COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICAL COURT

HAMPSHIRE, ss. **No. SJC-12925**

JOSHUA A. PERRIER,
Appellant,

v.

COMMONWEALTH OF MASSACHUSETTS,
Appellee.

On Appeal from a Judgment of the Single Justice

BRIEF FOR THE COMMONWEALTH

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Whether the Single Justice Acted Within Her Discretion and Correctly Applied the Law in Denying the Defendant's Petition Under G.L. c. 211, § 3 Because Double-Jeopardy Principles Do Not Bar a Retrial Where a Prosecutor Unintentionally Committed an Error that Resulted in the Granting of a New Trial.

STATEMENT OF THE CASE

On October 15, 2018, a complaint issued in the Northampton District Court charging the defendant with operating a motor vehicle under the influence of liquor, second offense, G.L. c. 90, § 24(1)(a)(1); negligent operation of a motor vehicle, G.L. c. 90, § 24(2)(a); a seatbelt violation, G.L. c. 90, § 13A; and speeding, G.L. c. 90, § 17. (Defendant's record appendix "RA"/3,11-12).

On July 29, 2019, the defendant admitted to sufficient facts on the negligent-operation charge, after which the judge (Connly, J.) continued the matter without a finding for three months. (RA/9). The judge also found the defendant responsible for the two civil infractions. (RA/9-10).

The next day, prior to a jury trial on the remaining OUI charge, the defendant moved *in limine* to "preclude reference to the defendant's age" during the trial. (RA/4,13-14). The trial judge (Melikian, J.) allowed the motion. (RA/5). During closing argument, however, the prosecutor referred to the defendant's youth. (RA/187). The defendant moved for a mistrial, which the judge denied. (RA/188-189).

The jury convicted the defendant of the OUI charge. (RA/9,218-220). After dismissing the subsequent-offender portion of the charge, the judge sentenced the defendant to one year of probation, but stayed its execution pending an anticipated defense motion. (RA/5,9,221-223,229).

On August 12, 2019, the defendant submitted a "motion to reconsider motion for mistrial with prejudice or, in the alternative, motion for a new trial," (RA/6,282-283), based on the prosecutor's alleged intentional misconduct in closing argument. (RA/285). In its opposition, the Commonwealth highlighted the prosecutor's statements at sidebar, as well as her contemporaneous notes, to

demonstrate that she had misunderstood the scope of the judge's pretrial ruling. (RA/321-335). The judge granted a new trial in a written decision, but rejected the claims of intentional prosecutorial misconduct.[1] (Addendum "Add."/33-35).

The defendant thereafter filed a motion to dismiss on alleged double-jeopardy grounds. (RA/339). The judge denied the motion in another written decision, (Add./36-37), noting that Federal and State double-jeopardy principles do not bar retrial in cases involving "unintentional prosecutorial mistakes." (Add./37).

The defendant thereafter petitioned the single justice under G.L. c. 211, § 3. (RA/362). The single justice (Budd, J.) rejected the petition, concluding that "the denial of a motion to dismiss an indictment or criminal charge cannot

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[1] Although the defendant's motion for a new trial challenged numerous aspects of the prosecutor's closing argument, (RA/285-299), the judge's decision referenced only the violation of his ruling on the motion *in limine* and an alleged appeal to sympathy. (Add./34). The defendant's motion for a mistrial had been limited to the former. (RA/188-189).

be appealed as a matter of right until after trial" and that "[t]he remedy available in the normal appellate process is adequate." (Add./38-39).

The defendant appealed the single justice's denial to the full court under S.J.C. Rule 2:21. (Commonwealth's appendix/3-4). In a written order, this Court determined that, "for present purposes," the defendant's "claim has enough, even if barely so, to go forward":

> The petitioner, Joshua Perrier, was convicted of operating under the influence of intoxicating liquor, second offense, in violation of G. L. c. 90, § 24(1)(a)(1), and other offenses. After the close of the evidence, on the basis of certain statements that the prosecutor made during closing argument, Perrier moved for a mistrial. The trial judge denied the motion and the jury found Perrier guilty. Perrier subsequently filed a motion for a new trial, arguing that the prosecutor's remarks deprived him of a fair trial. The judge allowed the motion. Perrier then filed a motion to dismiss the complaint on the basis that a second trial would violate the guarantee against double jeopardy. The judge denied the motion, specifically noting that he did not find that the conduct of the prosecutor rose to the level of prosecutorial misconduct intended to goad or provoke Perrier into moving for a mistrial. See Donavan v. Commonwealth, 426 Mass. 13, 14-15 (1997) ("A defendant, who has successfully moved for a mistrial, is not entitled to the dismissal of the

[complaint] against him unless there has occurred prosecutorial misconduct intended to goad or provoke him into moving for the mistrial"). See also Commonwealth v. Lam Hue To, 391 Mass. 301, 311-312 (1984). Perrier then filed a petition for relief pursuant to G.L. c. 211, § 3, seeking review of the trial judge's ruling. A single justice of this court denied the petition.

