PD-0710-17
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 7/6/2017 11:32 PM
Accepted 7/7/2017 12:46 PM
DEANA WILLIAMSON
CLERK

No. _____

FILED
COURT OF CRIMINAL APPEALS
7/7/2017
DEANA WILLIAMSON, CLERK

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

EX PARTE
ELIZABETH ANN GARRELS

On Discretionary Review
from the Ninth Court of Appeals
Beaumont, Texas
No. 09-17-00038-CR

On Appeal from the County Court at Law No. 5
Montgomery County, Texas
Cause No. 17-29859

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

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Oral Argument Requested

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Trial Judge
The Honorable Keith Stewart
County Court at Law No. 5
Montgomery County, Texas

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TO THE COURT OF CRIMINAL APPEALS OF TEXAS:

ELIZABETH ANN GARRELS, Appellant, in accordance with Texas Rule of Appellate Procedure 68, files this petition for discretionary review.

STATEMENT REGARDING ORAL ARGUMENT

This case presents a unique issue related to the implied consent to a mistrial. Garrels believes oral argument would assist this Court in its decision.

STATEMENT OF THE CASE

This is an appeal from the trial court's denial of Garrels's application for writ of habeas corpus claiming double jeopardy in a driving while intoxicated ("DWI") case. On October 27, 2015, Garrels was charged with misdemeanor DWI. On July 11, 2016, after a jury was sworn and testimony had begun, the trial judge *sua sponte* declared a mistrial. On January 30, 2017, the trial judge denied Garrels's application for writ of habeas corpus, and Garrels appealed.

STATEMENT OF PROCEDURAL HISTORY

On May 10, 2017, the Ninth Court of Appeals delivered a memorandum opinion affirming the trial court's order. *Ex parte Garrels*, No. 09-17-00038-CR, 2017 WL 1953282, 2017 Tex. App. LEXIS 4225 (Tex. App.—Beaumont, May 10, 2017) (mem. op., not designated for publication). Garrels's motion for rehearing was filed on May 25, 2017 and denied on June 6, 2017.

GROUND FOR REVIEW

1. **Has a defendant who did not object to a trial court's declaration of mistrial, despite an adequate opportunity to do so, impliedly consented to the mistrial?**[1]

ARGUMENT

After a jury was sworn and testimony had begun, the trial judge sustained Garrels's objection to the State's presentation of expert testimony. But rather than proceed with trial or grant the State's request for continuance, the trial judge *sua sponte* declared a mistrial. (1 RR 64). On appeal, Garrels argued that the double jeopardy clause protected her from further prosecution. The lower court overruled her issue, concluding that she consented to the mistrial because her counsel had an adequate opportunity to object, but did not do so. It did not address whether manifest necessity for the mistrial existed. *Garrels*, slip op. at 5.

This case warrants review because the lower court's holding creates a *per se* rule that the failure to object to a mistrial, despite an adequate opportunity to do so, will always constitute implied consent to the mistrial. But such a rule misconstrues this Court's holding in *Torres v. State*,[2] and conflicts with previous decisions of this Court, other Texas courts, and federal courts.

[1] 1 RR 47.
[2] 614 S.W.2d 436 (Tex. Crim. App. 1981).

Garrels asks this Court to settle this important question of law. TEX. R. APP. P. 66.3(a), 66.3(b), 66.3(c).

Consent to a mistrial may be implied from the totality of the circumstances.

Consent to a mistrial may be implied, rather than expressed. *Torres*, 614 S.W.2d at 441. But to determine whether a defendant has impliedly consented, a reviewing court must consider "the totality of the circumstances attendant to the declaration of mistrial." *Id*. Here, the lower court focused only on Garrels's failure to object, without considering the totality of the circumstances surrounding the mistrial.

The lower court has misconstrued *Torres*.

The lower court, both here and in its prior memorandum opinion, *Ex parte Jackson*, held that a "defendant who does not object to the trial judge's *sua sponte* declaration of a mistrial, despite an adequate opportunity to do so, has impliedly consented to the mistrial." *Garrels*, slip op. at 4 (citing *Ex parte Jackson*, Nos. 09-14-00138-CR, 09-14-00139-CR, 09-00140-CR, 2014 WL 3845780, 2014 Tex. App. LEXIS 8542, at *6-7 (Tex. App.—Beaumont Aug. 6, 2014, pet. ref'd) (mem. op., not designated for publication)). And both here and in *Jackson*, the lower court cited this Court's *Torres* opinion for this

holding, though this Court has never established such a holding. *Garrels*, slip op. at 4; *Jackson*, at *6.

