In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff & Respondent,

v.

RICHARD GOOLSBY,

Defendant & Appellant.

Case No. S216648

Fourth Appellate District, Division Two, Case No. E052297
San Bernardino County Superior Court, Case No. FSB905099
The Honorable BRYAN F. FOSTER, Judge

REPLY TO APPELLANT'S ANSWER TO PETITION FOR REVIEW

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TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Review should granted in this case to settle the question of whether retrial is barred when a defendant impliedly consents to add a lesser related count to the charge against him, but the jury fails to return a verdict on that count by reason of instructional error. In his answer, appellant claims that retrial is barred because, notwithstanding the implicitly amended charge, the prosecutor did not originally charge the lesser offense and did not insist a verdict be returned on it. He relies on this Court's opinion in *Kellett v. Superior Court* (1966) 63 Cal.2d 822 (*Kellett*), and in doing so, sets up an unprecedented expansion of this Court's rule in that case. Appellant's answer underscores the need for review in this case; it is for this Court to ultimately decide the parameters of its case authority. In short, because this case does not raise the concerns expressed by this Court in *Kellett* related to successive prosecutions it should not prevent retrial. Additionally, the nature of the error that occurred at trial neither prevents retrial, nor offends constitutional principles of double jeopardy.

In his answer, appellant contends that the Court of Appeal majority was correct in holding that *Kellett* bars retrial of the lesser related offense of arson of property in this case because the prosecutor was aware of the facts that gave rise to the offense, but did not charge it. He further contends that retrial is barred by *Kellett* because the prosecutor failed to obtain a verdict on that offense. (Ans. at pp. 11-15.) Appellant concedes, as he must, that the arson of property count was added to the charge by jury instruction. (Ans. at p. 7.) A defendant consents to a conviction of an uncharged lesser count when he requests or acquiesces in an instruction on the lesser count

or urges conviction on the lesser. (*People v. Toro* (1989) 47 Cal.3d 966, 976 (*Toro*), disapproved on another ground in *People v. Guiuan* (1998) 18 Cal.4th 558, 568, fn. 3; *People v. Ramirez* (1987) 189 Cal.App.3d 603, 623, disapproved on another point in *People v. Russo* (2001) 25 Cal.4th 1124, 1137.) Appellant impliedly agreed to an instruction on a lesser offense and urged that the jury convict him of a lesser offense. (2 RT 285, 354-356, 358, 368-369.) In keeping with the majority's opinion, appellant nevertheless claims that because the prosecutor did not initially charge the lesser related offense, application of the rule in *Kellett* is warranted. His claim must be rejected. The rule of *Kellett* relates to barring new and separate prosecutions of offenses that were never before considered by a jury, but are based on the same act or conduct for which an earlier prosecution failed. The concern articulated by this Court in *Kellett* – unreasonable harassment – is not present in a case where the charge was before the jury in the original prosecution, as it was here. (*Kellett, supra*, 63 Cal.2d at p. 827.)

Nor does the rule in *Kellett* require a prosecutor to insist upon a verdict. (Ans. at 14.) Appellant would make this a requirement under *Kellett* for his self-serving purpose of avoiding retrial because the jury did not return a verdict on the arson of property count. An instructional error occurred that mischaracterized the arson of property count as a lesser included offense. This instructional error rendered the arson of property count unresolved when the jury convicted appellant of the greater count. Regardless of this error, appellant refers to the unresolved count as a product of "the prosecutor's neglect" and ignorance. (Ans. at p. 8.) Appellant's characterization aside, as previously discussed, this Court's decision in *Kellett* is concerned with preventing the prosecution of a new and separate charge based on the same facts as a prior prosecution. Stated differently, *Kellett* is not concerned with preventing retrial of a count

because the jury was misinstructed on that count and left it unresolved. Appellant's protestations to the contrary, the unresolved count remains open for retrial by reason of the instructional error. *Kellett* cannot be read to encompass ordinary trial error. In short, the *Kellett* case does not apply to prevent resolution of the arson of property count.

It is significant that appellant consented by tacit agreement to the lesser count. (*People v. Birks* (1998) 19 Cal.4th 108, 136, fn. 19; *Toro, supra,* 47 Cal.3d at p. 976-977; *People v. Ramirez, supra,* 189 Cal.App.3d at p. 623.) Appellant's tactical reasons for placing himself in jeopardy of the lesser count are clear—he could have escaped not only the multiple structure enhancement, but potentially the Three Strikes sentence to which he was ultimately sentenced. More importantly, in agreeing he could be convicted of the lesser related offense of arson of property, appellant entered into a concomitant agreement that the jury would resolve the count, either by conviction or acquittal. Appellant's agreement does not carry any less force or validity because an instructional error occurred requiring retrial of that count for final resolution of it. Because the count is unresolved, appellant's original jeopardy remains intact. The constitutional prohibition against double jeopardy is not implicated when a defendant is placed in jeopardy and jeopardy has not terminated. (*Richardson v. United States* (1984) 468 U.S. 317, 325 [104 S.Ct. 3081, 82 L.Ed.2d 242].)

