

RENDERED: SEPTEMBER 2, 2005; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2004-CA-001822-MR

IVAN PEEPLES

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE MARY C. NOBLE, JUDGE  
ACTION NO. 03-CR-00900

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: TACKETT AND TAYLOR, JUDGES; HUDDLESTON, SENIOR JUDGE.<sup>1</sup>

TACKETT, JUDGE: Ivan Scott Peeples appeals from the judgment of the Fayette Circuit Court after a conditional plea of guilty to possession of cocaine, possession of drug paraphernalia, and being a persistent felony offender in the second degree.

Peeples argues on appeal that this prosecution should have been

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<sup>1</sup> Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

barred on double jeopardy grounds, due to the prosecution allegedly provoking a mistrial at his first trial on these charges in 2003. We disagree that the mistrial was intentionally provoked by the Commonwealth, and affirm the judgment.

Peeples was charged after an investigation into an assault against him, which police suspected to be drug-related. Two unidentified men pulled up behind the car in which Peeples was sitting at about noon on May 19, 2003, got out of the car and started shooting at him. Peeples denied to the investigating officer that the shooting was drug-related, but Sergeant Jack Dawson of the Lexington Police Department suspected otherwise after hearing Peeples' and witness Keisha Taylor's version of events of that day and the day before, when two men had kicked their way into Taylor's apartment. Dawson requested a drug dog to search Peeples' car, and the dog alerted to the presence of drugs. Dawson then obtained a search warrant and impounded the car after clearing the scene for other evidence. The search revealed two bags of cocaine and a bag of marijuana in the glove compartment, another bag of marijuana over the visor at the driver's seat, approximately \$6,000, scales, papers, and a picture.

Immediately prior to trial, the Commonwealth announced that it had found other evidence while preparing for trial,

including a picture of Peeples rolling a marijuana cigarette. The Commonwealth acknowledged that it was too late to introduce the picture in its case in chief but said that it had agreed with the defense that if Mr. Peeples were to testify that he knew nothing about marijuana, that the picture could come in as rebuttal evidence.

During Dawson's testimony, he opened and described the contents of bags of evidence to the jury, and when he opened the third bag, he described the picture to the jury. The defense moved for a mistrial, which was granted by the court.

Before his new trial, Peeples moved the court to dismiss the charges on double jeopardy grounds, alleging that the prosecution had goaded the defense into asking for a mistrial. That motion was denied, and Peeples entered into a plea agreement as described above, reserving the right to appeal on double jeopardy grounds. This appeal followed.

The essence of Peeples' argument is that the prosecution should have informed Dawson that the photograph in question was not to be introduced during its case in chief, and therefore its inaction amounted to goading the defense into requesting a mistrial. Citing United States v. Dinitz, 424 U.S. 600 (1967), Peeples notes that the Double Jeopardy Clause "bars retrials where 'bad faith conduct by judge or prosecutor . . . threatens the harassment of an accused by successive

prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict the defendant." The failure to instruct Dawson ahead of time not to refer to the photograph, the argument implies, amounted to precipitating a mistrial to afford the prosecution a more favorable opportunity to convict Peeples.

The circuit court held, and we agree, that double jeopardy does not bar this prosecution. The description of the photograph by the detective was obviously inadvertent, and not intended to provide any sort of substantial advantage to the Commonwealth. Indeed, we are little able to see how introducing the photograph in the case in chief would be specially advantageous to the Commonwealth, which had ample evidence to convict Peeples without it, and the photograph's best use from a tactical standpoint would certainly be for impeachment in case Peeples or another witness denied that he knew anything about marijuana. Under the totality of the circumstances, we perceive no attempt to deliberately goad the defense into requesting a mistrial, and therefore double jeopardy does not bar this subsequent prosecution.

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

ALL CONCUR.

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