

TABLE OF CONTENTS

A. Assignment of Errors1

B. Statement of Facts2

C. Argument9

 1. Commissioner Shaneyfelt, who was presiding over a criminal trial in his capacity as a judge pro tem over the objection of the defendant and without a written stipulation, did not have jurisdiction to conclude that the jury was deadlocked and declare a mistrial.10

 2. It was error for Commissioner Shaneyfelt to refuse to permit revision of his decision declaring a mistrial.12

 3. Commissiонер Shaneyfelt violated Ms. Powers’ double jeopardy right to be tried by the jury selected when he concluded the jury was deadlocked and declared a mistrial after two jurors opined that a verdict was possible.....13

D. Conclusion16

TABLE OF AUTHORITIES

Cases

<u>Arizona v. Washington</u> , 434 U.S. 497, 503, 54 L. Ed. 2d 717, 98 S. Ct. 824 (1978)	9
<u>State ex rel. Charles v. Bellingham Municipal Court</u> , 26 Wn. App. 144, 612 P.2d 427 (1980).....	13, 14
<u>State v. Dykstra</u> , 33 Wn. App. 648, 656 P.2d 1137 (1983)	14
<u>State v. Jones</u> , 97 Wn.2d 159, 164, 641 P.2d 708 (1982).....	9
<u>State v. Sain</u> , 34 Wn. App. 553, 663 P.2d 493 (1983).....	10
<u>State v. Sheets</u> , 128 Wn.App. 149, 115 P.3d 1004 (2005)	9
<u>State v. Smith</u> , 117 Wn.2d 263, 814 P.2d 652 (1991)	12
<u>State v. Taylor</u> , 109 Wn.2d 438, 745 P.2d 510 (1987).....	14
<u>United States v. Perez</u> , 22 U.S. (9 Wheat) 579, 6 L.Ed. 165 (1824)	9
<u>United States v. Ross</u> , 626 F.2d 77 (9th Cir. 1980).....	15

A. Assignment of Errors

Ms. Powers conviction for Hit and Run – Injury Accident violates double jeopardy principles and the trial court erred by not dismissing the charge.

Issues Pertaining to Assignment of Errors

1. Did Commissioner Shaneyfelt, who was presiding over a criminal trial in his capacity as a judge pro tem over the objection of the defendant and without a written stipulation, have jurisdiction to conclude that the jury was deadlocked and declare a mistrial?

2. Was it error for Commissioner Shaneyfelt to refuse to permit revision of his decision declaring a mistrial?

3. Did Commissioner Shaneyfelt violate Ms. Powers' double jeopardy right to be tried by the jury selected when he concluded the jury was deadlocked and declared a mistrial after two jurors opined that a verdict was possible?

B. Statement of Facts

Overview

Michelle Powers was charged by Second Amended Information with driving under the influence (DUI) and Hit and Run – Injury Accident. CP, 30. The case was tried twice. The first trial was presided over by

Visiting Judge Ken Williams. RP, 40. At the first trial, she was convicted of DUI. Ten of the jurors opined that it was not possible to reach a verdict on the Hit and Run charge while two jurors indicated that a verdict might be possible if further deliberations were permitted. RP, 378-79. Commissioner Shaneyfelt declared a mistrial on the Hit and Run offense after he found the jury could not reach a verdict. CP, 61. Ms. Powers promptly objected and moved for revision. RP, 380. The Commissioner dismissed the jury without affording an opportunity for revision.

Prior to the second trial, Ms. Powers moved to dismiss the Hit and Run offense on the ground that a second trial would violate her double jeopardy rights under the Fifth Amendment. CP, 66. The double jeopardy motion was heard on March 18, 2005 before Visiting Judge Anna Laurie. RP, 410. Judge Laurie concluded that Commissioner Shaneyfelt had not abused his discretion in granting a mistrial. RP, 419-20.

The case was retried starting August 8, 2005. Visiting Judge Leonard Costello presided. The jury convicted Ms. Powers of the sole remaining count of Hit and Run – Injury Accident. CP, 137. Ms. Powers appeals the Hit and Run – Injury Accident conviction.

B. Substantive Facts

Because Ms. Powers' assignments of error all relate to her double jeopardy claim, the substantive facts may be significantly truncated. The

following facts are taken from the second trial because that is the trial for which she was convicted of Hit and Run.

