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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000199-MR

ROBERT ALVEY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JUDITH E. McDONALD-BURKMAN, JUDGE
ACTION NO. 02-CR-002690

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, JOHNSON, AND McANULTY, JUDGES.

GUIDUGLI, JUDGE: Robert Alvey appeals from a conviction of escape in the second degree and of being a persistent felony offender in the first degree following a jury trial. On appeal, he presents the novel issue that this Court should review his first trial that ended in a mistrial based upon a hung jury. He argues that there was insufficient evidence presented by the Commonwealth in the first trial and thus, he was entitled to a judgment of acquittal, which would have prohibited the Commonwealth from trying him a second time. We affirm.

Alvey was indicted by the Jefferson County Grand Jury on November 25, 2002, on charges of robbery, first degree (KRS 515.020), burglary, first degree (KRS 511.020), burglary, second degree (KRS 511.030), robbery, second degree (KRS 515.030), burglary, third degree (KRS 511.040), escape, second degree (KRS 520.030), criminal mischief, third degree (KRS 512.040), and being a persistent felony offender, first degree (KRS 532.080). Upon his motion, Alvey was granted a separate trial on the escape and PFO charges. A jury trial on these charges was held on July 1 and July 2, 2003. At this trial, the Commonwealth called only one witness, Officer Maurice Raque. Officer Raque testified that Alvey was an inmate at the Community Correctional Center (hereinafter "CCC") on June 12, 2003, and had signed himself out on work release prior to the start of Officer Raque's shift and had not returned. Officer Raque also testified that he was advised by his shift supervisor to sign a warrant against Alvey for escape and that he did so that night. Raque also testified that eventually Alvey was arrested on the escape charge on September 24, 2002. Following the close of the Commonwealth's case and after the defense rested (the defense did not call any witnesses), Alvey moved the court for a directed verdict of acquittal, which was denied each time. The case was then submitted to the jury. During deliberations, the jury sent out several questions, which the court indicated it

could not answer. After two hours of deliberation, the jury sent out a note that stated, "We are hung? 10-2 no chance of changing the 2 – without more documents. What to do? Help!" The jury then returned to the courtroom and after further discussions the court declared a mistrial.

Alvey then filed a motion for a judgment notwithstanding the verdict. In the motion, Alvey requested the court to enter a judgment of acquittal because the Commonwealth had presented insufficient evidence to sustain a conviction. In his motion, Alvey alleged, in part, the following:

> The evidence in this case, when viewed in a light most favorable to the Commonwealth's position, shows merely that someone signed the name of "Robert Alvey" on the morning of June 12, 2002 and that Robert Alvey did not sign in during Officer Raque's shift on the same date. There is no evidence, in any way, that this is the same person named in the complaint, or moreover, that Robert Alvey was even serving time in the Community Corrections Center on June 12, 2002.
>
> Furthermore, the evidence supporting the elements of the charge of Escape, itself, is insufficient to sustain a conviction. The Commonwealth presented testimonial evidence of the desk officer on duty, Officer Raque, the evening of June 12, 2002; he, in no way, could show (1) that the defendant even left the facility at all that day, (2) the time period which the defendant was allowed to be away from the facility, or (3) the reason for which the defendant was allowed to be a way (sic) from the facility. The Commonwealth's evidence was wholly

insufficient to me[et] the definition of Escape as given by the court to the jury.

12. Retrial in this instance is barred under the Double Jeopardy Clauses of the Firth (sic) Amendment to the United States Constitution and Section Thirteen of the Kentucky Constitution. The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence, which it failed to muster in the first proceeding. *Burks v. United States*, 437 U.S. 1, 11 (1978). In *Burks*, the Supreme Court held that Double Jeopardy applies when an appellate court overturns a conviction due to a failure of proof at trial. It further went on to say that "the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever profit could assemble." Id. at 16.

13. In this instance, the hung jury resulted, as indicated by its note, from the Commonwealth's lack of proof. Specifically, two jurors were unwilling to convict without more evidence from the Commonwealth; the note, in no uncertain terms, stated that a verdict could not be reached due to lack of documentation.

