STATE OF MINNESOTA
IN COURT OF APPEALS
A10-74

State of Minnesota,
Appellant,

vs.

Michael William Sahr,
Respondent.

Filed July 20, 2010
Writ granted
Johnson, Judge

Stearns County District Court
File No. 73-CR-08-6524

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Janelle P. Kendall, Stearns County Attorney, Thomas J. Harbinson, Assistant County Attorney, St. Cloud, Minnesota (for appellant)

Mark D. Nyvold, Special Assistant State Public Defender, St. Paul, Minnesota (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Johnson, Judge; and Larkin, Judge.

U N P U B L I S H E D O P I N I O N

JOHNSON, Judge

This case presents the question whether the state may recharge Michael William Sahr in light of the midtrial dismissal of a prior case in which he was prosecuted for the same alleged conduct. The complaint in the first case mistakenly charged the offense of first-degree criminal sexual conduct (for which the state does not have sufficient evidence) instead of the offense of second-degree criminal sexual conduct (for which the state may have sufficient evidence). Sahr's trial counsel called the mistake to the district court's attention immediately after the jury was sworn. The district court refused to allow the state to amend the complaint and then dismissed the case based on the state's concession that it could not prove first-degree criminal sexual conduct. The district court subsequently refused to sign a new complaint charging Sahr with second-degree criminal sexual conduct on the ground that a second prosecution would be barred by the Double Jeopardy Clause. The state seeks review of the district court's refusal to sign the new complaint. We conclude that prosecution for second-degree criminal sexual conduct would not be barred by the Double Jeopardy Clause and, thus, grant the state's petition for a writ of mandamus.

FACTS

In May 2008, the state charged Sahr with one count of first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(a) (2006), based on a report that he had sexual contact with a nine-year-old girl. To obtain a conviction of first-degree criminal sexual conduct under that statutory provision with a person of that age, the state must prove that a defendant engaged in genital-to-genital contact. *See id.*; *see also* Minn.

Stat. § 609.341, subd. 11(c) (Supp. 2007). The probable-cause portion of the complaint, however, did not allege genital-to-genital contact. Rather, the complaint alleged merely "that the defendant touched" the victim and "rubbed" her genitals.

The case was set for trial in February 2009. Approximately one week before trial, the district court sought comments on its proposed jury instructions. The prosecutor suggested that the district court delete language referring to evidence of genital-to-genital contact and insert language referring to evidence of hand-to-genital contact, which would support a charge of second-degree criminal sexual conduct. *See* Minn. Stat. §§ 609.343, subd. 1(a) (2006), .341, subd. 11(a) (Supp. 2007). In an affidavit subsequently filed with this court in February 2009, the prosecutor stated that the complaint mistakenly charged Sahr with first-degree, instead of second-degree, criminal sexual conduct. The prosecutor refers to this error as a "clerical error."

Trial began on February 17, 2009. Shortly after the jury was seated and sworn, before the district court read its preliminary instructions to the jury, Sahr's trial counsel requested a sidebar conference at which he pointed out the incongruity between the probable-cause portion of the complaint and the offense charged. Sahr's counsel asked the district court to inform the jury in the preliminary instructions that first-degree criminal sexual conduct requires genital-to-genital contact. According to the prosecutor's affidavit, which has not been disputed, Sahr's trial counsel "stated that he had known for some time Count I was defective because the statute it cited alleged bare genital to genital contact." The district court recessed trial for the day.

The next day, February 18, 2009, the state moved to amend the complaint to charge second-degree criminal sexual conduct. The district court denied the state's motion to amend, citing Minn. R. Crim. P. 17.05. That same day, the state orally petitioned this court for emergency writs of prohibition and mandamus but was unsuccessful. The state also was unsuccessful in seeking emergency relief from the supreme court.