The case is before us pursuant to S.J.C. Rule 2:21, as amended, 434 Mass. 1301 (2001), which requires a petitioner seeking relief from an interlocutory ruling of the trial court to "set forth the reasons why review of the trial court decision cannot adequately be obtained on appeal from any final adverse judgment in the trial court or by other available means." Although a defendant ordinarily is not entitled to interlocutory review of the denial of a motion to dismiss, we have recognized that "[a] criminal defendant who raises a double jeopardy claim of substantial merit is entitled to review of the claim before he is retried," and that G.L. c. 211, § 3, is the appropriate route for obtaining review.[1] Neverson v. Commonwealth, 406 Mass. 174, 175 (1989). We have also recognized that "[t]he defendant . . . [has] the right to appeal an adverse determination by the single justice to the full court" in these circumstances. Id. at 176 n.2. See Creighton v. Commonwealth, 423 Mass. 1001 (1996) (recognizing appeal from single justice's decision to full court before retrial, as opposed to direct appeal from conviction following retrial, as preferred route for obtaining review of double jeopardy claim). We are satisfied for present purposes that Perrier's claim has enough, even if barely so, to go forward. Accordingly, his appeal

> from the single justice's judgment may proceed in the normal course, with full briefing.
>
> [1] "Substantial merit" in this context is synonymous with "meritorious . . . in the sense of being worthy of consideration by an appellate court." Cf. Commonwealth v. Gunter, 459 Mass. 480, 487 (2011) (defining "substantial" for purposes of gatekeeper provision of G.L. c. 278, § 33E, and noting that "[t]he bar for establishing that an issue is 'substantial' . . . [in this context] is not high").

(Commonwealth's appendix/4).

STATEMENT OF THE FACTS

In the early morning of October 14, 2018, Trooper Matthew Kane was in his fully marked State police SUV, parked alongside the road in Huntington center. (RA/104-106). He was "monitoring traffic," although, "[g]enerally speaking, there is no traffic in Huntington at 1:30 in the morning." (RA/114,138). His cruiser was facing west and was "not hidden at all." (RA/105). The road had a speed limit of 30 m.p.h. (RA/108-109).

A dark-colored sedan, heading east at a high rate of speed, quickly seized Trooper Kane's attention.

(RA/105-109). Using his radar, he clocked the car as traveling at 62 m.p.h., more than twice the legal limit. (RA/108-109). As the car passed his location, it was traveling at 59 m.p.h. (RA/109). The trooper immediately did a U-turn and gave chase. (RA/109-111).

Trooper Kane got behind the car and, to signal it to pull over, activated his cruiser's overhead flashers, which consisted of rotating red, white, and blue lights. (RA/111-112). The car did not stop, however. (RA/112). Next, the trooper turned on the cruiser's bright LED lights, which illuminated the "whole area," including the car's interior. (RA/113). But the car continued on. (RA/113). It was not until Trooper Kane sounded his cruiser's air horn that the car pulled over to the side of the road. (RA/113).

Two men were in the car, a driver (the defendant) and a front-seat passenger. (RA/114). Trooper Kane approached the vehicle and asked the defendant for his

license and the car's registration. (RA/114). An odor of alcohol emanated from the car. (RA/114). The passenger was obviously drunk. (RA/115). Trooper Kane asked the defendant if he himself had had anything to drink. (RA/115). The defendant replied, "No." (RA/115).

Trooper Kane then asked the defendant to complete two verbal tests: an alphabet test and a counting test. (RA/116). For the alphabet test, he requested that the defendant recite the alphabet from letter "C" to letter "M." (RA/116). The defendant said, "C, D, E, F, H, M," omitting the letters "G," "I," "J," "K," and "L." (RA/117). For the numbers test, the trooper requested that the defendant count from 55 to 67. (RA/116). The defendant counted from 55 to 66, but concluded his recitation, "66 and 69." (RA/117).

After checking the defendant's license and the car's registration, Trooper Kane asked the defendant to get out of the car to perform two field-sobriety tests.

(RA/118). The trooper demonstrated the first test – the one-leg stand – and explained that he must hold one foot extended and aloft six inches, keep his hands by his side, and count aloud to 30: "1,001, 1,002," etc. (RA/118-120). The defendant attempted the test, but he used his arms for balance – he "took his arms off of his side quite a ways" – and put his foot down after 15 seconds. (RA/120-123). He also slurred the word "thousand" when counting, making it "pretty difficult to understand" him. (RA/123-124,160-161).

For the other test – the nine-step walk and turn – Trooper Kane demonstrated and explained that he must walk heel-to-toe in a line for nine steps, pivot, and return heel-to-toe, counting off the steps each way. (RA/124-127). The defendant tried to perform the test, but made five errors in the execution: he stepped off the line; he missed heel-to-toe; he stopped during the exam; he used his arm for balance; and he made an improper turn. (RA/124-127).

During his interaction with the defendant, Officer Kane noted that the defendant's breath smelled of alcohol and that his eyes were glassy. (RA/124,161). Based on the defendant's signs of intoxication, his deficient performance on the four tests, and his driving, Trooper Kane concluded that the defendant was under the influence of alcohol and arrested him. (RA/128).

