

1998

West Valley City v. Randy Patten : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

WEST VALLEY CITY,	:	
	:	
Plaintiff/Appellee,	:	
	:	Case No. 980197-CA
v.	:	
	:	Priority No. 2
RANDY PATTEN,	:	
	:	
Defendant/Appellant.	:	

BRIEF OF THE APPELLEE

Appeal from the Third Judicial District Court,
West Valley Department,
in and for Salt Lake County, State of Utah;
the Honorable Judith S.H. Atherton

**UTAH COURT OF APPEALS
BRIEF**

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FILED
Utah Court of Appeals

NOV 25

Julia D'Alesandro
Clerk of the Court

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STATEMENT OF JURISDICTION

Appellate jurisdiction over this case is rested in the Utah Court of Appeals pursuant to Section 78-2a-3(2)(d), Utah Code Annotated 1953, as amended.

STATEMENT OF THE ISSUES

The City accepts the statement of appellant.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCE, AND RULES

Fifth Amendment, United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article I Section 12, Constitution of Utah

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to

have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

(Second paragraph omitted)

§ 76-1-403, Utah Code Annotated

§ 76-1-403. Former prosecution barring subsequent prosecution for offense out of same episode.

(1) If a defendant has been prosecuted for one or more offenses arising out of a single criminal episode, a subsequent prosecution for the same or a different offense arising out of the same criminal episode is barred if:

(a) The subsequent prosecution is for an offense that was or should have been tried under Subsection 76-1-402(2) in the former prosecution; and

(b) The former prosecution:

(i) resulted in acquittal; or

(ii) resulted in conviction; or

(iii) was improperly terminated; or

(iv) was terminated by a final order or judgment for the defendant that has not been reversed, set aside, or vacated and that necessarily required a determination inconsistent with a fact that must be established to secure conviction in the subsequent prosecution.

(2) (Omitted)

(3) (Omitted)

(4) There is an improper termination of prosecution if the termination takes place before the verdict, is for reasons not amounting to an acquittal, and takes place after a jury has been impanelled and sworn to try the defendant, or, if the jury trial is waived, after the first witness is sworn. However, termination of prosecution is not improper if:

(a) The defendant consents to the termination; or

(b) The defendant waives his right to object to the termination;

(c) the court finds and states for the record that the termination is necessary because:

(i) It is physically impossible to proceed with the trial in conformity with the law; or

(ii) there is a legal defect in the proceeding not attributable to the state that would make any

judgment entered upon a verdict reversible as a matter of law; or

(iii) Prejudicial conduct in or out of the courtroom not attributable to the state makes it impossible to proceed with the trial without injustice to the defendant or the state; or

(iv) the jury is unable to agree upon a verdict; or

(v) False statements of a juror on voir dire prevent a fair trial.

Utah Code of Judicial Conduct, Canon 3, Utah Code of Judicial Administration Chapter 12 (relevant portions)

Canon 3. A judge shall perform the duties of the office impartially and diligently.

E. Disqualification

(1) A judge shall enter a disqualification in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, a strong personal bias involving an issue in a case, or personal knowledge of disputed evidentiary facts concerning the proceeding;

STATEMENT OF THE CASE

The City accepts the statement of the appellant.

STATEMENT OF THE FACTS

1. The defendant Randy Patten was charged with violation of a protective order, § 76-5-108, Utah Code Annotated, which is a Class A Misdemeanor. The prosecution was commenced by the filing of three separate informations on or about February 28, 1997 (case #971000887, case #971000888, and case #971000889). Record, P. 1, 45.

2. On or about June 23, 1997, a bench trial was conducted before the Honorable Judge Ronald Nehring. The trial encompassed all three charges, which had been consolidated. Record, P. 56.

3. Upon commencement of the trial, witnesses were sworn and testified on behalf of the prosecution. Record, P. 179

4. During the testimony of Randy Patten's wife, Susan Patten, the alleged victim, it came to the attention of the Court that Susan Patten was being represented in her divorce action against Randy Patten by the wife of an assistant West Valley City prosecutor. Transcript, P. 42-45

5. When this issue arose during the questioning of Susan Patten, Judge Nehring declared a recess. Transcript, P. 45. During the recess, Judge Nehring spoke with the attorneys in his chambers. Record, P. 172.

