Circuit Court for Baltimore City
Case No: 818212015

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2837

September Term, 2018

ASADIQ DEJESUS

v.

STATE OF MARYLAND

Meredith,
Wells,
Thieme, Raymond G., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Wells, J.

Filed: January 24, 2020

Asadiq DeJesus, appellant, was charged with credit card theft and other related charges in the District Court of Maryland for Baltimore City. At trial, the State called its first witness and the clerk administered the oath. Before her testimony commenced, however, the trial judge recused himself and declared a mistrial over Mr. DeJesus' objection. The case was subsequently transferred to the Circuit Court for Baltimore City where Mr. DeJesus moved to have the charges against him dismissed, asserting that "further proceedings would violate the double jeopardy prohibition of the Fifth Amendment to the United States Constitution." The circuit court denied the motion and Mr. DeJesus noted a timely interlocutory appeal of that decision.

Now, we consider whether the circuit court erred in denying Mr. DeJesus' motion to dismiss on double jeopardy grounds. For the reasons we discuss, we affirm the decision of the circuit court.

BACKGROUND

In a March 2018 application for statement of charges, Saleemah Franklin alleged that Mr. DeJesus was a social guest in her home when she provided her debit card information to a food vendor over the telephone. She contended that Mr. DeJesus overheard the call, saved her debit card information, and used it to make at least ten purchases without her permission. Mr. DeJesus was then charged with credit card theft,[1] possession of personal identifying information of another individual without consent,[2]

[1] Md. Code Ann., Crim. Law § 8-204
[2] Md. Code Ann., Crim. Law § 8-301(b)

assumption of the identity of another with fraudulent intent,[3] and theft of property valued at $124.27.[4]

When the parties appeared before the District Court for trial, Mr. DeJesus waived his right to a jury trial. As a preliminary matter, Mr. DeJesus notified the court that there was an "informal type resolution" between Mr. DeJesus and Ms. Franklin brokered by their school. He requested that the State be "precluded from mentioning anything that happened after the incident to resolve the matter with the school."[5] With the prosecution in agreement, the court stated that it would "make a note" that such evidence would be precluded. The court was also notified that the date range of the incident was "March 5th to the 14th."

As its first witness, the State called Ms. Franklin to the stand. As she approached, the trial judge asked Ms. Franklin if she had testified in front of him before. She responded in the affirmative. Upon reaching the stand, Ms. Franklin was sworn-in by the court. Before she began to testify, however, the judge asked Ms. Franklin to step out of the courtroom. He then informed the parties that he had previously presided over a trial in which Ms. Franklin had testified and in which he had determined that her testimony was not believable. Though Ms. Franklin had been sitting in the courtroom "all day," the judge stated that "[i]t wasn't until the witness was sworn" that he realized: "I know this witness."

[3] Md. Code Ann., Crim. Law § 8-301(c)(2)(i)(ii)

[4] Md. Code Ann., Crim. Law § 7-104

[5] The school board became involved, in some manner, in an informal resolution between Mr. DeJesus and Ms. Franklin, though the details and result of such involvement is not disclosed in the record on appeal. **[T2. 2]**

He expressed concern whether it was "going to be fair to the State" were he to preside over the trial "knowing Ms. Franklin's history," particularly in a word versus word scenario.

The State immediately asked the judge to recuse himself. In the discussion that followed, the court and the parties addressed the ramifications of a recusal. They discussed whether Mr. DeJesus' right to a jury trial could be reinstated given his prior waiver, whether jeopardy had attached, and whether there was a manifest necessity to declare a mistrial. There was consensus that the Mr. DeJesus was "entitled to have his jury trial right back" and the court, therefore, reinstated that right.