On the ride to the police station, the defendant was belligerent – another possible indicator of intoxication. (RA/128-129,156). Specifically, the defendant "chirp[ed] in [the trooper's] ear the whole way," criticized his driving skills, and suggested that the police radar was faulty because his own radar detector had not alerted to it. (RA/128-129). The defendant cooperated during the booking process and was placed in a cell. (RA/129,140). Trooper Kane later checked on the defendant and smelled the odor of alcohol. (RA/129-130). This occurred at about 4:30

a.m. – three hours after their initial interaction. (RA/105,100,129-130). The defendant was the only one in the cell area at the time. (RA/130).

ARGUMENT

The Single Justice Acted Within Her Discretion and Correctly Applied the Law in Denying the Defendant's Petition Under G.L. c. 211, § 3 Because Double-Jeopardy Principles Do Not Bar a Retrial Where a Prosecutor Unintentionally Committed an Error that Resulted in the Granting of a New Trial.

"If you call a tail a leg, how many legs has a dog? Five? No, calling a tail a leg don't make it a leg." - Lincoln[2]

This is not a double-jeopardy case, notwithstanding the defendant's attempts to affix such a label to it. At the defendant's trial, the prosecutor unintentionally violated a ruling on a motion *in limine*. The judge remedied the error by vacating the conviction and awarding the defendant a new trial. (Add./33-35). Unsatisfied, the defendant tried to transform the prosecutor's unintentional error into a

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[2] Quoted in Eirhart v. Libbey-Owens-Ford Co., 996 F.2d 837, 841 n.5 (7th Cir. 1993).

deliberate "goading" and thereby bring it within the double-jeopardy ambit of Oregon v. Kennedy, 456 U.S. 667, 676 (1982) ("Only where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial"). But the judge reaffirmed his earlier conclusion that the prosecutor had not intentionally violated his order and, for purposes of the motion to dismiss, specifically rejected the "goading" argument: "The Court does not find that the conduct of the prosecutor rises to the level of 'prosecutorial misconduct intended to goad or provoke [the Defendant] into moving for the mistrial.'" (Add./37), quoting Donavan v. Commonwealth, 426 Mass. 13, 14 (1997).

Stripped of the double-jeopardy moniker, the defendant's motion reverted to its true self: an ordinary motion to dismiss. The single justice properly recognized this, concluding that "the denial of a motion to dismiss an indictment or criminal charge cannot be appealed as a matter of right until after trial" and that "[t]he remedy

available in the normal appellate process is adequate." (Add./38-39). Consequently, "the single justice did not abuse h[er] discretion or commit a clear error of law." Cepulonis v. Commonwealth, 426 Mass. 1010, 1010 (1998) (involving claim of double jeopardy). See also Chubbuck v. Commonwealth, 453 Mass. 1018, 1019-1020 (2009) (applying this standard of review even where, as here, the Court allows the "appeal to proceed in the regular course" under Rule 2:21).

I.

The Kennedy/Donavan doctrine can be stated succinctly: "A defendant, who has successfully moved for a mistrial, is not entitled to the dismissal of the indictment against him unless there has occurred prosecutorial misconduct intended to goad or provoke him into moving for the mistrial." Donavan, 426 Mass. at 14-15, citing Kennedy, 456 U.S. at 675-676. Putting aside for the moment, as did the trial judge, that application of the doctrine is conditioned on a defendant having "successfully moved for a mistrial,"

id., the defendant cannot satisfy the other condition; namely, that "the prosecutor actually intended to cause a mistrial." Id. at 15 n.2. See Commonwealth v. Cobb, 45 Mass. App. Ct. 271, 274 (1998) ("The burden is on the defendant to show prosecutorial 'goading'"). This Court has emphasized that this is a "narrow rule" and does not apply to "negligence," "inadvertence," or "unintentional prosecutorial mistakes." Donavan, supra, at 15-16 & n.2.

That's all we have here, however. Pretrial, the defendant moved *in limine* to "preclude reference to the defendant's age." (RA/4,13-14). The purpose was to prevent an invitation to jurors to surmise that the defendant, who was 19 years of age, had engaged in underage drinking. (RA/18-19). After discussion, the judge allowed the motion. (RA/5). During her closing argument, however, the prosecutor referred to the defendant's youth:

> Why do you think he might've said no [to the trooper's question about drinking] while he was driving that car? I mean, I don't know if -- you know, probably -- maybe he's young -- maybe he was too young.

(RA/187). At the sidebar conference immediately following the defendant's objection, the prosecutor stated her belief that the judge's pretrial ruling related only to testimony, not to argument:

> [Prosecutor]: Judge, I know the evidence didn't come out, but I can draw an inference from the appearance of the Defendant.
>
> THE COURT: No, no. We had the -- we, we discussed earlier and I was -- I said that prejudicial --
>
> [Prosecutor]: *As to* --
>
> THE COURT: -- it's gonna be prejudicial.
>
> [Prosecutor]: -- *the testimony. This is argument.*
>
> THE COURT: I'm not -- already the argument -- there's some concern about the argument on both sides. I'm not gonna let you go that route.