In *Torres*, this Court addressed the State's argument that an appellant impliedly consented to be retried because he failed to object to the court's declaration of mistrial, by holding that consent may be implied from the totality of the circumstances, but "before a failure to object constitutes an implied consent to a mistrial, a defendant must be given an adequate opportunity to object to the court's motion." *Torres*, 614 S.W.2d at 441-42. The holding simply instructs that if a failure to object is to be considered in a reviewing court's consent analysis, the defendant must have been given an adequate opportunity to object. It does not propose – as the lower court has – that the failure to object to a mistrial, despite an adequate opportunity to do so, creates an implied consent *per se*. This is supported in *Torres* by a cite to *United States v. Goldman*, which held that a failure to object to a mistrial is a factor to be considered, but may not, in and of itself, constitute consent. 439 F.Supp. 358, 362 (S.D.N.Y. 1977).

The lower court has taken *Torres* and created a much narrower rule than this Court intended. And though the lower court's opinion is not published, it

has now used this *per se* rule more than once. This Court should settle the issue. TEX. R. APP. P. 66.3(b).

This Court and other Texas courts have held that a defendant who did not object to a trial court's declaration of mistrial, despite an adequate opportunity to do so, had not consented to the mistrial.

The lower court's opinion effectively holds that the failure to object to a mistrial, despite an adequate opportunity to do so, *always* constitutes implied consent. But this *per se* rule directly conflicts with the holdings of this Court and other Texas courts.

In *Ex parte Little*, this Court held that the appellant did not consent to a mistrial, and yet the record showed that he did not object to the mistrial, despite an adequate opportunity to do so. 887 S.W.2d 62, 66 (Tex. Crim. App. 1994). In doing so, this Court rejected a hypertechnical holding that one consents to a mistrial merely by failing to explicitly state, "I object." *Id.* The lower court's *per se* rule conflicts with the *Little* holding. TEX. R. APP. P. 66.3(c).

In *Pierson v. State*, the Texarkana Court of Appeals determined that the totality of the circumstances failed to establish consent to mistrial, though the defendant did not object and "could have made his opposition more clear." 398 S.W.3d 406, 412 n.4 (Tex. App.—Texarkana 2013) *aff'd*, 426 S.W.3d 763

(Tex. Crim. App. 2014). The record suggested that the defendant had an adequate opportunity to object. But the *Pierson* court refused to infer consent from a silent record, reasoning that once the trial judge announced its intention to declare a mistrial, it was reasonable trial strategy not to challenge the decision. *Id*. The lower court's *per se* rule conflicts with the *Pierson* holding. TEX. R. APP. P. 66.3(a).

In *Banks v. State*, the San Antonio Court of Appeals held that the State failed to prove that the defendant consented to a mistrial, though the record suggested that he did not object, despite an adequate opportunity to do so. 768 S.W.2d 931, 933 (Tex. App.—San Antonio 1989, no pet.). The lower court's *per se* rule conflicts with the *Banks* holding. TEX. R. APP. P. 66.3(a).

Implied consent must be based on the totality of the circumstances.

The lower court's implied consent analysis considered only Garrels's failure to object to the mistrial, ignoring the totality of the circumstances. By contrast, courts that have established implied consent under the totality of the circumstances have done so with factors that indicated the defendants either wanted a mistrial or expected a retrial.

In *United States v. Goldstein*, the Second Circuit determined that the defendants had impliedly consented to a mistrial because they had previously

moved for a mistrial, and little had occurred thereafter to warrant a belief that their position had changed. Even if it had, they failed to make this change in position known to the trial judge, despite an adequate opportunity to do so. 479 F.2d 1061, 1067 (2nd Cir. 1973).

In *United States v. Smith*, the Ninth Circuit found enough to constitute implied consent because, not only did defense counsel not object to the mistrial, but also affirmatively indicated his understanding that there would be a retrial. 621 F.2d 350, 352 (9th Dist. 1980).

And flawed as the lower court's *Jackson* analysis is, its record contains distinguishing factors that separate it from the record in this case. There, the defendant requested a mid-trial continuance to test DNA evidence. Instead, the trial judge declared a mistrial, effectively giving the defendant the extra time he requested. And after the mistrial was declared, defense counsel discussed future trial dates with the judge. *Jackson*, at *2-5. Under the totality of the circumstances, it could be implied that the defendant consented to the mistrial, not solely because he failed to object, but because he benefited from the mistrial and expected a retrial.

Garrels did not consent to the mistrial.

Here, the lower court failed to consider the totality of the circumstances

surrounding the mistrial, including statements and circumstances that led to the mistrial. The record reflects the following important points:

1. Garrels wanted to proceed with trial.
2. Garrels did not benefit from a mistrial.
3. The State benefited from a mistrial.
4. Garrels did not expect to be retried.

