

UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT

United States :  
 :  
v. : No. 3:02cr81 (JBA)  
 :  
Patrick Triumph :

**Ruling on Defendant's Motion to Dismiss Indictment Due to Double Jeopardy**

Defendant Patrick Triumph, who represents himself at this time, seeks to dismiss the superceding indictment on double jeopardy grounds under the Fifth Amendment to the U.S. Constitution, because his first trial resulted in a mistrial. Defendant also argues that he was denied the right to counsel in the competency hearing that resulted in the mistrial, in violation of the Sixth Amendment. For the reasons that follow, defendant's motion is denied.

I. Background

On February 23, 2004, after four days of trial, defendant's former counsel, Assistant Federal Defender Thomas Belsky, advised the Court that he believed the defendant was unable to properly assist in his own defense and moved for a psychiatric examination. Based on defense counsel's representations and the Court's personal observations of the defendant's bizarre behavior in the courtroom, reasonable cause was found to order a

psychiatric examination.<sup>1</sup> Dr. Patricia Kelly, Law & Psychiatry Division, Yale Department of Psychiatry, was appointed to conduct the competency evaluation, which she did.<sup>2</sup> On February 25, 2004, this Court held an evidentiary hearing, at which Dr. Kelly set forth her opinion and basis therefor that Mr. Triumph was suffering from a mental defect that precluded him from assisting properly in the preparation of his defense. Based on Dr. Kelly's findings, the Court concluded that the defendant was incompetent to stand trial, and declared a mistrial. Pursuant to 18 U.S.C. § 4241(d), Mr. Triumph was committed to the custody of the Attorney General for evaluation and treatment to restore competency.

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<sup>1</sup>In particular, the finding of reasonable cause was based on the following considerations: "Mr. Triumph's appearance before the Court this morning with his fingers in his ears, rocking back and forth and praying aloud; his physically disruptive behavior towards his attorney, such that the U.S. marshals felt the need to physically subdue him and restrain him; his repeated return to the same subjects of concern . . . His serious threat of harm to his counsel, and very importantly, his counsel's opinion that he is absolutely unable to assist properly in his defense and expresses - has nothing expressed other than a paranoia that defense counsel is an arm of the government, all gives the Court reasonable cause to order such examination." Trial Tr. Vol. IV, Feb. 23, 2004, at 931.

<sup>2</sup> In order to preserve and protect the defendant's rights to Due Process and against self-incrimination, the Court ordered pursuant to 18 U.S.C. § 4241(f) "that no statement, testimony or other evidence made or provided by the defendant during or as a result of any court-ordered competency examination, no testimony or report of any psychotherapist or other expert based on such statement, testimony or evidence, and no other fruits of such testimony or evidence shall be admitted in evidence or otherwise used against defendant in any criminal proceeding except on an issue respecting his competency to stand trial." Supplemental Order, Feb. 24, 2004 [Doc. # 78].

Shortly thereafter, on March 5, 2004, this Court granted attorney Belsky's motion to withdraw as counsel, and appointed new counsel for Mr. Triumph. See Endorsement Order, Mar. 5, 2004 [Doc. # 88].

At the Bureau of Prisons Federal Medical Center in Butner, North Carolina, the defendant was examined by staff psychiatrists, and on July 15, 2004, A.F. Beller, Warden of the Butner Federal Medical Center, filed with this Court a Certificate of Restoration of Competency, certifying that Mr. Triumph was able to understand the nature and consequences of the proceedings against him and assist properly in his own defense. See Certificate of Restoration of Competency to Stand Trial [Doc. # 103]. Mr. Triumph, through his newly appointed counsel, Norman A. Pattis, waived a second competency hearing and stipulated to the findings in the Certificate of Restoration of Competency. See [Doc. # 106]. Based upon the certificate and stipulation, the Court concluded that Mr. Triumph was restored to competency and ready to proceed to trial, and scheduled jury selection for August 4, 2004.

A superceding indictment adding counts of interference with administration of internal revenue laws and failure to appear was returned on July 13, 2004. On the morning of jury selection, Mr. Triumph moved to represent himself at trial. After conducting a hearing to determine whether Mr. Triumph's waiver of his right to counsel was knowing, voluntary, and intelligent, this Court

granted Mr. Triumph's motion to proceed pro se, and a jury was selected with standby counsel assisting the defendant throughout. Evidence is scheduled to begin on August 25, 2004.

