Washington and Lee Law Review

Volume 21 | Issue 2 Article 11

Fall 9-1-1964

Discharge Of Hung Jury

DISCHARGE OF HUNG JURY

The maxim that "no person shall, for the same offense, be twice put in jeopardy of life or limb"[1] is an established[2] part of American jurisprudence. This rule, however, is subject to recognized exceptions.

It is well-settled that if a jury, after due deliberation, is unable to agree upon a verdict, the absolute necessity exception[3] may be applied

---

[1]Pa. Const. art. I, § 10.

The double jeopardy clause of the fifth amendment of the Federal Constitution is not applicable to the states through the fourteenth amendment. Barktus v. Illinois, 359, U.S. 121 (1959); Brock v. North Carolina, 344 U.S. 424 (1953); Palko v. Connecticut, 302 U.S. 319 (1937); United States ex rel. Melton v. Hendrick, 218 F. Supp. 293 (E.D. Pa. 1963); Robb v. State, 190 Md. 641, 60 A.2d 211 (1948); State v. Berry, 298 S.W.2d 429 (Mo. 1957); State v. Robinson, 100 Ohio App. 466, 137 N.E.2d 141 (1956); Commonwealth ex rel. Backus v. Cavell, 186 Pa. Super. 48, 140 A.2d 355 (1958).

The double jeopardy provision is applicable only to criminal prosecutions. State v. Puckett, 92 Ariz. 407, 377 P.2d 779 (1963); City of Macon v. Massey, 214 Ga. 589, 106 S.E.2d 23 (1958); State v. Labato, 7 N.J. 137, So. A.2d 617 (1961); McGillicuddy v. Monaghan, 201 Misc. 650, 112 N.Y.S.2d 786 (Sup. Ct. 1952). There is, however, a division of authority as to the moment jeopardy attaches. The majority of jurisdictions hold that jeopardy attaches when a legally constituted jury has been impaneled and sworn. E.g., Crawford v. United States, 285 F.2d 661 (D.C. Cir. 1960); Artrip v. State, 41 Ala. App. 492, 136 So. 2d 574 (1962); Hutson v. Superior Court, 203 Cal. App. 2d 687, 21 Cal. Rptr. 753 (Dist. Ct. App. 1962); Ferguson v. State, 219 Ga. 33, 131 S.E.2d 538 (1963); State v. Slorah, 118 Me. 203, 106 Atl. 768 (1919); People ex rel. Rosebrough v. Casey, 251, 867, 297 N.Y.S. 13 (1937); State v. Whitman, 93 Utah 557, 74 P.2d 696 (1937).

It has been held, however, that jeopardy does not attach until there has been an acquittal or conviction. State v. Buente, 256 Mo. 227, 165 S.W. 340 (1914); State v. Van Ness, 82 N.J.L. 181, 83 Atl. 195 (Sup. Ct. 1912). Under either view, therefore, an arraignment and plea alone do not place the defendant in jeopardy. Maloney v. Maxwell, 174 Ohio St. 84, 186 N.E.2d 728 (1962); State v. Fish, 20 Wis. 2d 431, 122 N.W.2d 381 (1963).

A majority of jurisdictions apply the double jeopardy clause to felonies, minor crimes, and misdemeanors. E.g., Ex parte Lange, 85 U.S. (18 Wall.) 163 (1873); United States v. Farwell, 76 F. Supp. 35 (D. Alaska 1948); State v. O'Brien, 106 Vt. 97, 170 Atl. 98 (1934).

[2]A prohibition against double jeopardy is contained in the constitutions of all but five states. Brock v. North Carolina, 344 U.S. 424, 435 (1953). The other five states are: Connecticut: Kohlfuss v. Warden of Conn. State Prison, 149 Conn. 692, 183 A.2d 626 (1962); Maryland: Moquin v. State, 216 Md. 524, 140 A.2d 914 (1958); Massachusetts: Commonwealth v. McCan, 277 Mass. 199, 178 N.E. 633 (1931); North Carolina: State v. Brickhead, 256 N.C. 494, 124 S.E.2d 838 (1962); and Vermont; State v. O'Brien, 106 Vt. 97, 170 Atl. 98 (1934). All these states prohibit double jeopardy as part of their common law.

