



IN THE COURT OF APPEALS OF IOWA

NEAL EDWARD HIRSH,	)	
Plaintiff,	)	Filed March 31, 1980
vs.	)	
THE DISTRICT COURT IN AND FOR	)	0-10
JOHNSON COUNTY, IOWA,	)	2-63342
(HONORABLE JOHN L. HYLAND,	)	
JUDGE),	)	
Defendant.	)	

Certiorari from Johnson District Court, John L. Hyland, Judge.

Plaintiff challenges by original certiorari action trial court denial of his motion for dismissal of robbery with aggravation charge. Affirmed; Writ Annulled.

Lawrence F. Scalise and Ann Fitzgibbons of Scalise, Scism, Gentry, Brick & Brick, Des Moines, for plaintiff.

Thomas J. Miller, Attorney General of Iowa, Kathy Krewer, Assistant Attorney General, and Jack Dooley, Johnson County Attorney, for defendant.

Heard by Oxberger, C.J., Donielson, Snell, Carter and Johnson, JJ.

DONIELSON, J.

Plaintiff, Neal Edward Hirsh, challenges by original certiorari action trial court's denial of his motion for dismissal of robbery with aggravation charge. Plaintiff contends trial court exceeded its jurisdiction or acted illegally in not dismissing the charge. He asserts his constitutional guarantee against double jeopardy will be violated if he is retried on that offense because the jury returned a verdict of acquittal in the prior trial on that charge, even though a mistrial was declared. We affirm the trial court's judgment and annul the writ of certiorari.

On certiorari, only questions of law are presented; the trial court's fact-findings will not be reviewed if supported by competent and substantial evidence. State v. District Court of Linn County, 218 N.W.2d 641, 643 (Iowa 1974). Party bringing this action has the burden to show the trial court's judgment is illegal or jurisdictionally defective. Newby v. District Court of Woodbury County, 259 Iowa 1330, 1336, 147 N.W.2d 886, 890 (Iowa 1967).

I.

On February 25, 1977, Hirsh was charged by county attorney information with five counts, including assault with intent to commit murder, robbery with aggravation, and assault while masked. He was convicted of the aggravated robbery and assault while masked charges, but his conviction was overturned on appeal. Hirsh was retried on the aggravated robbery charge and two counts of assault while masked. The jury acquitted him of the assault while masked charges, but following a polling and further deliberations was unable to reach a verdict on the robbery with aggravation charge. The trial court declared a mistrial as to this charge, discharged the jury, and instructed the county attorney to have the aggravated robbery charge reassigned for trial. The trial court overruled Hirsh's motion to dismiss the charge. Subsequently, Hirsh petitioned for writ of certiorari, which was granted on May 16, 1979.

The basis of Hirsh's claim centers on the return of the jury and the subsequent developments in the reading of the verdict and polling of the jury. At the close of the evidence, the trial court submitted three verdict forms on the robbery with aggravation charge. Form No. 1 stated the jury found Hirsh "not guilty of robbery with aggravation

or robbery." Form No. 2 stated the jury found Hirsh "guilty of robbery with aggravation." Form No. 3 stated the jury found Hirsh "not guilty of robbery with aggravation but guilty of the lesser and included offense of robbery."

After the jury foreman indicated a unanimous verdict had been reached as to at least one of the counts, the jury was brought back in the courtroom and the trial court took a roll call of the jury. The trial court asked the foreman if he had signed the appropriate verdict form on the counts on which they had reached unanimous agreement. The foreman responded he had and gave the verdict form to the trial court. The trial court then read the form that stated:

We, the jury, find the Defendant not guilty of robbery with aggravation or robbery. Dated this 20th day of February, 1979. Dean Shannon, Foreperson.

The trial court then asked the jurors whether this was their verdict. All jurors answered affirmatively. The trial court asked whether anyone would say this was not their verdict, no one responded. The county attorney did not request the jury be polled.

The following exchange then occurred:

THE COURT: None of the other verdict forms are signed.

MR. SHANNON [jury foreman]: Judge, may I say something?

THE COURT: Yes, sir.

MR. SHANNON: Okay, the last --

THE COURT: I would like to declare a mistrial on the others, though.

MR. SHANNON: Okay, if it doesn't matter, okay. The last two we basically, I guess, had an agreement on those, but the reason we didn't go any further is because the next was the problem, which is the reason I didn't sign any more. I guess this doesn't matter, but --

.....

THE COURT: It matters a great deal.

.....

MR. SHANNON: Okay. There were two more charges.

THE COURT: There were two more charges. Were you unanimous for guilty or unanimous for not guilty?

MR. SHANNON: We did not vote on those two, but the consensus was that we probably would have voted not guilty on those.

MS. OLSON [juror]: Sir, I think there is a mix-up. I think there is a mix-up on the first form. I think we made a mistake and perhaps we should go back and discuss it ourselves now.