(RA/174 [emphasis added]). That the prosecutor had this belief, albeit mistaken, was corroborated by her contemporaneous notes. On the face of her copy of the motion, she had inscribed, "Allowed, as to eliciting testimony of the defendant's age of 19." (RA/334-335). The prosecutor later submitted an affidavit attesting to the sincerity of her

mistaken belief. (RA/334). Moreover, at the hearing on the motion for a new trial, she addressed the judge as an officer of the court and explained how she had made the mistake, concluding, "In hindsight, I would love to take that back, but that was how I viewed that I wasn't committing an error, although I realize that I may be wrong in that judgment." (MNT transcript/24-26). Compare Commonwealth v. Brown, 57 Mass. App. Ct. 326, 332 (2003) (involving acknowledged prosecutorial mistake).

In these circumstances, the judge acted well within his discretion in finding that the prosecutor had not intended to "goad or provoke" a mistrial, see Cobb, 45 Mass. App. Ct. 274 ("The question whether a prosecutor intentionally provoked the defendant into moving for a mistrial is one of fact"), and he properly determined that even if the Kennedy/Donavan doctrine were to be stretched to cases where a mistrial motion was denied, it does not reach cases involving "unintentional prosecutorial mistakes":

> The Court does not find that the conduct of the prosecutor rises to the level of "prosecutorial

> misconduct intended to goad or provoke [the Defendant] into moving for the mistrial". Donavan v. Commonwealth, 426 Mass. 13, 14 (1997). The double jeopardy protections are not intended to "necessarily ensure an error free trial" Commonwealth v. Andrews, 403 Mass. 441, 447 (1988). Even in the event the current rule was to be expanded to include cases in which no mistrial was declared, the Supreme Judicial Court has declined to extend it to include unintentional prosecutorial mistakes. Donavan, supra at 16-17. The Court's denial of the Defendant's Motion for Mistrial and allowance of his Motion for New Trial placed him under continuing jeopardy during the pendency of the prosecution and did not place him at risk of double jeopardy.

(Add./37). Because this Court accords "deference to the determination of the trial judge that there was no prosecutorial intent to cause a mistrial," Commonwealth v. Cousin, 449 Mass. 809, 820 (2007), and the judge's determinations are supported by the record, a retrial in this case is permitted. Compare Donavan, 426 Mass. at 14-16 (unintentional failure to lay proper foundation to expert testimony insufficient to bar retrial on double-jeopardy grounds); Commonwealth v. Smith, 404 Mass. 1, 4-5 (1989) (retrial permitted where no indication that prosecutor intended to provoke a mistrial with three improper remarks

in opening statement); Commonwealth v. Patten, 401 Mass. 20, 23 (1987) (retrial permitted where prosecutor referred to an incriminating statement not provided in discovery); Commonwealth v. Lam Hue To, 391 Mass. 301, 311 (1984) (misconduct involving prosecution's lack of disclosure of exculpatory evidence and the inept and "bungling" performance by police was insufficient to invoke double-jeopardy bar); Brown, 57 Mass. App. Ct. at 332-333 (retrial permitted although prosecutor made references in opening statement to hearsay mistakenly thought to be admissible); Commonwealth v. Curtis, 53 Mass. App. Ct. 636, 636-641 (2002) (Lenk, J.) (retrial permitted despite arresting officer's impermissible testimony that breathalyzer had been offered to defendant after his arrest); Cobb, 45 Mass. App. Ct. 273-275 (retrial permitted where prosecutor inadvertently elicited information about defendant's prior incarceration).

II.

Notwithstanding this Court's longstanding and oft-stated position that, "[i]n ruling on such double jeopardy

claims based on State grounds, we have followed the Federal constitutional standard articulated in Oregon v. Kennedy," Donavan, 426 Mass. at 16 (emphasis added), the defendant contends that this Court has "indicated that protections broader than the limited exception articulated in Kennedy exist under state law." (Defendant's brief "Def.Br."/37). He bases this contention on language from two older, pre-Donavan decisions of this Court. (Def.Br./37). Review of these decisions readily reveals that they do not stand for such a proposition.

In the first decision, Commonwealth v. Murchison, 392 Mass. 273, 276 (1984), the Court sought to restate "the principles established in Commonwealth v. Lam Hue To, 391 Mass. 301 (1984)," summarizing them as follows:

> To implicate double jeopardy protections, and support a dismissal of the indictment or complaint, prosecutorial misconduct must be of a specific character: (1) Where the governmental conduct in question is intended to goad the defendant into moving for a mistrial, id. at 311, quoting Oregon v. Kennedy, 456 U.S. 667, 676 (1982); or (2) Where the governmental conduct resulted in such irremediable harm that a fair trial of the

> complaint or indictment is no longer possible, id. at 312-313.

Murchison, supra, at 276. Resort to the Lam Hue To decision, however, discloses that the Murchison decision inaccurately characterized this second prong as a double-jeopardy protection. Indeed, to the contrary, Lam Hue To stated that the second prong did *not* "implicate double jeopardy protections," but instead provided "another basis" for dismissal:

> To implicate double jeopardy protections, prosecutorial misconduct must be of a specific character: "Only where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." Oregon v. Kennedy, 456 U.S. 667, 676 (1982). In the instant case, the issue of prosecutorial misconduct was raised by the defendant's allegation of impropriety in the late disclosure of exculpatory evidence. There is, however, no evidence in the record suggesting, nor did the judge find, that the prosecution in this case sought to goad the defendant into seeking an end to the trial. Accordingly, to the extent that the trial judge sought to rest his order of dismissal upon prosecutorial misconduct, it was not such misconduct as would necessarily raise the double jeopardy bar to retrial. Rather, the propriety of the trial judge's grant of dismissal purporting to