The following day, February 19, 2009, the state requested that the district court instruct the jury on the lesser-included-offense of second-degree criminal sexual conduct. It appears that the district court denied that motion. Sahr then suggested that the district court dismiss the case on its own motion in the interests of justice pursuant to section 631.21 of the Minnesota Statutes.[1] The state made the same suggestion. The district court dismissed the case "on its own motion and in the furtherance of justice, . . . with prejudice as jeopardy has attached." In subsequent orders, the district court made clear that its dismissal was based on section 631.21.

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[1]That statute provides:

> The court may order a criminal action, whether prosecuted upon indictment or complaint, to be dismissed. The court may order dismissal of an action either on its own motion or upon motion of the prosecuting attorney and in furtherance of justice. If the court dismisses an action, the reasons for the dismissal must be set forth in the order and entered upon the minutes. The recommendations of the prosecuting officer in reference to dismissal, with reasons for dismissal, must be stated in writing and filed as a public record with the official files of the case.

Minn. Stat. § 631.21 (2006).

The following day, February 20, 2009, the state presented the district court with a new complaint that alleged one count of second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(a). The district court refused to sign the new complaint on the ground that recharging and reprosecuting Sahr would violate the Double Jeopardy Clause.

On February 27, 2009, the state petitioned this court for, among other things, a writ of mandamus that would compel the district court to grant its motion to amend the complaint or to sign the new complaint. On April 8, 2009, a special term panel of this court denied the state's petition for mandamus to the extent that it sought to require the district court to grant the state's motion to amend the complaint. But to the extent that the state's petition sought to compel the district court to sign the new complaint, the special term panel remanded the matter to the district court without either granting or denying the petition. Rather, the special term panel remanded for additional analysis of the double jeopardy issue. Specifically, this court instructed the district court to determine whether the "dismissal order constituted a finding of insufficient evidence to convict" Sahr and whether, for double jeopardy purposes, the putative second-degree charge "is the 'same offense'" as the first-degree charge.

In January 2010, the district court issued an order and memorandum that provided additional legal analysis of the double jeopardy issue. First, the district court stated that there is insufficient evidence to convict Sahr of first-degree criminal sexual conduct because "[t]he State does not have any evidence that the defendant intentionally touched [the victim's] bare genitals or anal opening with the defendant's bare genitals or anal

opening." The district court described its earlier dismissal order as "the functional equivalent of an acquittal" such that it "bars further prosecution." Second, the district court stated that "[t]he offense sought to be charged in the new complaint . . . is the 'same offense' as the dismissed count in the instant action for double jeopardy purposes." The district court reiterated its prior conclusion that the charging and prosecution of the offense stated in the new complaint would be barred by the Double Jeopardy Clause.

The state seeks review of the district court's January 2010 order.

D E C I S I O N

I.

We begin by addressing Sahr's responsive argument that the state may not obtain review of the district court's January 2010 order by way of a notice of appeal. We apply a *de novo* standard of review to Sahr's argument, which concerns the proper interpretation of a rule of court. *See State v. Barrett*, 694 N.W.2d 783, 785 (Minn. 2005).

The state's right to pursue an appeal before trial of a criminal case is limited. "There must be a statute or court rule that permits the appeal, or the issue must arise by necessary implication from an issue where the State's right to appeal is expressly provided." *State v. Rourke*, 773 N.W.2d 913, 923 (Minn. 2009) (quotation omitted). Generally, the state's right to appeal is governed by rule 28.04, subdivision 1, of the Minnesota Rules of Criminal Procedure, which describes seven types of district court decisions that may be appealed by the state as of right. *Barrett*, 694 N.W.2d at 787; Minn. R. Crim. P. 28.04, subd. 1. Appellate courts "strictly construe the rules governing appeals

by the State in criminal cases because such appeals are not favored." *Rourke*, 773 N.W.2d at 923.

Sahr contends that an appeal by the state is not authorized by any of the seven parts of Minn. R. Crim. P. 28.04, subd. 1. The state did not file a reply brief, although it addressed the issue of appealability at oral argument. Neither party has cited caselaw that clearly states whether the state may pursue an appeal as of right in this particular procedural posture, and our research has not yielded any such caselaw.

