

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-6073

Summary Calendar

Tomas Jimenez,

Petitioner-Appellant,

versus

James A. Collins, Director,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
CA L 90 081

(June 14, 1993)

Before HIGGINBOTHAM, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:*

Tomas Jimenez is presently serving a ninety-nine year prison sentence after being convicted of murder in Texas state court. He appeals the district court's denial of his petition for a writ of habeas corpus, claiming that the prosecution through which this conviction was obtained is barred by the Double Jeopardy Clause.

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

We disagree and therefore affirm the district court's denial of Jimenez' petition.

I.

Tomas Jimenez, his brother Rene, and Jose David Garcia were jointly tried for their roles in the death of Leonel Benavides in Texas state court in July 1988. Tomas and Garcia were each charged with murder; Rene, with aggravated assault. All three defendants retained their own counsel. The first trial ended on July 12, 1988, when the court declared a mistrial during the prosecutor's examination of the police officer who arrested Rene. The following exchange between Assistant District Attorney Cavazos and Officer Torres preceded the trial court's declaration:

- Q. After having advised him of his rights, did you ask the Defendant about his whereabouts that night, or whether he wanted to give you any statement?
- A. Yes, I told him that we were investigating the murder of Leonel Benavides, and we had information that he was at the crime scene with his car.

[TOMAS' COUNSEL]: Your Honor, I'm going to --

[RENE'S COUNSEL]: Your Honor, I'm going to object.

[TOMAS' COUNSEL]: -- To hearsay, in view of the fact that it has happened several times during the trial, the Prosecutor deliberately trying to inject hearsay not subject to cross. We move for a Mistrial.

[RENE'S COUNSEL]: The same objection, Your Honor.

THE COURT: The request is denied.

- Q. (By Ms. Cavazos) Okay. Mr. Torres, at that time, did Rene Jimenez make any statement to you about his whereabouts on the evening of the murder, or the early morning hours?
- A. Yes, he did.

[RENE'S COUNSEL]: Objection, Your Honor. I'm going to object on the grounds that that involves and entails impeachment on a collateral matter, Your Honor.

MS. CAVAZOS: It is not a collateral matter.

[RENE'S COUNSEL]: It's a proper form of impeachment, Your Honor.

MS. CAVAZOS: It is not a collateral matter, it is a prior inconsistent statement. The defendant himself testified, or rather, the witness, Rene Jimenez testified that he had not made any statements to the Police that night because he had a right to remain silent. He had not made any statements to the Police as to his whereabouts.

[TOMAS' COUNSEL]: We are going to object, also, to jury arguments, Your Honor, in front of the jury at this time.

THE COURT: Ladies and gentlemen of the jury, at this point I am going to have to grant, or declare a Mistrial in this case, and your services will no longer be needed. There is [sic] several matters that have come up that I feel would not be in the best interest of justice if this trial is allowed to be carried on. So, that I want to thank you very much. I apologize for taking your time. You are discharged from this jury. You are now free to discuss the case if you wish; although, you do not have to, and my advise to you would be not to discuss it anymore than you may want to. You may step down.

(Whereupon the Jury exited the Courtroom, and the following proceedings are held before the Court, to-wit:)

THE COURT: For the record, I am declaring a Mistrial because it became an issue as to the testimony of one of the Defendants, and having asserted his privilege against self-incrimination on a prior offense, on a prior occasion, and your questioning concerning that incident potentialates [sic] a comment on the assertion of the privilege against self-incrimination, and that is why I have declared a Mistrial.

MS. CAVAZOS: Is the Court declaring manifest necessity or something for that, Your Honor?

THE COURT: Well, I am declaring a Mistrial at this point because obviously it was not fair to have that brought before the jury.

MS. CAVAZOS: The fact that he had made prior statements, or arguments of Counsel?

THE COURT: The fact that you asked, Ms. Cavazos, repeatedly about the Defendant's asserting his right to remain silent in front of the jury, and out of an abundance of caution, these are matters that should not be brought before the jury, and that is why I am declaring a Mistrial, that I feel that that comment, that question, created in the minds of the jury a potential harm for the Defendant, and that is why I felt that I could not continue with this trial.

MS. CAVAZOS: For the record, the State objects to the Court's ruling, Your Honor.

When the state reindicted the three defendants, Tomas, Rene, and Garcia each filed pre-trial state habeas applications, claiming that the Double Jeopardy Clause prohibited a second trial on the same charges. Tomas' and Rene's petitions were denied at the district court level, while Garcia's application was granted. Their cases were then consolidated for purposes of appeal before the Fourth Court of Appeals of Texas. On August 30, 1989, the court held double jeopardy posed no obstacle to retrial because each defendant had implicitly consented to the mistrial. On Garcia's motion for rehearing (which Tomas and Rene did not join), however, the Court of Appeals reversed its initial judgment as to Garcia, holding that his consent to the mistrial ruling could not be inferred from his failure to object to the trial court's decision because the transcript disclosed that he was given no opportunity to do so. While they did not file a petition for rehearing in the Court of Appeals, Tomas and Rene did seek discretionary review in the Texas Court of Criminal Appeals. Their petition was refused by that court on December 6, 1989.

