

Miscarriage of justice? Only if the Constitution is a 'technical'

Bob Dole surely didn't have Sam Bell in mind when, in April, he criticized federal judges "who are dismantling those rails that protect society from the tory, the violent and the anti-social elements in our midst." The Republican

Michael Migdal



presidential nominee was taking a poke at the judicial nominees of President Clinton.

Bell was selected by President Ronald Reagan. You wouldn't expect him to be part of what Dole described as "an all-star team of liberal leniency." That is, unless you're the

mother of a 4-year-old daughter who accused the man she believes raped her daughter to walk free last month in the wake of a ruling by Judge Bell.

"The criminals are protected more than the victims are," she protested. "There's no justice in this case." Her pain was obvious frustration understandable. The defendant charged in the case had been on trial in Summit County Common Pleas Court. He had confessed. He had failed lie-detector tests.

Then, as the trial neared a conclusion, the defendant seemed to be turned on its head. A mistrial was declared, and Judge Bell

ruled that the defendant couldn't be tried again. The government had its shot at convicting him, he argued, and the double jeopardy clause of the Fifth Amendment declares that no person shall "for the same offense to be twice put in jeopardy of life or limb."

A travesty of justice? In some respects, yes. Still, the matter isn't as simple as some would like to think. It is easy to point the finger at Judge Bell, just as Bob Dole has done at the appointees of President Clinton. In truth, judges of all stripes, liberals, conservatives and moderates, face difficult decisions. Judge Bell bravely stuck to constitutional principle, not with the goal of seeing a criminal go free, but to uphold protections that serve as a necessary restraint on the courts and prosecutors, that protect innocent people from official harassment and wrongful conviction.

That may seem small comfort to victims and their families. Yet, to act otherwise invites greater travesties of justice.

The defendant insisted he had confessed under duress. He contended that, during a fourth round of questioning, a police detective presented him with a stark choice: He could fight the charges and face a potential life sentence or he could cooperate and receive lighter punishment involving counseling and probation.

In mounting a defense, the accused is

entitled to describe the circumstances of a confession. The reason is fair enough. The accused may have felt intimidated or confused or hurried. At the same time, prosecutors and judges are rightly wary of letting jurors know what the potential sentence in a case might be. Jurors may feel sympathy for someone facing life in prison and allow their feelings to affect their verdict.

Judge Beth Whitmore, the presiding judge in the trial, confronted these issues. She limited what the defense could say about the confession. It could not talk specifically about the prospect of a life sentence. Prosecutors then asked for a mistrial when Kirk Migdal, the defense attorney, cross-examining the last witness called to testify, mentioned the mandatory nature of the penalty.

Whitmore granted the prosecution request for a mistrial. Migdal then sought relief in federal court, arguing to Judge Bell that his client shouldn't be tried again in state court because the mistrial had been improperly granted.

Bell faced three questions:

- Did the defense attorney violate the trial judge's order?

Judge Bell said no. Migdal never mentioned life imprisonment.

- Did the trial judge violate the Constitution when she limited what the defense

could say about the confession?

Yes, Bell said. He pointed out that the Constitution guarantees criminal defendants the opportunity to present a complete defense and cited a U.S. Supreme Court ruling that concluded, "that opportunity would be an empty one if the state were permitted to exclude competent, reliable evidence bearing on the credibility of a confession."

- Finally, did the trial judge have other options short of declaring a mistrial?

Yes, Bell concluded. The judge might have simply informed jurors that they should disregard the comments of the defense counsel. "Granting a mistrial," Judge Bell argued, "is extraordinary relief that should only be done where there is a high degree of necessity. There is no indication in this case that such a necessity existed."

It wasn't even close.

Prosecutors have asked Bell to reconsider his decision. Yet, if anything, it is the prosecution that started things rolling in the direction of a mistrial. It insisted that the defense stepped over the line. It requested the mistrial. Whitmore agreed. It seemed cheeky, then, for Maureen O'Connell, Summit County prosecutor, to attend the news conference called by the distraught mother of the girl.

Little in Judge Bell's opinion suggests

he will change his mind. He might as well. It is very rare that a judge intervenes in a state court double jeopardy.

Bell has earned a reputation for fairness and tough-mindedness on the bench. He understood the situation and what he was doing.

"This is not a question of technicalities," he stressed. "This is an important question that the Fifth Amendment prohibits a second trial unless there is a manifest need to declare the first trial a mistrial."

Really, it can be no other way. The state, troubled that the defendant weren't going its way in court, too easily invite a mistrial against a defendant to be tried again.

That wouldn't be fair or

The system is not perfect, but it painfully illustrates. What strength and integrity are the principles that support it. A judge, even a Reagan-appointed judge, must make difficult decisions. Many will be disappointed. The alternative, however, may be something politicians would prefer. Judge Bell could not.

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