IN THE COURT OF APPEALS OF IOWA

No. 4-350 / 93-1714

FILED
OCT 25 1994
CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff,

vs.

IOWA DISTRICT COURT FOR BLACK HAWK COUNTY,

Defendant.

Appeal from the Iowa District Court for Black Hawk County, Robert E. Mahan, Judge.

The State filed a petition for writ of certiorari and an appeal from the district court order granting the defendant's motion for judgment notwithstanding the verdict after his conviction, following a jury trial, of theft in the second degree. **WRIT SUSTAINED AND CASE REMANDED.**

Bonnie J. Campbell, Attorney General, Mary Tabor, Assistant Attorney General, Thomas J. Ferguson, County Attorney, Linda A. Hall, Assistant County Attorney, for appellant.

Linda Del Gallo, Appellate Defender, B. John Burns and John F. Fatino, Assistant State Appellate Defenders, for appellee.

Heard by Donielson, C.J., and Cady and Huitink, JJ.

DONIELSON, C.J

Following a jury verdict finding him guilty of theft in the second degree, defendant Greg Riles filed a motion for judgment notwithstanding the verdict, a motion for new trial and a motion in arrest of judgment. The trial court granted the motion for judgment notwithstanding the verdict and dismissed the case. The State filed a notice of appeal and petition for writ of certiorari. By order of the Iowa Supreme Court these matters were joined and subsequently transferred to the Iowa Court of Appeals. Upon our review of the record we conclude the writ should be sustained and the case remanded for further proceedings consistent with this opinion.

I. Judgment Notwithstanding Verdict.

In his brief Riles concedes the district court was without authority to enter a judgment notwithstanding the verdict in a criminal proceeding. State v. Sullivan, 215 N.W.2d 491, 493 (Iowa 1974); State v. Deets, 195 N.W.2d 118, 125 (Iowa 1972). After a guilty verdict is returned relief for a defendant is limited to a motion in arrest of judgment, a motion for new trial and the postconviction procedures set forth in chapter 822 of the Iowa Code. State v. Marti, 290 N.W.2d 570, 582 (Iowa 1980). The trial court had no authority to enter a postconviction judgment of acquittal and the State's petition for writ of certiorari is sustained.

II. Rule 27(1) Dismissal -- Rule 23(2) New Trial.

Recognizing the judgment notwithstanding the verdict cannot be sustained on appeal, Riles alternatively argues this court should treat the district court's ruling as a sua sponte Iowa R. Crim. P. 27(1) dismissal or a grant of his Rule 23(2) motion for a new trial. This is not a case in which the trial court reserved its decision on Riles' motions for judgments of acquittal and could have granted them after the jury returned its verdict. See Iowa R. Crim. P. 18(8)(b); Marti, 290 N.W.2d at 582. This record does not support treating the trial court's post-verdict conduct as the equivalent of a Rule 27(1) dismissal.

The State contends the trial court "essentially" overruled Riles' motion for a new trial and this case should be remanded for the entry of a judgment on the jury's verdict of guilty. We have reviewed the trial court's ruling and do not agree. The trial court granted Riles' motion for judgment notwithstanding the verdict in lieu of ruling on the motion for a new trial. While the trial court concluded it could not consider evidence about jury deliberations in ruling on a motion for a new trial, it did not conclusively determine whether the motion should be granted. In fact, language in the trial court's ruling appears to indicate it might have ruled in favor of one of the four grounds Riles had set forth in support of his motion for a new trial had it not otherwise opted to grant his motion for judgment notwithstanding the verdict.

The grant or denial of a new trial is committed to the sound discretion of the trial court. State v. Belt, 505 N.W.2d 182, 184 (Iowa 1993). We will not presume to guess how the trial court would have ruled on Riles' motion and remand this case for entry of a definitive ruling by the trial court on Riles' motion for a new trial.

In conclusion, the State's petition for writ of certiorari is sustained as the trial court's entry of a judgment of acquittal was totally void and of no legal force or effect. Deets, 195 N.W.2d at 125. A reversal and remand is appropriate and will not subject Riles to double jeopardy. See id. This case is remanded with instructions for the trial court to rule on Riles' motion for a new trial and to enter a judgment of conviction, Iowa R. Crim. P. 22(1), if the motion is denied.

WRIT SUSTAINED AND CASE REMANDED.