

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

STATE OF MISSOURI

v.

MARKUS D. LEE

APPELLANT,

RESPONDENT.

DOCKET NUMBER WD71924
**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

DATE: June 7, 2011

Appeal From:

Jackson County Circuit Court
The Honorable Robert Michael Schieber, Judge

Appellate Judges:

Division One: Thomas E. Newton, P.J., and James M. Smart, Jr., and Joseph M. Ellis, JJ.

Attorneys:

Michael Joe Hunt, Kansas City, MO, for appellant.

Ruth Sanders, Kansas City, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

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STATE OF MISSOURI,

APPELLANT,

v.

MARKUS D. LEE,

RESPONDENT.

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Jackson County

Before Division One: Thomas E. Newton, P.J., and James M. Smart, Jr., and Joseph M. Ellis, JJ.

The State charged Markus Lee with one count of murder in the first degree, three counts of assault in the first degree, four counts of assault of a law enforcement officer in the first degree, and eight counts of armed criminal action. Lee's case proceeded to a jury trial on November 9, 2010. The prosecution alleged that the defendant participated in a shooting into a tire shop on March 5, 2007. Following the shooting, police officers chased the vehicle from which the gunfire apparently came. The occupants of the vehicle, being pursued, fired at the police chasing the vehicle. Three men, including Lee, were apprehended after the vehicle crashed.

During the prosecution of the case, Detective Danny Phillips of the homicide unit took the stand. Detective Phillips testified concerning the scene of the car crash at the end of the pursuit, as he was involved in the collection of evidence there. Detective Phillips, asked if he had further involvement in the case, stated that he had collected buccal swabs from Lee and the other suspects on March 28, 2007. On cross-examination, defense counsel asked Detective Phillips to clarify whether he took Lee's DNA sample some weeks after the incident. Detective Phillips answered, "Right," and then said, "I knew him prior."

Defense counsel immediately objected to the statement concerning the officer's prior knowledge of Lee and moved the court to declare a mistrial. The trial court, without asking for a response from the prosecution, granted the mistrial request. The trial judge then turned to Detective Phillips and admonished him.

On November 20, 2009, defense counsel filed a motion on behalf of the defendant asking the court to dismiss Lee's criminal case with prejudice. The court conducted a hearing on that motion on November 25, 2009 and granted the motion to dismiss with prejudice.

The State appeals, contending that the trial court erred in granting a dismissal with prejudice in a criminal case when the trial court reasonably believed that the police officer, on cross-

examination, intentionally mentioned previous contact with the defendant in order to provoke a mistrial, since there was no action to produce the mistrial from the prosecution.

REVERSED AND REMANDED.

Division One holds: As an issue of first impression in Missouri, despite the trial court's effort to equate the officer's misconduct to prosecutorial misconduct in order to invoke double jeopardy, no authority exists for the proposition that a trial court is authorized to dismiss a prosecution with prejudice based on the unsponsored rogue act of a police officer witness. In fact, there is no authority for the proposition that misconduct of a government witness must be attributed to the prosecution for purposes of the double jeopardy clause. Because the potentially prejudicial remark was neither sponsored, nor solicited, nor anticipated, by the prosecuting attorney and there was no obvious necessity to declare a mistrial, though the defense requested one (as opposed to asking for other corrective options available to the court), the trial court lacked authority to grant a *dismissal with prejudice* and the double jeopardy clause did not bar retrial in the case. The judgment dismissing the case with prejudice is vacated, and the case is remanded to the circuit court for further proceedings.

Opinion by James M. Smart, Jr., Judge

June 7, 2011

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