As to jeopardy, Mr. DeJesus argued that jeopardy had attached when Ms. Franklin was sworn. The State argued, in response, that jeopardy had not attached because "no evidence was ever given" and Ms. Franklin "didn't say anything" once sworn. The State reasoned, therefore, that the court could simply postpone the trial for a new judge to hear. In response, Mr. DeJesus pointed out that prior to the swearing, there was "argument on a particular evidence issue which…the Court heard and made a ruling on," referring to the motion to preclude evidence of the informal school resolution. Ultimately, the court found that jeopardy had attached when Ms. Franklin was sworn, citing *State v. Taylor*, 371 Md. 617 (2002), as authority.

As to whether there was a manifest necessity to declare a mistrial, the issue turned on whether the trial judge could be fair having rendered a prior decision as to Ms. Franklin's credibility. Although the judge stated several times to the parties that he "could be fair," he also made several statements to the contrary. For example, he said that "just thought it wasn't fair to hear this case…when it's going to be – it sounds like her word

versus his word." Ultimately, the judge recused himself "to be fair to both sides" and declared a mistrial.

The case was subsequently transferred to the Circuit Court for Baltimore City, Mr. DeJesus apparently having chosen to exercise his reinstated right to a jury trial. Upon transfer, Mr. DeJesus moved to dismiss the criminal charges against him on double jeopardy grounds, contending that jeopardy had attached in the District Court and that there had not been a manifest necessity to declare a mistrial. The circuit court reasoned, however, that despite the trial judge's pronouncements that he could be fair, the manner in which he raised the issue of Ms. Franklin's believability spoke otherwise. The court further reasoned that, having recused himself, there was a manifest necessity for a mistrial given that the trial judge "essentially walked off the bench." The circuit court, therefore, denied Mr. DeJesus' motion to dismiss. Mr. DeJesus noted the present appeal of the court's ruling.[6]

DISCUSSION

I. DOUBLE JEOPARDY GENERALLY

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides that no person "shall…be subject for the same offense to be twice put in jeopardy of life or limb." The prohibition against double jeopardy protects the criminally accused from multiple prosecutions and punishments stemming from a singular

[6] "A defendant has the right to immediate appellate review of an adverse ruling concerning a double jeopardy claim." *Kendall v. State*, 429 Md. 476, 484 n. 10 (2012) (citing *Pulley v. State*, 287 Md. 406, 414 (1980)).

criminal offense. *Monge v. California*, 524 U.S. 721, 727-28 (1998); *Serfass v. United States*, 420 U.S. 377, 387 (1975). This doctrine, a "fundamental ideal in our constitutional heritage," is applicable to the states by the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794 (1969). Though not specifically set out in its constitution, Maryland also provides double jeopardy protections at common law. *Purnell v. State*, 375 Md. 678, 691 (2003) (citing *Ware v. State*, 360 Md. 650, 708 (2000)).

The prohibition against double jeopardy "encompasses three interrelated pleas at common law: autrefois acquit, autrefois convict, and pardon." *Giddins v. State*, 393 Md. 1, 25-26 (2006). The pleas of autrefois convict and pardon "provide that a criminal defendant may not be prosecuted twice for the same offense *after conviction* and may not be punished multiple times for the same offense." *Id*. The plea of autrefois acquit, by comparison, provides that defendants who have been indicted and acquitted of an offense may not later be charged with the same offense. *Id.* These pleas serve to protect "the integrity of the final judgment." *Taylor*, 371 Md. at 630 (citing *United States v. Scott*, 437 U.S. 82, 92 (1978)).

In the instant case, however, we have neither a final judgment of acquittal, nor of conviction to protect. Rather, Mr. DeJesus seeks to bar retrial in the circuit court where the District Court proceedings concluded in a mistrial. Indeed, we have recognized that a mistrial, a trial ended before verdict and without consideration of the merits, falls under an expanded purview of double jeopardy protections prohibiting retrial. As we have explained:

> The broad umbrella term we call "double jeopardy" today embraces (in its federal manifestation) four distinct species: 1) classic former jeopardy, arising out of the common law pleas at bar of autrefois convict and autrefois acquit; 2) simultaneous jeopardy, involving largely issues of merger and multiple punishment and lying on the at-times blurred boundary between constitutional law and statutory construction; 3) the problem of retrial following mistrial; and 4) collateral estoppel.

