

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

THE STATE OF NEBRASKA,

Plaintiff-Appellee,

vs.

KENNETH E. SCRIPTER, JR.,

Defendant-Appellant.

Case No. CR00-20

JUDGMENT ON APPEAL

DATE OF HEARING: June 15, 2000.

DATE OF RENDITION: June 15, 2000.

DATE OF ENTRY: Date of filing by court clerk (§ 25-1301(3)).

APPEARANCES:

For plaintiff: Thomas P. Herzog, Holt County Attorney, and Avery L. Gurnsey, Special Holt County Attorney.

For defendant: Rodney J. Palmer without defendant.

SUBJECT OF ORDER: Appeal from county court.

OPINION:

1. The record shows the following proceedings in the county court:

A. The plaintiff filed a complaint charging the defendant with one count of driving under the influence of alcohol and alleging that it constituted a third offense. The defendant entered a written “not guilty” plea. On January 10, 2000, the county court conducted a jury trial. During the defendant’s cross-examination of the arresting officer, the prosecuting attorney objected, stating: “Relevance objection, Your Honor. Other than stalling and running up his bill, I can’t understand one reason for this.” (44:22-24)

B. The trial judge took a recess to “speak with counsel in chambers.” (45:1-2) The record does not show whether the court actually consulted with counsel or, if so, the content of such discussion. Five minutes after taking the recess, the court declared a mistrial without any motion of defendant appearing in the record. The court ordered a new trial to begin on January 18, 2000. The written order regarding these proceedings was entered on January 11, 2000.

C. On January 14, 2000, the defendant filed a motion to determine enhancement prior to trial, together with another motion not relevant to this appeal. Apparently in response to the motions, the county court did not commence the second trial as originally scheduled upon the declaration of mistrial.

D. On February 8, 2000, the county court considered the defendant's motion to determine enhancement. The prosecutor objected, asserting that the matter was not ripe for adjudication and a lack of jurisdiction to consider enhancement prior to a conviction. The court took the matter under advisement.

E. By order entered on March 2, 2000, the court found "that the [c]ourt has the authority to determine the degree of enhancement prior to trial." The order did not explicitly grant the motion, but implicitly did so by setting the matter of enhancement for hearing prior to the second trial. On March 29, the court conducted the enhancement hearing and took the matter under advisement.

F. By order dated April 25, 2000, and entered on May 2, 2000, the judge recused himself from the case. The recusal order recites that the judge had previously prepared and circulated to counsel an unsigned order regarding enhancement and determined not to enter the enhancement ruling because of the recusal decision.

G. Meanwhile, the defendant had filed a plea in bar on February 8, 2000, upon which the court held a hearing on March 15, 2000. The court took the plea in bar under advisement. By order entered on March 27, 2000, the court denied the plea in bar, stating that "the statements made by the State during the course of the trial were made in the heat of trial and were not intended to cause a mistrial but were simply inappropriate remarks made in response to a line of questioning that was itself perhaps inappropriate." (T15)

H. The defendant filed his notice of appeal, with deposit of docket fee, on April 25, 2000.

2. The defendant's statement of errors assigns as error the trial court's overruling of the plea in bar and the court's decision regarding enhancement that was circulated to counsel but not entered by the clerk.

3. A decision denying a plea in bar constitutes a final order. *State v. Kula*, 254 Neb. 962, 579 N.W.2d 541 (1998); *State v. Milenkovich*, 236 Neb. 42, 458 N.W.2d 747 (1990).

4. The plea in bar was not signed by the accused nor sworn to before some competent officer as required by NEB. REV. STAT. § 29-1818 (Reissue 1995). The county court, on that basis, could have summarily denied the plea in bar. *Schrum v. State*, 108 Neb. 186, 187 N.W. 801 (1922). However, the lower court considered the merits. As the Supreme Court observed in *George v. State*, 59 Neb. 163, 80 N.W. 486 (1899), the function of the plea in bar is to bring new matters before the court, and not merely to present in another form the matters already inscribed on its records. The Court described the requirement of a verified pleading in the latter circumstances as “an idle and witless ceremony.” *Id.* at 168, 80 N.W. at _____. By failing to object on this ground to consideration of the plea in bar, the plaintiff waived any error in failing to require a verified pleading.

5. The Supreme Court described as “well-settled law” the rule that a defendant who has entered a plea of not guilty must obtain leave of the court to withdraw that plea before asserting a plea in bar on double jeopardy grounds. *State v. Kula, supra*. In other words, the county court could have disregarded and summarily denied the plea in bar because of the defendant’s failure to request leave to withdraw his not guilty plea. However, as the court proceeded to consider the merits of the plea in bar, the plea of not guilty is considered to have been constructively withdrawn. *Schrum v. State, supra* (citing *George v. State, supra*).