Appellant claims that no manifest or legal necessity existed for the trial court to discharge the jury without returning a verdict on the arson of property count. (Ans. at pp. 15-16.) Appellant's reliance on the rule of manifest or legal necessity is misplaced. Manifest necessity originated as the "guiding rule" in cases where trial courts had to determine "when trials should be discontinued" and the jury discharged without rendering its verdict. (*Wade v. Hunter* (1949) 336 U.S. 684, 689 [69 S.Ct. 834, 93 L.Ed. 974], citing *United States v. Perez* (1824) 22 U.S. 579 [9 Wheat. 579,

6 L.Ed. 165] (*Perez*).) The rule vests the trial court with the authority to interfere with the trial process and abort it when "there is manifest necessity for the act, or the ends of public justice would otherwise be defeated." (*Perez, supra*, 22 U.S. (9 Wheat.) at p. 580.) Such authority must be exercised with great discretion so that retrial does not violate the guarantee against being twice placed in jeopardy. (See, *e.g.*, *Downum v. United States* (1963) 372 U.S. 734, 737-738 [83 S.Ct. 1033, 10 L.Ed.2d 100] [Retrial improper following first trial where jury discharged at prosecution's request because one of its key witnesses was absent and had not been found and the prosecutor allowed the jury to be selected and sworn under these circumstances]; *Fong Foo v. United States* (1962) 369 U.S. 141, 143 [82 S.Ct. 671, 7 L.Ed.2d 629] [Although criticized as being based upon an "egregiously erroneous foundation," directed verdict of acquittal was final and retrial barred by double jeopardy].) In the present case, there was no reason for the trial court to contemplate exercising its discretion to discontinue the trial. Appellant's consent to be placed in jeopardy for the amended charge and the trial court's mistaken instruction that allowed the jury to not return a verdict if it found guilt on the greater offense, which it did, justified the discharge without a verdict. (*People v. Sullivan* (2013) 217 Cal.App.4th 242, 256 ["Once jeopardy has attached, discharge of the jury without a verdict is tantamount to an acquittal and prevents retrial, unless the defendant consented to the discharge or legal necessity required it."].)

As in this case, circumstances sometimes arise during the course of trial that prevent the return of the jury's verdict, but that do not implicate the "oppressive practices" that the double jeopardy clause was designed to protect against. (*Wade v. Hunter, supra*, 336 U.S. at p. 689.) It cannot be said that a retrial of the unresolved count may be counted among the "oppressive practices" forbidden by the double jeopardy clause.

Continuing prosecution on unresolved charges does not amount to "governmental overreaching." (*Ohio v. Johnson* (1984) 467 U.S. 493, 501 [104 S.Ct. 2536, 81 L.Ed.2d 425].) Appellant agreed he may be convicted of the lesser offense of arson of property. Thus, he "has no constitutional interest in preventing his retrial" for arson, and "there is an important public interest in finally determining whether he committed that offense." (*Stone v. Superior Court* (1982) 31 Cal.3d 503, 522.)

Simply put, an instructional error occurred that has delayed resolution of the lesser related count. Appellant claims retrial to resolve it is foreclosed by double jeopardy principles. "The double-jeopardy provision of the Fifth Amendment, however, does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment." (*Wade v. Hunter, supra*, 336 U.S. at p. 689.) Because appellant's original jeopardy has not terminated, retrial for resolution of the lesser related offense is proper. Review should be granted to clarify that instructional error of the nature that occurred here does not prevent retrial either under *Kellett* or principles of double jeopardy.

Appellant raises an additional issue in his answer to respondent's petition. This Court should deny appellant's request for review of whether the evidence sufficiently established he harbored the malice required for arson. (Ans. at pp. 20-29.) This issue was fully briefed in the Court of Appeal and that court rejected it in its first opinion filed on February 14, 2013. However, the issue was not addressed in Court of Appeal's published opinion, filed January 14, 2014, the operative opinion on which respondent is seeking review by this Court. (Cal. Rules of Ct., rule 8.500(a).)

CONCLUSION

Respondent respectfully requests that the petition for review be granted.

Dated: March 20, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **REPLY TO APPELLANT'S ANSWER TO PETITION FOR REVIEW** uses a 13-point Times New Roman font and contains 1,634 words.

Dated: March 20, 2014

KAMALA D. HARRIS
Attorney General of California

FELICITY SENOSKI
Deputy Attorney General
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *People v. Richard James Goolsby*
No.: **S216648**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On March 21, 2014, I served the attached **REPLY TO APPELLANT'S ANSWER TO PETITION FOR REVIEW**, by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 21, 2014, at San Diego, California.

STEPHEN MCGEE
Declarant

Signature

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