Fields v. State, 96 Md. App. 722, 725 (1993).

As to these different "species" of double jeopardy, "[e]ach carries with it a different history; each serves a different purpose; each has different implementing rules." *Id*. at 725. For instance, the historical origins of the "retrial following mistrial" species of double jeopardy stems from an English rule of practice designed to guard against "the tendency of the Crown, acting either through the prosecutor or the judge or both, to sabotage a trial that was going badly for the Crown so the prosecution could regroup and live to fight another day." *Id*. at 731. In this context, the extension of double jeopardy protections seeks not to protect the integrity of a final judgment or to protect against multiple punishments, but instead seeks to bar "needless discharges" and guarantee a "defendant's valued right to have his trial completed by a particular tribunal." *Id*. 726-27, 731-32.

Moreover, a mistrial, unlike the entry of an acquittal, does not automatically bar a retrial on double jeopardy grounds. *Hubbard v. State*, 395 Md. 73, 89 (2006). Where a defendant has requested a mistrial, the defendant is said to have waived double jeopardy protections. *Id.* In such a case, retrial is not barred unless the "mistrial motion was precipitated by judicial overreaching or deliberate prosecutorial misconduct intended to provoke or goad the defendant into making the motion." *Ware*, 360 Md. at 709. Conversely, where the prosecution has requested a mistrial or the court has *sua sponte*

declared a mistrial, retrial is not barred provided there existed a "manifest necessity" to abort the trial. *Mansfield v. State*, 422 Md. 269 (2011).

Here, Mr. DeJesus argues that there was not a manifest necessity for the District Court to declare a mistrial over his objection. He contends, therefore, that a retrial before the circuit court should be barred as violative of double jeopardy. The State, in response, argues that double jeopardy was not implicated because the defendant was never placed in jeopardy during the District Court proceedings. We must first, therefore, consider whether jeopardy attached in the District Court.

II. DID JEOPARDY ATTACH IN THE DISTRICT COURT?

A. STANDARD OF REVIEW

"Whether principles of double jeopardy bar the retrial…is a question of law." *Giddins*, 393 Md. at 15. We will, therefore, review the legal conclusion of the circuit court de novo. *Id*.

B. THE "NORMAL" RULE

The State, citing *Blondes v. State*, 273 Md. 435, 444-45 (1975), contends that jeopardy attaches "at a bench trial when the judge begins to hear or receive evidence." Indeed, the Court of Appeals in *Blondes* recognized that this was the "normal rule" for identifying the point at which jeopardy attaches in a non-jury trial. *Id*. The State argues, therefore, that because Ms. Franklin had not yet offered any testimony and because the court had not heard or received any evidence at trial, that jeopardy had not attached.

In *Blondes*, the State proceeded to trial on a grand jury indictment and, out of concern for the "validity of the indictment," also proceeded to trial on a criminal

information "identical in wording to the first two counts of the indictment." *Id.* at 438. Prior to trial, the State asked the court to render a preliminary decision on the admissibility of a principal witness' deposition. *Id*. at 440. In doing so, the court heard testimony regarding the principal witness' absence and the absent witness' deposition transcript was offered into evidence. *Id.* at 446-47. Thereafter, the State entered a nolle prosequi with respect to the indictment only. *Id*. at 441. In response, *Blondes* argued that jeopardy had attached and double jeopardy barred the State from proceeding on the information. In its holding that jeopardy had attached prior to the entry of the nolle prosequi, the Court of Appeals reasoned:

> When the prosecution asks for a ruling on the admissibility of the chief documentary evidence against a defendant, when it begins offering other documentary evidence against the defendant, and when it offers the testimony of a witness as a necessary condition to the admissibility of such evidence, then the court has begun 'to hear the evidence.'