[3]The Supreme Court of the United States adopted the exception to the federal rule in United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824), wherein a trial involving a capital offense was terminated prematurely due to the failure of the jury to reach a verdict. In giving the opinion of the Court, Mr. Justice Story stated,

and the jury may be discharged.[4] The decision effectuating the discharge is within the sound discretion of the trial court.[5] Such a discharge based on necessity does not preclude a retrial of the accused for the same offense.[6]

A different situation is presented, however, where, the trial court abuses its discretion in discharging a jury due to its inability to reach agreement. In such cases, it is held that upon a retrial, the accused may successfully plead former jeopardy.

This situation arose recently in the Pennsylvania case of *Commonwealth v. Baker*.[7] The defendant was indicted and tried for murder in the first degree. Approximately nine and one-half hours after the jury retired to deliberate on its verdict, it returned to the courtroom in disagreement. Upon being asked by the court if there were any possibility that a verdict might be reached, the forelady said that the jury was hopelessly divided and asked that the court declare a mis-

---

"We think that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." 22 U.S. (9 Wheat.) at 580.

The exception is inapplicable, however, where, in a prosecution for a felony, the defendant is absent at the time of discharge through no fault of his own. In such a case, a plea of double jeopardy will be substained. State v. Sommers, 60 Minn. 90, 61 N.W. 907 (1895).

[4]Keerl v. Montana, 213 U.S. 135 (1909); Dreyer v. Illinois, 187 U.S. 71 (1902); Logan v. United States, 144 U.S. 263 (1892); United States v. Lynch, 94 F. Supp. 1011 (N.D. Ga. 1950); State v. Woodring, 386 P.2d 851 (Ariz. 1963); People v. Sullivan, 101 Cal. App. 2d 322, 225, P.2d 645 (Dist. Ct. App. 1950); Commonwealth v. Cody, 165 Mass. 133, 42 N.E. 575 (1896); People v. Pline, 61 Mich. 247, 28 N.W. 83 (1886); State v. Eisentrager, 76 Nev. 437, 537 P.2d 306 (1960); State v. Brooks, 59 N.M. 130, 297 P.2d 1048 (1955) Strickland v. State, 169 Tex. Crim. 550, 336 S.W.2d 185 (1960).

[5]Rothaus v. United States, 319 F.2d 528 (5th Cir. 1963); United States v. Potash, 118 F.2d 54 (2d Cir. 1941); Hyde v. State, 196 Ga. 475, 26 S.E. 2d 744 (1943); People v. Touhy, 361 Ill. 332, 197 N.E. 849 (1935); State v. Critelli, 237 Iowa 1271, 24 N.W.2d 113 (1946); State v. Block, 119 N.J.L. 277, 196 Atl. 225 (1938); Mack v. Commonwealth, 177 Va. 921, 15 S.E.2d 62 (1941).

California follows a stricter rule than the United States Supreme Court in the discretion given to the trial judge to discharge juries without leading to double jeopardy. See Cardeas v. Superior Court, 56 Cal. 2d 273, 363 P.2d 889, 14 Cal. Rptr. 657 (1961).

The authority to discharge a jury rests within the sound discretion of the trial court, which does not have to follow the wishes of the jury. United States v. Haskel, 26 Fed. Cas. 207 (No. 15321) (C.C.E.D. Pa. 1823).

