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IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS.)	Traffic Case No. 93-980 TDD
)	
)	
Plaintiff,)	DECISION AND ORDER ON
)	DEFENDANT'S MOTIONS:
v.)	1) TO DISMISS BASED ON
)	DOUBLE JEOPARDY; 2) FOR
)	JUDGMENT OF ACQUITTAL;
FREDRICK T. TEBIA,)	3) FOR STAY OF THE
Defendant.)	PROCEEDINGS PENDING
)	APPEAL

This matter was submitted on the briefs on November 16, 1993. Defendant Tebia moves for this Court to dismiss the complaint, for a judgment of acquittal, or alternatively, for a stay of proceedings pending appeal. The Commonwealth of the Northern Mariana Islands (Government) argues that retrial of this matter is the proper result.

FOR PUBLICATION

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I. FACTS

Defendant Tebia was charged with one count of driving under the influence of alcohol (9 C.M.C. §7105), one count of reckless driving (9 C.M.C. §7104), one count of driving without a valid driver's license (9 C.M.C. §2201) and insufficient clearance between vehicles (9 C.M.C. §5309).

On March 26, 1993, Defendant Tebia was arraigned before the Superior Court. Subsequently, on July 8, 1993, the Superior Court heard the trial of Defendant Tebia. Public Defender Gregory Baka appeared for Defendant Tebia, and Assistant Attorney General Charles Rotbart appeared for the Government. After the Court heard and ruled on the Defendant's motions in limine, the parties made opening statements, and the only witness, Officer Sandy Ambros, testified. Thereafter, the parties gave their closing arguments.

Throughout the trial, Defendant Tebia was present in the courtroom. However, he was located in the gallery and not at the defense table with his attorney, Mr. Baka. At the defense table were Mr. Baka and another defendant, Manuel Ortega, whom Mr. Baka was representing in a separate traffic matter. In his closing statement, Mr. Baka disclosed to the Court the actual location of Defendant Tebia during the trial and explained that he realized that the wrong defendant was sitting next to him after approximately two-thirds of the trial had been completed. Mr. Baka argued that the case should be dismissed since the Government failed to identify Defendant Tebia. The Court then ordered defense counsel to show cause why he should not be held in

1 contempt and decided later to declare a mistrial "in the interest
2 of justice."

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4 **II. ISSUES**

5
6 A. Whether Defendant was "present" during the trial as required
7 under Rule 43 of the Commonwealth Rules of Criminal Procedure.

8
9 B. Whether Defendant is entitled to immunity from double jeopardy
10 after the judge's declaration that the first trial ended in a
11 mistrial

12
13 C. Whether Defendant is entitled to a judgment of acquittal under
14 Rule 29 of the Commonwealth Rules of Criminal Procedure.

15
16 D. Whether Defendant is entitled to a stay of the proceedings
17 pending the appeal of the double jeopardy issue.

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19 **III. ANALYSIS**

20 **A. RULE 43(a)**

21 Rule 43(a) of the Commonwealth Rules of Criminal Procedure
22 provides that: "[t]he Defendant shall be **present** at . . . every
23 stage of the trial . . . except as otherwise provided by this
24 rule." (emphasis added). Rule 43(c)(2), an exception to 43(a),
25 states: "[i]n prosecutions for offenses punishable by fine or
26 imprisonment for not more than one year or both, the court, with
27 the **written consent** of the defendant, may permit . . . trial . .
28 in the defendant's absence." (emphasis added). Since the

1 charges against Defendant Tebia are punishable by imprisonment for
2 not more than one year, and Defendant Tebia did not submit to the
3 Court his written consent to be absent, Defendant Tebia was
4 required to be present during the trial under Rule 43(a).