On December 31, 2003 Tammy McConaghy was pulled over by Washington State Patrol Trooper Eric Ellefson. RP, 492. Ms. McConaghy had a headlight out. RP, 492, 511. Ms. McConaghy did not have identification, so Trooper Ellefson was writing down her information. RP, 492. While writing down the information, a white van came up behind them. RP, 493. The van hit Trooper Ellefson and he flew over the hood of Ms. McConaghy's car. RP, 493, 511. Trooper Ellefson landed on the ground and looked up to see the van driving away. RP, 513. The state's expert, Trooper Joihaner, opined that Ms. Powers brushed up against him just enough to catch his gun belt and lift him off the ground. RP, 453. She did not come in at an angle. RP, 452. Thinking there was something wrong with what had just happened; Trooper Ellefson ran back to his patrol car and pursued the white van with his emergency lights on. RP, 513.

When he caught up with the van, the van was traveling at or below the speed limit. RP, 516. The van stopped approximately two to three miles from the site of the collision. RP, 517. He contacted the driver, who was the defendant Michelle Powers. RP, 518. He then turned over the investigation to Jefferson County deputies. RP, 518.

The defense presented evidence that Ms. Powers was unaware of the accident due to extreme intoxication. The officers who first contacted her opined that she was very intoxicated. RP, 459. Blood testing indicated that her blood alcohol content was .29 grams of alcohol per one hundred milliliters of blood. RP, 572. Dr. Kenneth Muscatel, a psychologist called by the defense, opined that .29 blood alcohol levels was at the boundary of what psychologists consider pathological intoxication. RP, 551. At that level of intoxication, it is possible for a person to get into an accident and not understand she has been in an accident. RP, 553.

Procedural Facts Relating to Double Jeopardy Claim

The first trial lasted four days, ending on January 12, 2005. At 4:15 in the afternoon, the parties reconvened to discuss the fact that the jury had not yet reached a verdict. RP, 345. A proposal was made that a court commissioner should take the verdict the next day. RP, 345. The defense expressed no general objection to the proposal, but did object to Commissioner Shaneyfelt hearing the case if issues related to sentencing or release conditions were heard. RP, 345. The State said that if there was a conviction, they would request Ms. Powers be arrested. RP, 345. All parties agreed to Commissioner Harper. RP, 346. Visiting Judge Williams said he would be available by phone if needed. RP, 346. Later, Judge

Williams restated that if Commissioner Harper was unavailable, he would be available by phone to accept the verdict. RP, 348.

The next day the court reconvened with Commissioner Shaneyfelt. RP, 350. The time was just prior to 11:40. RP, 356. The record is silent as to why Judge Williams or Commissioner Harper were not there. Later, while talking to the jury, Commissioner Shaneyfelt said that Judge Williams was unavailable by phone, but it is unclear whether this was designed to prevent the jury from speculating or whether that was in fact the case. RP, 359.

The jury had a question about the jury instruction relating to voluntary intoxication. RP, 351. The court proposed to answer the question by referring them back to the existing instructions. RP, 352. The State agreed to this procedure but the defense objected. RP, 352.

While the attorneys were debating the correct answer to the voluntary intoxication jury instruction question, the bailiff announced that the jury had a second question. This time the question was whether the jury needed to be unanimous that they were deadlocked. RP, 354. The attorneys seemed surprised by the question but agreed that if the jury was deadlocked, they should be brought into court and polled on that issue. RP, 355. The court decided to bring the jury back into the courtroom. RP, 358. The presiding juror was asked if the jury was able to reach a verdict

on the Hit and Run charge. RP, 359. The presiding juror answered, "I can't answer that, because it's - " RP, 360. At that time the Commissioner cut her off. She answered that the jury had had enough time to review all the testimony and exhibits. RP, 360. But she answered in the negative when asked if the jurors had had enough time to express their opinions. RP, 360. The Commissioner then asked if there was a reasonable likelihood of reaching a verdict on the Hit and Run count. The presiding juror said, "I say no." RP, 360. The presiding juror then asked for an additional hour to deliberate. RP, 361. At that point, Commissioner Shaneyfelt sent the jury back to the deliberation room to resume their deliberations. RP, 361.