> bar further prosecution, instead of granting a mistrial, must rest on grounds other than prosecutorial misconduct as discussed in Oregon v. Kennedy, supra.
>
> The judge's rulings of law do suggest another basis for his decision: irremediable harm. …

Lam Hue To, 391 Mass. at 311-312. The remainder of the decision engaged in a traditional irremediable-harm analysis.[3]

In the second decision, Commonwealth v. Smith, 404 Mass. 1 (1989), the Court sought to characterize the legal landscape "[u]nder Federal law," with reference to a concurring opinion in Kennedy. Id. at 4, citing Kennedy, 456 U.S. at 683 (Stevens, J., concurring). The Court did not purport to chart a separate course under State law. Indeed,

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[3] The defendant also asserts that Murchison's supposed "breadth of double jeopardy protection has been reaffirmed by the Court" in Commonwealth v. Merry, 453 Mass. 653, 665-666 (2009). (Def.Br./37-38). This is inaccurate. In Merry, the Court merely "delineated" the various "circumstances for dismissing a complaint due to prosecutorial misconduct," Merry, supra, at 665-666, with nary a mention of double jeopardy, let alone a "reaffirm[ation]" of an expansion of it.

in the very next sentence, the Court noted that "the standard for barring a retrial based on double jeopardy principles is substantially the same under Massachusetts law." Id.

In any event, both decisions antedate Donavan, which was clear and emphatic in this regard: "We remain satisfied with the current rule which directs the dismissal of indictments [or complaints] on double jeopardy grounds *only* in instances of intentional prosecutorial misconduct calculated to provoke a defendant into moving for a mistrial." Donavan, 426 Mass. at 16 (emphasis added). Accord Poretta v. Commonwealth, 409 Mass. 763, 765 (1991). As the defendant does here, the defendant in Donavan had proposed broadening the State standard to encompass unintentional prosecutorial errors.[4] Donavan,

[4] The defendant even relies on the same out-of-state cases that the defendant relied upon in Donavan and which this Court rejected as "inapposite" because "all of them found some form of egregious or wrongful misconduct going well beyond mere negligence." Donavan, 426 Mass. at 15 n.2, citing State v. Kennedy, 295 Ore. 260 (1983); Pool v. Superior Court, 139 Ariz. 98 (1984); Bauder v. State, 921

supra, at 15. But this Court rejected the proposal for two reasons, both of which apply with equal force here.

First, "[t]he defendant fails to consider that double jeopardy protection does not necessarily ensure an error-free trial," id., a point that the trial judge also made in denying the defendant's motion to dismiss. (Add./37). Errors happen. And there is a vast array of procedures and frameworks to assess and address such errors, which may result, as here, in the awarding of a new trial. By contrast, double jeopardy "protects against three specific evils – 'a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense' – while tolerating certain conduct from the State." Marshall v.

S.W.2d 696 (Tex. Ct. App. 1996) [since overruled by Ex Parte Lewis, 219 S.W.3d 335, 337 (Tex. Ct. App. 2007) ("We conclude that Bauder should be overruled and that the proper rule under the Texas Constitution is the rule articulated by the United States Supreme Court in Oregon v. Kennedy")]; and State v. Breit, 122 N.M. 655 (1996). See (Def.Br./33-34,43,46,52).

Commonwealth, 463 Mass. 529, 534 (2012) (citations excised).

Second, "the public has a substantial interest in prosecuting those accused of crime and bringing the guilty to justice." Donavan, 426 Mass. at 15, quoting Commonwealth v. King, 400 Mass. 283, 290 (1987). "Dismissal of indictments [or complaints] is a 'drastic remedy," id. (citation omitted), which should be reserved for hard-core, deliberate misconduct, lest this public interest be needlessly frustrated. To bar prosecution due to unintentional transgressions would not only be a disproportionate remedy, but it is unnecessary, as the dearth of Kennedy/Donavan appellate claims (never mind successful ones) in the recent past can attest.

III.

The defendant's claim also suffers from an even more fundamental defect, one that is equally fatal to this appeal. By its very terms, the Kennedy/Donavan doctrine's application is conditioned on a defendant having

"successfully moved for a mistrial." Donavan, 426 Mass. at 14-15, citing Kennedy, 456 U.S. 675-676. Which makes sense, considering that its purpose is to safeguard a defendant's right to have the empaneled jury decide his case:

> The Kennedy prosecutorial misconduct exception is a narrow one, designed to protect the defendant's right to "have his trial completed before the first jury empaneled to try him." Kennedy, 456 U.S. at 673. Without this exception a prosecutor could intentionally provoke a defendant into requesting a mistrial and the defendant would then be prevented from later invoking a double jeopardy bar to his retrial. Such a result would render a defendant's "valued right to complete his trial before the first jury" a "hollow shell." Id.

United States v. McAleer, 138 F.3d 852, 855-856 (10th Cir.), cert. denied, 525 U.S. 854 (1998).