5 However, the Government argues that Defendant Tebia was not
6 present for the purposes of Rule 43(a) because he was seated in
7 the gallery. "The basic principle of construction is that
8 language must be given its plain meaning." *Tudela v. MPLC*, 1
9 N.M.I. 179 (1990). After applying this rule of construction the
10 Court finds that the Rules of Criminal Procedure do not require a
11 defendant to be seated at the counsel table in order to be present
12 at trial. COMMONWEALTH R. CRIM. P. 43(c); see *State v. Hall*, 665 P.2d
13 101 (Ariz. 1983) (discuss right to be present in the **courtroom**);
14 see also *Sivak v. State*, 731 P.2d 192 (Idaho 1986) (constitutional
15 right to be present in **courtroom** during trial). Although
16 Defendant Tebia was not seated at the defense counsel table during
17 the trial, he was still present in the courtroom since he was
18 seated in the gallery. (Tr. at 42).

19
20 B. DOUBLE JEOPARDY

21 The Double Jeopardy Clause of the CNMI Constitution provides
22 that:

23 No person shall be put twice in jeopardy for the same offense
24 regardless of the governmental entity that first institutes
prosecution.

25 COMMONWEALTH CONST. art. 1, § 4(e). "This section is taken from the
26 Fifth Amendment to the United States Constitution^{1/} which is made

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28 _____
The Fifth Amendment guarantees that no person "shall be
subject for the same offense to be twice put in jeopardy of life
or limb." U.S. CONST. amend. V.

1 applicable to the states by the Fourteenth Amendment, which is in
2 turn made applicable in the Northern Mariana Islands by section
3 501 of the Covenant." See Covenant to Establish A Commonwealth of
4 the Northern Mariana Islands in Political Union with the United
5 States of America, § 501(a); Commonwealth v. Oden, 3 N.M.I. 186,
6 205-6 (1992). Therefore, this Court will look to federal case law
7 interpreting the Fifth Amendment to establish that the minimal
8 protection against double jeopardy is afforded by the U.S.
9 Constitution. Commonwealth, 3 N.M.I. at 205.

10 A defendant may not be placed twice in jeopardy for the same
11 offense. Will v. U.S., 88 S.Ct. 269 (1967), cited in 22 C.J.S.
12 Criminal Law § 208 (1989). The double jeopardy clause is for the
13 accused's benefit and is a personal privilege which represents a
14 constitutional policy of finality. Harris v. U.S., 237 F.2d 274;
15 U.S. v. Jorn, 91 S.Ct. 547 (1971). Moreover, the underlying
16 purpose of this clause is:

17 that the State with all its resources and power should not be
18 allowed to make repeated attempts to convict an individual
19 for an alleged offense, thereby subjecting him to
20 embarrassment, expense and ordeal and compelling him to live
in a continuing state of anxiety and insecurity, as well as
enhancing the possibility that even though innocent he may be
found guilty.

21 Green v. U.S., 78 S.Ct. 221, 223 (1957).

22 For double jeopardy to apply, it must attach in the first
23 proceeding. *Serfass* v. U.S., 95 S.Ct. 1055 (1975). In a bench
24 trial, jeopardy attaches when the judge begins to hear the
25 evidence or when the first witness is sworn. *Id.*; Lee v. U.S., 97
26 S.Ct. 2141 (1977), cited in 22 C.J.S. Criminal Law § 218 (1989).
27 However, if the court lacks jurisdiction, jeopardy cannot attach.
28 See *Schlang* v. Heard, 691 F.2d 796, 798 (5th Cir. 1982), appeal

1 dismissed, 103 S.Ct. 2419 (1983) (no jurisdiction due to defective
2 indictment). A criminal court has jurisdiction to hear and
3 determine a case if it has jurisdiction of the subject matter and
4 of the person accused. *Brown v. State*, 37 N.E.2d 73 (1941).

5 Here, the Court had jurisdiction over the subject matter
6 because Defendant Tebia was tried for violating four sections of
7 the Commonwealth Code. Additionally, the Court had jurisdiction
8 over Defendant Tebia since he was arrested in the Commonwealth,
9 was arraigned in the Superior Court on March 26, 1993 and was
10 present during the trial. Not only did the Court have
11 jurisdiction to hear Defendant Tebia's case, but jeopardy attached
12 because the judge heard all the evidence and counsel gave their
13 respective closing arguments.

