IN THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT, ESCAMBIA COUNTY, FLORIDA

MISTY ANN EWING,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE No.: 2010 AP 000060

LOWER No.: 2009 MM 025341

ORDER DISMISSING PETITION FOR WRIT OF PROHIBITION

Opinion filed November 24, 2010

A Petition for Writ of Prohibition from the County Court, Escambia County, Florida, Thomas v. Dannheisser, County Court Judge; Division III

Assistant Public Defender Adam James Ellis, Esquire, on behalf of Office of Public Defender, Counsel for Petitioner

Assistant State Attorney Beau Peterson, Esquire, on behalf of Office of State Attorney, Counsel for Respondent

Counsel for the Petitioner filed a Petition for Writ of Prohibition which is not totally compliant with Fla.R.App.P. 9.100(e). The case name has been restyled above.

In this case, while the jury venire was sworn for jury selection purposes, the record establishes that the jury was not sworn for trial. That is a significant distinction.

Swearing the venire for jury selection establishes compliance with speedy trial requirements; just as the commencement of opening argument and testimony in a judge trial satisfies speedy trial requirements. However, swearing a jury venire for jury selection purposes is not the equivalent of swearing a jury for double jeopardy purposes. The record in this case clearly establishes that, while the jury venire was sworn for jury selection purposes, the jury was not sworn for double jeopardy purposes.

The lack of participation of the Defendant under these facts is not of moment. This case is outside the scope of Fla.R.Crim.P. 3.180(a)(4) or (6); as the chambers hearing for what became a motion to continue due to newly disclosed evidence neither dealt with actual selection of a jury nor with whether the new evidence might be admissible. It only dealt with surprise to defense counsel and defense counsel's candid comment that with advance notice of the evidence it might have affected *voir dire*. Counsel's comment about wanting a new jury amounted to a motion to continue which the Trial Judge granted. No mistrial was granted under these facts.

However, hearings on the record with a court reporter or digital recording with clear, adequate notice to counsel and with the Defendant present clearly avoid any issues as are collateral to this proceeding from arising.

The authorities cited for Petitioner are absolutely correct, and the Court must always be mindful of respecting double jeopardy protections after a criminal trial jury has been sworn. Multiple alternative mechanisms for dealing with emergencies that arise during trial should be explored. Only when no reasonable accommodation can be achieved and a clear finding of "manifest necessity" is established on the record with the Defendant present should a mistrial be granted, unless the request for mistrial is from the Defendant. Even then, best practice suggests the Defendant should be questioned to ensure of joinder in the motion and a free, voluntary, and knowing waiver of double jeopardy protections. Granting a mistrial on the motion of the State or on the Court's own motion absent findings of fact establishing "manifest necessity" violates double jeopardy protections.

This matter is remanded to the trial court for further proceedings consistent herewith.

TERRY D. TERRELL
Circuit Judge

Copies provided to:
ASA Beau Peterson, Esquire
APD Adam James Ellis,
The Honorable Thomas V. Dannheisser