[6]People v. Greer, 30 Cal. 2d 589, 184 P.2d 512 (1947); People v. Demes, 33 Cal. Rptr. 896 (Dist. Ct. App. 1963); People v. Deerman, 169 Cal App. 2d 808, 337 P.2d 853 (Dist. Ct. App. 1959); State v. Berry, 298 S.W.2d 429 (Mo. 1957); State v. Roller, 29 N.J. 339, 149 A.2d 238 (1959).

[7]413 Pa. 105, 196 A.2d 382 (1964).

trial. The court complied with the request over the objection of the Commonwealth, and with neither the consent nor objection of the defendant.

When again prosecuted for murder in the first degree, the defendant filed a plea of double jeopardy which was sustained. On appeal, the Commonwealth contended that the declaration of the mistrial was a valid exercise of judicial discretion, and that the defendant, by his silence, had consented to the discharge of the jury. The Supreme Court of Pennsylvania affirmed the lower court on the ground that discharge of the jury at the first indication of disagreement is an arbitrary exercise of discretion. Relying on *Commonwealth v. Melton*,[8] the court reasoned that since an accused cannot be tried for a criminal offense of which he has been previously acquitted, and since the trial court's arbitrary action was, in effect, an acquittal, jeopardy had attached to the defendant, and he could not be tried again for first degree murder.[9]

In rejecting the second contention of the Commonwealth that the defendant, by remaining silent, tacitly consented to the discharge of the jury, the court stated that "the maxim that silence gives consent should not be applied to a situation as grave and a constitutional right as important as this."[10] Therefore, while most jurisdictions hold that the protection of the former jeopardy doctrine is personal and may be waived,[11] the failure to object to a discharge of the jury does not constitute such a waiver.[12]

---

[8]406 Pa. 343, 178 A.2d 728 (1962).

[9]Kansas, however, has said that when a mistrial is declared due to the inability of a jury to agree upon a verdict, "the defendant has not been in jeopardy" so that he may be subsequently tried for the same offense. See Struble v. Gnadt, 164 Kan. 587, 191 P.2d 179, 183 (1948).

[10]Commonwealth v. Baker, 413 Pa. 105, 196 A.2d at 387. See Davis v. State, 144 Tex. Crim. 474, 164 S.W.2d 686 (1942).

[11]E.g., Brooks v. State, 152 So. 2d 441 (Ala. App. 1963); People v. Allen, 18 App. Div. 2d 840, 238 N.Y.S.2d 70 (1963); Pasternack v. Block, 35 Misc. 2d 16, 230 N.Y.S.2d 259 (Sup. Ct. 1962).

[12]E.g., Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949); Commonwealth v. Gray, 249 Ky. 36, 60 S.W.2d 133 (1933); Davis v. State, 144 Tex. Crim. 474, 164 S.W.2d 686 (1942).

In New Mexico, however, a plea of double jeopardy is properly overruled unless the accused objects to the discharge of the jury. State v. Woo Dak San, 35 N.M. 105, 290 Pac. 322 (1930).

If the accused moves for a mistrial, he has manifested his consent and waived his right to plead double jeopardy. United States v. Burrell, 324 F.2d 115 (7th Cir. 1963) (defendant moved for mistrial because two witnesses, who, by court order, were supposed to be separated, had discussed the case prior to the trial); United States v. Harriman, 130 F. Supp. 198 (S.D.N.Y. 1955) (defendant moved for mistrial

The principal case appears to apply a more strict rule than the Second Circuit did in *United States v. Cording*,[13] which held that immediate discharge of the jury after its initial report of disagreement was not an abuse of the court's discretion. The *Cording*[14] case is distinguishable, however, because the defendant was on trial for illegally selling heroin, which is a noncapital offense. The principal case involved the capital offense of first degree murder. Thus, as the gravity of the offense increases, the courts require a stronger showing of necessity to justify the discharge of a jury when it is unable to agree upon a verdict.

