

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION**

UNITED STATES OF AMERICA)	
)	
)	Case No. 5:00CR10027
)	Case No. 5:00CR10107
v.)	
)	OPINION AND ORDER
WILLIAM J. STRETT, ET AL.,)	
)	By: James P. Jones
Defendants.)	United States District Judge

The defendants have filed a joint motion to dismiss the charges¹ against them, asserting that the Double Jeopardy Clause bars a retrial after a hung jury. Because the defendants’ acquiesced in the declaration of mistrial and because, under the circumstances of this case, there was a “manifest necessity” for a mistrial, the defendants’ motion will be denied.

¹ William J. Strett and Sharon L. Strett, husband and wife, and James G. Sprinkel, their accountant, are charged in Case No. 5:00CR10027 with conspiracy to obstruct the Internal Revenue Service in the ascertainment and collection of federal income taxes. *See* 18 U.S.C.A. § 371 (West 2000). Dr. Strett is also charged in that case with three counts of making a false tax return, in violation of 26 U.S.C.A. § 7206(1) (West 1989).

In the consolidated case No. 5:00CR10107, the accountant Sprinkel is charged with two counts of making a materially false statement or writing to the Internal Revenue Service. *See* 18 U.S.C.A. § 1001 (West 2000).

Mrs. Strett pleaded guilty before trial to the three counts of making a false tax return.

I

The defendants' jury trial on tax charges began on November 6, 2000, and lasted approximately two and one-half days. At noon on November 9, 2000, the case was submitted to the jury. After approximately three hours of deliberations, the jury informed the court that it was unable to reach a unanimous decision on any of the charges. (Tr. of Jury Question at 4-7.)

After the jurors were asked to leave to courtroom, the following exchange occurred:

THE COURT: Does the government wish me to declare a mistrial?

MR. MOUNTCASTLE: I think I'd like to hear first whether the jurors have any additional questions or evidence they want to look at and see what happens then.

THE COURT: Defense counsel have anything to add at this time?

MR. KNIGHT: Not at this time, Your Honor.

(*Id.* at 7.)

After the jury returned and further indicated that there was no additional assistance from the court that would aid in their decision, the court again asked:

THE COURT: Mr. Mountcastle, what's the Government's desire?

MR. MOUNTCASTLE: I would say we need a mistrial, Your Honor.

THE COURT: Defense counsel wish to add anything?

MR. KNIGHT: No, sir.

A mistrial was then declared. (*Id.* at 8.)

II

The defendants now seek to have the indictment against them dismissed, arguing that the court “precipitously” granted a mistrial in this case, thus barring any subsequent trial in this cause pursuant to the Fifth Amendment’s Double Jeopardy Clause.² Because I find both that the defendants waived their objections to double jeopardy, and that original jeopardy has not terminated, I will deny the defendants’ motion.

A

When a defendant does not object to the declaration of a mistrial, a retrial on those same charges “is not barred on account of former jeopardy.” *United States v. Ndame*, 87 F.3d 114, 115 (4th Cir. 1996).

In the instant case, the court first raised the possibility of a mistrial with the parties when the foreperson stated that the jury was unable to reach a unanimous

² The text of the Double Jeopardy Clause reads, “[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.”

verdict on any of the charges. After the foreperson subsequently indicated that the jury was hopelessly deadlocked, the court again asked whether the government desired a mistrial. In neither instance did the defendants raise any objection to the granting of a mistrial in this case.³ Additionally, as the government correctly asserts, none of the defendants raised a double jeopardy challenge until approximately three months after the end of their first trial. The defendants' "acquiescence" to the mistrial declaration serves as a waiver of the objections each of them now raise. *See United States v. Ellis*, 646 F.2d 132, 135 (4th Cir. 1981).

B

Even had the defendants not waived their double jeopardy objections, however, their claims nevertheless fail in substance. The heart of the defendants' argument is no more than that retrial after mistrial would place them in double jeopardy.

This argument, however, has been found to be "without merit," *Ellis*, 646 F.2d at 134, both because of the "broad discretion" granted to the trial court in determining the necessity of a mistrial, *see United States v. Sloan*, 36 F.3d 386, 393 (4th Cir. 1994),

³ The defendants did object to the possibility of a partial jury verdict, when it was initially believed that the jury had come to a unanimous decision on certain charges, stating that "it's probably more appropriate [that] they should be directed to continue with deliberations and see if they can come to a unanimous verdict." (Tr. of Jury Question at 5.) However, the possibility of a mistrial was not raised until after the foreperson explained that the jury could not reach a unanimous decision on any count.

as well as the long established rule that the failure of a jury to agree on a verdict is an instance of “manifest necessity” which permits a trial judge to terminate the first trial and retry a defendant, so that “the ends of public justice” are not otherwise defeated. *See Richardson v. United States*, 468 U.S. 317, 323-24 (1984). The Double Jeopardy Clause, by its terms, applies only if there has been some event, such as an acquittal, that terminates the attachment of original jeopardy to a defendant. Contrary to the defendants’ arguments, however, the Supreme Court has expressly held that the failure of a jury to reach a verdict is “not an event which terminates jeopardy.” *See id.* at 325.

