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SUPREME COURT OF ARKANSAS

No. CR11-116

	Opinion Delivered October 6, 2011
KENNETH RAY OSBURN APPELLANT	APPEAL FROM THE ASHLEY COUNTY CIRCUIT COURT,
V.	[NO. CR07-177-1]
	HONORABLE SAM POPE, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED.

JIM HANNAH, Chief Justice

Kenneth Ray Osburn appeals the denial of his motion to prohibit the State from seeking the death penalty on retrial of the charge of capital murder. He asserts that because he was sentenced to life without parole as a matter of law when the jury deadlocked in the penalty phase at his first trial, principles of double jeopardy preclude imposition of the death penalty on retrial. We find no error and affirm.

Osburn seeks relief by interlocutory appeal. A double-jeopardy claim may be raised by interlocutory appeal because if a defendant is illegally tried a second time, the right would have been forfeited. *Blueford v. State*, 2011 Ark. 8, at 5, ___ S.W.3d ___, ___ (citing *Williams v. State*, 371 Ark. 550, 268 S.W.3d 868 (2007)). Our jurisdiction is pursuant to Arkansas Supreme Court Rule 1-2(a)(2).

On January 18, 2008, Osburn was convicted of capital murder and kidnapping and sentenced to life without parole and life respectively. Osburn appealed his convictions and

sentences, and this court reversed and remanded the case based on trial error in the admission of evidence. *See Osburn v. State*, 2009 Ark. 390, 326 S.W.3d 771.

The facts relevant to the present appeal are as follows. The jury in the penalty phase informed the bailiff that it could not reach a decision on the capital-murder charge. The jury was brought back into the courtroom and instructed, among other things, that should it be "unable to agree unanimously on a recommendation, the court shall impose the sentence of life imprisonment without parole." The jury was sent back to the jury room, and later it again informed the court that it could not reach a verdict on the penalty to be imposed on the capital-murder conviction. In discussion with counsel, the court stated that it was inclined to declare a "mistrial" in the penalty phase and impose sentence. Osburn's counsel stated, "That's what I would request, Your Honor." He stated further, "I'd ask the Court to declare the mistrial and impose the sentence." The court stated in open court as follows:

> On the capital murder charge, they have been unable to reach a decision, announcing to the Court that the jury was hung 11 to 1. Therefore, it will be my responsibility to sentence you in this case, and the law calls for a life without parole sentence. . . . It is the judgment of this Court on the charge of capital murder that you be sentenced to the Arkansas Department of Correction for life without Parole.

Imposition by the circuit court of the sentence of life without parole was undertaken pursuant to Arkansas Code Annotated section 5-4-603(c) (Supp. 2007), which provides that "[i]f the jury does not make any finding required by subsection (a)[1] of this section, the court shall

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[1] Arkansas Code Annotated section 5-4-603(a) (Supp. 2007) provided as follows:

(a) The jury shall impose a sentence of death if the jury unanimously returns written findings that:

(1) An aggravating circumstance exists beyond a reasonable doubt;

(2) Aggravating circumstances outweigh beyond a reasonable doubt all

impose a sentence of life imprisonment without parole."

Osburn alleges that once a life sentence was imposed on the capital-murder charge, death was no longer an available penalty on retrial after his successful appeal. We first consider his claim under federal law. The Double Jeopardy Clause of the Fifth Amendment precludes the government from seeking the death penalty against a criminal defendant when he or she has been acquitted of the death penalty previously at a trial-like sentencing proceeding "like the trial on question of guilt or innocence." *See Bullington v. Missouri*, 451 U.S. 430, 446 (1981). The Court in *Bullington* noted that in capital sentencing, a separate hearing is held in which the jury is given only two alternative punishments, life imprisonment or death, and is given standards to guide it in making the decision. *See Bullington*, 451 U.S. at 438. The Court also noted that in this proceeding certain facts have to be established by proof beyond a reasonable doubt in order to obtain the harsher punishment, and that the proceeding is a trial in itself. *Id.* The Court stated that sentencing procedures considered in the Court's prior cases where double jeopardy had not been applied "did not have the hallmarks of the trial on guilt or innocence." *Bullington*, 451 U.S. at 439. The Court in *Bullington* also stated that it agreed with the idea that where these trial-like conditions exist, and the jury fixes punishment at life, the jury has already acquitted the defendant "of whatever was necessary to impose the death sentence." *Bullington*, 451 U.S. at 445 (quoting *State ex rel. Westfall v. Mason*, 594 S.W.2d 908, 922 (Mo. 1980) (Bardgett, C.J, dissenting)).