The cases are in substantial agreement that when a jury disagrees upon the verdict to be rendered,[15] or upon the penalty to be imposed[16] and is validly discharged, the disagreement, in effect, nullifies the trial. The problem, therefore, is in determining whether the discharge is an abuse of discretion. In this determination, no concrete formula can be applied, and the court's discretionary power is subject only to the restraint that it must not be arbitrary.[17]

The decision to discharge a jury, which is unable to reach a verdict, however, is not absolutely within the discretion of the trial court. The defendant's valued right to have his trial completed and punishment assessed by the particular jury that was charged with his deliverance is protected by the power of appellate review over the trial court's decision. If a clear abuse of discretion is proved by the defendant, he is entitled to a reversal.[18] In several cases, a clear abuse of discretion has been found.

---

because of prejudicial variance between indictment and proof); Kamen v. Gray, 169 Kan. 664, 220 P.2d 160 (1950) (defendant moved for mistrial because of erroneous admission of a police report); State v. Wolak, 33 N.J. 399, 165 A.2d 174 (1960) (defendant moved for a mistrial because of alleged misconduct of the prosecutor); Gang v. State, 191 Tenn. 468, 234 S.W.2d 997 (1950) (mistrial declared with agreement of defendant when jury was unable to agree upon a verdict).

Hipple v. State, 80 Tex. Crim. 531, 191 S.W. 1150 (1916), held that the consent of defense counsel to the granting of the State's motion for a mistrial would not be binding on the defendant who remained silent.

[13]290 F.2d 392 (2d Cir. 1961).

[14]Ibid.

[15]State v. Woodring, 386 P.2d 851 (Ariz. 1963); State v. King, 121 Kan. 139, 245 Pac. 1018 (1926); People v. Bishop, 38 Misc. 2d 106, 238 N.Y.S.2d 107 (Sup. Ct. 1962); Usary v. State, 172 Tenn. 305, 112 S.W.2d 7 (1938).

[16]Villarreal v. State, 172 Tex. Crim. 213, 355 S.W.2d 516 (1962).

[17]Yarbrough v. State, 90 Okla. Crim. 74, 210 P.2d 375 (1949).

[18]United States v. Potash, 118 F.2d 54 (2d Cir. 1941); Kastel v. United States, 23 F.2d 156 (2d Cir. 1927); Hyde v. State, 196 Ga. 475, 26 S.E.2d 744 (1943); State v. Brooks, 59 N.M. 130, 279 P.2d 1048 (1955); Murphy v. State, 149 Tex. Crim. 624, 198 S.W.2d 98 (1946); State v. Hemmenway, 120 N.W.2d 561 (S.D. 1963).

In *Grigsby v. State*,[19] where the trial judge declared a mistrial after the jury had deliberated approximately an hour and forty-five minutes, the court was found to have abused its discretion as to the deliberation time allowed the jury and as to the time when the jury should have been discharged. A jury, therefore, must deliberate until it is improbable that further deliberation will result in a verdict.[20] Extensive deliberation, however, may exceed the demands of public justice for as the deliberation time lengthens, the risk of coercion is greatly increased. Therefore, when, within a reasonable time, it becomes apparent to the trial court that agreement, if reached, may be coerced, the court should grant a mistrial and discharge the jury.[21]

Although the deliberation time involved is a factor to be considered,[22] it is not necessarily controlling. *State v. Reddick*[23] held that discharging a jury which had deliberated only two and one-half hours was a valid exercise of judicial discretion. Also, it has been held[24] that a deliberate decision by a trial judge to have a jury discharged by the minute clerk if the jury was unable to agree upon a verdict within five hours will not support a plea of double jeopardy.[25]

The limitation on the scope of the court's discretion, however, prevents discharging the jury merely upon an extra-judicial report from the jury that it is unable to agree upon a verdict. In *People v. Cage*,[26] the sheriff was requested by the court to ask the jury, while they were deliberating, if they had reached a verdict. Due to a negative answer, the court was adjourned for the term which was to end by operation of law on the ensuing day. In holding that the court's action provided grounds for a successful plea of double jeopardy, the Supreme Court of California said that there is "no necessity for the final adjournment of the Court before the fixed limit of the term is reached."[27] The court also stated that if the jury could not reach a verdict, it

---

[19]158 Tex. Crim. 484, 257 S.W.2d 110 (1953).

