

Will The Pennsylvania Supreme Court Screw Bill Cosby?

By Norm Pattis » for Your Content



The Pennsylvania Supreme Court appeared to ask a lot of the right questions in arguments this week on Bill Cosby's appeal of his criminal conviction for sexual assault. What worries me are the answers the court is likely to give.

It took two trials for the Commonwealth of Pennsylvania to win a conviction against

Cosby for sexually assaulting Andrea Constand, a former basketball player at Temple University. The assault allegedly took place in 2004. Ms. Constand contends she was drugged and then assaulted.

The Commonwealth could not persuade a jury that the crime took place the first time the case was brought to trial, in

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2017. So they tried Cosby again, winning a conviction in 2018. Cosby was sentenced to a prison term of three to 10 years. He has now served two years of that sentence.

What happened at the first trial?

First, some fundamentals. In a criminal trial the state has the burden of proof. A defendant need prove nothing. Defendants enjoy both the right to remain silent and the presumption of innocence. If the state fails to meet its burden of proof, then the presumption of innocence alone is sufficient to justify an acquittal. And, of course, a defendant cannot be tried twice for the same crime: That violates the bar against double jeopardy.

Stick with me here.

So how did Cosby get tried twice? The state tried him once, and did not get a conviction. Weren't his rights against double jeopardy violated?

Welcome to the dark arts of judicial law-making, and remember this: There is an unstated exception to the Bill of Rights. Call it the heinous crime exception.

Pennsylvania requires jurors to be unanimous to reach a verdict. Thus every juror must agree on either a verdict of guilty or not guilty. If every juror doesn't agree, then courts decide there is "no verdict," and they declare a mistrial for "manifest

necessity." By judicial fiat, a defendant can then be tried again.

But hold your nose here and try to follow the logic. The defendant need prove nothing; he certainly need not prove his innocence. The state must prove its case by persuading all jurors to convict. Why doesn't it follow, then, that when the state fails to persuade all jurors, a defendant is acquitted? Isn't the presumption of innocence enough to acquit? Hasn't the state failed to meet its burden of proof?

There is no justification as a matter of logic for giving a state multiple bites at the apple. Take your best shot, Commonwealth. But if you fail the first time, there is no constitutional justification for permitting you to try again.

Yet it happens all the time. The courts don't want to face the issue.

Indeed, I raised this issue in the Connecticut Appellate Courts for a man who thrice faced trial for murder. See, *State v. Jermaine Richards*. In the first two cases, jurors could not agree. So he was tried a third time, and convicted. But, wait, I said to the Appellate Court, logic dictates otherwise.

The Appellate Court's response? It tried to ignore an issue it could not address in a principled fashion by relegating it to a

footnote. When I asked the State's Supreme Court for a little bit of sunlight to advance the issue, the Court turned it away. (The case is being heard in the State Supreme Court on other grounds.)

There is shockingly little jurisprudence on this issue now. Only a scattered collection of law review articles discuss in an honest way the "successive trial" problem after a so-called hung jury.

So Bill Cosby got tried twice, with the Commonwealth given a chance to correct the mistakes it made in its trial run. It was a despicable farce that should embarrass a Supreme Court. But it won't.

When it comes to retrials of defendants presumed innocent, the courts know no shame.

Tomorrow I'll tell you how and why the Pennsylvania Supreme Court can do the right thing and reverse Cosby's conviction. Stay tuned for a discussion about the fallacy of signature crimes in sexual misconduct cases. You didn't know there were special rules for claims alleging ancient claims of sexual misconduct, did you? Due process? Good luck.

See you tomorrow. ■