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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000959-MR

MATTHEW DERRY

APPELLANT

v. APPEAL FROM METCALFE CIRCUIT COURT
HONORABLE PHILLIP R. PATTON, JUDGE
ACTION NO. 03-CR-00019

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: HENRY, TACKETT, AND VANMETER, JUDGES.

TACKETT, JUDGE: Matthew Derry appeals from the judgment of the Metcalfe Circuit Court accepting his conditional guilty plea to first-degree sexual abuse and sentencing him to two years' imprisonment and three years' conditional discharge. The only issue raised on appeal is whether the charge should have been dismissed as violating his right against double jeopardy. We find that double jeopardy did not attach when Derry requested a

dismissal due to improper venue and, thus, affirm the trial court.

Derry was originally indicted by the Barren County Grand Jury on charges of first-degree rape, first-degree sodomy and first-degree sexual abuse. The victim in the case was a child less than twelve years old. On March 5, 2003, a jury in Barren County began to hear evidence against Derry. After the Commonwealth's third witness had already testified, someone in the trial judge's office suggested that the house where the offenses had allegedly taken place was actually the last house inside the Metcalfe County line. The Commonwealth immediately requested a recess and contacted the Property Valuation Administrator. It was determined that the property where the house was located straddled the Barren/Metcalfe county line; however, the house itself was located in Metcalfe County.

Both the Commonwealth and defense counsel argued during a bench conference that venue was an essential element of the crime, and Derry stated that he would not waive venue. Derry requested a dismissal of the charges. The trial court found that there was a manifest necessity for a mistrial and that it was not caused by bad faith or prosecutorial misconduct; therefore, the charges were dismissed without prejudice. Derry was subsequently indicted by the Metcalfe County Grand Jury on the same charges. At this time, he moved to have the charges

dismissed, claiming that the indictment violated his right to be free from double jeopardy. The Commonwealth admitted that the charges were the same ones from the earlier indictment, but argued that the first trial had ended in mistrial due to manifest necessity. The trial court denied Derry's motion and allowed him to enter a conditional plea to first-degree sexual abuse. This appeal followed.

On appeal, Derry argues that, since jeopardy had already attached when the Barren Circuit Court dismissed the charges against him, it violated his rights to allow the same charges to be prosecuted in Metcalfe County. Jeopardy attaches when the jury is empaneled and sworn; thus, there is no question that jeopardy had attached during Derry's first trial. Crist v. Bretz, 437 U.S. 28, 98 S.Ct. 2156, 57 L.Ed.2d 24 (1978).

However, the United States Supreme Court has recognized an exception to the prohibition against double jeopardy where a trial ends in mistrial due to manifest necessity. Illinois v. Somerville, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973). The trial court evidently believed that venue was an essential element required to convict Derry of the offenses. Thus, Derry argues that the trial court's order amounted to a directed verdict that the evidence was insufficient to sustain a conviction. We disagree. Although Derry requested a dismissal, the trial court granted the dismissal without prejudice after

both the Commonwealth and defense counsel agreed that a mistrial was appropriate. Indeed, the trial court specifically stated twice that the Commonwealth could re-indict him in Metcalfe County. Even knowing that he could still face prosecution on the charges, Derry did not object to the dismissal/mistrial.

Derry also contends the trial court was mistaken in believing that proper venue was necessary for a conviction. He cites Literal v. Commonwealth, 250 Ky. 565, 63 S.W.2d 587 (1933), for the proposition that venue is not an element of the offense in Kentucky. Further, Kentucky Revised Statute (KRS) 452.650 states that "failure to make a timely motion to transfer the prosecution to the proper county shall be deemed a waiver of the venue of the prosecution." This ignores his position in front of the trial court. When Derry learned that the location where the crimes were alleged to have occurred was in fact Metcalfe County, he refused to waive venue. Instead, his counsel moved for a dismissal. The trial court made a finding on the record that the case was ending in mistrial due to manifest necessity, and Derry did not object. Clearly, at the time the charges were dismissed, he understood that he might still face prosecution. KRS 505.030(4)(a) clearly states that an offense which has been previously prosecuted may be reprosecuted when a defendant "expressly consents to the termination or by motion for mistrial or in some other manner

waives his right to object to the termination" of the first prosecution. Derry, who requested dismissal of the Barren County indictment and failed to object to the trial court's finding of manifest necessity, cannot now take the position that a subsequent prosecution in Metcalfe County was barred by double jeopardy.

For the foregoing reasons, the judgment of the Metcalfe Circuit Court is affirmed.

ALL CONCUR.

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