SUPREME COURT OF THE UNITED STATES

No. 03–8661

MELVIN T. SMITH, PETITIONER *v.* MASSACHUSETTS

ON WRIT OF CERTIORARI TO THE APPEALS COURT OF MASSACHUSETTS

[February 22, 2005]

JUSTICE GINSBURG, with whom THE CHIEF JUSTICE, JUSTICE KENNEDY, and JUSTICE BREYER join, dissenting.

Does the Double Jeopardy Clause bar the States from allowing trial judges to reconsider a midtrial grant of a motion to acquit on one or more but fewer than all counts of an indictment? The Court unanimously answers "No." See *ante*, at 7–8 ("[A]s a general matter state law may prescribe that a judge's midtrial determination of the sufficiency of the State's proof can be reconsidered."). A State may provide for such reconsideration, the Court also recognizes, by legislation or by judicial rule, common-law decision, or exercise of supervisory power. See *ante*, at 8. According to the Appeals Court of Massachusetts, the State has so provided through its decisional law. 58 Mass. App. 166, 171, 788 N. E. 2d 977, 983 (2003); see *Commonwealth* v. *Haskell*, 438 Mass. 790, 792, 784 N. E. 2d 625, 628 (2003) ("A judge's power to reconsider his own decisions during the pendency of a case is firmly rooted in the common law . . . ."). The view held by the Massachusetts court on this issue is hardly novel. See, *e.g., United States* v. *LoRusso*, 695 F. 2d 45, 53 (CA2 1982) ("A district court has the inherent power to reconsider and modify its interlocutory orders prior to the entry of judgment . . . ."); cf. Fed. Rule Civ. Proc. 54(b) (Absent "entry of a final judgment as to one or more but fewer than all of the claims or parties," "any order or other form of decision, however

designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.").

Nevertheless, the trial court here was locked into its on-the-spot error, the Court maintains, because "the availability of reconsideration [had not] been plainly established by pre-existing rule or case authority expressly applicable to midtrial rulings on the sufficiency of the evidence." *Ante*, at 10. Otherwise, according to the Court, "[t]he Double Jeopardy Clause's guarantee [would] become a potential snare for those who reasonably rely upon it." *Ibid.*

I agree that, as a trial unfolds, a defendant must be accorded a timely, fully informed opportunity to meet the State's charges. I would so hold as a matter not of double jeopardy, but of due process. See *Gray* v. *Netherland,* 518 U. S. 152, 171 (1996) (GINSBURG, J., dissenting) ("Basic to due process in criminal proceedings is the right to a full, fair, potentially effective opportunity to defend against the State's charges."). On the facts presented here, however, as the Massachusetts Appeals Court observed, see 58 Mass. App., at 171, 788 N. E. 2d, at 983, defendant-petitioner Smith suffered no prejudice fairly attributable to the trial court's error.

The trial judge in Smith's case acted impatiently and made a mistake at the close of the State's case. Cutting short the prosecutor's objections, see App. 20–22, she granted Smith's motion for a "required finding of not guilty" on one of the three charges contained in the indictment, unlawful possession of a firearm, *id.*, at 20.[1] She

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[1]The other charges, on which no motion to acquit was made, were

did so on the ground that the State had failed to prove an essential element of the crime, *i.e.*, that the barrel of the gun Smith was charged with possessing was less than 16 inches. See Mass. Gen. Laws Ann., ch. 269, §10(a) (West 2000) (rendering possession of a "firearm," unless exempted, unlawful); ch. 140, §121 (West 2002) (defining "firearm" as a "pistol" or "revolver" with a barrel length "less than 16 inches"). The ruling for Smith was endorsed on the motion and recorded on the docket, but it was not communicated to the jury.

The trial judge corrected her error the same day it was made. She did so in advance of closing arguments and her charge to the jury. See App. 71–74. The trial judge retracted her initial ruling and denied the motion for a required finding of not guilty because the prosecutor had called to her attention a decision of the Supreme Judicial Court of Massachusetts directly on point, *Commonwealth* v. *Sperrazza*, 372 Mass. 667, 363 N. E. 2d 673 (1977). In that case, Massachusetts' highest court held that a jury may infer a barrel length of less than 16 inches from testimony that the weapon in question was a revolver or handgun. *Id.*, at 670, 363 N. E. 2d, at 675. Here, there was such testimony. The victim in Smith's case had testified that the gun he saw in the defendant's hand was a ".32 or .38" caliber "pistol." App. 12. The trial court's new ruling based on *Sperrazza* was entered on the docket, Smith did not move to reopen the case, and the jury convicted him on all charges.