Blondes, 273 Md. at 446-47.

Since *Blondes*, Maryland courts have implemented the "normal" rule to determine when jeopardy attaches in non-jury trials, particularly in cases involving the common law plea of autrefois acquit. *See State v. Taylor*, 371 Md. 617 (2002) (holding that the court's consideration of evidence outside the four corners of the criminal information in granting defendant's motion to dismiss, despite its characterization, constituted an acquittal for double jeopardy purposes); *Brooks v. State*, 299 Md. 146, 151-55 (1984) (concluding that trial court's grant of motion for judgment of acquittal was based upon the evidence and therefore implicated protections against double jeopardy); *State v. Hallihan*, 224 Md. App. 590 (2015) (holding that jeopardy did not attach where the court heard only argument on

defendant's motion to dismiss and did not consider any evidence in granting dismissal). Further, it is worth noting that in cases involving a retrial following a mistrial, Maryland courts have also cited *Blondes* as authority that jeopardy "attaches at a bench trial when the judge begins to hear or receive evidence." *Mansfield*, 422 Md. at 282.

C. THE "MINORITY" RULE

The Court of Appeals in *Blondes*, however, also recognized a "minority rule" that "jeopardy attaches when the first witness is sworn." *Blondes*, 273 Md. at 444-45. Here, the District Court relied on this rule in determining that jeopardy had attached when Ms. Franklin was sworn.[7] The minority rule has not been formally adopted or rejected in Maryland cases. *Id.* at 446; *Taylor* 371 Md. at 631 ("Maryland courts also have recognized, without adopting, the minority view that in a bench trial jeopardy attaches when the first witness is sworn."). *Blondes* did not formally adopt either the 'normal' or the 'minority' rule because, applying either, the Court of Appeals arrived at the same conclusion as to jeopardy. *Blondes*, 273 Md. at 446-47 (stating "under the alternate test of 'swearing the first witness,' jeopardy attached when Mr. Miller took the oath.").

It is important to note that the 'normal' and the 'minority' rules are not typically at odds with one another. Firstly, the minority rule "can only be applied where the initial evidence is testimonial." *Id*. at 446. So, where non-testimonial evidence is presented to

[7] Contrary to the District Court's assertion, *Taylor* does not hold that jeopardy attaches in a bench trial when the first witness is sworn. Though *Taylor* recognized the minority rule, it did not purport that Maryland courts had adopted the rule, nor did it implement the rule in arriving at its ultimate decision as to jeopardy. *Taylor* 371 Md. at 631.

the court in advance of the swearing of any witness, the court has no need to utilize the minority rule. Secondly, "in most cases it will make no difference whether jeopardy attaches when the first witness is sworn or when the first witness begins to testify, as one will usually follow the other with nothing occurring between the two events." *Id*. at 446. In such circumstances, it often makes no difference which rule is applied. In the case at bar, we have come upon one of the rare cases where the testimony of a witness, which would have been the first evidence offered to the court, did not follow immediately after the witness' swearing-in.

D. NO BASIS FOR ADOPTING THE MINORITY RULE

Because Maryland courts have already adopted and applied the 'normal rule' in non-jury trials since *Blondes*,[8] its application is established Maryland precedent. As no reason has been advanced by the parties for departing from this rule, stare decisis requires its continued application in Maryland cases. *See State v. Waine*, 444 Md. 692, 700 ("The crux of the doctrine of stare decisis is that courts should reaffirm, follow, and apply ordinarily the published decisional holdings of our appellate courts even though, if afforded a blank slate, the court might decide the matter differently."). We must consider, however, in cases