Here, however, the judge *denied* the defendant's mistrial motion when it was made. (RA/175). He could have reserved ruling on it until after jury returned its verdict, see Murchison, 392 Mass. at 275, but he did not do so. Because the doctrine has no application in the absence of a mistrial, see McAleer, supra, at 855 ("Defendant's reliance on Kennedy is misplaced, however, because no mistrial was

declared in this case"); United States v. Davis, 873 F.2d 900, 906 (6th Cir.), cert. denied, 493 U.S. 923 (1989) ("Oregon and its relatives do not apply here" because "no mistrial was declared"), a retrial in this case is permissible.

CONCLUSION

For these reasons, the Commonwealth respectfully requests that this Honorable Court affirm the order of the single justice.

Respectfully submitted,

THE COMMONWEALTH

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ADDENDUM

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COMMONWEALTH OF MASSACHUSETTS

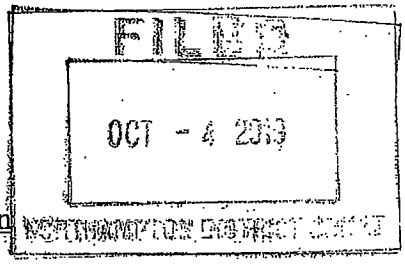
HAMPSHIRE, ss.

Trial Court of the Commonwealth
District Court Department
Northampton Division
Complaint No(s). 1845CR01279

COMMONWEALTH OF MASSACHUSETTS

V.

JOSHUA PERRIER



Memorandum of Decision

BACKGROUND: The above entitled action came before the Court for trial by jury on July 30, 2019. The Defendant, Joshua Perrier, filed a Motion in Limine to Preclude Reference to the Defendant's age during the course of the trial. The motion was allowed over the Commonwealth's objection on the grounds that the probative value of the reference was outweighed by the prejudicial effect of same. During the course of her closing the prosecutor stated the following to the jury;

"Why do you think he [the defendant] might have said no [to the officer's question to the defendant asking if he had anything to drink] while he was driving that car? I don't know. You know. Probably. Maybe he's young. Maybe he's too young."; and

"Do you think this Defendant would have had the ability to respond quickly if an animal would have come out on the road? Or a car, or a car had pulled out unexpectedly?"

The Defendant seasonably objected to the statements and moved for a mistrial. The Defendant's Motion for Mistrial was denied and the jury was given generalized corrective instructions. Thereafter the Defendant was found guilty of operating a motor vehicle under the influence of alcohol. The Defendant, through counsel, subsequently filed the present motion for Reconsideration of his Motion for Mistrial with Prejudice or in the alternative, a Motion for New Trial based upon the Defendant's contention that the prosecutor made improper closing argument to the jury thereby depriving him of a fair trial. A hearing on said motion was held on

September 13, 2019. Based upon the findings and rulings set forth in this memorandum and Order, the Defendant's Motion for New Trial is ALLOWED.

DISCUSSION: It is well settled that "while prosecutors are entitled to argue forcefully for the defendant's conviction, closing arguments must be limited to facts in evidence and the fair inferences that may be drawn from those facts." *Commonwealth v. Wilson, 427 Mass, 336, 350, 693 N.E. 2nd 158 (1998).* Further, it is improper for the prosecutor or defense counsel to appeal to juror emotions in their closing arguments. *See Commonwealth v. Grinkley, 75 Mass. App. Ct. 798, 806, 917 N.E. 2nd 236 (2009).* Where, as here, the prosecutor argued facts in closing argument that find no support in the evidence at trial, and in fact where the prosecutor was instructed not to refer to said facts, the error is nonprejudicial only if the Court is "sure that the error did not influence the jury, or had but very slight effect." *Commonwealth v. Hrabak, 440 Mass. 650, 656, 801 N.E. 2nd 239 (2004).* The Defendant seasonably objected to the prosecutor's statements in her closing which the Court finds went to the heart of the case. *Commonwealth v. Kater, 432 Mass. 404, 422, 734 N.E. 2nd 1164 (2000).* The Court instructed the jury that their verdict must be based solely on the evidence at trial, that the closing arguments of the attorneys are not evidence, and if the jurors recollection of the evidence differs from the attorneys, it is the jurors recollection that controls. *See Commonwealth v. Kozec, 399 Mass. 514, 505 N.E. 2nd 519 (1987).*

The jury indicated during its deliberations that it was deadlocked. To its credit, the jury informed the Court that it wished to continue deliberating prior to the Court providing additional instructions on its deadlocked status. Clearly, it was a close case for the jury, and in such cases, it cannot be said with assurance that the improper remarks of the prosecutor had little or no effect on the jury's deliberations. *See Commonwealth v. Loguidice, 420 Mass. 453, 650 N.E. 2nd 1254 (1995), Commonwealth v. Beaudry, 445 Mass. 577, 586, 839 N.E. 2nd 298 (2005).* "Where it cannot be said with assurance that the improper closing argument could not have influenced the jury to convict, the judgment of conviction cannot be preserved." *Beaudry, supra at 586.* The Commonwealth contends that the statements of the prosecutor were the result of a misinterpretation of the Court's ruling on the Defendant's Motion in Limine. The Court does not find that the statements of the prosecutor constitute deliberate, intentional and/or egregious prosecutorial misconduct sufficient to give rise to presumptive prejudice and the "drastic remedy of dismissal." *Commonwealth v. Cronk, 396 Mass. 194, 484 N.E. 2nd 1330 (1985).* "Absent egregious misconduct or at least a serious threat of prejudice, the remedy of dismissal infringes too severely on the public interest in bringing parties to justice." *Commonwealth v. Light, 394 Mass. 112, 115, 474 N.E. 2nd 1074 (1985).* Therefore, while the Court finds that the judgment of conviction cannot be preserved and the motion for new trial is allowed, the Defendant's motion seeking reconsideration of the Court's denial of the Motion for Mistrial with Prejudice is denied. *See Commonwealth v. Durand, 475 Mass. 657, 59 N.E. 3rd 1152 (2016).*