14 The double jeopardy provision does not mean that each time a
15 defendant is tried before a competent tribunal he is entitled to
16 go free if the trial does not end in a final judgment. *Wade v.*
17 *Hunter*, 69 S.Ct. 834, 836-7 (1949). For instance, a second trial
18 is permissible when a court declares a mistrial over the
19 defendant's objections based on a manifest necessity. *Wade*, 69
20 S.Ct. at 836-7; *Duffel v. Dutton*, 632 F.Supp. 768, cited in 22
21 C.J.S. Criminal Law §§ 208-209 (1989). The trial judge is granted
22 broad discretion in such circumstances because he is in the best
23 position to make an intelligent decision. *Illinois v. Somerville*,
24 93 S.Ct. 1066, 1069 (1973); *Gori v. U.S.*, 81 S.Ct. 1523, 1526
25 (1961). However, a judge should use the greatest caution and a
26 mistrial should only be used under urgent circumstances. *States*
27 *v. Perez*, 9 Wheat. 579 (1824). Although there is no precise
28 formula to determine whether manifest necessity exists, the judge

1 must determine whether a less drastic alternative is practicable
2 taking all the circumstances into consideration. *Id.*; *U.S. v.*
3 *Jarvis*, 792 F.2d 767, cert. denied, 107 S.Ct. 182 (1986).

4 After Mr. Baka disclosed to the Court that the wrong
5 defendant was seated next to him, the judge declared a recess,
6 reviewed the matter and came back several hours later to declare
7 a mistrial "in the interest of justice." (Tr. at 49). In
8 reaching his decision, the judge reviewed the records and the
9 testimony of the witness and listened to the arguments. (Tr. at
10 49). It is clear from the time and manner in which the judge came
11 to his decision that he used the greatest caution and did not act
12 abruptly in making his decision. See *U.S. v. Jorn*, 91 S.Ct. 547,
13 558 (1970) (judge acted too abruptly because he made no effort to
14 exercise sound discretion).

15 Although Defendant Tebia was present for purposes of Rule
16 43(c)(2) by sitting in the gallery, the wrong defendant was seated
17 at the counsel table. Mr. Baka realized the mistake after two-
18 thirds of the trial had been completed but notified the Court of
19 this fact only after the witness testified and both sides rested.
20 Since the entire trial was conducted as if the person sitting next
21 to Mr. Baka was Defendant Tebia, when in fact he was not, the
22 judge had no way of fairly deciding Defendant Tebia's guilt or
23 innocence. Moreover, because Mr. Baka waited until the end of the
24 trial to disclose the error, it was too late for the judge to
25 rectify the problem. Therefore, this Court finds that the judge
26 had no alternative but to declare a mistrial.

27 Although the retrial of Defendant Tebia will afford the
28 Government with a second opportunity to prosecute, the mistrial

1 was not based on the actions of the Government, but rather on the
2 actions of the defense. Thus, the underlying purpose of immunity
3 from double jeopardy, which disfavors repeated attempts to
4 convict, will not be undermined. Moreover, when the defense's
5 actions cause a declaration of a mistrial, the defendant should
6 not be entitled to the privilege since the immunity is designed to
7 protect against government misconduct.

8 This Court finds that the judge carefully took all the
9 circumstances into consideration and determined that there was no
10 other alternative but to declare a mistrial based on a manifest
11 necessity. Thus, Defendant Tebia is not entitled to the immunity
12 from double jeopardy.