[8] Despite application of the 'normal rule,' Maryland courts have barred retrials as violative of double jeopardy in cases in which the State has presented no evidence or testimony, but where "not guilty" verdicts were entered by the court following a criminal defendant's not guilty plea. *See Farrell v. State*, 364 Md. 499 (2011); *Daff v. State*, 317 Md. 678 (1989), *In re Kevin E.*, 402 Md. 624 (2008). Where the State is given the opportunity to present evidence at trial, but chose not to or fail to do so, and the court enters a not guilty verdict upon the defendant's plea, jeopardy has attached because the defendant was "specifically put to trial before the trier of facts" and "subjected to the risk of conviction." *In re Kevin E*., 402 Md. at 635-37.

in which the initial evidence presented is testimonial, whether the minority rule should be integrated into the existing framework. In such cases, were the attachment of jeopardy moved forward to the swearing of the first witness, the result would simply be an earlier point of attachment and the normal rule would not be disturbed.

We do not perceive that the inclusion of the minority rule into our existing jurisprudence would benefit or further the underlying purposes of double jeopardy protections any more so than the normal rule currently provides. Firstly, "the basic test of initial jeopardy is whether the defendant has been 'put to trial before the trier of the facts, whether the trier be a jury or a judge,' and thereby 'subjected to the risk of conviction.'" *Daff v. State*, 317 Md. 678, 688–89 (1989) (quoting *Serfass*, 420 U.S. at 388). If a "defendant is never subjected to the risk of conviction, jeopardy has not attached." *Id*. The swearing of an initial witness does not, in itself, subject a criminal defendant to an increased risk of conviction. We have not been directed to, nor do we find any Maryland precedent that the swearing of a witness alone, untethered to the submission of testimony, exposes a criminal defendant to the risk of conviction. Certainly, consistent with the ruling in *Blondes*, when the court begins to hear or receive evidence, a criminal defendant is subjected to this risk. However, the swearing of an initial witness does not amplify this risk.

Consider, for instance, where no objection has been raised, that an unsworn witness may offer testimony that is ultimately considered by the trier of fact. *See Schaefer v. Cusack*, 124 Md. App. 288, 313 (1998); *see also* 6 L. McLain, *Maryland Evidence—State and Fed.*, § 603:1(c) (May 2017 update) ("Objection to a witness's testifying who has not

made an oath or affirmation will be considered waived unless made before the testimony or, if the witness is not on the stand, as soon as it should be apparent that the witness is testifying."). In such circumstances, the swearing of the witness has been waived, yet the criminal defendant is still exposed to the risk of conviction by the witness' unsworn testimony. The oath, or lack thereof, has had no effect on the ultimate risk of conviction.

By contrast, in the context of jury trials, it is well-established that "a defendant is placed in jeopardy when the jury is selected and sworn." *Blondes*, 273 Md. at 444 (citing *Illinois v. Somerville*, 410 U.S. 458, 467). A criminal defendant's right to a sworn, impartial jury, as provided by Articles 5 and 21 of the Maryland Declaration of Rights, may not be waived. *Harris v. State*, 406 Md. 115, 129 (2008). A verdict rendered by an unsworn jury "is a nullity." *Id.* The swearing of the jury, therefore, is a necessary element to the entry of a lawful verdict in a jury trial. Without a sworn jury, the criminal defendant is not exposed to the risk of conviction and jeopardy is not said to have attached. *Id*. at 132. In this light, the swearing of a witness is distinguishable as it can be waived and is not a necessary element to the rendering of a lawful verdict.

Moreover, as to the risk of conviction, consider the facts in the case at bar. Here, we have a trial judge who has not heard any testimony or received any evidence. He has not entered a verdict, nor is he considering the merits of the charges against Mr. DeJesus. Considering these facts, it is difficult to conceive how the swearing itself put Mr. DeJesus at risk of conviction.