Regardless whether the appeal is authorized by rule 28.04, subdivision 1, this court may construe the state's appeal as a petition for a writ of mandamus. *State v. Hoelzel*, 639 N.W.2d 605, 609-10 (Minn. 2002). It is appropriate to construe the state's appeal in this case as a petition for a writ of mandamus "because the relief the state seeks is in the form of an order to compel the district court to perform a function the state claims is required." *Id*. at 609; *see also State v. Hart*, 723 N.W.2d 254, 257-61 (Minn. 2006) (reviewing mandamus petition concerning district court's refusal to sign complaint). In addition, the district court order at issue was issued at the direction of this court in response to the mandamus petition that the state filed in February 2009. We neither granted nor denied that mandamus petition but, rather, left it unresolved. We thus implied that a final ruling on the petition would await further analysis by the district court. In essence, the present proceedings in this court are a continuation of the prior proceedings in this court on the state's February 2009 mandamus petition. In light of the rather unusual circumstances of this case, we will construe the state's notice of appeal as a petition for a writ of mandamus and proceed to consider the merits of the district court's January 2010 order.

II.

The state argues that the district court erred by refusing to sign the new complaint, which would charge Sahr with second-degree criminal sexual conduct. We may issue a writ of mandamus to a district court only if the district court "had a clear and present official duty to perform a certain act." *State v. Pero*, 590 N.W.2d 319, 323 (Minn. 1999); *see also* Minn. Stat. § 586.01 (2008).

A district court has an obligation to examine a complaint and to determine whether it is supported by probable cause. Minn. R. Crim. P. 2.01 (2008); *Hart*, 723 N.W.2d at 259. Here, the district court refused to sign the new complaint solely because it concluded that recharging Sahr would violate the Double Jeopardy Clause. On appeal, the parties' arguments are confined to the double jeopardy issue. Thus, we proceed on the premise shared by the parties: that the district court is required to sign the new complaint if reprosecution of Sahr is not barred by the Double Jeopardy Clause.

The Double Jeopardy Clause of the United States Constitution provides, "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V; *see also* Minn. Const. art. I, § 7. The purpose of the Double Jeopardy Clause is to "protect[] a criminal defendant from repeated prosecutions for the same offense." *Oregon v. Kennedy*, 456 U.S. 667, 671, 102 S. Ct. 2083, 2087 (1982). The protection against multiple prosecutions is reflected in a criminal defendant's "right to have his trial completed by a particular tribunal." *Id.* at 671-72, 102 S. Ct. at 2087 (quotation omitted).

> The Double Jeopardy Clause, however, does not offer a guarantee to the defendant that the State will vindicate its societal interest in the enforcement of the criminal laws in one proceeding. If the law were otherwise, the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again.

Id. at 672, 102 S. Ct. at 2087 (quotation and citation omitted).

The Double Jeopardy Clause prohibits a state from reprosecuting a person for an offense of which the person has been acquitted. *See, e.g.*, *Sanabria v. United States*, 437 U.S. 54, 64, 98 S. Ct. 2170, 2179 (1978). If a person's trial results not in an acquittal but in a mistrial "without the defendant's request or consent," the defendant may or may not be reprosecuted, depending on "whether there is a manifest necessity for the [mistrial], or the ends of public justice would otherwise be defeated." *United States v. Dinitz*, 424 U.S. 600, 606-07, 96 S. Ct. 1075, 1079 (1976) (alteration in original) (quotation omitted). "Different considerations obtain, however, when the mistrial has been declared at the defendant's request." *Id.* at 607, 96 S. Ct. at 1079. In that situation, the general rule is that "'*a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution*, even if the defendant's motion is necessitated by prosecutorial or judicial error,'" unless the circumstances giving rise to the mistrial are "attributable to prosecutorial or judicial overreaching." *Id.*, 96 S. Ct. at 1079-80 (emphasis added) (quoting *United States v. Jorn*, 400 U.S. 470, 485, 91 S. Ct. 547, 557 (1971) (plurality opinion)). "Such a motion by the defendant is deemed to be a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact." *United States v. Scott*, 437 U.S. 82, 93, 98 S. Ct. 2187, 2195 (1978). Thus, if "a defendant in a criminal trial

successfully moves for a mistrial, he may . . . thereafter invoke the bar of double jeopardy against a second trial" only if "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. at 679, 102 S. Ct. at 2091.