14. Focusing on the jury's note alone, in no other instance would retrial fly more in the face of the basic principles of the Double Jeopardy clause. The Double Jeopardy clause does not allow "the State…to make repeated attempts to convict an individual for an alleged offense", since "[t]he constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense". *Green v. United States*, 355 U.S. 184, 187 (1957). To allow the Commonwealth to retry the case, rewards it for its failure to properly prosecute the case the first time.

> Fault for not having proper witnesses and proof lies solely with the Commonwealth.
>
> **WHEREFORE** the defendant, Robert Alvey, by his counsel, respectfully moves the court to enter a judgment of acquittal in this case.[1]

The court denied that motion on July 17, 2003. Prior to the start of the second jury trial on December 16, 2003, Alvey orally renewed this motion. Again, the motion was denied. Following the retrial, in which the Commonwealth called numerous witnesses and introduced several exhibits, Alvey was convicted of both the escape and PFO charges. The court followed the jury recommendation and imposed a ten (10) year sentence. This appeal followed.

In this appeal, Alvey does not present any agreement as to the second jury trial. His contention is that the Commonwealth failed to present sufficient evidence of guilt in the first jury trial. And he contends the Commonwealth should not benefit from the mistrial and be given an opportunity to correct its mistakes and failures of the first trial to his detriment. Alvey argues that the trial court and the appellate courts are authorized to evaluate the sufficiency of evidence presented at trial and to enter a judgment of acquittal after a jury has become deadlocked and a mistrial has been granted. Alvey's position is that the trial court erred in not granting

[1] Trial record, pp. 195-196.

his motion for a judgment of acquittal following his first trial under RCr 10.24.

In support of his argument that an appellate court can review the sufficiency of evidence following a mistrial, Alvey cites primarily Burks v. United States, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978) and Nichols v. Commonwealth, 657 S.W.2d 932 (Ky. 1983). Burks involved a case in which the defendant was found guilty by a jury after the trial court had denied his motion for a judgment of acquittal at the conclusion of the trial. As in this case, the trial court also denied a motion for a new trial. Burks contended that the evidence was insufficient to support a guilty verdict. On appeal, the Court of Appeals agreed with Burk that the evidence was insufficient to support a verdict and reversed his conviction. However, the appellate court then remanded the case to the district court "for a determination of whether a directed verdict of acquittal should be entered or a new trial entered." Burks, 57 L.Ed.2d at 5. The Supreme Court of the United States framed the issue before it as "whether an accused may be subjected to a second trial when conviction in a prior trial was reversed by an appellate court solely for lack of evidence to sustain a jury's verdict." Id. at 4. In reversing the Court of Appeals, Chief Justice Burger, writing for an unanimous Court, (Justice

Blackmun took no part in the consideration or decision of the case) stated:

> The Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding [footnote omitted]. This is central to the objective of the prohibition against successive trials. The Clause does not allow "the State . . . to make repeated attempts to convict an individual for an alleged offense," since "[t]he constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense." [Citations omitted].
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> . . .
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> In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished. See Note, Double Jeopardy: A New Trial After Appellate Reversal For Insufficient Evidence, 31 U Chi L Rev 365, 370 (1964).
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> The same cannot be said when a defendant's conviction has been overturned

> due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice for it has been given one fair opportunity to offer whatever proof it could assemble. [Footnote omitted]. Moreover, such an appellate reversal means that the government's case was so lacking that it should not have even been submitted to the jury. Since we necessarily afford absolute finality to a jury's verdict of acquittal – no matter how erroneous its decision – it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.
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> . . .
>
> While this is not the appropriate occasion to re-examine in detail the standards for appellate reversal on grounds of insufficient evidence, it is apparent that such a decision will be confined to cases where the prosecution's failure is clear. [Footnote omitted]. Given the requirements for entry of a judgment of acquittal, the purposes of the Clause would be negated were we to afford the government an opportunity for the proverbial "second bite at the apple."

Id. at 9, 10, 12 and 13.