Secondly, adoption of the minority rule does not further the underlying purposes of double jeopardy any more so than the normal rule currently provides. As previously stated,

with regard to the 'retrial following mistrial' species of double jeopardy, the underlying purpose is to protect a "defendant's valued right to have his trial completed by a particular tribunal." *Id*. 726-27, 731-32. With respect to jury trials, "[t]he reason for holding that jeopardy attaches when the jury is empaneled and sworn lies in the need to protect the interest of an accused in retaining a chosen jury." *Crist v. Bretz*, 437 U.S. 28, 35–36 (1978). *Id*. As the Supreme Court stated:

> [T]he federal rule as to when jeopardy attaches in a jury trial is not only a settled part of federal constitutional law. It is a rule that both reflects and protects the defendant's interest in retaining a chosen jury. We cannot hold that this rule, so grounded, is only at the periphery of double jeopardy concerns. Those concerns—the finality of judgments, the minimization of harassing exposure to the harrowing experience of a criminal trial, and the valued right to continue with the chosen jury—have combined to produce the federal law that in a jury trial jeopardy attached when the jury is empaneled and sworn.

By contrast, as to non-jury trials, "[g]enerally, a litigant has no right to have his case heard before a particular judge." *State v. Peterson*, 315 Md. 73, 85–86 (1989). The Supreme Court "has consistently adhered to the view that jeopardy does not attach, and the constitutional prohibition can have no application, until a defendant is 'put to trial before the trier of facts, whether the trier be a jury or a judge." *Serfass*, 420 U.S. at 388 (citing *United States v. Jorn*, 400 U.S. 470, 479 (1971)). Therefore, it is important to determine when a trial judge has stepped into the role of 'trier of fact.' Prior to the commencement of trial, a judge may decide preliminary matters where he or she is not acting in this capacity. In such instances, jeopardy is not implicated. *See Odem v. State*, 175 Md. App. 684, 700 (2007). When the judge begins to hear or receive evidence, however, this is a logical line of demarcation indicating that the judge has stepped into the role.

In our view, the swearing of the initial witness does not necessarily signal such a transition, as the swearing itself may be viewed as an administrative action that bears no relationship to jeopardy. For instance, in *Newman v. United States.*, 410 F.2d 259 (1969), the United States Court of Appeals for the District of Columbia, was tasked with determining when jeopardy attached in a case where all the witnesses were "commonly sworn as a group" and, in which, a nolle prosequi was entered before the first witness began to testify. *Id.* The court decided that the swearing of witnesses did not represent "an affirmative step into trial by the Government, but [was] an administrative procedure followed for the convenience of the court." *Id*. As such, the court held that the swearing of witnesses did not signal the attachment of jeopardy in non-jury trials. *Id*.

Thirdly, the minority rule does not, in itself, advance the other purposes commonly espoused in upholding double jeopardy protections. The Supreme Court has emphasized that the prohibition against double jeopardy manifests society's "awareness of the heavy personal strain which a criminal trial represents for the individual defendant" and its "willingness to limit the Government to a single criminal proceeding to vindicate its very vital interest in enforcement of criminal laws." *Jorn*, 400 U.S. at 479. As expressed in *Green v. United States*, 355 U.S. 184, 187-88 (1957):

> The underlying idea…is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offence, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty.

However, "[w]hen a criminal prosecution is terminated prior to trial, an accused is often spared much of the expense, delay, strain and embarrassment which attend a trial." *Serfass*, 420 U.S. at 391. The swearing of Ms. Franklin did not, in itself, subject the Mr. DeJesus to any embarrassment, expense, or ordeal, nor to the "hazards of trial and possible conviction." *Id.* "Without the risk of a determination of guilt, jeopardy does not attach." *Id*.

Finally, we are not persuaded that the minority rule should be adopted solely because it provides a bright-line rule in assessing jeopardy. Prior to *Blondes* reaching the Court of Appeals, we considered the issue of when jeopardy attaches in a non-jury trial. *Blondes v. State*, 19 Md. App. 714, (1974), *rev'd*, 273 Md. 435 (1975). Though ultimately overturned, we had adopted the "minority" rule, stating:

> With respect to a non-jury trial, the law is more equivocal as to the time when jeopardy attaches. In addition to the imprecise standard of 'the commencement of trial', the cases refer to 'the swearing of the first witness' or 'the introduction of testimony', or 'the hearing of evidence'. In some cases these three phrases seem to be treated as synonymous. In others there appears to be an effort to distinguish them. When the witness takes the oath, he is sworn; when he gives his name and address, testimony is introduced; when he testifies on the merits, evidence is heard. The majority of the cases couch the rule in terms of the hearing of evidence.

