STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM ROBERT AUGHTON,

Defendant-Appellant.

UNPUBLISHED
July 9, 1996

No. 185297
LC No. 91-005158-fh

Before: Smolenski, P.J., and Holbrook, Jr., and F.D. Brouillette,* JJ.

PER CURIAM.

Defendant appeals as of right his conviction of operating a vehicle while under the influence of liquor (OUIL), third offense, MCL 257.625(6); MSA 9.2325(6). Defendant's license was revoked and he was ordered to pay costs in the amount of $400. We affirm.

In June of 1991, defendant was arrested and charged with OUIL, third offense, and resisting or obstructing an officer in the discharge of his duties, MCL 750.479; MSA 28.747. After a two-day trial in February of 1992, defendant was found guilty of both charges. Defendant appealed to this Court as of right on May 5, 1992. On July 22, 1994, this Court released an unpublished opinion reversing defendant's conviction of OUIL, third offense, affirming defendant's conviction of resisting and obstructing a police officer, and remanding for resentencing on the resisting and obstructing conviction. *People v Aughton*, unpublished opinion per curiam of the Court of Appeals, issued July 22, 1994 (Docket No. 151879). Over defendant's objections, the lower court retried defendant on the OUIL, third offense, charge. On October 7, 1994, the jury returned a verdict of guilty on the OUIL charge, and defendant pleaded guilty to two previous convictions.

On appeal, defendant first contends that retrial on the charge of OUIL, third offense, was barred by the constitutional protection against double jeopardy. Defendant initially cites to case law that states that the prohibition against double jeopardy includes being subjected to a retrial after the initial prosecution ends in mistrial. We find defendant's reliance misplaced. A mistrial only occurs when the

* Circuit judge, sitting on the Court of Appeals by assignment.

jury is discharged and the trial ends before a verdict is reached. *People v Langley*, 187 Mich App 147, 150; 466 NW2d 724 (1991). When a verdict is reached, as here, the rules pertaining to double jeopardy in relation to mistrials do not apply. *Id*. Instead, the rule of law is established that the Double Jeopardy Clause does not preclude the retrial of a defendant whose conviction is set aside because of any error in the proceeding leading to conviction other than the insufficiency of the evidence to support the verdict. *People v Setzler*, 210 Mich App 138, 139-140; 533 NW 2d 18 (1995).

Defendant also argues that double jeopardy bars his retrial as the charges of OUIL, third, offense, and resisting and obstructing a police officer arise from the same transaction. In light of our previous discussion, we disagree. In any event, the test used in Michigan to determine whether offenses arise from the same transaction and thus are barred by double jeopardy is called the same transaction test. *People v Sturgis*, 427 Mich 392, 401; 397 NW2d 783 (1986). Under this test, where one or more of the offenses does not involve criminal intent, the criterion is whether the offenses are part of the same criminal episode, and whether the offenses involve laws intended to prevent the same or similar harm or evil, not a substantially different, or a very different kind of, harm or evil. *Crampton v 54-A District Judge*, 397 Mich 489, 502; 245 NW 2d 28 (1976). Analyzing the charges against defendant, we find they do not arise from the same transaction.

MCL 257.625; MSA 9.2325 concerns persons driving under the influence of intoxicating liquor, and is designed to protect the traveling public against danger from drivers not in full control of themselves. *Crampton, supra* at 504. In contrast the plain language of MCL 750.479; MSA 28.747 prohibits the resisting or obstructing of an officer in discharge of his duties, and states that the law is designed to protect the ability of persons authorized by law to maintain and preserve the peace. MCL 750.479; MSA 28.747. As the statutes do not prevent the same or similar harm or evil, they do not arise from the same transaction. Therefore, a retrial on the charge of OUIL, third offense, is not barred by the constitutional prohibition against double jeopardy.

Defendant next contends that as this Court previously reversed on the OUIL, third offense, conviction and did not specifically remand for retrial, the law of the case bars the lower court from allowing a retrial on the OUIL, third offense, charge. We disagree. The doctrine of the law of the case holds that an appellate court ruling on an issue binds the appellate court and all lower courts with respect to its decision on that issue. *In re Loose (On Remand)*, 212 Mich App 648, 653; 538 NW2d 92 (1995). In our unpublished July 22, 1994 opinion, we stated that we were setting aside the verdict on the OUIL, third offense, charge as the court had erroneously instructed the jury. In light of this finding, defendant's contention that our reversal was tantamount to an acquittal is without merit. Further, in criminal cases, a trial court retains the power to grant a new trial when it finds that justice has not been done. *People v Herrera (On Remand)*, 204 Mich App 333, 340; 514 NW2d 543 (1994). Therefore, it was within the lower court's authority to grant a new trial, and not a violation of the law of the case.

Next, defendant claims that an ex parte communication between the lower court judge and the

prosecutor concerning a motion deprived defendant of a fair and impartial trial by causing the judge to change his opinion on his ruling. We disagree. In reviewing for bias, we must review the record as a whole. *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988). On reviewing this record, we find that the alleged bias arose from a letter sent to Lenewee Circuit Court Judge Kenneth B. Glaser, Jr., from the prosecutor, requesting the judge consider a case before filing his order on the motion. The prosecution presented an affidavit that a copy of the letter was sent to defense counsel. In addition, on the record, the judge stated that prior to reviewing the case submitted by the prosecutor, he had already made his decision. Therefore, we find no bias or prejudice resulted toward defendant.

Finally, although defendant indicates that bias ensued from the fact that the lower court's final order differed from the record made at the September 6, 1993 hearing, this claim is without merit as the court rules authorize trial courts to alter their orders prior to entry of judgment in a case based on a substantive mistake. MCR 6.435(B). Here, Judge Glaser stated at the October 6, 1994 hearing that he had changed his mind and was going ahead with the trial after rethinking the law concerning double jeopardy and the law of the case principles. Therefore, Judge Glaser was altering his order as authorized under MCR 6.435(B), and was not behaving in an improper or prejudicial manner. Further, defendant had available the procedure of MCR 2.003, allowing him to move to disqualify the judge for prejudice. Defendant failed to avail himself of this remedy.

Affirmed.

/s/ Michael R. Smolenski
/s/ Donald E. Holbrook, Jr.
/s/ Francis D. Brouillette