Thus, since original jeopardy never terminated, the defendants do not find themselves in double jeopardy because of a second trial.

Nor do the cases cited by defense counsel convince me that the Double Jeopardy Clause bars a subsequent prosecution of the government’s case. A review of those authorities demonstrates that they are inapplicable.

Two of the cases cited are clearly distinguishable. In *United States v. Dixon*, 913 F.2d 1305 (8th Cir. 1990), and *United States v. Bates*, 917 F.2d 388 (9th Cir. 1990), the appellate courts were addressing situations where the trial courts had dismissed cases, sua sponte, before submission to the jury.

The Supreme Court, however, has recognized a logical distinction in the manifest necessity of a mistrial in cases like *Dixon* and *Bates* and those, such as in the instant case, where a mistrial was declared because of a hung jury. *See Richardson*, 468 U.S. at 324.

The remaining cases cited by the defendants, while addressing mistrials declared after cases were submitted to juries, are nevertheless factually distinguishable from the instant case. In *United States v. Horn*, 583 F.2d 1124 (10th Cir. 1978), the court of appeals held that the district court had improvidently granted a mistrial because “no inquiry of the foreman or the individual jurors” was made as to “whether the members expected to reach a verdict.” *Id.* at 1125.

Likewise, in *United States v. Gordy*, 526 F.2d 631 (5th Cir. 1976), the district court learned that the jury was unanimous as to one count, but split on the other. As to that second count, the only inquiry made of the jury was of their numeric vote split. *See id.* at 634. The lack of any further inquiry, coupled with circumstances of docket management not presented here, led the Fifth Circuit to find an absence of manifest necessity in the declaration of a mistrial. *See id.* at 637.

Unlike those cases, the jury in the instant case was asked whether there were any additional exhibits to be viewed, or any additional questions that could be answered, that would aid them in reaching a unanimous decision. As the defendants concede in

their reply brief (Defs.' Reply Br. at 2), it was only after the jury instructed the court that no evidence or additional assistance could bring them to a unanimous verdict that the court declared a mistrial. "The determination of manifest necessity . . . depends upon the state of the jury. . . ." *Gordy*, 526 F.2d at 632. In the instant case, after a relatively short trial on issues of comparative simplicity, the jury was reasonably perceived to be in hopeless deadlock.

The defendants have repeatedly argued, both in their original motion to dismiss and in their reply brief, that the government must satisfy a strict scrutiny standard in establishing the manifest necessity of a mistrial, *see Arizona v. Washington*, 434 U.S. 497, 508 (1978), because the government caused the mistrial in this case by asking for a mistrial after the jury indicated that it was unable to reach a unanimous verdict on any count. (Defs.' Reply Br. at 3.) This, the defendants claim, was done in an effort to obtain a "tactical advantage" to the government in the subsequent trial of this case. *See Washington*, 434 U.S. at 508.

Counsel for Sprinkel argues that the tactical advantage sought by the government was a second indictment against Sprinkel.⁴ According to defense counsel, once the government heard Sprinkel's defense during the first trial, the prosecutor was

⁴ The Streets concede that the tactical advantage argument most directly impacts upon Sprinkel, though they contend that as co-conspirators, the inability of Sprinkel to raise defenses in the case against him affects their ability to defend themselves.

able to indict Sprinkel on charges that made it more difficult to assert the same defense again.⁵ Counsel further suggests that the short duration between the mistrial declaration and the return of the second indictment is circumstantial evidence of the government's strategy in seeking a mistrial.⁶

This contention, however, is betrayed by the fact that it was the prosecutor who requested that the jurors first be asked whether they "have any additional questions or evidence they want to look at" before a mistrial was declared. (Tr. of Jury Question at 7.) It was only after the jurors indicated that they were hopelessly deadlocked that the government requested a mistrial.

Thus, whatever possible benefit may have been visited upon the prosecutor, the circumstances make clear that the "cause" of the mistrial in this case was the inability of the jury to reach a unanimous verdict on any count. Thus, *Washington's* strict scrutiny standard is inapplicable.

⁵ The conduct charged in the second indictment, making materially false statements or writings to the Internal Revenue Service, was also charged as overt acts in the conspiracy count of the first indictment. At trial, it was argued on Sprinkel's behalf, although he did not testify, that while he may have committed the acts in question, he did not do so as a part of any conspiracy.

⁶ The mistrial was declared on November 9, 2000. On December 13, 2000, Sprinkel was indicted in the second case.

C

The defendants finally argue that it was error to not give an *Allen* charge in the instant case before declaring a mistrial.⁷ The decision whether to give an *Allen* charge is within the sound discretion of the trial court. *See United States v. Cropp*, 127 F.3d 354, 359-60 (4th Cir. 1997). For the reasons already articulated, an *Allen* charge would likely have provided no benefit to the jury.

There being no constitutional infirmity in retrying this case, the defendants' motion will be denied on these grounds.

III

For the aforementioned reasons, it is **ORDERED** that the defendants' motion to dismiss (Doc. 52) is hereby denied.

ENTER: February 26, 2001

United States District Judge

⁷ *See Allen v. United States*, 164 U.S. 492 (1896).