

[Cite as *State v. Jackson*, 2016-Ohio-704.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103035

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANDREW L. JACKSON

DEFENDANT-APPELLANT

**JUDGMENT:
DISMISSED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-13-577257-A

BEFORE: Jones, A.J., Keough, J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: February 25, 2016

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LARRY A. JONES, SR., A.J.:

{¶1} Defendant-appellant, Andrew Jackson, appeals his conviction for aggravated robbery and grand theft of a motor vehicle. For the reasons that follow, we dismiss this appeal for lack of a final appealable order.

{¶2} In 2013, Jackson and two codefendants, Marcian Jackson and Cleatrice Mayo, were charged with two counts of kidnapping with one- and three-year firearm specifications, two counts of aggravated robbery with one- and three-year firearm specifications, and grand theft of a motor vehicle. The codefendants entered into a plea agreement with the state of Ohio and pleaded guilty to amended indictments.

{¶3} Jackson's case proceeded to trial. After the evidence was presented and the jury was deliberating, the jury informed the trial court that it could not reach a decision on Counts 1 and 3, which were the kidnapping counts with one- and three-year firearm specifications. The parties requested the court declare a mistrial on the kidnapping counts and proceed to a verdict on the remaining counts. The court agreed and the jury returned a verdict of guilty of aggravated robbery and grand theft of a motor vehicle. The jury acquitted Jackson of the firearm specifications attendant to the aggravated robbery charges.

{¶4} The trial court indicated to the parties that they should try to work something out on the remaining charges before it set the case for retrial on the kidnapping charges. The state responded that it was moving to dismiss the kidnapping charges and the trial court issued a journal entry dismissing those charges. At a subsequent sentencing

hearing, the trial court sentenced Jackson to a total of six years in prison.

{¶5} Jackson moved for leave to file a delayed appeal, which this court granted. In his appeal, Jackson raises four assignments of error, challenging trial court rulings, the effectiveness of his trial counsel, sufficiency of the evidence, and the jury instructions. We are unable to reach the merits of Jackson's appeal, however, because this court lacks jurisdiction over the appeal. This court cannot consider Jackson's appeal until the remaining counts of his indictment have been resolved because the kidnapping counts were dismissed without prejudice.

{¶6} This court has repeatedly held that, in a criminal case, a dismissal without prejudice does not constitute a final order under either R.C. 2505.02 or Crim.R. 48. *State v. Cole*, 8th Dist. Cuyahoga No. 88722, 2007-Ohio-3076, ¶ 8; *Fairview Park v. Fleming*, 8th Dist. Cuyahoga Nos. 77323 and 77324, 2000 Ohio App. LEXIS 5714 (Dec. 7, 2000).

{¶7} R.C. 2505.02(B) provides, in part, that

[a]n order is a final order that may be reviewed, affirmed, modified, or reversed, with or without retrial, when it is one of the following:

- (1) __An order that affects a substantial right in an action that in effect determines the action and prevents a judgment;
- (2) __An order that affects a substantial right made in a special proceeding or upon a summary application in an action after judgment.

* * *

{¶8} Crim.R. 48(A) provides that “[t]he state may by leave of court and in open court file an entry of dismissal of an indictment, information, or complaint and the

prosecution shall thereupon terminate.”

{¶9} In *State v. Bobby*, 8th Dist. Cuyahoga No. 50455, 1986 Ohio App. LEXIS 6699 (May 8, 1986), the jury could not reach a verdict on two counts of the indictment. This court determined that the appellant had no valid double jeopardy claim to prevent retrial because jeopardy did not terminate when the hung jury was discharged. *Id.* at *4, citing *Richardson v. United States*, 468 U.S. 317, 104 S.Ct. 3081, 82 L.Ed.2d 242 (1984).

Rather, the case remained pending because “a mistrial following a hung jury is not an event that terminates original jeopardy,” and, thus, no final disposition had been made in the case. *Id.*, citing *id.*

{¶10} In *Cole*, *supra*, the jury could not reach a verdict on one count of the indictment. The trial court declared a mistrial as to that count and issued a journal entry dismissing that count “without prejudice.” On appeal, this court found that it lacked jurisdiction and dismissed the appeal because a charge remained pending against the defendant. *Id.* at ¶ 10.

{¶11} In this case, there was no indication that the dismissal of the kidnapping charges was with prejudice. This court has held that when a trial court does not specify whether a dismissal is with or without prejudice, we are to presume it is intended to be without prejudice. *State v. Brown*, 8th Dist. Cuyahoga No. 84229, 2004-Ohio-5587, ¶ 8.

If a complaint can be refiled, then a dismissal is not a final determination of the parties’ rights and is not a final order under R.C. 2505.02(B)(1) and (2). *Id.* at ¶ 10, citing *Cleveland v. Stifel*, 8th Dist. Cuyahoga No. 75761, 1999 Ohio App. LEXIS 4093 (Sept. 2,

1999).

{¶12} Here, the parties asked the court to declare a mistrial on the two kidnapping charges and the trial court agreed to do so: “Based upon the jurors’ inability to reach verdicts on Counts 1 and 3, I find a mistrial on those counts.”

The state then moved to dismiss “those counts where there was a mistrial,” but never asked that the charges be dismissed with prejudice. The trial court journalized the dismissal of the kidnapping charges, but did not indicate in the entry whether the dismissal was with prejudice:

Count(s) 1, 3 is/are dismissed. (The jury was unable to reach verdicts on Counts one and three. A mistrial was therefore declared on those counts. Thereafter, the state’s oral motion to dismiss Counts one and three was unopposed by the defendant and granted.)

November 21, 2013 Journal Entry.

{¶13} Consequently, before this case can be considered on appeal, the state is required to either dismiss the kidnapping charges with prejudice or proceed to trial on the remaining charges. *See Cole* at ¶ 11, citing *State v. Bourdess*, 8th Dist. Cuyahoga No. 70541, 1997 Ohio App. LEXIS 2361 (May 29, 1997).

{¶14} Therefore, the dismissal of the kidnapping charges without prejudice was not a final order and this court lacks jurisdiction to consider Jackson’s appeal.

{¶15} Appeal dismissed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common

pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

LARRY A. JONES, SR., ADMINISTRATIVE JUDGE

KATHLEEN ANN KEOUGH, J., and
EILEEN T. GALLAGHER, J., CONCUR