State of New Jersey

v.

Tony Alto,
Defendant-Appellant

A-01-6851-T3

Superior Court, Appellate Division

Submitted May 3, 2001 -- Decided May 23, 2001

Before Judges GRIM, REAPER and MERCY.

Barbara Frankly, Dewey, Cheatham & Howe L.L.P., attorneys for the defendant-appellant (Ms. Frankly, of counsel and on the brief).

Jameson McGreasy, Assistant Essex County Prosecutor, for the State of New Jersey (Donna DiFrancesca, Essex County Prosecutor, attorney; Mr. McGreasy, of counsel and on the brief).

REAPER, J.A.D., joined by GRIM, J.A.D.

The Defendant was convicted in the Superior Court, Law Division, Criminal Part, Essex County, on October 26, 2000, of purposeful or knowing murder, illegal possession of a firearm and fishing without a permit. He appeals his convictions on the basis that the trial court improperly substituted a juror during deliberations.

We hold that defendant through counsel waived any objection to the ultimate composition of the jury by his vigorous effort to obtain the precise judicial action which he now presses as error. Moreover, even if defendant is entitled to seek relief, we hold that it was not error for the trial court to have excused a juror and substituted an alternate. Defendant's convictions, therefore, are affirmed.

The Facts

The facts as established before Law Division Judge Jon Coresine are not in dispute.

Tony Alto is an executive for Hudson Waste Management, a Jersey City firm which, according its mission statement, is engaged in “a little of this and a little of that”. According to the record, Mr. Alto's troubles began on August 29, 1999 at a business lunch at a popular Newark go-go bar called “Bottom's Up”, where Mr. Alto met with two of his business partners, Paulie Peanuts and Freddy Two-Fingers.

According to witnesses who testified at trial, the discussion became heated. Mr. Alto brandished a pistol, pointed it at Peanuts, and said, “What do you say we do a little fishing?” The three men then exited the club and Peanuts was never seen or heard from again. Alto and Two-Fingers were seen later that day docking an 18-foot motorboat at the Port Elizabeth Marina.

The case ultimately came down to a credibility judgment between key witnesses for the prosecution and the defense. The prosecution’s key witness was Two-Fingers, who agreed to testify against Alto in exchange for a reduced charge of illegal dumping. Two-Fingers testified at trial, in gruesome detail, how he and he Alto “plugged Paulie fulla holes so he wouldn't float” and “sent him to school”, that is, to a school of fish.

The defense witness, Cousin Senior, testified that Alto dropped Peanuts and Two-Fingers off at the Port Elizabeth Marina, and took him (Senior) to the Bada-Boom Diner for a snack. He further testified that when they returned to the Marina, Two-Fingers was just pulling back up to the dock and was alone. He testified that Alto then went out with Two-Fingers for “just a little tour of the Newark Bay”.

The jury deliberated for three days. Around mid-afternoon on the third day, the trial judge, with consent of counsel, sent a note in to the jurors asking if it would be of any help to them if the court provided dinner for them at the courthouse. At approximately 4:00 p.m., the court received a note back, which read: “No dinner, we’d like to be excused for the day.”

The judge called the jury back into the courtroom, dismissed the jurors for the day with the usual admonition not to read about or discuss the case. As the other jurors were leaving, Juror Eight, Bob Torch, approached the judge and asked to speak to him privately. The judge cleared the courtroom except for counsel[1] and interviewed the juror on the record:

COURT: What seems to be the problem, Mr. Torch?

JUROR 8: Well, judge, I didn't think this would drag on this long. You see, I can't sit around for long periods. I get, you know, nervous.

1. The defendant was not in the courtroom during deliberations, having previously put on the record a waiver of his presence for all matters arising during deliberations. His exact words were that he waived his presence for “everything, it don’t matter, all questions from the jury, everything up to the verdict.” No objection on grounds of presence or absence of the defendant was made prior to sentencing. R. 3:20-2. *See also State v. Trent*, 157 N.J. Super. 231, 241-42 (App. Div. 1978), *rev'd on other grounds*, 79 N.J. 251 (1979).

COURT: What do you mean, you “get nervous”?

JUROR 8: I don’t do good in closed places and with people getting upset and all. My heart pounds hard and I like to, you know, stay away from stress, if you know what I mean. Staying here isn’t good for me, if you know what I mean.

COURT: Are you saying you have a medical hardship?

JUROR 8: Yeah, that’s the ticket. A medical hardship. Besides, I think I’m just holding things up.

COURT: What do you mean you're “holding things up”?

JUROR 8: Well, the others are about ready to vote, if you know what I mean. The guys in the neighborhood all say that Cousin guy is a lying fink. But I dunno. I just can’t talk about it no more on account of my heart, if you know what I mean. Besides, I ain't too keen on crossing Tony Alto but a man’s gotta be a man, if you know what I mean.