## II. Discussion

The defendant now contends that the mistrial was declared in error, because he did not consent to the competency hearing on February 25, was not provided with an attorney to represent his opposition to his counsel's competency motion, was not allowed the opportunity to testify and confront and cross-examine witnesses at the competency hearing, has always maintained that he has been competent to stand trial, and never consented to the declaration of mistrial. Defendant contends that because the mistrial was declared in error, the double jeopardy clause prohibits retrial in this case.

"The double-jeopardy provision of the Fifth Amendment . . . 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. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed. . . [A] defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments." Richardson v. United States, 486 U.S. 317, 324

(1984). Thus, where the defendant requests a mistrial, "[i]t is settled law that double jeopardy bars retrial after a mistrial requested by the defense only if the government provoked the defense into making the request." United States v. Millan, 4 F.3d 1038, 1044 (2d Cir. 1993) (citations omitted). Where a mistrial is declared without the defendant's request or consent, the issue is whether "there is a manifest necessity for the (mistrial), or the ends of public justice would otherwise be defeated." United States v. Dinitz, 424 U.S. 600, 607 (1976) (citations and internal quotation marks omitted).

Here, the Court found reasonable cause to order a competency evaluation at defense counsel's request, based on counsel's representations and the Court's own observations of defendant's behavior in the courtroom. Dr. Kelly, a board certified psychiatrist engaged in a forensic fellowship at Yale University, had significant prior experience performing competency evaluations in state court in Connecticut and in New Mexico.<sup>3</sup> Dr. Kelly evaluated Mr. Triumph by observing his interaction with

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<sup>3</sup>Dr. Kelly testified that she interviewed "100 plus" criminal defendants in her career, including 20 competency evaluations on behalf of the New Haven Office of Court Evaluations. See Transcript of the Testimony of Dr. Patricia Kelly and Order of Competency Evaluation, Feb. 25, 2004 [Doc. # 95] at 5, 33. Dr. Kelly's professional experience included roles as director of psychiatry for Addus Health Care and Correctional Medical Services, both of which were health care providers to the state of New Mexico's Department of Corrections; psychiatric director of Oneida Mental Health Treatment Center; and consultant to the state's attorney's office in New Haven, Connecticut, regarding psychiatric issues.

defense counsel and performing a formal mental status examination, and offered her professional opinion that although Mr. Triumph had a factual understanding of the legal proceedings, he was not able to rationally understand them because of "delusional beliefs and paranoid ideation," and therefore was unable to assist in his defense. See Transcript of the Testimony of Dr. Patricia Kelly and Order of Competency Evaluation, Feb. 25, 2004 [Doc. # 95] at 51. Upon receiving the opinion of Dr. Kelly that Mr. Triumph was unable to properly assist in his own defense and not competent to stand trial, this Court's finding of incompetency compelled its declaration of a mistrial. 18 U.S.C. § 4241 provides that if, after a hearing to determine the competency of a defendant:

the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility--

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and  
(2) for an additional reasonable period of time until--  
(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed.

18 U.S.C. § 4241(d).

In light of the incompetency determination, trial could not

have proceeded, making the declaration of mistrial a manifest necessity. It is well-established that "the conviction of an accused person while he is legally incompetent violates due process." Pate v. Robinson, 383 U.S. 375, 378 (1966). "[P]ublic justice is not served by trial of an individual for an alleged offense when that individual is mentally unable reasonably to comprehend the action being taken against him or to assist in the defense of his liberty." Featherston v. Mitchell, 418 F.2d 582, 586 (5<sup>th</sup> Cir. 1969), cert denied, 397 U.S. 937 (1970) (concluding that declaration of a mistrial where a defendant is found incompetent to stand trial is a manifest necessity not barring a second trial).