Sometimes a trial concludes neither by an acquittal nor a mistrial but, rather, by a dismissal of the charges. In that situation, the Double Jeopardy Clause may allow reprosecution. "A mistrial ruling invariably rests on grounds consistent with reprosecution, while a dismissal may or may not do so." *Lee v. United States*, 432 U.S. 23, 30, 97 S. Ct. 2141, 2145 (1977) (citation omitted). "[A]t least in some cases, the dismissal of an indictment may be treated on the same basis as the declaration of a mistrial." *Scott*, 437 U.S. 94, 98 S. Ct. at 2196.

The parties to this case disagree about how we should treat the termination of Sahr's February 2009 trial. The state contends that it should be deemed a mistrial; Sahr contends that it should be deemed an acquittal. Sahr points to the district court's statement that the dismissal was "the functional equivalent of an acquittal and bars further prosecution." But a double jeopardy analysis "does not turn on" how a trial court "labels its action." *Lee*, 432 U.S. at 30, 97 S. Ct. at 2145. Furthermore, a "'trial judge's characterization of his own action cannot control the classification of the action.'" *Scott*, 437 U.S. at 96, 98 S. Ct. at 2196 (quoting *Jorn*, 400 U.S. at 478 n.7, 91 S. Ct. at 553-54 n.7 (plurality opinion)). Moreover, the district court's characterization of the dismissal in this case is inconsistent with our supreme court's observation that a dismissal pursuant to section 631.21 "ordinarily would not have the effect of precluding the prosecutor from recharging the

accused." *State v. Streiff*, 673 N.W.2d 831, 838 (Minn. 2004). In any event, whether a district court contemplates a new trial "is not conclusive on the issue of double jeopardy." *Scott*, 437 U.S. at 92, 98 S. Ct. at 2194. Rather, the determination whether reprosecution is barred is a matter of "balanc[ing] the valued right of a defendant to have his trial completed by the particular tribunal summoned to sit in judgment on him against the public interest in insuring that justice is meted out to offenders." *Id.* (quotation and citation omitted).

In urging us to treat the termination of Sahr's February 2009 trial as if it were a mistrial, the state relies primarily on *Lee*, which arose from facts that are similar to this case. The government charged Lee with theft, but the prosecutor prepared a defective indictment that failed to allege "that the theft [was] committed knowingly and with intent to deprive the victim of his property." *Lee*, at 25, 97 S. Ct. at 2143. The Supreme Court described "the prosecutor's failure to draft the information properly" as "at most an act of negligence, as prejudicial to the Government as to the defendant." *Id.* at 34, 97 S. Ct. at 2147. Just before trial, Lee moved to dismiss the indictment because of the defect. *Id.* at 25-26, 97 S. Ct. at 2143. The district court initially denied the motion but later granted it after the defense had rested its case. *Id.* at 26-27, 97 S. Ct. at 2143-44. The Supreme Court determined that "the order entered by the District Court was functionally indistinguishable from a declaration of mistrial." *Id.* at 31, 97 S. Ct. at 2146. The Supreme Court thus concluded "that the distinction between dismissals and mistrials has no significance in the circumstances here presented and that established double jeopardy

principles governing the permissibility of retrial after a declaration of mistrial are fully applicable." *Id.*