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14 C: ACOUITTAL

15 Defendant Tebia argues that under Rule 29 of the Commonwealth
16 Rules of Criminal Procedure that he is entitled to a judgment of
17 acquittal since the Government failed to identify him. Rule 29
18 provides that a court shall order the entry of judgment of
19 acquittal if the evidence is insufficient to sustain a conviction.
20 COMMONWEALTH R. CRIM. P. 29(A). However, this case ended in a mistrial
21 based on a manifest necessity. This mistrial declaration renders
22 Defendant's motion for judgment of acquittal moot. State v.
23 Patterson, 165 P.2d 309 (Ariz. 1946).

24
25 D: STAY PENDING APPEAL

26 Finally, Defendant argues that he is entitled to a stay of
27 the proceedings pending the appeal of the double jeopardy issue.
28 The Commonwealth Supreme Court has interpreted the Commonwealth

1 Code to provide that it has jurisdiction over final judgments and
2 orders of the Superior Court. *CNMI v. Hastino*, 1 N.M.I. 377, 385
3 (1990); 1 CMC § 3102(a). The "collateral order doctrine" creates
4 an exception to this finality rule. If an order satisfies the
5 following three prong test, even though it does not satisfy the
6 finality rule, a stay may be issued pending an appeal to the
7 Supreme Court. The rule states:

8 As a minimum, to come within the collateral order exception
9 to the final judgment rule, the order sought to be appealed
10 must [1] conclusively determine the disputed question, [2]
11 resolve an important issue completely separate from the
12 merits of the action, and [3] be effectively unreviewable on
13 appeal from a final judgment.

14 *Hastino*, at 384 n.6. (citation omitted); *Olopai v. Hillbom*, 3
15 N.M.I. 528, 533 (1993) (failed the third prong of the collateral
16 order doctrine because the request for disqualification was
17 reviewable following judgment on the merits).

18 In *Abney v. U.S.*, 97 S.Ct. 2034, 2039 (1977), the U.S.
19 Supreme Court addressed the issue of finality of a motion to
20 dismiss based on the double jeopardy clause. The Court found that
21 a "pretrial denial of a motion to dismiss . . . on double jeopardy
22 grounds is obviously not 'final' in the sense that it terminates
23 the criminal proceedings in district court." *Id.* at 2039.
24 However, it held that double jeopardy falls within the collateral
25 order exception. *Id.* First, an appeal from a double jeopardy
26 issue constitutes a complete, formal and final rejection of a
27 criminal defendant's double jeopardy claim; thereby satisfying the
28 first prong of the test. Second, the very nature of a double
jeopardy claim is such that it is collateral to, and separate from
the guilt or innocence of an accused. *Id.* Finally, since the
double jeopardy clause protects an individual against being twice

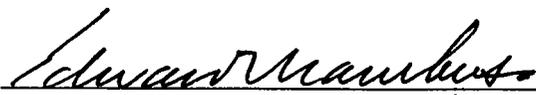
1 put to trial for the same offense, the double jeopardy claim is
2 effectively unreviewable on appeal from a final judgment. Id. If
3 a defendant is to avoid exposure to double jeopardy, the claim
4 must be reviewable before a second trial occurs.

5 Since the Covenant makes the Fifth Amendment of the United
6 States applicable to the Commonwealth, and the *Abney* decision is
7 a statement of the protection required under the Fifth Amendment,
8 *Abney* is a binding precedent on this Court. Moreover, this Court
9 finds that the *Abney* standard sets forth the applicable double
10 jeopardy standard under the Commonwealth Constitution. Thus, this
11 Court finds that Defendant's motion to dismiss satisfies the three
12 prong collateral order doctrine, and accordingly, stays the
13 proceedings pending the appeal.

14
15 **IV. CONCLUSION**

16 This Court hereby DENIES the Defendant's motion to dismiss
17 based on double jeopardy since a mistrial was based on a manifest
18 necessity. Second, this Court hereby DENIES the Defendant's
19 motion for acquittal. Finally, this Court hereby GRANTS the
20 Defendant's request for a stay of the proceeding pending the
21 appeal of the double jeopardy issue.

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23 So ORDERED this 22 day of November, 1994.

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25 
26 EDWARD MANIBUSAN, Associate Judge