lot of blows struck against this defendant. While the Court is mindful of the harsh remedy of dismissing a case pursuant to the double jeopardy and Rhode Island standards and the Rhode Island Constitution, this prosecutor went out of her way, knowingly, purposefully, and intentionally on three separate occasions to introduce facts before this jury that she knew absolutely were forbidden by rule of this Court. This Court is not attempting to expand the **Kennedy** rule by any means, but that course of conduct, including the other lesser, of course, but similarly serious acts of misconduct did, in this Court's mind, cause this Court to come to the conclusion that she provoked or goaded the defendant into making this motion. If that was not goading, I don't know what goading or provoking is.

There was a conscious attempt by a seasoned prosecutor to disclose facts that she knew she shouldn't have engaged in before this jury. Can I get into her

mind? Did she think that she was losing that case? Probably not. But the egregiousness, the number and cumulative effect of this act of transgression left this defendant absolutely no other alternative or conclusion other than to be provoked and goaded into making that motion. The defendant had no other possible alternative, so the Court is going to grant the motion to dismiss the indictment against the defendant. And we'll note the State's objection, and the Court would like you to enter an order consistent with this opinion. Court will be in recess.

(MATTER CONCLUDED)