The eventual mistrial grew out of an in-trial objection. During direct examination of the State's first witness, a police officer, Garrels objected to the officer testifying as an expert witness because the State had violated a discovery statute related to the disclosure of expert witnesses. (1 RR 47). The trial judge agreed that the State violated the statute, and sustained the objection. (1 RR 52, 55-56). It is important to emphasize that the objection called for the exclusion of expert testimony. And after the trial judge sustained the objection, Garrels expected that the testimony would be excluded. The prosecutor suggested that the trial judge had three options; exclude the testimony, grant the State's continuance, or allow the testimony. (1 RR 59). Garrels opposed the State's request for continuance, arguing that a continuance would allow the State an improper way out of its own mistake. (1 RR 57).

Although Garrels did not formally object to the mistrial, her position after the sustained objection never changed. She wanted to trial judge to follow his ruling and exclude the expert testimony. The record reflects that the trial judge and prosecutor both understood that Garrels did not want a mistrial. An exchange between the trial judge and prosecutor after the mistrial was declared supports this conclusion:

> Prosecutor: We would be jeopardy barred, very likely, and in fact be a dismissal.
>
> Trial Judge: You think that's true, even if –
>
> Prosecutor: Because the defense has not requested a mistrial. I believe that you need a manifest necessity to declare a mistrial. You are free to grant a mistrial, generally, but I believe that would bar us. *If the defense wanted to request a mistrial in lieu of submitting the testimony, that would be different.*
>
> Trial Judge: *Doesn't sound like that's what* –
>
> Prosecutor: *Correct.* It's my understanding when the defense doesn't request a mistrial it needs to be due to manifest necessity.

(1 RR 61-62) (emphasis added). Garrels's trial counsel subsequently stated in a verified affidavit filed along with the application for writ of habeas corpus that he did not consent to the mistrial. (Supp. Clerk's Record 70).

By declaring a mistrial and allowing the State to prosecute Garrels

further, the trial judge assisted the State around its discovery violation and left the sustained objection completely toothless. The record shows that Garrels wanted to proceed with trial, and she did not benefit from the mistrial in any way. Under the totality of the circumstances, it is unreasonable to infer that Garrels consented to the mistrial.

The lower court erred by considering only the failure to object, rather than the totality of the circumstances, in its implied consent analysis. Such a holding misconstrues this Court's prior opinions, and conflicts with decisions from this Court, other Texas courts, and federal courts. The lower court's opinion should be reversed.

PRAYER

Garrels prays that this Court grant review and, after full briefing on the merits, issue an opinion resolving this important issue.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this document contains 2,164 words and is in compliance with Texas Rule of Appellate Procedure 9.4.

/s/ Matthew J. DeLuca
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CERTIFICATE OF SERVICE

I certify that a copy of this document was served on the following parties through the efile.txcourts.gov e-filing system on July 6, 2017:

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APPENDIX

MEMORANDUM OPINION
OF THE NINTH COURT OF APPEALS
Filed May 10, 2017

In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-17-00038-CR

EX PARTE ELIZABETH ANN GARRELS

On Appeal from the County Court at Law No. 5
Montgomery County, Texas
Trial Cause No. 17-29859

MEMORANDUM OPINION

Appellant Elizabeth Ann Garrels appeals the trial court's denial of her application for a pretrial writ of habeas corpus, in which she argued that double jeopardy barred further prosecution after the trial judge granted a mistrial. We affirm the trial court's order denying Garrels's application for writ of habeas corpus.

Garrels was charged with driving while intoxicated. After a jury had been sworn and testimony had begun, the defense objected to certain expert testimony under article 39.14(b) of the Texas Code of Criminal Procedure and argued that the State had not timely designated the expert witness. *See* Tex. Code Crim. Proc. Ann.

art. 39.14(b) (West Supp. 2016). The State acknowledged its violation of the statute because "formal written notice" of the identity of the testifying witness was provided to the defense the prior week, but the State argued that there was no surprise to the defense and that the identity of the witnesses "have been well-known to the defense weeks prior [to the deadline required by article 39.14(b).]" The State argued that the appropriate remedy would be a continuance of the trial and not the exclusion of testimony. Defense counsel voiced opposition to a continuance:

> Judge, the only argument I would make is that granting a continuance would allow the state an improper way out of their own mistake by violating the statute and would prejudice Ms. Garrels in an unfair manner. They've had at least one continuance on this case on trial date. And the alternative, we would renew our original request from the Court to strike all the testimony of all expert witness[es] untimely provided by the state in this case.