6. The defendant asserts statutory grounds, as well as claims that both the Nebraska Constitution and the U.S. Constitution bar a second trial. The Nebraska Supreme Court has consistently held that the double jeopardy clause of the Nebraska Constitution provides no greater protection than that of the U.S. Constitution. *State v. Kula, supra*.

7. The defendant was put on trial before a court having competent jurisdiction upon a complaint sufficient to sustain a conviction, and a jury was impaneled and sworn, and thus charged with the defendant’s deliverance. Jeopardy thereby attached to the proceeding. *Steinkuhler v. State*, 77 Neb. 331, 109 N.W. 395 (1906).

8. NEB. REV. STAT. § 29-2023 (Reissue 1995) authorizes discharge of the jury without prejudice to a later retrial upon specified conditions, the only potentially applicable condition in this case being “other accident or calamity requiring their discharge”

9. For over 100 years, the Nebraska Supreme Court has emphasized the requisite showing of necessity to discharge a jury under § 29-2023. In *State v. Shuchardt*, 18 Neb. 454, 25 N.W. 722 (1885), the Supreme Court observed:

“That the power to discharge is a most responsible trust, and to be exercised with great care, is too obvious to require illustration.” It is a discretion, said Mr. Justice Story, to be exercised only “under very extraordinary and striking circumstances.” [citation omitted] “The power,” said the same judge, “ought to be used with the greatest caution under urgent circumstances, which would render it proper to interfere.” [citation omitted] “I am of the opinion,” said Chief Justice Spencer, “that although the power of discharging a jury is a delicate and highly important trust, yet it does exist in some cases of *extreme and absolute necessity*.” [citation omitted]

Id. at 456, 25 N.W. at ___ (emphasis in original).

10. Prosecutorial misconduct forms the basis of the county court’s declaration of a mistrial. In *State v. Kula*, 254 Neb. 962, 972-73, 579 N.W.2d 541, ___ (1998), the Supreme Court noted:

[The decision in] *Oregon v. Kennedy*, 456 U.S. 667, 102 S.Ct. 2083, 72 L.Ed.2d 416 (1982), in which the Supreme Court held that where a defendant’s motion for mistrial based upon prosecutorial misconduct is granted, double jeopardy bars retrial when “the conduct giving rise to the successful motion for a mistrial was intended to provoke the defendant into moving for a mistrial.” 456 U.S. at 679. In formulating this rule, the Court specifically stated that notwithstanding its language in *United States v. Jorn*, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971), and *United States v. Dinitz*, 424 U.S. 600, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976), suggesting a broader rule, “[p]rosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant’s motion . . . does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause.” 456 U.S. at 675-76. We adopted this rule in *State v. Munn*, 212 Neb. 265, 322 N.W.2d 429 (1982). See, also, *State v. Cisneros*, 248 Neb. 372, 535 N.W.2d 703 (1995); *State v. Bostwick*, 222 Neb. 631, 385 N.W.2d 906 (1986).

11. However, in this case, the record does not reflect any motion for a mistrial by the defendant. That crucial distinction matters because a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant’s motion is necessitated by prosecutorial misconduct or judicial error. *State v. Bostwick*, 222 Neb. 631, 385 N.W.2d 906 (1986) (citing *United States v. Jorn*, 400 U.S. 470, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971)). The rationale for that rule, as the Supreme Court observed in *State v. Cisneros*, 248 Neb. 372, 378, 535 N.W.2d 703, ___ (1995), considers that:

A defendant's motion for a mistrial is a deliberate election on his part to forego his right to have his guilt or innocence determined before the first trier of fact. Absent intentional conduct on the part of the prosecutor to goad the defendant into moving for a mistrial, a defendant cannot raise the bar of double jeopardy to a second trial after succeeding in bringing the first trial to a close on his own motion.

12. Despite the absence of a motion by the defendant, the trial court must decide whether a manifest necessity to declare a mistrial exists. The discussion in *State v. Clifford*, 204 Neb. 41, 43-45, 281 N.W.2d 223, ___ (1979), aptly illustrates the applicable analysis:

Trial commenced and continued through the morning. At the noon recess one of the jurors contacted the judge about his ability to fairly and impartially carry out his duties as a juror. The court conducted a hearing and ascertained that the juror had not associated the defendant's name with his face at the time of the voir dire examination, but after sitting through a portion of the trial the juror realized that he and his wife were well acquainted with some of the defendant's family and knew some facts about the defendant that he did not realize at the time of the voir dire examination. The juror stated that he did not think he could be a fair and impartial juror.