After the jury left the room, defense counsel again brought up the topic of the jury instructions. RP, 362. Defense counsel objected to the court not directly answering the question, rather than the proposal of referring them to the existing instructions. RP, 362. While discussing defense counsel's renewed objection, the jury sent a new question, again asking for clarification about the voluntary intoxication instruction. RP, 364. Defense counsel again asked the Commissioner to clarify the instruction. RP, 365. The Commissioner ruled that he would simply refer the jury back to the existing instructions. RP, 367. Defense counsel immediately moved orally for revision of the jury instruction issue by

Judge Williams. RP, 367. Later that day, defense counsel moved in writing for revision pursuant to RCW 2.24.050. CP, 60.

The next time the court convened, Judge Williams presided by telephone. RP, 368. The jury continued to deliberate. Ms. Powers objected to Commissioner Shaneyfelt's ruling on the jury instructions. RP, 368. She asked for immediate revision. Judge Williams ruled that Commissioner Shaneyfelt's response to the question was appropriate and declined to revise the decision. RP, 374-76. After ruling on the jury instruction issue, Judge Williams asked about having a commissioner take the verdict. RP, 376. The clerk reported that Commissioner Shaneyfelt was available, but Commissioner Harper could not be located. RP, 376. Judge Williams said, "I should be available again at this number. And if worse comes to worse, I can take a verdict over the telephone. I did bring a juror list with me. If need be, that can happen." RP, 376. Defense counsel did not respond to this colloquy.

The next hearing was held in open court with the jury present and Commissioner Shaneyfelt presiding. RP, 377. In response to a question, the presiding juror reported that the jury had reached a verdict on the DUI charge. RP, 377. Commissioner Shaneyfelt then asked, "[D]o you believe at this point there is any possibility that you will reach a verdict on count one?" RP, 378. She responded, "No, at all." RP, 378. The Commissioner

then polled the jury, asking each one if they believed they could reach a verdict. Ten of the jurors answered, "No." One juror answered, however, "It's hard to say. I'm sorry. I can't give you a yes or no." RP, 378. Another juror answered, "I guess I'd have to say it's hard to say, also." RP, 379.

After polling the jury, Commissioner Shaneyfelt, without consulting with counsel, said, "I'm finding the jury is deadlocked regarding count one and there is no reasonable probability that a verdict can be reached by this jury on count one." RP, 380. Defense counsel immediately and unequivocally objected, "Your honor, I'd like to lodge a formal objection to the court's ruling. I would ask that the trial judge be called regarding the matter and move for revision of your decision in that regard." RP, 380. The State represented that the parties had "agreed" that Commissioner Shaneyfelt could take the verdict. RP, 380. Commissioner Shaneyfelt refused to delay the proceedings and found that the jury was deadlocked on the Hit and Run count. RP, 380. The jury then delivered its verdict on the DUI count, which was "guilty." RP, 380.

C. Argument

The state and federal constitutional protection against double jeopardy not only bars a second trial following acquittal, but also encompasses a defendant's "valued right to have his trial completed by a particular tribunal." Arizona v. Washington, 434 U.S. 497, 503, 54 L. Ed. 2d 717, 98 S. Ct. 824 (1978). Since the earliest days of the republic, the Fifth Amendment prohibition against double jeopardy has been interpreted as prohibiting the trial court from declaring a mistrial except upon a showing of "manifest necessity." United States v. Perez, 22 U.S. (9 Wheat) 579, 6 L.Ed. 165 (1824). In Washington, this has been interpreted as requiring "'extraordinary and striking circumstances' [that] must exist before the judge's discretion can come into play." State v. Sheets, 128 Wn.App. 149, 115 P.3d 1004 (2005), citing State v. Jones, 97 Wn.2d 159, 164, 641 P.2d 708 (1982). In this case, the Commissioner declared a mistrial when no manifest necessity existed and thereby violated Ms. Powers' right to have her case decided by the jury that was selected.

Before reaching the merits of the double jeopardy claim, however, there are two procedural irregularities in this case that must be discussed. First, the State's assertion notwithstanding, Ms. Powers never stipulated to Commissioner Shaneyfelt hearing the case. Second, even if he properly

presided over the verdict, Ms. Powers timely moved to revise his decision, a motion that was ignored.