The Defendant also filed a Motion to Order the District Attorney's Office to Pay Reasonable Attorney's Fees based upon the aforesaid conduct of the prosecutor. The exercise of the Court's power to award attorney's fee in the interests of justice must be reserved only for the "most rare and egregious cases." *Police Commissioner of Boston v. Gows, 429 Mass. 14, 19, 705 N.E. 2nd 1126 (1999).* The Court finds that the actions of the prosecutor do not rise to the level of "egregious, deliberate and intentional conduct" necessary to find the Commonwealth in contempt. *Id. at 19.*

CONCLUSION: For the reasons as set forth in this Memorandum and Order, the Defendant's Motion for New Trial is ALLOWED and the Motion For Attorney's Fees is DENIED.

SO ORDERED.

10-2-19

Date

Bruce S. Melikian

Associate Justice of the District Court

COMMONWEALTH OF MASSACHUSETTS

HAMPSHIRE, ss.

Trial Court of the Commonwealth
District Court Department
Northampton Division
Complaint No(s). 1845CR01279

COMMONWEALTH OF MASSACHUSETTS

V.

JOSHUA PERRIER

Memorandum of Decision

BACKGROUND: The above entitled action came before the Court for trial by jury on July 30, 2019. The Defendant, Joshua Perrier, filed a Motion in Limine to Preclude Reference to the Defendant's age during the course of the trial. The motion was allowed over the Commonwealth's objection on the grounds that the probative value of the reference was outweighed by the prejudicial effect of same. During the course of her closing the prosecutor stated the following to the jury;

"Why do you think he [the defendant] might have said no [to the officer's question to the defendant asking if he had anything to drink] while he was driving that car? I don't know. You know. Probably. Maybe he's young. Maybe he's too young."; and

"Do you think this Defendant would have had the ability to respond quickly if an animal would have come out on the road? Or a car, or a car had pulled out unexpectedly?"

The Defendant seasonably objected to the statements and moved for a mistrial. The Defendant's Motion for Mistrial was denied and the jury was given generalized corrective instructions. Thereafter the Defendant was found guilty of operating a motor vehicle under the influence of alcohol. The Defendant, through counsel, subsequently filed a Motion for New Trial based upon the Defendant's contention that the prosecutor made improper closing argument to the jury thereby depriving him of a fair trial. After hearing the Defendant's Motion for New Trial was allowed on October 4, 2019. Thereafter, the Defendant filed the present motion seeking dismissal of the Complaint on the grounds of double jeopardy. A hearing on said motion was held on December 17, 2019.

DISCUSSION: The double jeopardy clause of the Fifth Amendment to the United States Constitution, and protections recognized in Massachusetts statutory and common law prevent

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NORTHAMPTON
DISTRICT COURT

a criminal defendant from being tried more than once for the same offense. *Commonwealth v. Woods, 414 Mass. 343, 346, 607 N.E. 2nd 1024 (1993).* The "constitutional policies underpinning the Fifth Amendment's guarantee against double jeopardy are not implicated before that point in the proceedings at which jeopardy attaches." *Commonwealth v. Love, 452 Mass. 498, 503, 895 N.E. 2nd 744 (2008).* Jeopardy attached in the present case when the jury was empaneled and sworn. *Id. at 503.* Continuing jeopardy exists where a verdict is vacated by the allowance of a motion for new trial. *See Commonwealth v. Resende, 476 Mass. 141, 65 N.E. 3rd 1148 (2017).*

In rendering it's decision on the Defendant's Motion For New Trial, the Court specifically found that the statements of the prosecutor did not rise to the level of "deliberate, intentional and/or egregious prosecutorial misconduct sufficient to give rise to presumptive prejudice and the drastic remedy of dismissal." *Commonwealth v. Cronk, 396 Mass. 194, 484 N.E. 2nd 1330 (1985).* "Absent egregious misconduct or at least a serious threat of prejudice, the remedy of dismissal infringes too severely on the public interest in bringing parties to justice." *Commonwealth v. Light, 394 Mass. 112, 115, 474 N.E. 2nd 1074 (1985).* The Court further found that the actions of the prosecutor did not rise to the level of "egregious, deliberate and intentional conduct" necessary to find the Commonwealth in contempt. *Police Commissioner of Boston v. Gows, 429 Mass. 14, 19, 705 N.E. 2nd 1126 (1999).* While the Defendant's Motion for Mistrial was denied, his post verdict Motion for New Trial was allowed. The Court does not find that the conduct of the prosecutor rises to the level of "prosecutorial misconduct intended to goad or provoke [the Defendant] into moving for the mistrial". *Donavan v. Commonwealth, 426 Mass. 13, 14, 685 N.E. 2nd 1164 (1997).* The double jeopardy protections are not intended to "necessarily ensure an error free trial" *Commonwealth v. Andrews, 403 Mass. 441, 447, 530 N.E. 2nd 1222 (1988).* Even in the event the current rule was to be expanded to include cases in which no mistrial was declared, the Supreme Judicial Court has declined to extend it to include unintentional prosecutorial mistakes. *Donavan, supra at 16-17.* The Court's denial of the Defendant's Motion for Mistrial and allowance of his Motion for New Trial placed him under continuing jeopardy during the pendency of the prosecution and did not place him at risk of double jeopardy. *Resende, supra at. 146.*