Because the issue of Mr. Triumph's competency rendered a declaration of mistrial a manifest necessity, it is ultimately of no bearing to the double jeopardy issue whether Mr. Triumph consented to the mistrial, or disagreed with his counsel's request for a competency evaluation. Nonetheless, to the extent that defendant's motion can be construed as a separate Sixth Amendment challenge to his right to counsel and to confrontation, the Court notes that the defendant never informed the Court that he wished to defend his competency or sought new counsel to aid him in doing so.<sup>4</sup> At no point did Mr. Triumph indicate to the

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<sup>4</sup>Mr. Triumph's silence on the issue of competency may be contrasted to his demonstrated willingness and ability to file his own motions with the Court when he believed his counsel was not acting in his interest. See, e.g. Motion to Dismiss

Court that he opposed the competency evaluation, or that he desired new counsel, despite the fact that the Court questioned him at length about the problems he believed existed in his relationship with defense counsel. In fact, during the hearing on defense counsel's motions for a competency evaluation and for substitution of counsel due to a conflict of interest, the Court asked Mr. Triumph if he was satisfied with Mr. Belsky as his attorney, to which Mr. Triumph responded, "I have no problem provided that we can have attorney-client privilege relationship."<sup>5</sup> Trial Tr., Feb. 23, 2004, at 915.

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Indictment Due to Prosecutorial Misconduct [Doc. # 76]; Letter dated 7/13/04 for appointment of new counsel [Doc. # 104].

<sup>5</sup>What Mr. Triumph meant by his qualification about the "attorney-client privilege relationship" is somewhat unclear. In context of the Court's colloquy with Mr. Triumph, however, it is clear that Mr. Triumph identified serious "communication barriers" with his attorney, but did not himself request new counsel. See, e.g. Trial Tr., Feb. 23, 2004, at 914-16. The relevant portion of the transcript states as follows:

The Court: Mr. Triumph has not requested that he represented himself or that counsel be substituted.

Mr. Ring: Mr. Belsky has, I thought, by saying there is a conflict.

The Court: But Mr. Triumph hasn't. Am I correct, Mr. Triumph?

The Defendant: Absolutely correct, your Honor.

The Court: So you're satisfied to continue with Mr. Belsky as your attorney.

The Defendant: I have no problems provided that we can have attorney-client privilege relationship.



After the Court granted the motion for a competency evaluation, Mr. Triumph met with Dr. Kelly, both alone and in the presence of his defense counsel for 2 ½ hours. Dr. Kelly's testimony to the Court did not give any indication that Mr. Triumph opposed the competency evaluation process. At the hearing, defense counsel examined Dr. Kelly about the basis of her opinion, and the Government vigorously cross-examined her about whether Mr. Triumph could be malingering, whether Mr. Triumph's behavior resulted from cultural differences, not mental illness, and whether the beliefs that Dr. Kelly identified as delusional rose to the level of a mental illness preventing Mr. Triumph from assisting in his own defense. While neither defense counsel nor the Government directly asked Dr. Kelly about whether Mr. Triumph expressed a view on his own competence, Dr. Kelly's testimony, in response to a question about whether the defendant was malingering in expressing symptoms of mental illness, noted Mr. Triumph's general cooperativeness throughout his examination. As Dr. Kelly stated:

It is very difficult for a person who is feigning mental illness to sustain disorganization as he did during our discussion. Usually – and he was – another aspect of that was he was very willing to continue the discussion for as long as – he was very cooperative and very polite throughout the interview, and was very willing to stay with me and work with me for quite awhile, and often one who is malingering will ask to terminate the interview early because they tire of having to produce these symptoms.

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Id.

Transcript of the Testimony of Dr. Patricia Kelly, Feb. 25, 2004  
[Doc. # 95] at 19.

After hearing the extensive questioning by both sides exploring the merits of Dr. Kelly's assumptions and conclusions, this Court had a comprehensive basis for making the finding that Mr. Triumph lacked competence to stand trial.

Mr. Triumph relies on the dissent in United States v. Boigegrain, 155 F.3d 1181 (10th Cir. 1998), which found that "[l]eaving the defendant alone with only an attorney suggesting, contrary to the position defendant elected to take, that he was incompetent denied him due process under the Fifth Amendment and assistance of counsel under the Sixth Amendment." Id. at 1193. Because here, Mr. Triumph did not make apparent any election to oppose the competency evaluation process, the reasoning of the dissent in Boigegrain is inapplicable. This dissenting view, moreover, was rejected by the majority, which concluded that a defendant who disagrees with his counsel's request for a competency hearing is not entitled to separate counsel for the purposes of that competency hearing. See Boigegrain, 155 F.3d at 1188. In fact, the professional standard set forth by the American Bar Association provides that where defense counsel has a good faith doubt as to the defendant's competence, "counsel may move for evaluation over the client's objection." ABA STANDARDS FOR CRIMINAL JUSTICE Standard 7-4.2(c) (cited in Boigegrain, 155 F.3d 1181, 1188 (10th Cir. 1998)).

