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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



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FILED: 03/11/2010
PHILIP G. URRY, CLERK
BY: GH

STATE OF ARIZONA,) 1 CA-CR 08-0058
)
Appellee,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 111, Rules of the
PHILLIP WAYNE JORDAN,) Arizona Supreme Court)
)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-006437-001 DT

The Honorable Robert L. Gottsfield, Judge

AFFIRMED

Terry Goddard, Attorney General Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Michael T. O'Toole, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
by Tennie B. Martin, Deputy Public Defender
Attorneys for Appellant

P O R T L E Y, Judge

¶1 Defendant Phillip Wayne Jordan challenges his felony conviction for possession or use of dangerous drugs. He argues that the trial court erred when it did not grant a mistrial. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Defendant was arrested on July 16, 2006, at the intersection of Central Avenue and Camelback Road in Phoenix, Arizona. During a search incident to arrest, a Phoenix police officer ("the Officer") discovered a "small baggie" containing "a white crystalline substance" in the "right front coin pocket of [Defendant's] blue jean shorts." Forensic testing revealed that the bag contained 820 milligrams of methamphetamine.

¶3 Defendant was charged with one count of possession or use of dangerous drugs, a class four felony. Prior to trial, the State disclosed the Officer as a witness in its case in chief. The State also disclosed all police reports, and, pursuant to Arizona Rule of Criminal Procedure 15.1(b), any "existing written statements of the Defendant." The Rule 15.1(b) disclosure also noted that "[a]ny other statement of the defendant that any witness may remember may be obtained through witness interviews." Defendant, however, did not interview the Officer.

¶4 During his examination at trial, the Officer testified that Defendant, near the time of his arrest, told him that he was under the influence of methamphetamine. Both lawyers were surprised by the statement because the Officer's report did not include that information. The court quickly concluded that it would "probably have to grant a mistrial."

¶5 After some discussion outside the presence of the jury, the Officer's testimony continued. He again indicated that Defendant told him that he was under the influence of methamphetamine. During a break in cross-examination, the following exchange occurred:

The Court: All right. I want to put on the record a couple of things. The defense has made a motion for a mistrial. I normally would grant it because of the non-disclosure of a statement made to the police officer. We now realize there was one statement made to the police officer, but because the bell was rung I would certainly grant a mistrial to start all over again. The defense is saying they don't want to. So, I want to put on the record for the appella[te] court, number one, there is a stipulation, an avowal by both counsel, that the prior judge ruled that there would be no testimony by a police officer of what the paramedics said.

. . .

The Court: The next part of that was, that neither side realized that the police officer was going to say that a statement was made to him, that the defendant was under the influence, on meth. So, because of those things, you can't un-ring a bell, I would have granted a mistrial, based on that statement, which I believe was inadvertently made by the officer. All right, but the defense has elected to go on, and we know how we're going to do that, so we'll get started at three.

. . .

The Court: I need to know if the defendant agrees with the lawyer. Hang on a second.

The Defendant: I agree with him.

The Court: The defendant agrees with his lawyer and doesn't want to ask for a mistrial. Because I would grant it right now if that's what the defendant wants.

Defense Counsel: No, we are good.

¶6 After Defendant completed cross-examining the Officer, the State, on redirect, again asked the Officer if Defendant had told him he was under the influence of methamphetamine. Defendant again objected and stated that "the reason why [he] didn't ask for a mistrial" was because he "thought [they] were [not] going to go beyond" the evidence of what the Officer put into his report. The State noted that the objectionable testimony had already been presented, and was not barred by any pretrial ruling. The following exchange then occurred:

Defense Counsel: Well, then I move for a mistrial, I guess.

The Court: Okay. So you're moving for a mistrial?

Defense Counsel: If [the State] is going to ask that.

. . .

The Court: This is one way I would grant a mistrial. What we could do is let the case [go to] verdict, and then if [the jury] decide[s] in favor of the State[,] I grant a mistrial.

Defense Counsel: Very well.

Defendant: I want to do that.

Defense Counsel: Yeah. Maybe the State doesn't want to.

¶7 After more discussion, the court again stated that there was "trial by surprise" and it "would grant [a mistrial] if that is what [Defendant] want[ed]." The court then granted defense counsel an opportunity to speak to his client, after which the parties proceeded with the examination of the Officer. The issue of mistrial never resurfaced.

¶8 Defendant was convicted as charged. Prior to sentencing, Defendant filed a pro per motion to vacate the verdict and argued that the case should be dismissed with prejudice because the State had failed to disclose the Officer's statement pursuant to Arizona Rule of Criminal Procedure 15.1 and because the Officer committed perjury. The court, however, concluded that there was no violation of Rule 15 and no evidence of perjury, and consequently denied the motion.¹ Defendant was sentenced to a super-mitigated prison term of six years.