In Nichols, supra, cited by Alvey, the Kentucky Supreme Court reviewed a denial of a motion for a directed verdict in a first trial that ended in a mistrial following a second trial, relying on Burks. In addressing the issue of the motion for directed verdict made in the first trial, the Court held:

> Rather, appellant contends that because he was entitled to a directed verdict at the first trial, he cannot be tried again. We have carefully reviewed the evidence at the first trial and hold that appellant was not entitled to a directed verdict of acquittal.
>
> The motion for directed verdict, made at the close of the Commonwealth's case and again at the completion of all of the evidence, could not be sustained unless the evidence was such that a reasonable juror could not find guilt beyond a reasonable doubt under any theory of the case on the evidence presented. *Trowel v. Commonwealth*, Ky., 550 S.W.2d 530 (1977).

Id. at 933.

The Court, however, also held that "[t]he granting of a mistrial because the jury is unable to agree is a classic example of when a retrial can be had...."

The Commonwealth contends that because Alvey's first trial ended in a mistrial he is not entitled to a review of the sufficiency of the evidence issue raised at and following his first trial. In support of its contention, the Commonwealth cites Richardson v. United States, 468 U.S. 317, 82 L.Ed.2d 242, 104 S.Ct. 3081 (1984), and several other federal and state cases. The Richardson Court distinguished its holding from that of Burks in that in Burks a verdict had been rendered where as in Richardson the trial had ended in a mistrial when the jury could not reach a verdict. Specifically, the Richardson Court stated:

Turning to the merits of petitioner's double jeopardy claim, we reject it. He asserts that if the Government failed to introduce sufficient evidence to establish his guilt beyond a reasonable doubt at his first trial, he may not be tried again following a hung jury. While petitioner bases his contention on Burks v. United States, 437 US 1, 57 L.Ed2d 1, 98 S Ct 2141 (1978), we do not agree that Burks resulted in the sweeping change in the law of double jeopardy which petitioner would have us hold. In Burks we held that once a defendant obtained an unreversed appellate ruling that the Government had failed to introduce sufficient evidence to convict him at trial, a second trial was barred by the Double Jeopardy Clause. Id., at 18, 57 L Ed 2d 1, 98 S Ct 2141. We overruled prior decisions such as Bryan v. United States, 338 US 552, 94 L Ed 335, 70 S Ct 317 (1950), in which we held that if a defendant successfully sought reversal of his conviction on appeal because of insufficient evidence, retrial following such reversal was not barred by the Double Jeopardy Clause.

The Court in Burks did not deal with the situation in which a trial court declares a mistrial because of a jury's inability to agree on a verdict. Thus, petitioner's reliance on Burks in the context of the present case can be supported only if that decision laid down some overriding principle of double jeopardy law that was applicable across the board in situations totally different from the facts out of which it arose. But it is quite clear that our decision in Burks did not extend beyond the procedural setting in which it arose. Where, as here, there has been only a mistrial resulting from a hung jury, Burks simply does not require that an appellate court rule on the sufficiency of the evidence because retrial might be barred by the Double Jeopardy Clause. See Justices

of Boston Municipal Court v. Lydon, 466 US 294, 308-310, 80 L Ed 2d 311, 104 S Ct 1805 (1984).

. . .

We think that the principles governing our decision in Burks, and the principles governing our decisions in the hung jury cases, are readily reconciled when we recognize that the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy. See Justices of Boston Municipal Court, supra,; Price v. Georgia, 398 US 323, 329, 26 L Ed 2d 300, 90 S Ct 1757 (1970). Since jeopardy attached here when the jury was sworn, see United States v. Martin Linen Supply Co., 430 US 564, 569, 51 L Ed 2d 642, 97 S Ct 1349 (1977), petitioner's argument necessarily assumes that the judicial declaration of a mistrial was an event which terminated jeopardy in his case and which allowed him to assert a valid claim of double jeopardy.