6. Following the recess, Judge Nehring declared a mistrial. Judge's Ruling, P. 2. He also announced that he was going to reassign the case to another judge since, during the discussions, he had learned information about the case which was beyond the information presented by the witnesses and beyond the record in the case. Judge Nehring announced that, "In my view, my continued involvement on this case would be inappropriate." Judge's Ruling, P. 3.

7. On November 3, 1997, the defendant filed a motion to dismiss on double jeopardy and improper termination grounds. Record, P. 169. The defendant's motion was heard at oral argument by the Honorable Judge Judith S.H. Atherton on January 26, 1998. Record, P. 171.

8. On March 18, 1998, Judge Atherton denied the defendant's motion by Memorandum Decision wherein she found Judge Nehring's recusal from the case constituted a clear and compelling reason for a mistrial and that retrial of the defendant was not barred by the principles of double jeopardy. Record, P. 172.

SUMMARY OF THE ARGUMENTS

I. JUDGE ATHERTON CORRECTLY RULED THAT JUDGE NEHRING'S DECLARATION OF A MISTRIAL IN THIS CASE WAS NOT IMPROPER AND THAT THE REPROSECUTION OF RANDY PATTEN IS NOT BARRED BY THE PROHIBITION AGAINST DOUBLE JEOPARDY.

- a. The 'manifest necessity' mistrial exception to double jeopardy and the statutory exception in §76-1-403, Utah Code Annotated.**

The United States and Utah Constitutions bar retrial following a declaration of mistrial unless the mistrial was declared based upon a 'manifest necessity.' This concept has been codified in Utah as §76-1-403 Utah Code Annotated.

- b. Judge Nehring's recusal and reassignment of the case is 'manifest necessity' for a mistrial and falls within the exceptions contained in §76-1-403, Utah Code Annotated.**

Judge Atherton correctly determined and ruled that Judge Nehring's declaration of a mistrial in this case was not a bar to retrial on grounds of double jeopardy. Although the parties argued other grounds for the mistrial, Judge Atherton held that Judge Nehring's recusal on the grounds that he had been privy to too much information about the case was a basis for finding that retrial was not barred by §76-1-403, Utah Code Annotated. Furthermore, the midtrial, *sua sponte*, recusal of a judge for bias or potential bias is required by the Utah Code of Judicial Conduct and falls squarely

within the 'manifest necessity' exception to the double jeopardy provisions.

Also, since the trial judge is the person who is in the best position to judge his own potential bias or the appearance of bias on his part, his decision to recuse should be given great deference.

- c. The trial courts failure to use the phrase 'legal necessity' or 'manifest necessity' in it's rulings does not affect the correctness of Judge Atherton's decision.**

The trial courts failure to use the correct legal terminology in reaching their decisions is not a fatal error, since an adequate basis for finding 'manifest necessity' can be found in the record.

DETAIL OF THE ARGUMENTS

I. JUDGE ATHERTON CORRECTLY RULED THAT JUDGE NEHRING'S DECLARATION OF A MISTRIAL IN THIS CASE WAS NOT IMPROPER AND THAT THE REPROSECUTION OF RANDY PATTEN IS NOT BARRED BY THE PROHIBITION AGAINST DOUBLE JEOPARDY.

- a. The 'manifest necessity' mistrial exception to double jeopardy and the statutory exception in §76-1-403, Utah Code Annotated.**

This case is an appeal of the Memorandum Ruling of Judge Atherton denying the Defendant Randy Patten's ("Patten") motion to dismiss all charges on the grounds of double jeopardy. A thorough examination of the case law indicates that Judge Atherton's ruling

was correct and that, based upon the information found in the record, a mistrial in this case was a manifest necessity.