¶9 Defendant appeals, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2001), and -4033(A) (Supp. 2008).

¹ In *State v. Escherivel*, our supreme court held that an oral communication of a defendant to a police officer that was not contained in the officer's report was not a "statement[] of the defendant" requiring disclosure under Rule 15.1. 113 Ariz. 300, 301, 552 P.2d 1194, 1195 (1976).

DISCUSSION

¶10 Defendant contends that the trial court abused its discretion "when it did not declare a mistrial as it had agreed was appropriate and as it had promised that it would in the event of Appellant's conviction."² He argues that the trial court's failure to fulfill its promise violated his rights to due process and effective assistance of counsel, and denied him a "meaningful opportunity to present a complete defense." The State argues that the record does not support Defendant's characterization that the court "promise[d] to grant a mistrial in the event of a guilty verdict."

¶11 During the exchange between the court and the parties, Defendant ultimately, but with reservation, moved for a mistrial. Defendant argues that the trial court's statement that "we could . . . get a jury verdict, and then[,] if they decide in favor of the State[,] I grant a mistrial," and his subsequent agreement to the proposal, constituted a promise by the court to declare a mistrial in the event of a guilty verdict. We disagree.

² Defendant argues that we must defer to the trial court's decision on whether or not to grant a mistrial based on improper testimony "because it is in the best position to assess whether the testimony will likely affect the trial's outcome." In this case, however, the court did not grant a mistrial.

¶12 Although the court was clearly of the mindset that a mistrial was warranted, an issue that we need not address, its proposal that it "could" wait for a jury verdict before granting a mistrial was nothing more than the court's consideration of an option available to the parties. Defense counsel recognized that reality when he noted that the State may have objections to the suggestion.

¶13 Additionally, following the proposal, and some further discussion, the court again told Defendant that he "would grant [a mistrial] if that is what [he] want[ed]." This statement is inconsistent with Defendant's construction of the court's earlier statements. Had the court already promised to grant a mistrial upon the rendering of a guilty verdict, it would be inconsistent and redundant to tell the Defendant that it would grant a mistrial if that is what he wanted.

¶14 The record indicates that, following the entire exchange and the court's final offer to grant a mistrial, Defendant had a discussion with his counsel, and then proceeded with the examination of the Officer and other witnesses. He did not raise the issue of mistrial again after the discussion, and tellingly, neither counsel nor Defendant raised the issue after the jury rendered the guilty verdict. Rather, after the case was submitted to the jury for deliberation, defense counsel stated, "If, by chance, worst case scenario, we have a guilty

verdict, how does the court want to address the priors?" It was decided, on defense counsel's urging, that immediately following a verdict, the court would conduct a hearing to determine Defendant's prior convictions. Had the court promised to grant a mistrial in the event of a guilty verdict, Defendant's desire to conduct a hearing on prior convictions would be illogical. In fact, after the guilty verdict was read, Defendant did not request a mistrial or even attempt to remind the judge of his purported promise. Our review of the record reveals that Defendant did not raise the issue of mistrial again until this appeal.³

¶15 Therefore, contrary to Defendant's arguments, the trial court did not promise to grant a mistrial in the event of a guilty verdict.⁴ Because the court made no such promise,

³ Although Defendant filed a pro per motion to vacate the verdict, he argued that the case should be dismissed with prejudice because the State had failed to disclose the Officer's statement pursuant to Arizona Rule of Criminal Procedure 15.1 and because the Officer committed perjury. He did not request a mistrial or even mention any promise by the trial court to grant one. The State argued in its response that the motion to vacate should be declined, in part because Defendant "declined to request a mistrial and requested that the trial continue." Defendant did not challenge the characterization in his reply.

⁴ Even if the court did promise to grant a mistrial in the event of a guilty verdict, we find that Defendant waived the issue by failing to raise it to the trial court after the verdict was rendered.

Defendant's argument that the court violated his constitutional rights has no merit.⁵

CONCLUSION

¶16 Based on the foregoing, we affirm Defendant's conviction and sentence.

/s/

MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

LAWRENCE F. WINTHROP, Judge

/s/

MARGARET H. DOWNIE, Judge

⁵ To the extent that Defendant argues that the trial court should have granted a mistrial despite his actions, we find the argument unpersuasive. We have repeatedly held that "we will not find reversible error when the party complaining of it invited the error." *State v. Logan*, 200 Ariz. 564, 565-66, ¶ 9, 30 P.3d 631, 632-33 (2001). Because Defendant did not accept the court's explicit offers to grant a mistrial, he invited any error in the failure to grant one. See *State v. Levato*, 186 Ariz. 441, 445, 924 P.2d 445, 449 (1996) (finding that a defendant was "bound by counsel's deliberate choice of strategy" where counsel denied a trial court's invitation to request a mistrial).