Defendant's reliance on United States v. Purnett, 910 F.2d 51 (2d Cir. 1990), is also misplaced, as there the Second Circuit faulted the district court's acceptance of the defendant's waiver of the right to counsel prior to making a competency determination, and the defendant's proceeding without counsel at pretrial proceedings when his competence was at issue. The Court thus did not address whether a represented defendant is entitled to separate counsel to represent his position of competency during a competency hearing. Instead, the Court was concerned with the limits of the right to self-representation, and held that "where a trial court has sufficient cause to doubt the competency of a defendant to make a knowing and intelligent waiver of the right to counsel, it must appoint counsel--whether defendant has attempted to waive it or not--and counsel must serve until the resolution of the competency issue." Id. at 56. Here, in contrast, Mr. Triumph was represented throughout all proceedings when his competency was at issue.

Finally, the fact that the staff psychiatrist at the Butner Federal Medical Center ultimately found Mr. Triumph competent, and that Mr. Triumph now argues that he has been always been competent, do not indicate that the proceeding that gave rise to the finding of incompetence was illegitimate. There may be a variety of reasons for the difference in professional opinions, including recovery due to the passage of time or retreat from the immediate pressures of trial, and professional disagreement.

The defendant also argues that the superceding indictment is multiplicitous, and violates the double jeopardy clause by subjecting him to punishment for the same crime more than once. "A multiplicitous indictment . . . is one that charges in separate counts two or more crimes, when in fact and law, only one crime has been committed. The test for determining if a defendant has improperly been convicted under different statutes for a single transaction is whether Congress intended to authorize separate punishments for the conduct in question." United States v. Holmes, 44 F.3d 1150, 1153-54 (2d Cir. 1995) (citations omitted). Here, the superceding indictment adds the charge of interference with the administration of the internal revenue laws in violation of 18 U.S.C. § 7212, which is distinct from the counts alleging aiding and abetting the filing of false tax returns, in violation of 18 U.S.C. § 7206(2), as it involves a separate statutory punishment, different legal elements, and distinct factual allegations. As alleged in the indictment, Count 39 of the Superceding Indictment charges that Mr. Triumph endeavored "to obstruct and impede the due administration of the Internal Revenue Laws and Internal Revenue Service, in connection with the agency's efforts to investigate his preparation of individual income tax returns and amended returns by advising, persuading and instructing a third party, Pekah Wallace, to provide false and misleading information to Internal Revenue Service investigators." Superceding Indictment [Doc. # 102] at

Count 39. As the activity charged in this Count is not charged in any other counts of the indictment, the counts are not multiplicitous.

In sum, having found Mr. Triumph incompetent to stand trial after the February 25, 2004 hearing, declaration of mistrial was a manifest necessity, and therefore the Court concludes that there is no violation of the double jeopardy clause. Having reviewed defendant's motion in full, the Court concludes that the remaining arguments, including that his commitment for mental hospitalization constitutes cruel and unusual punishment, that his bail was excessive, and that perjured testimony before the grand jury requires dismissal of the indictment, also lack merit.

The defendant has indicated his intention to file an interlocutory appeal of this issue. "A district court may retain jurisdiction and proceed to trial, despite the pendency of a defendant's interlocutory appeal, when the appeal is frivolous." United States v. Millan, 4 F.3d 1038, 1044 (2d Cir. 1993) (citing United States v. Salerno, 868 F.2d 524, 539 (2d Cir.) (collecting circuit court decisions), cert. denied, 491 U.S. 907 (1989)). For the foregoing reasons, this Court finds defendant's double jeopardy arguments frivolous, and plans to proceed with trial as scheduled.

IT IS SO ORDERED.

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Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut, this 24th day of August, 2004.