The analysis found in Patten's brief regarding the doctrine of double jeopardy is accurate. In the case of bar, West Valley City ("City") agrees that since this was a bench trial and a witness had been sworn, that jeopardy had attached. The City also agrees that Patten did not consent to the termination of the trial, nor did he waive his right to object to the termination of the trial. Under circumstances such as this, the double jeopardy clauses of both the Fifth Amendment, United States Constitution, and Article 1, Section 12, Utah State Constitution, bar retrial of the defendant unless the mistrial was based upon circumstances that amount to a 'manifest necessity'. As Judge Atherton correctly concluded, such manifest necessity is apparent in this case.

The original standard for an exception to double jeopardy for a mistrial based upon a 'manifest necessity' was set forth by the United States Supreme Court in *United States v. Perez*, 22 U.S. 579 (1824). In Utah, the doctrine of double jeopardy and its exceptions have been codified at Section 76-1-403, Utah Code Annotated. *State v. Nilson*, 854 P.2d 1029 (Utah App. 1993).

Utah Courts have consistently recognized that the double jeopardy provisions do not bar retrial when a mistrial has been declared for reasons of manifest necessity. Many Utah courts, have used the phrase 'legal necessity,' rather than the more common

phrase 'manifest necessity,' however, it is clear that the terms are synonymous. *State v. Ambrose*, 598 P.2d 354 (Utah 1979).

- b. Judge Nehring's recusal and reassignment of the case is 'manifest necessity' for a mistrial and falls within the exceptions contained in §76-1-403, Utah Code Annotated.**

A close examination of the Memorandum Decision issued by Judge Atherton on March 18, 1998, indicates that her decision was based solely on Judge Nehring's decision to recuse himself. Judge Atherton held that:

The basis of the judge's reassignment of the case to another judge is a clear and compelling basis for declaring a mistrial under Section U.C.A. 76-1-403(4)(c)(iii) (Supp.1997), 'prejudicial conduct in or out of the court room not attributable to the state, mak[ing] it impossible to proceed with the trial without injustice to the defendant or state'.

Record, p. 173.

The Utah Code section referred to above by Judge Atherton is a specific statutory exception to the bar against retrial and is analogous to the 'manifest necessity' mistrial exception to the constitutional double jeopardy provisions. Judge Atherton also stated that since the record supported the declaration of a mistrial based upon Judge Nehring's recusal, she need not address other arguments. Since it is Judge Atherton's Memorandum Decision which is the subject of this appeal, it is appropriate to closely examine the basis for that decision, which was Judge Nehring's decision to recuse himself.

While there appears to be no Utah case law directly on point, the relationship between a judge's decision to recuse himself and the double jeopardy bar against reprosecution has been examined by several other jurisdictions. Those courts have been very clear that the midtrial recusal of a judge constitutes 'manifest necessity' for purposes of the mistrial exception to the double jeopardy rule.

In this case, Judge Nehring was faced with the appearance of an impropriety when it was discovered that a key prosecution witness was being represented in her divorce action against Patten by the wife of an assistant West Valley City Prosecutor. When this issue arose during the questioning of the witness, Judge Nehring declared a recess. Transcript, p. 42-45. During the recess, Judge Nehring spoke with the attorneys in his chambers. Record, p. 172. Apparently, it was during this discussion that Judge Nehring became privy to additional information about the case beyond that which had been entered into evidence. The court docket states "Judge Nehring recused himself based on discussions of resolution as Court was trying to solve the issue of conflict of interest." Record p.179-180. Following the recess, Judge Nehring declared a mistrial.

Among the statements Judge Nehring placed on the record when declaring the mistrial was the following:

I am going to reassign the case because I have participated in discussions of possible resolutions to the case, I know a considerable amount about this case beyond what I have heard from witnesses and beyond what's on the record in the case. And in my view, my continuing involvement in this case would be inappropriate...

Judge's Ruling, p. 3.

This is the portion of the record supporting Judge Nehring's recusal that is referred to by Judge Atherton in her Memorandum Decision denying Patten's motion to dismiss on grounds of double jeopardy.