CONCLUSION: For the reasons as set forth in this Memorandum and Order, the Defendant's Motion to Dismiss on the Grounds of Double Jeopardy is DENIED.

SO ORDERED.

1/2/20

Date

Bruce S. Melikian

Associate Justice of the District Court

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. SJ-2020-0086

Northampton District Court
No. 1845CR001279

JOSHUA PERRIER

v.

COMMONWEALTH

JUDGMENT

This matter came before the Court, Budd, J., on the defendant's petition pursuant to G.L. c. 211, § 3 seeking relief from the January 2, 2020 order issued by the Northampton District Court denying the defendant's motion to dismiss the criminal complaint charging him with operating a motor vehicle under the influence of alcohol.

Upon consideration thereof, it is ORDERED that the petition be, and the same hereby is, denied without hearing on the grounds that it is well-established that the denial of a motion to dismiss an indictment or criminal charge cannot be appealed as a matter of right until after trial and that a petition for extraordinary relief under G.L. c. 211, §3, absent a double jeopardy claim of substantial merit, cannot be used to circumvent this rule. See Quigley v. Commonwealth, 480 Mass. 1026 (2018); Pfeiffer v. Commonwealth, 466 Mass. 1032

(2013). The remedy available in the normal appellate process is adequate.

By the Court, (Budd, J.)

Assistant Clerk

Entered: March 11, 2020

G.L. c. 211, § 3. Superintendence of Inferior Courts

The supreme judicial court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein if no other remedy is expressly provided; and it may issue all writs and processes to such courts and to corporations and individuals which may be necessary to the furtherance of justice and to the regular execution of the laws.

In addition to the foregoing, the justices of the supreme judicial court shall also have general superintendence of the administration of all courts of inferior jurisdiction, including, without limitation, the prompt hearing and disposition of matters pending therein, and the functions set forth in section 3C; and it may issue such writs, summonses and other processes and such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration; provided, however, that general superintendence shall not include the authority to supersede any general or special law unless the supreme judicial court, acting under its original or appellate jurisdiction finds such law to be unconstitutional in any case or controversy. Nothing herein contained shall affect existing law governing the selection of officers of the courts, or limit the existing authority of the officers thereof to appoint administrative personnel.

S.J.C. Rule 2:21

(1) When a single justice denies relief from a challenged interlocutory ruling in the trial court and does not report the denial of relief to the full court, the party denied relief may appeal the single justice's ruling to the full court. Unless the court otherwise orders, the notice of appeal shall be filed with the Clerk of the Supreme Judicial Court for Suffolk County within seven days of the entry of the judgment appealed from. Unless the single justice or the full court orders otherwise, neither the trial nor the interlocutory ruling in the trial court shall be stayed.

(2) The appeal shall be presented to the full court on the papers filed in the single justice session, including any memorandum of decision. Nine copies of the record appendix must be filed in the Office of the Clerk for the Supreme Judicial Court for the Commonwealth within fourteen days after the date on which the appeal is docketed in the full Supreme Judicial Court. The record appendix shall be accompanied by eight copies of a memorandum of not more than ten pages, double-spaced, in which the appellant must set forth the reasons why review of the trial court decision cannot adequately be obtained on appeal from any final adverse judgment in the trial court or by other available means. No response from the prevailing party shall be filed, unless requested by the court.

(3) This rule shall not apply to interlocutory appeals governed by Rule 15 of the Massachusetts Rules of Criminal Procedure.

(4) The full court will consider the appeal on the papers submitted pursuant to this rule, unless it otherwise orders.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the applicable court rules, including Mass.R.A.P. 16(a)(13), 16(e), 18, 20, and 21. The text is in Century Schoolbook font (14 point) and consists of 4,503 words, as determined by Microsoft Word's word-count function.

3/30/2021	/s/ Thomas H. Townsend
Date	Thomas H. Townsend

CERTIFICATE OF SERVICE

I hereby certify that one (1) copy of the of the Commonwealth's brief and appendix have been sent via electronic filing to Nicholas Matteson, Esq., nmatteson@mattesoncombs.com, attorney for the defendant, on this date.

3/30/2021	/s/ Thomas H. Townsend
Date	Thomas H. Townsend

No. SJC-12925

JOSHUA A. PERRIER,
Appellant,
v.
COMMONWEALTH OF MASSACHUSETTS,
Appellee.

On Appeal from a Judgment of the Single Justice

BRIEF FOR THE COMMONWEALTH

HAMPSHIRE COUNTY
