## MEMORANDUM DECISION





ATTORNEY FOR APPELLANT

Christopher Taylor-Price
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Justin F. Roebel
Deputy Attorney General
Indianapolis, Indiana

# IN THE COURT OF APPEALS OF INDIANA

Roderick Standell Flowers,
*Appellant-Defendant,*

v.

State of Indiana,
*Appellee-Plaintiff.*

January 16, 2024

Court of Appeals Case No. 23A-CR-1582

Appeal from the Marion Superior Court

The Honorable Marc Rothenberg, Judge

The Honorable Michelle Waymire, Magistrate

Trial Court Cause No. 49D29-2104-F2-12765

**Memorandum Decision by Judge Riley.**
Judges Crone and Mathias concur.

**Riley, Judge.**

## STATEMENT OF THE CASE

[1] Appellant-Defendant, Roderick Flowers (Flowers), appeals his conviction for dealing in a narcotic drug, a Level 2 felony, Ind. Code § 35-48-4-1(a)(2).

[2] We affirm.

## ISSUES

[3] Flowers presents this court with two issues, which we restate as:

(1) Whether double jeopardy barred Flowers' retrial after his first trial ended in a mistrial; and

(2) Whether Flowers was entitled to discharge or dismissal of the charges upon retrial pursuant to Indiana Criminal Rule 4(B).

## FACTS AND PROCEDURAL HISTORY

[4] In 2021, Flowers was on parole for an offense which qualified him as a serious violent felon (SVF). As conditions of his parole, Flowers agreed not to engage in new criminal conduct and to allow parole officers to search his residence or any other real property reasonably under his control. Initially, Flowers was approved to live with Tamara Smith (Smith), with whom Flowers has a young child, at a home in the 8100 block of Windham Lake Way in Marion County. However, Smith subsequently requested that Flowers be removed from the home, and, on January 15, 2021, a no-contact order was issued in her favor against Flowers. After the entry of the no-contact order, Flowers' approved

residence was a home located in the 4900 block of Rue Vallee, also in Marion County.

[5] In April 2021, parole officials suspected that Flowers was frequenting the Windham Lake Way residence. On April 22, 2021, Flowers was directed to appear at the office of his parole supervisor for a visit. Parole officials checked mapping data on Flowers' cell phone which indicated that he had been at the Windham Lake Way home earlier that day and the previous day. The parole officials decided to search Flowers' approved residence but were unable to make entry, so they proceeded to the Windham Lake Way residence, where Flowers' adult son from another relationship opened the door to them.

[6] The parole officials executed a parole search and discovered a firearm later determined to have Flowers' DNA on it, approximately thirteen grams of a heroin/fentanyl mix, suspected marijuana, and a roll of currency in the drawer of a nightstand beside the bed in the primary bedroom. After making this discovery, the officials halted their search and alerted the Indianapolis Metropolitan Police Department (IMPD) for further investigation. Detective Scott Nickels (Detective Nickels) was the lead officer on the investigation. Detective Nickels procured a search warrant for the home which was executed the same day. Also located in the drawer with the firearm and the drugs was a receipt from a tire service business with Flowers' name on it, dated April 15, 2021, and listing the Windham Lake Way address. Other pieces of mail bearing Flowers' name were also located in the drawer, along with a Bible containing a photograph of Flowers with a small child. Also found in the

residence were two digital scales, one of which had a white residue on it, a measuring cup containing a white residue, and a pill press.

[7] On April 22, 2021, the State filed an Information, charging Flowers with Level 2 felony dealing in a narcotic drug, Level 4 felony unlawful possession of a firearm by an SVF, and Class B misdemeanor possession of marijuana. On March 31, 2022, the trial court granted Flowers' motion to bifurcate the proceedings so that the jury could determine his SVF status in a separate trial. On April 5, 2022, Flowers filed a motion for speedy trial, which the trial court granted the same day, rendering Flowers' speedy trial deadline June 14, 2022. After one continuance, Flowers' jury trial was set for June 2, 2022. On June 1, 2022, Flowers filed a motion in limine seeking to prohibit any reference to his prior convictions or to the reason he was on parole at the time of the charged offenses. On June 2, 2022, the trial court granted Flowers' motion in limine as it pertained to those topics.