As did Judge Atherton, many Courts have determined that a trial judge's recusal is a valid reason for mistrial. The case of *State v. Graham*, 960 P.2d 457 (Wash. App. Div. 2 1998), is a good example of how a judge's decision to recuse himself has been addressed by other courts in relation to the bar against double jeopardy. In *Graham*, the defendant had been charged with malicious mischief. During the course of the trial, the *pro tem* judge realized that he may have a conflict of interest since a police officer from a town for which the Judge acted as City Attorney would be testifying. The judge in the *Graham* case recused himself and explained his reasons as follows:

The Code of Judicial Conduct rule 3(d)(1) requires me to disqualify myself because I think it could reasonably be expected that my impartiality could be questioned. Frankly, it wouldn't, but the point is it could be reasonably be expected because South Bend is my client, on-going client, so I don't think I have any choice.

State v. Graham, at Page 458.

Utah has a similar section in its Code of Judicial Conduct which is found at Canon 3(E)(1), which states: "A judge shall enter a disqualification in a proceeding in which the judge's

impartiality might reasonably be questioned..." Utah Code of Judicial Conduct, Canon 3.

The Washington Court of Appeals decision in the *Graham* case stated:

We hold that where the judge correctly decides that he must recuse himself, and there is no evidence of bad faith conduct by the judge, a manifest necessity exists for his recusal. We hold that the judge in this case did not abuse his discretion in finding a manifest necessity and, therefore, *Graham's* second trial was not barred by the constitutional prohibition against double jeopardy.

State v. Graham, at Page 458.

In the case at bar, Judge Nehring stated that "...in my view my continued involvement on this case would be inappropriate..." Judge's Ruling p. 3. There is no indication from the record that bad faith played any role in Judge Nehring's decision. He apparently believed that his exposure to additional information about the case either raised a question as to his impartiality or, perhaps created a doubt in his own mind about his ability to be impartial. Because only Judge Nehring can truly gauge such factors, his decision to recuse himself should be accorded great deference. The Court of Appeals of Georgia, in *Bailey v. State*, 465 S.E.2d 284 (Ga. App. 1995) stated:

We agree that where the decision for declaring a mistrial is bias on the part of the fact finder, the trial court's decision to declare a mistrial is entitled to the highest deference. Although we have held that the trial court must consider less drastic

alternatives prior to declaring a mistrial, there appear to be no alternatives for the trial judge to consider in this situation. Therefore, we find that, in this instance, the trial judge's inability to disregard evidence he ruled inadmissible constitutes a manifest necessity for mistrial. Accordingly, Bailey's double jeopardy rights will not be violated by a retrial to a jury. (Citations omitted)

Bailey v. State, at 286.

In an analogous case from Pennsylvania, the Superior Court of Pennsylvania reviewed a situation in which the trial court judge and the defense counsel had an argument during the course of the bench trial. The trial judge admitted that he had adopted a "personal, condemnatory opinion of the entire defense approach and strategy" and *sua sponte* recused himself and declared a mistrial. *Commonwealth v. Leister*, 712 A.2d 332 (Pa. Super. Ct. 1998).

In *Leister*, the Pennsylvania court stated that the reviewing Court should not use a mechanical formula in determining whether a trial court had a manifest need to declare a mistrial. *Commonwealth v. Leister*, at 335. Similarly, the Utah Supreme Court has declined to "lay down specific rules in this area." *State v. Ambrose*, at p. 359. The *Leister* court relied on the United States Supreme Court case of *Wade v. Hunter*, 336 U.S. 684, 69 S.Ct. 384, 93 L.Ed 974 (1949), in stating "Far more conversant with the factors relevant to the determination than any reviewing court can possibly be, the trial judge, who is the foremost authority in his or her courtroom,

is usually best positioned to determine the necessity of recusal in any individual case." *Commonwealth v. Leister*, at 335.

The court then went on to state that, "When judges doubt their own ability to adjudicate impartially, they should recuse themselves. Such an inability to be objective creates a manifest necessity for the declaration of a mistrial, particularly when a judge must exert the broad discretion that a bench trial demands." (Citations omitted) *Commonwealth v. Leister*, at 335.