After a discussion regarding the appropriate remedy for failure to disclose an expert in a timely manner under article 39.14(b), the trial court *sua sponte* granted a mistrial:

> THE COURT: All right. I'm just going to grant a mistrial on my own. Y'all can deal with it and decide what to do going forward. I think the short amount of time that he's had the discovery and the statute being pretty clear black lettering, I don't have any -- legislature didn't give me any instruction and there [are] no cases that are new enough. I guess y'all will figure out what to do going forward.
>
> [Prosecutor]: Judge, if you wanted to make some findings related to manifest necessity to see if that fits.

> THE COURT: What I would say is during jury selection we told the jury we would be here Monday, Tuesday, Wednesday and not past that, and that they have the ability to pick between five different court dates to show up. So they were all expecting to have their jury service this week. They told me three days. They told me they didn't have any conflicts in those three days. Now, we're talking about having them coming back July 27th. Puts me on vacation before my kids go back to school or some other time after that. And I can't reset them to some other time after that. I would have to give them a specific set date. I don't think that's a reasonable or even remotely reasonable use of judicial resources. So I don't think that the alternative of admitting all the evidence would be fair, nor do I think it would survive an appeal, based on the fact that it's so defective time wise; three days as opposed to 20 days. So I don't feel like the Court has any other option at this point in time.
>
> [Prosecutor]: Thank you, Judge. Just to be clear[,] the state[] respectfully objects to the granting of a mistrial.
>
> THE COURT: Okay. All right.

Garrels subsequently filed an application for a pretrial writ of habeas corpus, in which she asserted that double jeopardy bars further prosecution because the trial court had granted a continuance, and the court made no finding that manifest necessity for a mistrial existed. The trial court signed an order denying Garrels's application.

In her sole appellate issue, Garrels argues that the trial court abused its discretion by declaring a mistrial *sua sponte* absent Garrels's consent and without considering less drastic measures. Garrels argues that she did not expressly consent to the mistrial, did not expressly object to the trial court's declaration, and was silent

after the trial court declared the mistrial. Garrels contends that her consent cannot "be inferred from a silent record[,]" and that "the totality of the circumstances fails to establish that [she] consented to the mistrial." Garrels asserts that, because she voiced her opposition to a continuance as a remedy and "a mistrial would have given the State the same opportunity to correct its error as a continuance[,]" and one could "reasonably conclude that Garrels would not have been satisfied with such a result."

"The Fifth Amendment to the United States Constitution prohibits a State from twice putting a defendant in jeopardy for the same offense." *Ex parte Brown*, 907 S.W.2d 835, 838 (Tex. Crim. App. 1995) (citations omitted). Jeopardy attaches once a jury has been impaneled and sworn. *Id.* at 839. "Consequently, as a general rule, if, after the defendant is placed in jeopardy, the jury is discharged without reaching a verdict, double jeopardy will bar retrial." *Id.* A defendant who does not object to the trial judge's *sua sponte* declaration of a mistrial, despite an adequate opportunity to do so, has impliedly consented to the mistrial. *See Ex parte Jackson*, Nos. 09-14-00138-CR, 09-14-00139-CR, and 09-14-00140-CR, 2014 WL 3845780, at **6-7 (Tex. App.—Beaumont Aug. 6, 2014, pet. ref'd) (mem. op., not designated for publication) (citing *Torres v. State*, 614 S.W.2d 436, 441-42 (Tex. Crim. App. [Panel Op.] 1981); *Ledesma v. State*, 993 S.W.2d 361, 365 (Tex. App.—Fort Worth 1999, pet. ref'd)).

Based on this record, Garrels's counsel had an adequate opportunity to object to the mistrial, but did not do so. We conclude that Garrels consented to the mistrial.[1] *See id.* (citing *Torres*, 614 S.W.2d at 441-42; *Ledesma*, 993 S.W.2d at 365). Therefore, double jeopardy does not bar further prosecution. *Ex parte Brown*, 907 S.W.2d at 838. Accordingly, we overrule Garrels's issue on appeal and affirm the trial court's order denying Garrels's pretrial application for writ of habeas corpus.

AFFIRMED.

LEANNE JOHNSON
Justice

Submitted on May 3, 2017
Opinion Delivered May 10, 2017
Do Not Publish

Before McKeithen, C.J., Kreger and Johnson, JJ.

[1] Because we conclude that Garrels consented to the trial court's *sua sponte* declaration of a mistrial, we need not address her argument alleging that manifest necessity did not exist. *See Ex parte Jackson*, Nos. 09-14-00138-CR, 09-14-00139-CR, and 09-14-00140-CR, 2014 WL 3845780, at *7 n.1 (Tex. App.—Beaumont Aug. 6, 2014, pet. ref'd) (mem. op., not designated for publication) (citing Tex. R. App. P. 47.1; *Ex parte Brown*, 907 S.W.2d 835, 838 (Tex. Crim. App. 1995)).