[8] On June 2, 2022, the trial court convened Flowers' two-day jury trial. Detective Nickels was the State's assisting witness who sat through the entirety of Flowers' trial. The State presented the testimony of parole officials and several IMPD officers involved in the search of the Windham Lake Way residence and the subsequent investigation. The jury heard evidence that Flowers had been released from the Indiana Department of Correction and was on parole at the time of the charged offenses. Detective Nickels testified in three parts, the first two times offering short testimony establishing the facts surrounding the search warrants granted to search the Windham Lake Way

residence and Flowers' cell phone. Detective Nickels then took the stand a third time as the State's final witness and provided testimony on a variety of topics based upon his training and experience as a thirteen-year police veteran and as a member of the Northwest Violent Crimes Task Force, including the differing indicia of drug users and drug dealers. On cross-examination of Detective Nickels, Flowers' counsel asked a series of questions about whether it could be discerned how long any of the contraband at issue had been in the nightstand or who specifically had placed it there. The following exchange then took place:

> Counsel: Okay. The gun, don't know how long that had been in there?
>
> Detective Nickels: No.
>
> Counsel: Don't know who put that in there?
>
> Detective Nickels: All I know is that [Flowers] touched it.
>
> Counsel: Okay. But you don't know when he could've touched it?
>
> Detective Nickels: I would have to look. There was–there was actually a discussion that we had–an internal discussion about that. And I'm not[,] I am not an ATF gun liaison, but I don't know about how long DNA stays.
>
> Counsel: Okay.
>
> Detective Nickels: But I know he was in prison for a long time, and he was a serious violent felon. And I know –

(Transcript Vol. III, pp. 123-24). Flowers' counsel immediately objected and moved for a mistrial due to the fact that the jury had been informed that

Flowers was an SVF. After hearing the argument of the parties, the trial court declared a mistrial and re-set Flowers' jury trial within Flowers' speedy trial request for June 9-10, 2022. The trial court also set a contempt hearing for June 21, 2022, to determine whether the State should be sanctioned and assessed the costs of the trial for its violation of the motion in limine.

[9] On June 6, 2022, the trial court revisited its retrial scheduling decision, relying on *Johnson v. State*, 355 N.E.2d 240 (Ind. 1976), and ruling that Flowers' original speedy trial request no longer applied. The trial court took Flowers' request to reset his trial within his original speedy trial deadline as a re-assertion of his speedy trial right and concluded that Flowers' new speedy trial deadline was August 11, 2022. The trial court then set Flowers' retrial for June 16, 2022, a date which was repeatedly extended for reasons not implicating Flowers' appellate arguments.

[10] On June 15, 2022, Flowers filed a motion to dismiss the charges, arguing that retrial was barred on double jeopardy grounds and pursuant to Indiana Criminal Rule 4(B). On June 21, 2022, the trial court held a rule to show cause hearing on the issue of the State's role in the mistrial. The deputy prosecutor who had tried the case represented to the trial court that he had met with the State's witnesses in May of 2021 to prepare for trial and that he would have gone over the standards applicable to a trial involving a bifurcated SVF proceeding. However, the deputy prosecutor admitted that he had not gone over that issue again with the witnesses just before trial and had not specifically informed the witnesses of the trial court's grant of Flowers' motion in limine

because he felt that he had already prepared the State's witnesses on those issues. The deputy prosecutor denied that he and Deputy Nickels, "together or individually, colluded to make a plan to drop a 'serious violent felon' bomb . . . at the end of trial." (Tr. Vol. III, p. 141). Deputy Nickels did not testify at the hearing but submitted a verified affidavit in which he averred that he did not recall the deputy prosecutor ever informing him of the motion in limine or a prohibition on saying 'serious violent felon', that when he uttered the prohibited testimony he was attempting to explain that Flowers' DNA had to have been deposited on the firearm within a certain window of time, that he was unaware his testimony would violate a court order or that it was generally problematic to say 'serious violent felon', and that he would never knowingly violate a court order.