In another Pennsylvania case, the trial court judge realized during trial that he had a great familiarity with many of the people involved in the case. He stated, "Now I frankly question my ability to be objective in this case and would feel better that the matter be submitted to a petit jury." *Commonwealth v. Smith*, 467 A.2d 888 (Pa. Super. Ct. 1983) In the *Smith* case, the Superior Court of Pennsylvania agreed with the trial court's decision by stating:

"Discovery by the sitting judge during a trial that a member or members of the jury were biased pro or con one side has been held to warrant discharge of the jury and direction of a new trial." In appellant's case, the trial judge sitting as the fact finder recognized that he had a bias and on that basis ruled a mistrial. In a situation such as this, a mistrial clearly was a 'manifest necessity' and thus a new trial would not violate appellant's double jeopardy rights.

Commonwealth v. Smith, at 891, [quoting *Downum v United States* 372 U.S. 734, 83 S.Ct 1033, 10 L.Ed 2d 100(1963)]

Although there are no similar recusal/double jeopardy cases in Utah, the Utah Supreme Court has provided an opinion as to a

judge's obligation to recuse himself under the Utah Code of Judicial Conduct. In *State v. Neeley*, 748 P.2d 1091 (Utah 1988), the Court stated,

However, a judge *should* recuse himself when his 'impartiality' might reasonably be questioned. Utah Code of Judicial Conduct 3(C)(1)(b) (1981). This standard set forth by the Code of Judicial Conduct should be given careful consideration by the trial judge. It may require recusal in instances where no actual bias is shown. (Emphasis in original)

State v. Neeley, p. 1094.

The Utah Supreme Court also stated in *Neeley* that: "...we do not withdraw from the stand this court has taken on previous occasions that the integrity of the judicial system should be protected against any taint of suspicion." *State v. Neeley*, p. 1094. See also, *Haslam v. Morrison*, 113 Utah 14, 190 P.2d 520 (1948). See also, *In the Interest of Morrow*, 583 A.2d 816, 819 (Pa. Super. Ct. 1990). ("When a judge 'believes his impartiality can be reasonably questioned,' he should recuse himself, just as he should if he himself has doubt as to his ability to preside impartially.")

Another approach to this problem was used by the Supreme Court of Michigan. In *People v. Hicks*, 528 N.W.2d 136 (Mich. 1994), the court found that the midtrial recusal of a trial judge is analogous to the situation created by the midtrial disability of a judge. In *Hicks*, the court determined that since the successor judge could not proceed in any manner acceptable to the parties, the recusal of

the original judge constituted manifest necessity for a mistrial and, therefore, retrial was not barred by double jeopardy principles.

Finally, the state of the law in this area has been set forth in some detail by the United States Court of Appeals for the Eleventh Circuit. In *United States v. Kelly*, 888 F.2d 732 (11th CIR. 1989), the Eleventh Circuit Court of Appeals reviewed a case in which the trial court judge discovered that the wife of a witness was a close personal friend of the judge's wife. Also, prior to realizing that she was the wife of a witness, the judge had a conversation with the woman in his chambers during a recess. After *sua sponte* raising the issue of recusal, the trial court judge decided not to recuse himself but to continue with the trial. It was clear from the record that he did not recuse himself because he was afraid a retrial would be barred by double jeopardy principles.

Based upon those facts, the Eleventh Circuit Court of Appeals determined that the trial courts judge's decision to not recuse himself from a bench trial constituted reversible error. The Court stated that Federal judges are governed by 28 U.S.C.A. Section 455 which provides, among other things, that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." That phrase from Section 455 is virtually identical to Canon 3 (E)(1), Utah Code of Judicial Conduct, which governs judges in Utah. Federal judges, under

Section 455, are required to resolve any doubts they may have in favor of disqualification. *United States v. Alabama*, 824 F.2d 1532 (11th CIR. 1987), (Cert. denied sub nom).