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mitigating circumstances found to exist; and

(3) Aggravating circumstances justify a sentence of death beyond a reasonable doubt.

Sattazahn v. Pennsylvania, 537 U.S. 101 (2003) is factually similar to the present case. In *Sattazahn*, the jury was "hopelessly deadlocked." *Sattazahn*, 537 U.S. at 105. Pursuant to the applicable Pennsylvania statute in *Sattazahn*, the trial court "discharged the jury as hung" and entered a life sentence. *Id.*

The Court in *Sattazahn* noted that the touchstone for double-jeopardy protection under federal law is whether there was an acquittal in a trial-like capital-sentencing proceeding. *See Sattazahn*, 537 U.S. at 109. In *Sattazahn*, there was no acquittal of the death penalty in a trial-like capital-sentencing proceeding because the court was bound by statute to impose a life sentence when the jury deadlocked. *Id.* For the same reasons, there was no acquittal of the death penalty in the present case when the circuit court imposed the life sentence as required by law, and we find no merit to Osburn's claims of double jeopardy preclusion under federal law.

We now consider Osburn's claims under Arkansas law. Osburn relies on *Sneed v. State*, 159 Ark. 65, 255 S.W. 895 (1923), a case in which the criminal defendant had previously been convicted by a jury of first-degree murder and sentenced by the jury to life imprisonment. *See Sneed v. State*, 143 Ark. 178, 219 S.W. 1019 (1920). Osburn cites this court to the following language in *Sneed*:

> The effect of the instruction was to tell the jury that, as appellant had once been put upon trial for murder in the first degree, and the punishment in that case fixed at life imprisonment, if they should return a verdict of guilty, they could not punish him by death. It was proper for the court to instruct the jury as to the form of its verdict, and as to the punishment in case they should return a verdict of guilty, so that they might not be misled and possibly return a verdict in a form that would result in a mistrial because of former jeopardy.

Sneed, 159 Ark. at 80, 255 S.W. at 901. Relying on *Sneed*, Osburn argues that once he was sentenced to life imprisonment, he may not be sentenced to death on retrial. Osburn misreads our holding in *Sneed*. The rule stated in *Sneed* and adhered to by this court in a number of cases over the years is that *where a jury has decided guilt in a capital case and then imposed a life sentence*, there is an implied rejection of the death penalty, and upon retrial, the death penalty is unavailable to the state. *See Henderson v. State*, 279 Ark. 435, 652 S.W.2d 16 (1983); *Rush v. State*, 239 Ark. 878, 395 S.W.2d 3 (1965); *Sneed*, 159 Ark. 65, 255 S.W. 895.

Applying this law to the case before us, it is clear that the jury did not reject the death penalty. Here, the jury deadlocked and made no decision on the penalty at all. Then the circuit court imposed the sentence of life without parole as a matter of law as required by Arkansas Code Annotated section 5-4-603(c).

The Pennsylvania Supreme Court in *Commonwealth v. Sattazahn*, 763 A.2d 359, 367 (Pa. 2000) faced a similar situation. As already noted, "the judge dismissed the jury as hung, and entered a mandatory life sentence." *Sattazahn*, 763 A.2d at 362. Sattazahn argued that it was irrelevant whether a life sentence in the first trial was entered as a result of a unanimous jury verdict or by operation of law following a jury deadlock, "because either situation is an acquittal on the merits." *Sattazahn*, 763 A.2d at 367. The court cited *Commonwealth v. Martorano*, 634 A.2d 1063 (Pa. 1993), a case Sattazahn argued was wrongly decided, and concluded that Sattazahn, like the appellants in *Martorano*, failed to apprehend the significance of the lack of a decision on the merits. The Court found that because there were no findings by the jury, there was no acquittal on the death penalty. *Sattazahn*, 763 A.2d at 367 (quoting

Martorano, 634 A.2d at 1070). We likewise conclude that the failure of a jury to reach a decision fails to act as an acquittal on the death penalty. Further, as in *Sattazahn*, the mandatory entry of a sentence of life without parole as a matter of law involves no findings. *Sattazahn*, 763 A.2d at 367 (quoting *Martorano*, 364 A.2d at 1070). It does not trigger a double-jeopardy bar on retrial. *Sattazahn*, 763 A.2d at 367 (quoting *Martorano*, 364 A.2d at 1070). Upon remand, the State may seek the death penalty.

Affirmed.