The prosecutor offered to stipulate to a trial by the remaining jurors but defendant's counsel refused. The prosecutor moved for a mistrial without prejudice and the defendant moved for a mistrial with prejudice. The court declared a mistrial without prejudice. The defendant preserved his position prior to the retrial contending that he had been twice put in jeopardy for the same offense in violation of both the Nebraska and United States Constitutions.

The early common law rule was that the discharge of an impaneled jury in a criminal case for any cause before the verdict would sustain a plea of former jeopardy and operate practically as a discharge of the prisoner. The modern rule permits a court to discharge a jury without having the effect of acquitting the defendant in any case where the ends of justice would be otherwise defeated. A mistrial may be declared and a new trial granted where there is a manifest necessity to do so in order to serve the ends of public justice. See *Arizona v. Washington*, 434 U.S. 497, 98 S. Ct. 824, 54 L.Ed.2d 717.

Long ago the Supreme Court recognized that the discovery of the possible bias of a juror after the commencement of trial constituted manifest necessity for a mistrial, and that a subsequent retrial of a defendant did not constitute double jeopardy. In *Simmons v. United States*, 142 U.S. 148, 12 S. Ct. 171, 35 L. Ed. 968, one juror swore during voir dire that he did not know the defendant. After the jury was impaneled and evidence was taken it became known that the juror knew the defendant personally. The trial court discharged the jury without prejudice and ordered retrial. The issue on appeal was whether the subsequent retrial of the defendant constituted double jeopardy. The court held it did not and said: "There can be no condition of things in which the necessity for the exercise of this power is more manifest, in order to prevent the defeat of the ends of public

justice, than when it is made to appear to the court that, either by reason of facts existing when the jurors were sworn, but not then disclosed or known to the court, or by reason of outside influences brought to bear on the jury pending the trial, the jurors or any of them are subject to such bias or prejudice as not to stand impartial between the government and the accused.”

This court has held that where, during trial, a juror is found disqualified because of his partiality toward the defendant and his failure to disclose that fact on voir dire examination, the declaration of a mistrial without prejudice and a subsequent retrial did not constitute double jeopardy. See *Quinton v. State*, 112 Neb. 684, 200 N.W. 881. In that case we said: “The right, in the absence of statute, to exclude a juror and discharge the jury in a proper case, without prejudice to a future trial of the case on its merits, is and of necessity must be inherent in the court, within its sound discretion. This is necessary to the protection of the state, as well as for the protection of defendant. To deny it to either would be a flagrant abuse of the discretion imposed. * * *

“Thus, we conclude that the court, in considering the juror disqualified, in discharging the jury, and in sustaining the demurrer to the plea in bar, was clearly within the law, and that its acts and doings, as shown by the record, did not place defendant twice in jeopardy.”

The disqualification of the juror in the present case and the declaration of a mistrial due to the juror’s bias were manifestly necessary to serve the ends of justice and the retrial of the defendant under such circumstances did not constitute double jeopardy.

13. Thus, the role of the appellate court is to determine if the trial court abused its discretion in determining that a manifest necessity required the declaration of mistrial. *State v. Bostwick*, 222 Neb. 631, 385 N.W.2d 906 (1986).

14. An abuse of discretion occurs when the trial judge’s reasons or rulings are clearly untenable, unfairly depriving a litigant of a substantial right and denying just results in matters submitted for disposition. *In re App. of Sanitary and Improvement District No. 384*, 259 Neb. 351, ___ N.W.2d ___ (2000).

15. The trial judge determined that the prosecutor’s comment was not intended to cause a mistrial. This court finds that the record supports that conclusion.

16. In declaring a mistrial *sua sponte*, the trial judge deprived the defendant of a substantial right, i.e., the right to a determination of the cause by the initial trier of fact. *United States v. Jorn*, 400 U.S. 470, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1971); *Wade v. Hunter*, 336 U.S. 684, 69 S. Ct. 834, 93 L. Ed. 974 (1949). This court concludes that, unlike the situation in *Clifford*, the trial court did not face

a manifest necessity for a mistrial without regard to the defendant's lack of request therefor. The record does not show any bias or prejudice toward the defendant by any juror. The trial court had the option of admonishing the jury to disregard the prosecutor's comment. On the record presented, the defendant could have made a conscious, rational decision to request the court to so admonish the jury and to proceed with the trial to the initial jury. However, by acting on its own motion and without opportunity for the defendant to make such request on the record, the trial court unfairly deprived the defendant of that opportunity.

17. This court is not unmindful that the record shows that a recess of some five minutes duration was taken immediately after the misconduct occurred upon the judge's stated intention to confer with counsel in chambers. However, the substance of that conference does not appear in the record. Moreover, the journal entry signed by the trial judge does not indicate any such request or acquiescence, stating simply that "[t]he [c]ourt declared a mistrial. . . ." (T7) This court cannot assume that the defendant requested, or even acquiesced in, the granting of the mistrial.