In a lengthy footnote addressing the Kelly trial court's concerns about double jeopardy, the Eleventh Circuit Court of Appeals stated,

Contrary to the judge's concerns, retrial would probably not have been barred in this case. Because this issue may recur in future cases, we find it appropriate to express our view that *sua sponte* recusal, when properly exercised according to any of the requirements of section 455, constitutes 'manifest necessity' for declaring a mistrial under *Arizona v. Washington*, 434 U.S. 497, 54 L. Ed. 2d 717, 98 S. Ct. 824 (1978).

It has long been established that retrial is barred by double jeopardy principles following a mistrial declared over the objections of the defendant, absent a showing of 'manifest necessity.' See *Oregon v. Kennedy*, 456 U.S. 667, 672, 72 L. Ed. 2d 416, 102 S. Ct. 2083 (1982); cf. *Id.* (Retrial normally allowed where mistrial is 'declared at the behest of the defendant'). In *Arizona v. Washington*, the Supreme Court held that a trial judge's declaration of mistrial because of prejudicial comments made to the jury by defense counsel satisfied the 'manifest necessity' standard. The Court held: 'In a strict, literal sense, the mistrial was not 'necessary.' nevertheless, the overriding interest in the evenhanded administration of justice requires that we accord the highest degree of respect to the trial judge's evaluation of the likelihood that the impartiality of one of more jurors may have been affected by the improper comment.' 434 U.S. at 511; see also *id.* At 513-14 (noting that judge's firsthand familiarity with the trial '[militates] in favor of appellate

deference to [his] evaluation of the significance of possible bias'). Accord *Abdi v. Georgia*, 744 F.2d 1500, 1503 (11th Cir. 1984), cert. denied, 471 U.S. 106, 85 L. Ed. 2d 164, 105 S. Ct. 1871 (1985); see also *United States v. Cousins*, 842 F.2d 1245, 1247 (11th Cir.), cert. denied, 488 U.S. 853, 109 S. Ct. 139, 102 L. Ed. 2d 111 (1988) (grant of mistrial based on possible jury prejudice 'largely within the discretion of the district court').

These considerations apply even more strongly to the case at bar, which involves a judge acting as sole fact finder in a bench trial. The Court in *Arizona v. Washington* held that because the judge in that case exercised 'sound discretion'..., the mistrial order is supported by the 'high degree' of necessity which is required in a case of this kind.' *Id.* At 516. We hold, therefore, that where a trial judge properly exercises his discretion to recuse himself under section 455, 'manifest necessity' is established for any resulting mistrial.

United States of America v. Kelly, Footnote 24.

Based on the foregoing, it is clear that Judge Atherton correctly determined that Judge Nehring's decision to recuse himself was sufficient reason to declare a mistrial and that retrial of Patten would not be a violation of double jeopardy principles.

c. The trial courts failure to use the phrase 'legal necessity' or 'manifest necessity' in it's rulings does not affect the correctness of Judge Atherton's decision.

Patten was concerned in his brief that neither Judge Nehring nor Judge Atherton used the phrase 'manifest necessity' or the common Utah phrase "legal necessity" in making their respective

rulings. That omission is not a terminal defect that bears on the correctness of their decisions. Explicit findings on the presence of manifest necessity are not necessary as long as a basis can be found in the record.

In *Arizona v. Washington*, 434 U.S. 497, 98 S. Ct. 824, 54 L. Ed. 2d 717 (1978), the United States Supreme Court addressed that specific issue in a case involving improper statements made to a jury during opening argument. The Supreme Court reversed the rulings of the United States District Court and the Ninth Circuit Court of Appeals and stated:

One final matter requires consideration. The absence of an explicit finding of 'manifest necessity' appears to have been determinative for the District Court and may have been so for the Court of Appeals. If those courts regarded that omission as critical, they required too much. Since the record provides sufficient justification for the state-court ruling, the failure to explain that ruling more completely does not render it constitutionally defective. (Footnote omitted)

Arizona v. Washington, 434 U.S., at p.516-517.

The Supreme Court went on to state:

The state trial judge's mistrial declaration is not subject to collateral attack in a federal court simply because he failed to find 'manifest necessity' in those words or to articulate on the record all the factors which informed the deliberate exercise of his discretion.