At this point, defense counsel moved to declare a mistrial. The trial court replied: "I am not sure that I can find a mistrial, Mr. Scalise, when a verdict of not guilty has been returned; and I am going to poll the jury on my own." The trial court proceeded to poll the jury without objection.

The first five jurors indicated their agreement with the verdict. The sixth juror polled stated the jury had voted not guilty to Count I, the robbery with aggravation charge. The following exchange then occurred:

MR. DOOLEY [county attorney]: I wonder if there is any possibility, Your Honor, that there was some confusion between Verdict Form 1 and 3, which is a robbery simple. I see some heads nodding. I do not wish to take over. Could No. 3 be read, Your Honor, and some inquiry made of the jury? I think that is the problem; not guilty of robbery with aggravation, guilty of robbery simple.

THE COURT: "Form No. 3. We, the jury, find the Defendant not guilty of robbery with aggravation but guilty of the lesser and included offense of robbery." That verdict is not signed.

JUROR: That is not what we voted on. We voted on Count No. I, if you will read that.

THE COURT: Well, all right. I will read your Count I, but Count I has an included offense, robbery. This is very carefully pointed out to you in the Instructions. It is apparent to me that the jury has -- at least Ms. Edwards feels that she did not understand what she was voting on, and, therefore, objects to the not guilty of robbery with aggravation or robbery; is that right?

MS. EDWARDS: Un-huh, that's right.

The trial court completed his poll of the jury. In all, three jurors indicated they did not join in the verdict returned. The trial court returned the jury for further deliberations. Subsequently, the jury returned to the courtroom and advised the trial court they were in unanimous agreement Hirsh was not guilty of Counts II and III, but they disagreed on Count I, the robbery with aggravation charge. As a result, the trial

court discharged Hirsh as to Counts II and III, declared a mistrial on Count I, and directed the county attorney to have Count I assigned for retrial. Defense counsel made no objection to this procedure.

II.

Hirsh contends the jury returned a verdict of acquittal on the robbery with aggravation charge and to try him on this charge after acquittal violates his constitutional guarantee against double jeopardy. The controlling issue is whether the jury did in fact enter a legally effective verdict of acquittal. We do not think it did for the reasons stated below.

For a verdict to be valid and effective it must be the unanimous opinion of the members of the jury. §§ 785.15, .17, The Code 1975. After a verdict is read, if a poll of the jury or inquiry by the court or clerk reveals any juror disagrees with the verdict, the jury must be sent out for further deliberations. §§ 785.15, .17, The Code 1975. Thus, the prime requirement for a valid verdict is the unanimity of the jury.

Initially, the jury here returned and indicated it had reached a verdict. Subsequently, the jury's unanimity on the verdict became open to question, and, finally, three jurors indicated their disagreement with it. Hirsh contends it is at this point where the trial court erred in returning the jury for further deliberations on the entire verdict. In his opinion, the jury was in unanimous agreement Hirsh was not guilty of robbery with aggravation, and in effect, entered a not guilty verdict on that charge, and the trial court erred in returning the jury to deliberate further on the charge rather than just on the lesser included offense of robbery.

This view is not, however, supported by the record. The jurors who indicated their disagreement in response to the trial court's question whether Form No.1 was their verdict stated:

MS. EDWARDS: Now that it's stated as such, no. That is not my verdict.

.....

MS. NELSON: No.

.....

MS. FRANKE: I misunderstood it, too. That was not my verdict.

The trial court was required at this point to return the jury for further deliberations. § 785.15, The Code 1975. See generally State v. Maxwell, 42 Iowa 208, 214 (1875); State v. Arthur, 21 Iowa 322, 325 (1866). There are no indications in these responses suggesting agreement with any verdict of not guilty. Viewed in the context they spoke, we can only assume certain jurors were confused regarding the verdict forms and the trial court correctly determined the lack of a unanimous opinion by polling and correctly returned the jury for deliberations. See State v. Morelock, 169 N.W.2d 819, 823 (Iowa 1969). Until a valid verdict is entered into the record, any preliminary actions indicating approval are without effect. State v. Novak, 109 Iowa 717, 738-39, 79 N.W. 465, 472-73 (1899).

The only evidence presented by Hirsh to support his contention is the testimony of the jury foreman, Dean Shannon. In the hearing on the motion to dismiss, Shannon testified the jury agreed defendant was not guilty of robbery with aggravation. Only an unambiguous, unanimous jury verdict returned in open court may acquit a defendant. See Morelock, 169 N.W.2d at 823. Here, the trial court correctly declared a mistrial after the jury returned for the second time deadlocked on the robbery with assault charge. Since the mistrial was declared because the jury could not reach a verdict, Hirsh was not acquitted of the charge and a subsequent prosecution is not barred on double jeopardy grounds. See Wade v. Hunter, 336 U.S. 684, 688-89, 69 S. Ct. 834, 836-37, 93 L. Ed. 974, 978 (1949); State v. Nelson 234 N.W.2d 368, 374-75 (Iowa 1975).

We affirm the trial court's judgment and order the writ of certiorari annulled.

AFFIRMED.