But this proposition is irreconcilable with cases such as Perez [United States v. Perez, 9 Wheat 579, 6 L.Ed. 165 (1824)] and Logan[v. United States, 144 U.S. 263, 36 L.Ed. 429, 12 S.Ct. 617 (1892)], and we hold on the authority of these cases that the failure of the jury to reach a verdict is not an event which terminates jeopardy. Our holding in Burks established only that an appellate court's finding of insufficient evidence to convict on appeal from a judgment of conviction is for double jeopardy purposes, the equivalent of an acquittal; it obviously did not establish, consistently with cases such as Perez, that a hung jury is the equivalent of an acquittal. Justice Holmes' aphorism that "a page of history is worth a volume of logic" sensibly applies here, and we reaffirm the proposition that a trial court's declaration

> of a mistrial following a hung jury is not an event that terminates the original jeopardy to which petitioner was subjected. [Citations omitted].

Id. at 82 L.Ed.2d 249, 250, 251.

Similarly the case of Commonwealth v. Ray, 982 S.W.2d 671 (Ky.App. 1998), held that second trial is proper following a mistrial when a jury fails to reach a verdict. In Ray, this Court held:

> Jeopardy attaches when a jury is impaneled and sworn. *Lear v. Commonwealth* Ky., 884 S.W.2d 657, 661 (1994), *citing Crist v. Bretz*, 437 U.S. 28, 98 S.Ct. 2156 57 L.Ed.2d 24 (1978). Once jeopardy attaches, prosecution of a defendant before a jury other than the original jury or contemporaneously-impaneled alternates is barred unless 1) there is a "manifest necessity" for a mistrial or 2) the defendant either requests or consents to a mistrial. KRS 505.030(4); *Leibson v. Taylor*, Ky., 721 S.W.2d 690, 693 (1986); *United States v. Dinitz*, 424 U.S. 600, 606-07, 96 S.Ct. 1075, 1079, 47 L.Ed.2d 267 (1976). A well-established situation of "manifest necessity" involves a hung jury or a jury unable to reach a verdict. *Richardson v. United States*, 468 U.S. 317, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984); *Gray v. Goodenough*, Ky., 750 S.W.2d 428, 429 (1988). Thus, the principle of double jeopardy does not bar a subsequent retrial where the jury has failed to reach a verdict in the initial trial.

Id. at 673.

The issue before this Court is two-fold. First, the question is can this Court review the issue raised in the first trial

regarding the sufficiency of the evidence. Second, if we decide the answer to question number one in the affirmative, then did the Commonwealth produce sufficient evidence in the first case to overcome a motion for acquittal. We believe the answer to the first question is no. Despite his arguments to the contrary, we believe Alvey is not entitled to a review of his motion, although properly and timely filed in his first trial. It is clear from the numerous cases we have reviewed that a properly granted mistrial based upon a jury's failure to reach a verdict does not result is double jeopardy. As stated in Richardson, Ray and other similar cases, a mistrial resulting from a hung jury is considered to be a termination which is manifestly necessary. See KRS 505.030(4). The result being that from a legal standpoint it is as if the first trial did not occur. Neither party is considered prejudiced and neither party has a right to appeal rulings, motions or issues that occurred in that trial. We can understand Alvey's frustration that resulted from the hung jury. In the second trial, the Commonwealth obviously learned that it could not base its case solely on Officer Raque's testimony. Instead, it produced numerous witnesses and documents which left no doubt as to Alvey's guilt. This is clear from the fact that Alvey can find no appealable issue as to the second trial. This result, as difficult as it is for Alvey to accept, does not violate any

rights he claims he is entitled to, including due process or double jeopardy.

By answering Alvey's first issue in the negative, his second argument becomes moot. However, we note that this Court has reviewed the entire video transcript of the first trial and believe the Commonwealth had presented sufficient evidence to overcome a motion for directed verdict. See Commonwealth v. Sawhill, 660 S.W.2d 3 (Ky. 1983); Commonwealth v. Benham, 816 S.W.2d 186 (Ky. 1999). While defense counsel did an admirable job by creating doubt in the minds of two jurors, Officer Raque's testimony was sufficient to overcome a motion for directed verdict.

For the foregoing reasons, we affirm the judgment of conviction entered by the Jefferson Circuit Court.

JOHNSON, JUDGE, CONCURS.

McANULTY, JUDGE, CONCURS IN RESULT ONLY.

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