COURT: What guys in the neighborhood are you talking about?

JUROR 8: See, my brother-in-law's a bartender at Bottom’s Up. He called me last night to see how the trial was going.

COURT: Why didn't you bring this to my attention earlier today? I admonished you at the start of this trial not to discuss the case with anyone.

JUROR 8: Hey, he didn’t say nothing I didn’t tell you when you picked me for this jury. I told you Cousin Senior and Freddy Two-Fingers got, what you call it, a reputation in the community.

COURT: Did anything your brother-in-law said influence your vote?

JUROR 8: Oh, no, never, judge. I don’t need nobody to tell me tell when a guy is a lying fink. I can tell by the way his eyes shift back and forth every time he gets asked a question. And I especially don’t need nothing from my brother-in-law.

COURT: Did you say anything to any other juror about that conversation?

JUROR 8: Nope. Didn’t get a chance to say anything today, if you know what I mean. I hate people being in my face and I can’t do this no more.

The juror was removed to wait in the jury room and the court heard argument from counsel.

Defense counsel urged the court to dismiss the juror as unable to continue pursuant to R. 1:8-2(d). The prosecutor objected on the grounds that there was no objective evidence of illness or inability to continue warranting substitution of a juror.

Defense counsel then noted that the juror was tainted by his discussion with his brother-in-law which reinforced a pre-existing view that the key defense witness was a liar. The prosecutor again objected, arguing that the reputations of both key witnesses in the community as men of less than perfect integrity was well-known before and during jury selection, that Juror Eight had indicated his awareness of those reputations during the jury selection process and that defense counsel had accepted the juror despite that knowledge.

After the argument, the trial judge removed the juror on both hardship and taint grounds. When the jurors reconvened the following morning, the judge directed the clerk to draw the name of one of the alternates to replace Juror Eight. The jury was then instructed as follows: "Juror number eight has been dismissed and replaced by an alternate. You are to begin deliberations anew, as if you were deliberating for the first time." Neither counsel raised any objection to that charge to the jury.

Roughly one hour after the new deliberations began, the jury returned a guilty verdict on all counts.

Discussion

Defendant urges us to find that the trial court committed error when it substituted a juror after three days of deliberations and permitted the newly-constituted jury to return a verdict roughly one hour later. We decline to do so on two grounds.

First, there is no question that the removal of the juror was something vigorously sought by defense counsel as a strategic choice when the juror's responses to the court's questions suggested that the juror was having difficulty believing the defense witness. "The defendant cannot . . . request the trial court to take a certain course of action, and upon adoption by the court, take his chance on the outcome of the trial, and if unfavorable then condemn the very procedure he sought and urged, claiming it to be error and prejudicial." *State v. Pontery*, 19 N.J. 457, 471 (1955). "[E]xcept in the most extreme cases, strategic decisions made by defense counsel will not present grounds for reversal." *State v. Marshall*, 123 N.J. 1, 93 (1991); *accord, State v. Buonadonna*, 122 N.J. 22, 44 (1991). If this was error, it was invited error, and "defendant should not be allowed to convert unsuccessful trial strategy into grounds for reversal of a criminal conviction." *State v. Morton*, 155 N.J. 383, 443 (1998).

Clearly, this defendant, through counsel, misread the situation. Counsel concluded that the one juror was suggesting that the jury was ready to acquit and that he was the only holdout for conviction, and counsel sought to have the juror removed and replaced as a result of this conclusion. This was a reasonable and strategic trial choice. That counsel turned out to be wrong that the jury would acquit the defendant without the participation of this juror is not a cause for extraordinary relief.

Second, even if defendant is now entitled to raise the issue at all, our Supreme Court has been clear and consistent in its interpretation of Rule 1:8-2(d), that replacing a juror for good cause shown does not offend due process and our constitutional guarantee of trial by jury. *See, e.g., State v. Miller*, 76 N.J. 392, 406 (1978).

In the present case, the trial judge had two reasons for dismissing the troubled juror: (1) the juror had a nervous condition; and (2) he was tainted by information he learned outside of the trial proceedings.

The rule gives the trial judge broad discretion in exercising the option of substituting a juror. The judge interviewed the juror in person and, from the interview, made an informed, and in our view, correct judgment, that the juror's nervous condition rendered him unable to continue to deliberate. Moreover, justice would be compromised in permitting a tainted juror to participate in the rendering of a criminal verdict. The parties are entitled to a jury of 12 unbiased, untainted jurors. Refusing to dismiss Torch would have violated that jury process.