Smith urges that our decision in *Smalis* v. *Pennsylvania,* 476 U. S. 140 (1986), controls this case. I disagree. In *Smalis*, the Court held that the Double Jeopardy Clause bars appellate review of a trial court's grant of a motion to acquit, because reversal would lead to a remand for fur-

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assault with intent to murder, and assault and battery by means of a dangerous weapon.

ther trial proceedings. *Id.*, at 146. An appeal, including an interlocutory appeal, moves a case from a court of first instance to an appellate forum, and necessarily signals that the trial court has ruled with finality on the appealed issue or issues. A trial court's reconsideration of its initial decision to grant a motion, on the other hand, occurs before the court of first instance has disassociated itself from the case or any issue in it. Trial courts have historically revisited midtrial rulings, as earlier noted, see *supra*, at 1–2, for the practical exigencies of trial mean that judges inevitably will commit occasional errors. In contrast, the government traditionally could pursue no appeal at any stage of a criminal case, however mistaken the trial court's pro-defense ruling. See *United States* v. *Scott,* 437 U. S. 82, 84–86 (1978) (discussing the evolution of the Government's right to appeal). This Court has long recognized the distinction between appeals and continuing proceedings before the initial tribunal prior to the rendition of a final adjudication. Compare Fed. Rule Civ. Proc. 54(b), quoted *supra*, at 1–2, and *Swisher* v. *Brady,* 438 U. S. 204, 215–216 (1978) (no double jeopardy bar to the State's exceptions to a master's findings where an accused juvenile "is subjected to a single proceeding which begins with a master's hearing and culminates with an adjudication by a judge"), with *Kepner* v. *United States,* 195 U. S. 100, 133 (1904) (Double Jeopardy Clause bars the Government's appeal to a higher court after acquittal of the defendant by the "court of first instance").

Nor is Massachusetts Rule of Criminal Procedure 25(a) (2004) dispositive here. That Rule states: "If a defendant's motion for a required finding of not guilty is made at the close of the Commonwealth's evidence, *it shall be ruled upon at that time*." (Emphasis added.) While Rule 25(a) plainly instructs an immediate ruling on the motion, it says nothing about reconsideration.

The Appeals Court of Massachusetts determined that

Rule 25(a) did not place the incorrect midtrial ruling beyond the trial court's capacity to repair its error. Rule 25(a)'s demand for an immediate ruling rather than reservation of the question,[2] the Appeals Court said, "protects a defendant's right to insist that the Commonwealth present proof of every element of the crime with which he is charged before he decides whether to rest or to introduce proof." 58 Mass. App., at 171, 788 N. E. 2d, at 982–983 (quoting *Commonwealth* v. *Cote*, 15 Mass. App. 229, 240, 444 N. E. 2d 1282, 1289 (1983)).[3] That protection was accorded the defendant here, the court observed, for the State's evidence, presented before the "required finding of not guilty" motion was made and granted, in fact sufficed to prove every element of the firearm possession charge. See 58 Mass. App., at 171, 788 N. E. 2d, at 983. Rule 25(a) does not import more, the Appeals Court indicated. Because the jury remained seated with no break in the trial, and the defendant retained the opportunity to counter the State's case,[4] that court concluded, neither Rule 25(a) nor

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[2] Cf. Fed. Rule Crim. Proc. 29(b) (providing that a trial court may reserve decision on a defendant's challenge to the sufficiency of the evidence until after the jury has returned a verdict). Several States follow the federal model. See, *e.g.,* Alaska Rule Crim. Proc. 29(b) (2004); Del. Super. Ct. Rule Crim. Proc. 29(b) (2004); Iowa Rule Crim. Proc. 2.19(8)(b) (2004); N. Y. Crim. Proc. Law Ann. §290.10(1) (West 2002); W. Va. Rule Crim. Proc. 29(b) (2004).

[3] Counsel for petitioner suggested at oral argument that the protection is more theoretical than real, for "what [judges] do as . . . a matter of practice in Massachusetts is they simply deny [the motion]." Tr. of Oral Arg. 56 (also noting that the motion to acquit may be renewed at the close of defendant's case and after the jury has returned a verdict).

[4] The Court hypothesizes that dismissal of one count might affect a defendant's course regarding the undismissed charges. *Ante*, at 9–10. The Appeals Court addressed that prospect concretely: Defendant Smith "has not suggested that the initial allowance of the motion affected his trial strategy with regard to the other charges." 58 Mass. App. 166, 171, 788 N. E. 2d 977, 983 (2003). Further, there is not even the slightest suggestion that Smith's codefendant, who was acquitted

the Double Jeopardy Clause froze as final the erroneous midtrial ruling on the firearm possession charge. I would not pretend to comprehend Rule 25(a) or Massachusetts' decisional law regarding state practice better than the Massachusetts Appeals Court did.

In sum, Smith was subjected to a single, unbroken trial proceeding in which he was denied no opportunity to air his defense before presentation of the case to the jury. I would not deny prosecutors in such circumstances, based on a trial judge's temporary error, *one* full and fair opportunity to present the State's case.

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by the jury, "alter[ed] [her case] in harmful ways." But see *ante*, at 10, n. 6.