1. Commissioner Shaneyfelt, who was presiding over a criminal trial in his capacity as a judge pro tem over the objection of the defendant and without a written stipulation, did not have jurisdiction to conclude that the jury was deadlocked and declare a mistrial.

Washington Constitution article 4, section 7 reads: "A case in the superior court may be tried by a judge, pro tempore, who must be a member of the bar, agreed upon in writing by the parties' litigant, or their attorneys of record, approved by the court and sworn to try the case." Accord RCW 2.08.180. This provision is jurisdictional. State v. Sain, 34 Wn. App. 553, 663 P.2d 493 (1983). A defendant has the right "to be tried in a court presided over by an elected superior court judge accountable to the electorate." Id. In Sain, the Court held that the failure of court to obtain a written stipulation to the judge pro tem was prejudicial error and reversed.

In Ms. Powers' case, although she consented generally to have a commissioner hear her case, she never consented to Commissioner Shaneyfelt. In fact, she specifically objected to Commissioner Shaneyfelt. RP, 345. Although her objection was cloaked in terms of concerns about

post-trial release conditions, the fact that the State intended to have her arrested should she be convicted did nothing to allay those concerns. Judge Williams interpreted the comments by counsel, coupled with the State's response, to be an objection and ruled that someone other than Commissioner Shaneyfelt would take the verdict. RP, 346, 348.

It is possible the State will argue that Commissioner Shaneyfelt was acting in his capacity as a court commissioner, not as a judge pro tem, when he accepted the verdict. This argument is not persuasive. A commissioner has limited authority. RCW 2.24.040 (15) give a commissioner authority "[i]n adult criminal cases, to preside over arraignments, preliminary appearances, initial extradition hearings, and noncompliance proceedings pursuant to RCW 9.94A.634; accept pleas if authorized by local court rules; appoint counsel; make determinations of probable cause; set, amend, and review conditions of pretrial release; set bail; set trial and hearing dates; authorize continuances; and accept waivers of the right to speedy trial." A commissioner has no authority to make decisions in the jury trial of an adult criminal defendant. The only way Commissioner Shaneyfelt had jurisdiction in Ms. Powers' trial was if he was acting as a judge pro tem by written stipulation. Not only did Ms. Powers not provide written consent, but she objected to him hearing her

case. Commissioner Shaneyfelt was, therefore, without jurisdiction to take the verdict.

2. It was error for Commissioner Shaneyfelt to refuse to permit revision of his decision declaring a mistrial.

Even if Commissioner Shaneyfelt had jurisdiction to take the verdict, he did not have the discretion to ignore Ms. Powers prompt motion for revision of his decision to declare a mistrial. RCW 2.24.050 says, in part, “All of the acts and proceedings of court commissioners hereunder shall be subject to revision by the superior court.” What makes this case unusual is that Ms. Powers’ motion was for revision of an interlocutory decision where time was of the essence. In State v. Smith, 117 Wn.2d 263, 814 P.2d 652 (1991) the Court held that all decisions of a commissioner, final or interlocutory, are subject to revision by an elected judge.

RCW 2.24.050 requires the motion for revision be in writing. But in this case, the Commissioner refused to grant even a short delay to allow for revision. The events of earlier in the day are instructive. When Ms. Powers objected to Commissioner Shaneyfelt’s ruling on the jury instructions, she immediately moved orally for revision. The motion was followed up with a written motion later that same day. The motion was heard by Judge Williams, who appeared telephonically, and affirmed the

Commissioner's ruling. He also reaffirmed his availability should there be any other problems or a verdict. What is significant about this sequence is not the specific ruling about the jury instructions, but that Judge Williams was available to rule on the motion for revision and that Ms. Powers' counsel was ready and willing to convert his oral motion for revision into a written motion. But Commissioner Shaneyfelt did not give Ms. Powers the opportunity to file a written motion or to try and contact Judge Williams. Instead, he proceeded to discharge the jury. This was error.

3. Commissioner Shaneyfelt violated Ms. Powers' double jeopardy right to be tried by the jury selected when he concluded the jury was deadlocked and declared a mistrial after two jurors opined that a verdict was possible.