Arizona v. Washington 434 U.S., at p. 517; see also, *State v. Callaway* 787 P.2d 1247 (N. M. App. 1989).

Judge Atherton's decision is correct, despite the fact that neither Judge Nehring nor Judge Atherton used the phrase 'manifest necessity' in their rulings. Pursuant to §76-1-403(4)(c), the trial judge is required to state on the record the reasons for mistrial. Judge Nehring's comments on the record regarding his knowledge of the case and the inappropriateness of him hearing the case meet that standard and constitute 'manifest necessity' according to the relevant case law. Judge Atherton correctly recognized this, even though the parties were presenting other arguments which she chose not to address.

In this case, the only person who could make the decision as to what effect the additional information may have on the fairness of the bench trial was Judge Nehring. To second guess his decision, and bar retrial based upon double jeopardy, has the potential to put trial courts in the extremely awkward position that the judge in the *Kelly* case found himself. In situations where there is actual, potential, or the appearance of bias on the part of the trial court, the judge will be faced with the dilemma of deciding to follow the Canons of the Utah Code of Judicial Conduct and recuse himself, thereby risking a double jeopardy bar to retrial; or continuing with the trial, thereby risking violating the Utah Code of Judicial Conduct and potentially the fairness of the trial. Also, the failure to observe the Canon and recuse when appropriate may result in disciplinary action against the judge.

State v. Neeley, supra, at p. 1094. If the Supreme Court's admonition in *Neeley*, that "a judge *should* recuse himself when his 'impartiality' might reasonably be questioned" (emphasis in original) is to be followed by the trial courts of this state, then the trial court judge should be given the deference to determine when such recusal is appropriate. *State v. Neeley*, at p. 1094. It also follows that a mistrial cause by the recusal of the trial court judge for reasons of actual, potential or the appearance of bias must fit squarely within the 'manifest necessity' exception to the double jeopardy bar against retrial and the exception contained in §76-1-403(4)(c)(iii) Utah Code Annotated, its state law corollary.

CONCLUSION

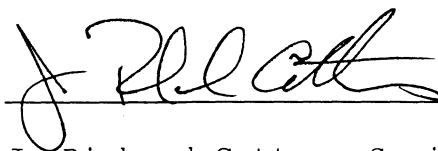
Based on the foregoing, it is clear that Judge Atherton correctly determined and ruled that Judge Nehring's declaration of a mistrial in this case was not a bar to retrial on grounds of double jeopardy. Although the parties argued other grounds for the mistrial, Judge Atherton held that Judge Nehring's recusal on the grounds that he had been privy to too much information about the case was a basis for finding that retrial was not barred by Section 76-1-403, Utah Code Annotated. Also, the midtrial, *sua sponte*, recusal of a judge for bias or potential bias is required by the Utah Code of Judicial Conduct and falls squarely within the

'manifest necessity' exception to the double jeopardy provisions of the United States and Utah Constitutions.

Judge Atherton's Memorandum Decision should be affirmed and Patten's appeal should be dismissed.

DATED this 25TH day of NOVEMBER , 1998.

WEST VALLEY CITY

A handwritten signature in dark ink, appearing to read "J. Richard Catten", is written over a horizontal line.

J. Richard Catten, Senior Attorney

Attorney for Plaintiff/Appellee

CERTIFICATE OF SERVICE

I, J. Richard Catten, certify that on the 25TH day of November, 1998, I served upon Herschel Bullen, Attorney for Defendant/Appellant, two (2) copies each of the Brief of the Appellee, by causing said Briefs to be mailed to them, by first class mail, with sufficient postage prepaid, to the following addresses:

Herschel Bullen
39 Exchange Place, Suite 200
Salt Lake City, Utah 84111

WEST VALLEY CITY

A handwritten signature in dark ink, appearing to read "J. Richard Catten", is written over a horizontal line.

J. Richard Catten, Senior Attorney
Attorney for Plaintiff/Appellee