18. Because this court concludes that the *sua sponte* decision of the county court to declare a mistrial constituted an abuse of discretion, that action terminated jeopardy and the constitutional provisions against double jeopardy bar a second trial. The court erred in failing to grant the plea in bar. The order denying the plea in bar must be reversed and the cause remanded with directions to dismiss the complaint with prejudice.

19. The defendant's other assignment of error lacks merit. The prosecutor correctly argued, on the defendant's motion to determine enhancement, that the county court lacked jurisdiction to consider enhancement prior to verdict upon the present charge. Until the jury returned a verdict determining the defendant guilty upon the present charge, any determination by the county court regarding the number or status of prior convictions would have constituted an advisory opinion.

20. While it is not a constitutional prerequisite for jurisdiction, the existence of an actual case or controversy is necessary for the exercise of judicial power. *Hron v. Donlan*, 259 Neb. 259, ___ N.W.2d ___ (2000). However persuasive the practical reasons cited by the prosecutor to avoid such determinations may be, the fundamental issue is one of jurisdiction. Prior to verdict, the court lacks jurisdiction to consider the issue of enhancement. The defendant contends the court erred in its determination of the enhancement. Because the court lacked jurisdiction to enter any order on that issue

at that point, the court's failure to determine enhancement was correct. Even though the county court determined not to enter the decision because of the trial judge's recusal, a proper result will not be reversed merely because it was reached for the wrong reason. *In re Guardianship of Lavone M.*, 9 Neb. App. 245, ___ N.W.2d ___ (2000).

JUDGMENT: IT IS THEREFORE ORDERED AND ADJUDGED that:

1. The order of the county court denying the defendant's plea in bar is reversed and the cause is remanded with direction to dismiss the complaint with prejudice.
2. The appeal from the order declining to enter order on the matter of enhancement is dismissed for lack of jurisdiction.
3. Costs on appeal are taxed to the appellee.
4. Mandate to issue as provided by law.

Signed at O'Neill, Nebraska, on June 15, 2000.
DEEMED ENTERED upon the date of filing by the court clerk.

If checked, the Court Clerk shall:

- : Mail a copy of this order to all counsel of record and to any pro se parties **and deliver a certified copy to county court.**
Done on _____, 20__ by ____.
- 9** Enter judgment on the judgment record.
Done on _____, 20__ by ____.
- : Mail postcard/notice required by § 25-1301.01 within 3 days **stating judgment entered as "REVERSED AND REMANDED WITH DIRECTION TO DISMISS"**.
Done on _____, 20__ by ____.
- : Note the decision on the trial docket as: [date of filing] Signed "Judgment on Appeal" entered.
Done on _____, 20__ by ____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge

**THE FOLLOWING DOES NOT CONSTITUTE ANY PORTION OF THE ABOVE
JUDGMENT OR ORDER AND IS INCLUDED SOLELY FOR THE CONVE-
NIENCE OF THE CLERK OF THE DISTRICT COURT:**

1. Assuming that the clerk of the district court places the file stamp and date upon this order (the “entry” defined by § 25-1301) on Thursday, June 15, 2000, the last day for filing notice of appeal and depositing docket fee for appeal to the Nebraska Court of Appeal would be **Monday, July 17, 2000**.
2. If further appeal **is** timely perfected, issuance of the mandate of this court would await the mandate of the higher appellate court.
3. If **no** further appeal is timely perfected, within 2 judicial days after expiration of time for appeal, § 25-2733(1) requires the clerk of the district court to issue the mandate and to transmit the mandate to the clerk of the county court together with a copy of the decision.
4. The clerk of the district court should be prepared to transmit the mandate on **Tuesday, July 18, 2000**.
5. In anticipation, at the clerk’s earliest convenience, the clerk should prepare a draft mandate for review to assure that it is properly completed as to form. The form is provided in the form book. The space for the district court decision would be filled in as “**REVERSED AND REMANDED WITH DIRECTION TO DISMISS**”.
6. The mandate should be prepared in **two** duplicate originals. Both copies would be properly dated as to date of issuance, signed by the clerk, and the district court seal affixed.
7. **One** of the duplicate originals would be filed in the district court file. It would, of course, be file-stamped and docketed.
8. The **other** would be transmitted to county court on the **same day** that it is **issued**. The clerk of the district court would physically hand carry it to the county court clerk for filing in that court. **Attached** to the county court copy should be a **copy of the above judgment or order**. That attached copy does not have to be specially certified. The judge realizes that, pursuant to the court’s instructions, the district court clerk will have already transmitted a certified copy of the judgment or order to the county court at the time of entry. But the statute (§ 25-2733(1)) specifically requires that a copy of the decision be attached to the mandate.