Id. at 733-35 (citations omitted).

We reasoned that the minority rule was "least subject to uncertainty" and that under the minority rule, "the time jeopardy attaches begins as mechanically as when the jury is sworn." *Id*. We stated that the minority rule would nullify any question of "an accused being put in jeopardy by hearings preliminary to trial on the general issue, as, for example,

on motion to dismiss the indictment or to suppress evidence, or to change the venue, or for discovery." *Id.*

While it is perhaps true that the minority rule provides less uncertainty, "the courts have disparaged rigid, mechanical rules in the interpretation of the Double Jeopardy Clause." *Serfass*, 420 U.S. at 390. Without an underlying basis tying the minority rule to double jeopardy protections, we will not adopt it solely for its ability to provide certainty.

E. APPLYING THE NORMAL RULE TO THIS APPEAL

For the foregoing reasons, we hold that it was error for the District Court to adopt the minority rule in deciding whether jeopardy attached. Instead, the District Court should have adhered to the rule that jeopardy attaches in a non-jury trial when "the judge begins to hear or receive evidence." *Blondes*, 273 Md. at 444-45.

Mr. DeJesus contends, in a footnote, that the "trial court had already ruled on an evidentiary motion raised by the defense" prior to the court declaring a mistrial.[9] However, the motion Mr. DeJesus raised sought only to preclude the State "from mentioning anything that happened after the incident to resolve the matter with the school" and did not require

[9] Mr. DeJesus also submits, and the State acknowledges, that the prosecution conceded in the circuit court that jeopardy had attached. However, Mr. DeJesus has raised an issue concerning whether double jeopardy bars trial in the circuit court. This is an issue of law which necessarily requires this Court to review whether jeopardy attached in the first place. "[A] party may not concede a point of law to the exclusion of appellate review, as necessary and proper to decide the case." *Greenstreet v. State*, 392 Md. 652, 667 (2006). Moreover, "[a]n appellee, in seeking an affirmance, is ordinarily entitled to assert any ground shown by the record for upholding the trial court's decision, even though the ground was not relied on by the trial court and was perhaps not raised in the trial court by the parties." *State v. Cates*, 417 Md. 678, 691–92 (2011) (citing *Grant v. State*, 299 Md. 47, 53 n. 3 (1984)).

the District Court to consider the merits of the case. The court was not advised of the specifics of the resolution efforts made by the school and did not receive evidence regarding the school's efforts by way of stipulation, documentation, testimony, or otherwise. The court only decided that if the State sought to introduce such evidence, that it would not be considered by the court. "[A] defendant does not risk a determination of guilt when a trial court determines a preliminary matter without reaching the merits of the case." *Odem*, 175 Md. App. at 700; *see also Giddins*, 393 Md. at 27 (holding that autrefois acquit was not implicated where "the trial judge was speaking to the admissibility of the evidence and not the sufficiency or weight of the evidence.").

Accordingly, the District Court did not receive evidence prior to the swearing of Ms. Franklin. After she was sworn, Ms. Franklin did not provide any testimony for the court's consideration, and Mr. DeJesus was not exposed to the risk of conviction. Jeopardy, therefore, did not attach in the District Court. Because jeopardy did not attach in the District Court, we need not consider here whether there was a manifest necessity for the court to declare a mistrial, as trial had not commenced when the trial judge recused himself. For the foregoing reasons, we hold that a trial on the merits before the circuit court does not violate the prohibition against double jeopardy.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.