Tomas and Rene then filed the instant federal habeas petition in U.S. District Court for the Southern District of Texas. After conducting an evidentiary hearing, the magistrate recommended denying relief on grounds that Tomas and Rene had consented to the trial court's declaration of a mistrial. The district court adopted the magistrate's report and entered final judgment denying habeas relief on October 4, 1991. On November 18, 1991, after a second trial in Texas state court, Tomas was found guilty of murder and sentenced to ninety-nine years imprisonment.

Tomas and Rene had filed notices of appeal in this court soonafter the district court's denial of their federal petitions for habeas corpus. Rene's appeal was subsequently dismissed, however, when he failed to file a brief in this court. As a result, only Tomas' petition is properly before this court.

II.

Tomas Jimenez does not challenge the general principle that a defendant's consent to a mistrial will normally preclude a subsequent double jeopardy claim. See, e.g., United States v. Dinitz, 424 U.S. 600, 606-08 (1976); United States v. Bauman, 887 F.2d 546, 549 (5th Cir. 1989), cert. denied, 110 S.Ct. 1128 (1990). Nor does he contest the well-established rule that such consent need not be express, but may be inferred from the "totality of circumstances." See, e.g., United States v. Nichols, 977 F.2d 972, 974 (5th Cir. 1992); United States v. Gordy, 526 F.2d 631, 635 n.1 (5th Cir. 1976); Maula v. Freckleton, 972 F.2d 27, 29 (2d Cir. 1992); United States v. Goldstein, 479 F.2d 1061, 1067 (2d Cir.),

cert. denied, 414 U.S. 873 (1973); Camden v. Circuit Court of the Second Judicial Circuit, 892 F.2d 610, 614-15 (7th Cir. 1989), cert. denied, 110 S.Ct. 1954 (1990); United States v. Puleo, 817 F.2d 702, 705 (11th Cir.), cert. denied, 484 U.S. 978 (1987). Rather, Jimenez' argument on appeal is limited to the assertion that the district court erred in determining that he had implicitly consented to the trial court's declaration of a mistrial. After a close examination of the transcript, we disagree and therefore affirm the district court's judgment.

As the Second Circuit recently noted, "the crucial consideration in determining consent under the double jeopardy clause 'is that the defendant retain primary control over the course to be followed in the event of [judicial or prosecutorial] error.'" Maula, 972 F.2d at 29 (quoting Dinitz, 424 U.S. at 609) (brackets in original). Where, as here, the trial court regards the comments of the prosecutor so improper as to require to a sua sponte order of a mistrial, the question is whether defendant's conduct, which may include omissions as well as acts, indicates that he would have preferred less drastic measures. Like other courts, we have found defendant's own motions for mistrial and his failure timely to object to the declaration of a mistrial most probative on the issue of consent. Nichols, 977 F.2d at 974; Gordy, 526 F.2d at 635 n.1.

Tomas Jimenez' counsel moved for mistrial on four separate occasions during the trial, with the last motion coming just before the trial court's sua sponte declaration. Jimenez urged a mistrial

on grounds that Rene's alleged statement to Officer Torres, which the prosecutor was attempting to elicit, was inadmissible hearsay. While the trial court's denial of this motion and its decision to rest its mistrial declaration on somewhat different grounds might well preclude a finding of express consent, see, e.g., Nichols, 977 F.2d at 974, these circumstances do not necessarily bar a finding of implicit consent. Given Jimenez' apparent belief that the introduction of any portion of Rene's alleged statement would so poison the proceedings as to warrant a mistrial, it is quite reasonable to view, as the district court did, the trial court's subsequent declaration on the basis of a particular part of this statement as entirely consistent with his revealed preference.¹

The district court's inference of consent to a mistrial draws additional support from Jimenez' failure to object to the trial court's sua sponte declaration. As Jimenez points out, the transcript discloses that the trial court announced his decision and dismissed the jury without any discussion of the matter. While such precipitous action does not necessarily strip defendant of the relevant "minimal but adequate opportunity to object," Camden, 892 F.2d at 615, we agree with Jimenez that such circumstances frequently make it unrealistic and unfair to infer consent from silence. See id. at 619-20 (Posner, J., dissenting). Nonetheless, even in this situation the defendant's failure to oppose the

¹ We agree with the district court that the prosecutor's comments did not constitute the sort of misconduct which might render Jimenez' apparent consent irrelevant for double jeopardy purposes. See, e.g., Oregon v. Kennedy, 102 S.Ct. 2083, 2091 (1982).

court's declaration is not without significance where, as here, there is other evidence of consent (namely, Jimenez' prior motions for mistrial) and the prosecutor's own objection to the mistrial discloses that such an assertion was not impossible.

This is a close case. Examined individually, Jimenez' prior mistrial motions and his failure to object to the trial court's declaration might not provide sufficient grounds for inferring consent to the mistrial with the requisite level of confidence. However, when these two factors are considered together, as the "totality of circumstances" inquiry directs, we believe that a finding of implicit consent to the court's order is warranted.² Double jeopardy thus did not bar the state from retrying Tomas Jimenez on charges of murder. We therefore deny his petition for a writ of habeas corpus.

PETITION DENIED.

² For this reason, we do not regard our decision as inconsistent with the Court of Appeals' determination that Garcia, Jimenez' co-defendant, had not consented to the mistrial and thus could not be retried. As that court noted, Garcia, unlike Tomas and Rene, never sought a mistrial during the proceedings.