The state also relies on *Scott*, which was issued by the Supreme Court one year after *Lee*. The government charged Scott with three drug-related offenses. *Scott*, 437 U.S. at 84, 98 S. Ct. at 2190. Before trial and during trial, Scott moved to dismiss the first and second counts on the ground that he was prejudiced by pre-indictment delay. *Id.* The district court granted the motion after the presentation of evidence. *Id.* The jury returned a verdict of not guilty on the remaining count. *Id.* The government's appeal raised the question whether the Double Jeopardy Clause precluded the government from continuing to pursue its prosecution of the two dismissed counts. *Id.* at 84-86, 98 S. Ct. at 2190-91. The Supreme Court recited the "underlying idea" of the Double Jeopardy Clause, namely, "that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity." *Id.* at 95, 98 S. Ct. at 2196 (quotation omitted). But the Court reasoned that this underlying idea "is not a principle which can be expanded to include situations in which the defendant is responsible for the second prosecution." *Id.* at 95-96, 98 S. Ct. at 2196. The Court stated that the oppression that is avoided by the Double Jeopardy Clause is

> a far cry from the present case, where the Government was quite willing to continue with its production of evidence to show the defendant guilty before the jury first empaneled to try him, but the defendant elected to seek termination of the trial on grounds unrelated to guilt or innocence. This is scarcely a

> picture of an all-powerful state relentlessly pursuing a defendant who had either been found not guilty or who had at least insisted on having the issue of guilt submitted to the first trier of fact. It is instead a picture of a defendant who chooses to avoid conviction and imprisonment, not because of his assertion that the Government has failed to make out a case against him, but because of a legal claim that the Government's case against him must fail even though it might satisfy the trier of fact that he was guilty beyond a reasonable doubt.

Id. at 96, 98 S. Ct. at 2196. The Court thus concluded that no double jeopardy bar exists if a "defendant himself seeks to have the trial terminated without any submission to either judge or jury as to his guilt or innocence." *Id.* at 101, 98 S. Ct. at 2199. In such a case, the Court explained, the defendant "has not been deprived of his valued right to go to the first jury." *Id.* at 100, 98 S. Ct. at 2198 (quotation omitted). Rather, "only the public has been deprived of its valued right to one complete opportunity to convict those who have violated its laws." *Id.* (quotation omitted).

The facts of this case are fairly similar to those of both *Lee* and *Scott*. The May 2008 complaint contained an error that appears to have been caused by simple negligence. The district court specifically found "that there was no bad faith on the part of the State." The district court terminated the February 2009 trial after Sahr's trial counsel drew attention to the prosecutor's negligence and suggested that the district court dismiss the case. The district court responded by dismissing the case, on its own motion, in the interests of justice. The case was terminated "without any submission to either judge or jury as to [Sahr's] guilt or innocence." *Scott*, 437 U.S. at 101, 98 S. Ct. at 2199. In fact, the state never presented any evidence because there was no dispute that the state's evidence would be insufficient to prove first-degree criminal sexual conduct. In *Lee*, the

Supreme Court reasoned that a prosecutor's error "was one that could be avoided -- absent any double jeopardy bar -- by beginning anew the prosecution of the defendant." 432 U.S. at 30, 97 S. Ct. at 2146. As in *Lee*, we construe the termination of Sahr's February 2009 trial to be "functionally indistinguishable from a declaration of mistrial." 432 U.S. at 31, 97 S. Ct. at 2146. Given that characterization, we apply the general rule that "a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution." *Jorn*, 400 U.S. at 485, 91 S. Ct. at 557 (plurality opinion).

We acknowledge language in *Lee* that the Double Jeopardy Clause bars reprosecution if "a midtrial dismissal is granted on the ground . . . that the defendant simply cannot be convicted of *the offense charged*." 432 U.S. at 30, 97 S. Ct. at 2145 (emphasis added). But we do not interpret this language to forbid reprosecution in this case. In *Lee*, the issue on appeal was whether the government should be permitted to reprosecute Lee by recharging him under the *same* statutory provision but with more complete factual allegations. 432 U.S. at 27, 97 S. Ct. at 2144. This case comes to us in a different procedural posture because the state seeks to charge Sahr under a *different* statutory provision: the statute setting forth the offense of second-degree criminal sexual conduct instead of the statute setting forth the offense of first-degree criminal sexual conduct. *See* Minn. Stat. §§ 609.342, subd. 1(a), .343, subd. 1(a). Other language in both *Lee* and *Scott* makes clear that the Supreme Court did not intend to bar reprosecution in these circumstances. In *Lee*, the Court stated that there was no determination "that Lee could *never* be prosecuted for or convicted of the theft of the two wallets." 432 U.S. at 30, 97 S. Ct. at 2145 (emphasis added). In *Scott*, the Court phrased the issue more generally as