[11] On July 7, 2022, the trial court issued its ruling declining to impose sanctions on the State relating to Flowers' mistrial. While the trial court expressed its expectation that an officer of Detective Nickels' experience should have been aware of the problematic nature of mentioning a defendant's SVF status at trial, the trial court found that neither the deputy prosecutor nor Detective Nickels had acted intentionally or in bad faith. The trial court observed that witnesses rely upon the prosecutor to inform them of the limits of their testimony, that the deputy prosecutor had neglected his duty to do so in a timely manner in this case, and that the deputy prosecutor had neglected his duty to inform the detective of the granting of Flowers' motion in limine, all of which was negligent on the deputy prosecutor's part. The trial court "strongly suggest[ed]"

that Detective Nickels ensure compliance with motions in limine in the future and counseled the deputy prosecuting attorneys involved in the case "in the strongest possible terms" that they execute their affirmative duty to advise witnesses of the existence and parameters of a granted motion in limine. (Appellant's App. Vol. II, pp. 227-28).

[12] On July 18, 2022, the trial court denied Flowers' motion to dismiss, concluding that retrial was not prohibited in this case because neither the deputy prosecutor nor Detective Nickels had "intended to cause a mistrial." (Appellant's App. Vol. II, p. 229). The trial court credited the detective's affidavit and found that he had not been informed by the deputy prosecutor of the prohibition on mentioning Flowers' SVF status. The trial court found that there was no evidence that the deputy prosecutor and Detective Nickels had conspired to cause the mistrial and that the detective's nonresponsive answer on cross-examination was insufficient evidence of any intent to cause a mistrial. In the same order, the trial court rejected Flowers' argument that he was entitled to dismissal or discharge under Indiana Criminal Rule 4(B). On August 9, 2022, the trial court granted Flowers' request to be released from custody in this case pending retrial.

[13] On April 10, 2023, the trial court convened Flowers' two-day bifurcated retrial. The State dismissed the marijuana possession charge and proceeded only on the dealing and firearm possession charges. At the conclusion of the second trial, the jury found Flowers guilty. The State dismissed the firearm possession charge, and no SVF trial was held. On June 14, 2023, the trial court held

Flowers' sentencing hearing and ordered Flowers to serve fourteen years with the Indiana Department of Correction.

[14] Flowers now appeals. Additional facts will be provided as necessary.

## DISCUSSION AND DECISION

I. *Double Jeopardy Barring Retrial*

[15] Flowers argues that the trial court erred when it denied his motion to dismiss the charges following the mistrial based on federal and state constitutional grounds.[1] The Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life and limb[,]" and Article 1, section 14 of the Indiana Constitution provides that "[n]o person shall be put in jeopardy twice for the same offense." As a general rule, the State is not barred from retrying a criminal defendant on the same charge if the defendant elects to terminate the first trial. *Woods v. State*, 484 N.E.2d 3, 5 (Ind. 1985). However, a narrow exception to this rule exists if the prosecutor brought about prejudicial conduct that made it impossible to proceed with the first trial without injustice to the defendant and the prosecutor did so with the intent to cause the termination of the first trial. *Etter v. State*, 56 N.E.3d 53, 56 (Ind. Ct. App. 2016) (citing *Oregon v. Kennedy*, 456 U.S. 667, 674, 102 S.Ct. 2083, 2088, 72

[1] Although Flowers cites Indiana Code section 35-41-4-3, which codifies certain double jeopardy principles, he only suggests that the protections afforded by the statute are similar to those furnished by the Fifth Amendment. Therefore, we do not address Flowers' statutory claim separately from our analysis under the Fifth Amendment. *See Butler v. State*, 724 N.E.2d 600, 602 n.1 (Ind. 2000) (addressing Butler's statutory claim under the rubric of the Fifth Amendment, where Butler only suggested that the statute codified federal and state double jeopardy protections).