[20]State v. Whitman, 93 Utah 557, 74 P.2d 696 (1937).

[21]Commonwealth v. Kent, 355 Pa. 146, 49 A.2d 388 (1946).

[22]Green v. State, 167 Tex. Crim. 330, 320 S.W.2d 139 (1958).

[23]76 N.J. Super. 347, 184 A.2d 652 (1962).

[24]United States v. Fitz Gerald, 205 F. Supp. 515 (N.D. Ill. 1962).

[25]In justifying its decision, the court said "that the trial judge made a deliberate decision as to when the jury should be discharged for failure to agree, that it was the trial judge's decision and not his minute clerk's, that it was announced in the presence of counsel. It is clear that it was not done at a moment when it was believed the jury was about to acquit the defendant and therefore knowingly deprived him of an acquittal." Id. at 517-18.

[26]48 Cal. 323 (1874).

[27]Id. at 328.

should have reported that fact in the presence of the court and the defendant. The jury, therefore, should be questioned individually as to the probability of reaching a verdict,[28] and a mistrial is not justified upon a mere statement by the jury that it is unable to agree.[29] In such a case, the jurors may only be confused, and it is the duty of the trial judge to correct any misconception that the jury may have[30] and to encourage agreement upon a verdict,[31] but he must also give them an opportunity to consider the additional instructions. Discharging the jury before it sufficiently considers such additional instructions would be an abuse of the trial court's discretion.

Since the determination to declare a mistrial in jury disagreement cases is dependent upon the particular circumstances of each case, an abuse of discretion is extremely difficult to prove. It is apparent, therefore, that although a trial court may abuse its discretion in discharging a "hung jury," the majority of cases, due to insufficient evidence, reject claims of abuse of discretion.[32] In the absence of an arbitrary decision by the trial court, however, it is submitted that since guilt remains undetermined when a jury is discharged during deliberation, the ends of justice will best be met by a retrial.

ROBERT STEPHEN PLESS

---

[28]Paulson v. Superior Court, 58 Cal. 2d 1, 372 P.2d 641, 22 Cal. Rptr. 649 (1962).

[29]People v. Parker, 145 Mich. 488, 108 N.W. 999 (1906); People ex rel. Stabile v. Warden of City Prison, 202 N.Y. 138, 95 N.E. 729 (1911).

[30]Hyde v. State, 196 Ga. 475, 26 S.E.2d 744 (1933).

Moreover, in Marcus v. State, 149 Ga. 209, 99 S.E. 614 (1919), it was held that the court can recharge the jury without receiving a request from them.

[31]In seeking to impress upon the jury the desirability of reaching a verdict, the court should remember that "Juries should be left free to act without any real or seeming coercion on the part of the court, and the verdict should as to the facts, be the result of their own free and voluntary action." White v. Fulton, 68 Ga. 511, 513 (1882).

[32]E.g., United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824); Gilmore v. United States, 264 F.2d 44 (5th Cir. 1959); Dortch v. United States, 203 F.2d 709 (6th Cir. 1953); People v. Green, 100 Cal. 140, 34 Pac 630 (1893); Ex parte McLaughlin, 41 Cal. 211 (1871); People v. Westwood, 154 Cal. App. 2d 406, 316 P.2d 23 (Dist. Ct. App. 1957); State v. Eisentrager, 76 Nev. 437, 357 P.2d 306 (1960); State v. Roller, 29 N.J. 339, 149 A.2d 238 (1959); State v. Hemmenway, 120 N.W.2d 561 (S.D. 1963); Miller v. State, 167 Tex. Crim. 533, 322 S.W.2d 289 (1959).