Against this odd procedural backdrop, we turn to the merits of Ms. Powers' double jeopardy claim. State ex rel. Charles v. Bellingham Municipal Court, 26 Wn. App. 144, 612 P.2d 427 (1980) is very instructive. In Charles, the jury heard evidence on two charges: negligent driving and hit-and-run. The jury deliberated for approximately 75 to 90 minutes when it announced that it had a verdict. After the jury was escorted into the courtroom it became clear, however, that it only had a verdict on one count. After finding the defendant "not guilty" of negligent driving, the presiding juror said that the jury had not reached a verdict on

the hit-and-run count. The trial court dismissed the jury without inquiring further. Defense counsel's motion to poll the jury went unheeded. The Court concluded that the trial court had abused its discretion by declaring a mistrial and held that double jeopardy prohibited the subsequent trial. Cf. State v. Dykstra, 33 Wn. App. 648, 656 P.2d 1137 (1983) (trial court did not abuse discretion in declaring mistrial after jury deliberated for 13-1/2 hours and there was a breakdown in the jury).

The Washington Supreme Court cited Charles approvingly in State v. Taylor, 109 Wn.2d 438, 745 P.2d 510 (1987) saying, "The decision to discharge the jury should be made only when it appears to the trial judge that there is no reasonable probability of the jury arriving at an agreement even if given more time." The factors to be considered in discharging a jury are the length of time the jury had been deliberating in light of the length of the trial and the volume and complexity of the evidence. The judge also may consider any progress in the deliberations. Interestingly, the jury's own assessment that it is deadlocked, while helpful, is not itself sufficient ground for declaring a mistrial. Taylor at 443 (citations omitted). As the Ninth Circuit has said, "A statement by the jury that it is currently deadlocked has been held an insufficient ground for declaring a mistrial. The judge should question the jury in such circumstances, either individually or through its foreman, on the possibility that its current

deadlock could be overcome by further deliberations.” United States v. Ross, 626 F.2d 77 (9th Cir. 1980) (citations omitted).

Ultimately, this case comes down to two questions: (1) was the jury so deadlocked as to create a manifest necessity for a mistrial; and (2) who had the authority to make that determination. On January 13, 2005, Commissioner Shaneyfelt found himself presiding over a criminal trial without jurisdiction. The jury was divided on whether it could possibly reach a verdict, with ten jurors saying that was not possible, but two jurors disagreeing. Commissioner Shaneyfelt concluded the jury was deadlocked without receiving input from counsel. Defense counsel promptly moved for revision. But the Commissioner refused to recess the case even long enough to try and contact Judge Williams by phone. All of the cases talk about the degree of discretion accorded the trial judge in determining whether a jury is deadlocked. But when the decision maker is without jurisdiction and refuses mandatory revision when asked, then no discretion has been exercised. Given the fact that two jurors opined that the jury was not irrevocably deadlocked, it was error for Commissioner Shaneyfelt to exercise any discretion at all. The jury should not have been discharged and the decision to do so violated Ms. Powers’ right to have her case decided by the jury that was selected. The retrial violated her right to be free from double jeopardy and the charge must be dismissed.

D. Conclusion

Ms. Powers' Hit and Run – Injury Accident charge should be reversed and dismissed.

DATED this 10th day of March, 2006.

A handwritten signature in black ink, appearing to read 'T. E. Weaver', written over a horizontal line.

Thomas E. Weaver, WSBA #22488
Attorney for Appellant

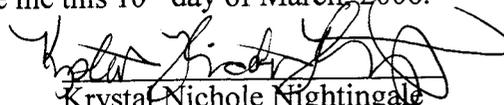
1 On March 10, 2006, I sent a copy, postage prepaid, of BRIEF OF APPELLANT to
2 Michelle Rugeley Powers, 3222 Cliff Street, Port Townsend, WA 98368.

3
4
5 Dated this 10th day of March, 2006.



6 Thomas E. Weaver
7 WSBA #22488
8 Attorney for Defendant

9 SUBSCRIBED AND SWORN to before me this 10th day of March, 2006.



10 Krystal Nichole Nightingale
11 NOTARY PUBLIC in and for
12 the State of Washington.
13 My commission expires: 2/22/2010