L.Ed.2d 416 (1982), and applying this standard to Etter's federal and state constitutional claims), *trans. denied*. "Thus, if a defendant moves for or consents to a mistrial, the defendant forfeits the right to raise a double jeopardy claim in subsequent proceedings unless the motion for mistrial was necessitated by governmental conduct 'intended to goad the defendant into moving for a mistrial.'" *Willoughby v. State*, 660 N.E.2d 570, 576 (Ind. 1996) (applying the *Oregon v. Kennedy* standard to the defendant's federal and state double jeopardy claims). The subjective intent of the government actor or actors is the dispositive issue. *Farris v. State*, 753 N.E.2d 641, 646 (Ind. 2001). Where the same trial court judge presides over the first trial and the motion to dismiss, we review the trial court's factual determinations regarding the intent behind governmental conduct in this context under a clearly erroneous standard, and while the trial court's findings are not conclusive for our purposes, they are "'very persuasive.'" *Id*. (quoting *Wilson v. State*, 697 N.E.2d 466, 472 (Ind. 1998)); *Butler v. State*, 724 N.E.2d 600, 603-04 (Ind. 2000).

[16] Here, there is no evidence that either the deputy prosecutor or Detective Nickels intended to provoke a mistrial. The testimony that caused the mistrial occurred during cross-examination, not during direct examination of Detective Nickels by the deputy prosecutor, who argued against Flowers' motion for mistrial. *See Woods*, 484 N.E.2d at 6 (considering the fact that the prosecutor had argued vehemently against a mistrial in affirming the denial of Woods' motion to dismiss charges on retrial following his successful mistrial motion). The State had not received any evidentiary rulings that gravely impacted their

case, and all their witnesses had appeared. While we agree with the trial court that the deputy prosecutor was negligent in failing to instruct the State's witnesses not to say 'serious violent felon' during their testimony and in failing to appraise those witnesses of the grant of Flowers' motion in limine, there is no indication that the deputy prosecutor had anything to gain by somehow provoking a mistrial in this case. *See Wilson*, 697 N.E.2d at 471 (rejecting Wilson's argument that double jeopardy barred retrial and noting that the trial court had found there was no evidence that the State benefitted from the mistrial).

[17] In addition, the factual context of the instant case necessitated that the jury hear evidence that Flowers had been in prison, was serving parole, and was prohibited from possessing a firearm, matters that are generally excluded from trial, and another offer with the Northwest Violent Crimes Task Force who had participated in the investigation testified without objection that "we focus on our serious violent felons[.]" (Tr. Vol. II, p. 245). These circumstances render it more credible that Detective Nickels, who had a colorable explanation for referring to Flowers' SVF status, did not know that his statement would cause a mistrial.

[18] The trial court found that neither the deputy prosecutor nor Detective Nickels had intentionally caused or provoked the mistrial. Flowers argues that Detective Nickels must have acted intentionally because his answer on cross-examination containing the prohibited utterance was nonresponsive, the offending testimony occurred the third time he took the stand, and because the

detective was experienced. However, Flowers does not bring to our attention any cases wherein a trial court's denial of a motion to dismiss was reversed under similar circumstances, and our own research uncovered none. The trial court was aware of these facts but credited other evidence establishing unintentional conduct. After reviewing the record, we cannot say that this determination was clearly erroneous. *Farris*, 753 N.E.2d at 646; *Butler*, 724 N.E.2d at 604.

[19] Flowers also argues that we should adopt a broader protection under Article 1, section 14 than that afforded by the federal constitution, as other jurisdictions have done. However, this court has repeatedly rejected similar arguments. *See Etter*, 56 N.E.3d at 55 n.1 (rejecting Etter's Article 1, section 14 argument as unsupported with precedent and noting that "Indiana courts have not undertaken a separate analysis under our state constitution when addressing the double jeopardy issue Etter presents here"); *Harbert v. State*, 51 N.E.3d 267, 275 (Ind. Ct. App. 2016) (declining to adopt a 'prosecutorial indifference to mistrial' standard developed under Oregon state constitutional jurisprudence), *trans. denied*; *Calvert v. State*, 14 N.E.3d 818, 823 (declining to adopt the Oregon rule). Absent any additional guidance from our supreme court indicating that Article 1, section 14 affords defendants greater protections in this area, as have our colleagues, we decline Flowers' invitation to evaluate the State's conduct under a different standard.