to whether there had been a determination of "guilt or innocence." 437 U.S. at 101, 98 S. Ct. at 2199. Our supreme court has identified "the crucial question" as "whether it is clear that the trial court 'evaluated the [state]'s evidence and determined that it was legally insufficient to sustain a conviction' or whether the defendant sought to terminate the prosecution solely on a legal claim unrelated to factual guilt or innocence." *State v. Large*, 607 N.W.2d 774, 780 (Minn. 2000) (quoting *Scott*, 437 U.S. at 97, 98 S. Ct. at 2197 (alteration in original)). Ultimately, permitting the state to recharge and reprosecute Sahr does not frustrate the purpose of the Double Jeopardy Clause, which, as stated in *Scott*, is to forbid the State from engaging in "repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity."[2] 437 U.S. at 95, 98 S. Ct. at 2196 (quotation omitted).

[2]In light of our reliance on *Lee* and *Scott*, we need not consider the issue we identified but refrained from answering in *State v. Rhines*, 435 N.W.2d 542 (Minn. App. 1989), *review denied* (Minn. Mar. 17, 1989), namely, "whether the Double Jeopardy Clause bars retrial of 'a defendant who is afforded an opportunity to obtain a determination of a legal defense prior to trial and nevertheless knowingly allows himself to be placed in jeopardy before raising the defense.'" *Id.* at 545 (quoting *Serfass v. United States*, 420 U.S. 377, 394, 95 S. Ct. 1055, 1065 (1975)). We cited an opinion of another court holding that "'a defendant who for reason of trial tactics delays until mid-trial a challenge to the indictment that could have been made before the trial -- and before jeopardy had attached -- is not entitled to claim the protection of the double jeopardy clause when his objections to the indictment are sustained.'" *Id.* at 546 (quoting *United States v. Kehoe*, 516 F.2d 78, 86 (5th Cir. 1975)). We stated that "[w]e would never condone such a tactic," although we disposed of the issue by stating that "there is no evidence that counsel for Rhines delayed in making his motion as a matter of strategy." *Id.* The district court record in this case, though not well developed on this point, appears to be different from the district court record in *Rhines*.

The district court's analysis of the double jeopardy issue is erroneous because it places excessive emphasis on the timing of its dismissal of the first complaint. In its February 19, 2009, order, the district court stated that "*Lee* is distinguishable in that defense's motion to dismiss in *Lee* was made prior to the attachment of jeopardy therefore, double jeopardy was not raised." Similarly, the district court's February 20, 2009, order explained its refusal to sign the second complaint by stating that *Hart* was "factually distinguishable" because "jeopardy had not attached" in that case. At one time, double jeopardy determinations "turn[ed] largely on temporal considerations"; a dismissal that occurred after "jeopardy had attached" but before "the factfinder's conclusion as to guilt or innocence" was deemed "final" and, thus, a bar to reprosecution. *See Lee*, 432 U.S. at 36, 97 S. Ct. at 2148-49 (Rehnquist, J., concurring). But that "'bright-line' analysis was circumvented" by subsequent opinions, which require an analysis that is based only in part on the question whether jeopardy has attached. *See id.*, 97 S. Ct. at 2149 (Rehnquist, J., concurring).

In sum, we conclude that the Double Jeopardy Clause does not preclude the state from charging Sahr with second-degree criminal sexual conduct. Thus, we grant the state's petition for a writ of mandamus. The district court shall sign the complaint that the state presented to it on February 20, 2009.

Writ granted.