The jury was properly instructed to begin deliberations anew when the new juror was seated. *State v. Trent*, 79 N.J. 251 (1979). It is of no moment that the jury deliberated only a short time, comparatively, after the alternate was seated before returning the verdict. This is not a situation in which a partial verdict had been reached, *cf. State v. Corsaro*, 107 N.J. 339 (1987), and once the jury began to review the evidence again, it was entitled to do so as quickly as it chose to and in whatever manner it chose to. *State v. Holloway*, 288 N.J. Super. 390 (App. Div. 1996).

For these reasons, we uphold the verdict of the trial court. Defendant’s convictions are affirmed.

MERCY, J.A.D., dissenting.

I must respectfully dissent, and voice my fear that a grave injustice has been perpetrated against this Defendant. There is nothing more cherished in our criminal jurisprudence than that the accused is entitled to a trial by a jury, and that a verdict of guilty must be unanimous before we deprive a citizen of his right to liberty.

First, I cannot agree that defendant waived any rights whatsoever or can be held responsible in any way for the decision of his counsel. It is critical to note that defendant was not present in the courtroom when the issue as to Juror Eight arose, despite his right under our Constitution, the federal Constitution and R. 3:16(b) to be present at all stages of trial. His waiver of his presence “for all questions from the jury, everything up to the verdict” (*supra*, n.1) cannot be read to include a knowing, voluntary and counselled waiver of his right to be present during what amounted to jury selection.

Fundamental rights, such as the right to trial by an impartial jury, are so central to our jurisprudence that we must indulge every reasonable presumption against waiver and find waiver only where the record is clear. *State v. Buonadonna*, 122 N.J. 22, 35-36 (1991). A waiver cannot be presumed from a record at best ambiguous and at worst silent on such a critical issue. *See State ex rel. T.M.*, 166 N.J. 319, 336 (2001) (“An appellate court cannot presume a waiver of constitutional rights from a record silent on the matter”).

Moreover, even if defendant’s waiver did extend so far as to include his presence during consideration of the substitution of the juror, “[i]t does not follow that merely

because an error was occasioned by the intentional or purposeful acts of defense counsel, a reversal on such grounds is automatically foreclosed." *State v. Harper*, 128 N.J. Super. 270, 277 (App. Div.), certif. den. 65 N.J. 574 (1974). The fact is that defendant's fundamental rights remain at stake. "In our jurisprudential system, we punish criminal defendants for their crimes, not for their attorneys' mistakes." *State v. Thomas*, 245 N.J. Super. 428 (App. Div. 1991). We may still provide relief if the error is "clearly capable of producing an unjust result." R. 2:10-2.

Looking at the facts here under the standard of R. 1:8-2(d), I see no basis for the dismissal of this juror at all. Until the words "medical hardship" were offered by the judge, the juror had provided no evidence of illness or actual inability to continue to deliberate and had suggested, instead, discomfort with the deliberative process. Such is not a ground for dismissal and substitution. Nor is it grounds for dismissal that a juror may be unfavorable to a party. *See State v. Harvey*, 318 N.J. Super. 167, 174 (App. Div. 1993), aff'd 136 N.J. 458 (1994).

The Supreme Court has held that the juror replacement rule "is to be employed sparingly". *State v. Valenzuela*, 136 N.J. 458, 468 (1994). The juror cannot be charged as "unable to continue" unless the record adequately establishes that the juror suffers from a true inability to function, and is not merely discouraged by the interaction with the other jurors. None of this is clear form the record.

Further, I do not see a taint issue here. This juror's knowledge of the reputations of the witnesses was made known during jury selection and he assured the court during the final dialogue that his distrust in the credibility of a key witness was based on personal observation at trial, and whatever information he learned out of court did not influence that view. *See State v. Cruz*, 330 N.J. Super. 274 (App. Div. 2000) (juror should not be dismissed for cause known during voir dire).

Most importantly, in my view, no verdict should have been accepted from this jury after a scant 55 minutes of deliberation with the new juror compared to three days of deliberation prior to substitution of the juror. Even with the judge's instruction that the jurors "deliberate anew," there is plain error if deliberations had progressed so far that they had reached determination. *State v Corsaro*, 107 N.J. 339 (1987).

In light of the law as applied to these facts, I would vacate the Defendant's conviction and remand the case to the Law Division for a new trial.

IN THE SUPREME COURT
OF THE STATE OF NEW JERSEY

A-01-522

STATE OF NEW JERSEY	:	
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	:	
v.	:	**ORDER**
	:	
TONY ALTO,	:	
	:	
Defendant-Appellant.	:	
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This matter having been brought before the Court on May 29, 2001, by the defendant-appellant, it is, on this 30th day of May, 2001, hereby docketed as to all appropriate issues. Simultaneous briefing is directed and both parties are to file briefs with this Court on or before July 16, 2001.

STEPHEN W. TOWNSEND, Clerk
For the Court