II. *Indiana Criminal Rule 4(B)*

[20] Flowers also contends that he was entitled to dismissal of the charges following his first trial because the trial court did not set his second trial within the time limits of his original speedy trial request. Here, no factual issues were resolved by the trial court in denying Flowers' Criminal Rule 4(B) motion. Where a trial court's ruling on a Criminal Rule 4(B) motion was a question of law applied to undisputed facts, we review a trial court's determination under a de novo standard. *Austin v. State*, 997 N.E.2d 1027. 1039 (Ind. 2013).

[21] The right of an accused to a speedy trial is provided by our federal and state Constitutions. *See* U.S. Const. amend. VI; Ind. Const. art. 1, § 12. The mechanism for the enforcement of this right, Criminal Rule 4, generally provides that an accused must be brought to trial within seventy days of making a speedy trial motion unless he causes delay or there is insufficient time to try him due to court congestion. *See* Ind. Crim. Rule 4(B)(1). Here, Flowers' first trial commenced within seventy days of his April 5, 2022, speedy trial request, but his second trial was not convened within that same seventy-day window. Flowers argues that he was entitled to discharge or dismissal of the charges because "the State failed in its burden to bring [him] to trial within the required seventy days due to causing a mistrial[.]" (Appellant's Br. p. 24).

[22] In *Johnson*, 355 N.E.2d at 241, murder defendant Johnson filed a speedy trial request, his first trial was set within the seventy-day time limit, and the trial ended in a mistrial due to a hung jury. After his original speedy trial deadline had expired, Johnson filed a second speedy trial request but also motioned for

discharge, arguing that his second trial had not commenced within the time limit mandated by his first speedy trial request. *Id*. The trial court denied Johnson's motion for discharge, and his retrial took place within the second seventy-day period triggered by Johnson's second speedy trial motion, resulting in a conviction. *Id*. On appeal, our supreme court rejected Johnson's argument that the Criminal Rule 4(B) deadline automatically began running again on the day his first trial ended in a hung jury. *Id*. at 241-42. The *Johnson* court reasoned that "Criminal Rule 4(B) is not self-executing" and that after a defendant has filed a motion for a speedy trial "and the trial court has acted on that motion by setting a trial date, the motion will be deemed to have served its purpose." *Id*. at 242. The court held that after Johnson's first trial ended in a mistrial, he was required to make another motion to reactivate the Criminal Rule 4(B) time limits and that "[t]he seventy[-]day period thus began running from the date of this second motion." *Id*.

[23] Here, Flowers does not dispute that his first trial began within seventy days of his first speedy trial motion. Flowers acknowledges *Johnson* but argues that its holding does not apply to his case because, here, the mistrial was caused by the State, not by a hung jury. However, the *Johnson* court did not limit its holding to mistrials caused by a hung jury, and its reasoning that "we do not think that it can be presumed that a defendant in such a situation will want to invoke the rule's provisions" could also be applied to defendants whose mistrials are caused by the State, as those defendants have heard the State's evidence and may wish to rework their own trial strategies. *Id*. Flowers has not provided us

with cases wherein the bright line announced in *Johnson* was altered or ignored because a mistrial was caused by the State, and we were unable to locate any. Therefore, we follow *Johnson* and affirm the trial court's denial of Flowers' motion.

## CONCLUSION

[24] Based on the foregoing, we hold that double jeopardy principles did not bar Flowers' retrial and that Flowers was not entitled to discharge or dismissal of the charges pursuant to Criminal Rule 4(B).

[25] Affirmed.

[26] Crone, J. and Mathias, J. concur