

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2012 IL App (4th) 120373-U
NO. 4-12-0373
IN THE APPELLATE COURT
OF ILLINOIS
FOURTH DISTRICT

FILED
December 3, 2012
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	McLean County
DANE RYAN HALM,)	No. 11CF285
Defendant-Appellant.)	
)	Honorable
)	Rebecca Simmons Foley,
)	Judge Presiding.

JUSTICE POPE delivered the judgment of the court.
Justices Knecht and Turner concurred in the judgment.

ORDER

¶ 1 *Held:* The appellate court granted appointed counsel's motion to withdraw where defendant's claim of violation of his double jeopardy rights was meritless.

¶ 2 This case comes to us on motion of the office of the State Appellate Defender (OSAD) to withdraw as counsel on appeal pursuant to *Anders v. California*, 386 U.S. 738 (1967), because no meritorious issues can be raised in this case. For the following reasons, we grant OSAD's motion and affirm the trial court's judgment.

¶ 3 I. BACKGROUND

¶ 4 In April 2011, the State charged defendant, Dane Ryan Halm, with four counts of aggravated battery to a correctional employee, a Class 2 felony (720 ILCS 5/12-4(d-5), (e)(2) (West 2010)).

¶ 5 In January 2012, a jury trial commenced. After approximately four to five hours,

the jury informed the bailiff it was unable to reach a decision. The trial court brought the jurors back into the court room and informed them the court would take a recess and they would return the next morning to continue deliberations.

¶ 6 When the trial court reconvened at 9 a.m. the next morning, the court informed counsel juror No. 83 had called in, indicating he was at the emergency room with his mother. The court then asked counsel how each party would like proceed. The State suggested the court contact the alternate juror. The defense moved for a mistrial, explaining the jury might be angered if they had to start deliberations "from scratch" and might "take it out on the defendant." The court decided to contact the alternate juror.

¶ 7 The trial court took a brief recess and reconvened at 9:40 a.m. At that time, the alternate juror had not returned the court's phone call. The court asked counsel if they had changed their positions on the matter or if they had any considerations on how long they would like the jury to wait for the alternate juror. Defendant's attorney indicated he had not changed his position and was leaving the decision to the discretion of the court. The State suggested the court try to contact the alternate juror a second time and give him 30 minutes to call back. The court proceeded with the State's suggestion and called the jury into the courtroom to explain what had transpired. The court then sent the jury back to the deliberation room and took a brief recess.

¶ 8 The trial court reconvened at 10:50 a.m. and informed counsel it had personally tried to contact the alternate juror but was unable to reach him. Defendant's attorney then made a second motion for a mistrial. The State did not object, and the court granted defendant's motion. The court thereafter released the jury from service.

¶ 9 On February 21, 2012, following the mistrial, defendant filed a motion to dismiss

the charges against him. Defendant's motion alleged retrial would violate his right against double jeopardy because the State's evidence was insufficient to prove him guilty beyond a reasonable doubt. On February 29, 2012, the trial court heard argument on defendant's motion. The court reserved ruling until March 21, 2012.

¶ 10 On March 21, 2012, the trial court denied defendant's motion. On April 20, 2012, defendant filed an interlocutory appeal pursuant to Rule 604(f) (Ill. S. Ct. R. 604(f) (eff. July 1, 2006)), and the trial court appointed OSAD to represent him. OSAD filed a motion to withdraw, attaching to its motion a brief in conformity with the requirements of *Anders v. California*, 386 U.S. 738 (1967). On its own motion, this court granted defendant leave to file additional points and authorities by August 15, 2012. Defendant has not done so. After examining the record and executing our duties in accordance with *Anders*, we grant OSAD's motion and affirm the trial court's judgment.

¶ 11 II. ANALYSIS

¶ 12 OSAD asserts it would be frivolous to argue defendant's right against double jeopardy would be violated if a retrial were to occur where defendant's first trial ended in a mistrial. We agree.

¶ 13 "In reviewing the denial of a motion to dismiss on double jeopardy grounds where 'neither the facts nor the credibility of witnesses is at issue, we address a purely legal question, and our standard of review is *de novo*.'" *People v. Griffith*, 404 Ill. App. 3d 1072, 1079, 936 N.E.2d 1174, 1181 (2010) (quoting *In re Gilberto G.-P.*, 375 Ill. App. 3d 728, 730, 873 N.E.2d 534, 537 (2007)).

¶ 14 The double jeopardy clause protects a defendant against the following: (1) being

prosecuted a second time for the same offense after an acquittal, (2) being prosecuted a second time for the same offense after conviction, and (3) receiving multiple punishments for the same offense. *People v. Smith*, 338 Ill. App. 3d 254, 255, 788 N.E.2d 802, 803 (2003). A jury's failure to reach a verdict is not an event which terminates jeopardy; nor is it the equivalent of an acquittal. *Richardson v. United States*, 468 U.S. 317, 325 (1984). Therefore, double jeopardy is not implicated in the case of a mistrial based on a hung jury. *Smith*, 338 Ill. App. 3d at 255, 788 N.E.2d at 803. Moreover, where a mistrial has been declared because of a hung jury, retrial is not barred by double jeopardy and the defendant is not entitled to appellate review of the sufficiency of the evidence. *People v. Hobbs*, 301 Ill. App. 3d 581, 589, 703 N.E.2d 943, 949 (1998).

¶ 15 In the case *sub judice*, the jury was unable to reach a verdict so the trial court sent the jury home and it reconvened the next morning to continue deliberations. However, one member of the jury did not appear. After the court made several failed attempts to contact the alternate juror, the court declared a mistrial, at defendant's request. Thus, defendant was never convicted or acquitted and jeopardy was never terminated. Therefore, defendant will not be subjected to double jeopardy if a retrial were to occur, and the court properly denied his motion to dismiss on that basis. Defendant is likewise not entitled to appellate review of the sufficiency of the evidence.

¶ 16 In closing, we note this case presents a slightly different factual scenario than those cases cited for the proposition double jeopardy is not implicated in the case of a mistrial based on a hung jury. Here, the cause of defendant's mistrial was the combination of a hung jury and the lack of an intact jury, rather than a purely hung jury. However, the protection of the

double jeopardy clause only applies when "there has been some event, such as an acquittal, which terminates the original jeopardy." *Richardson*, 468 U.S. at 325. Because this case is lacking a "terminating" event of the original jeopardy, we conclude the line of cases concerning mistrials and double jeopardy govern defendant's case.

¶ 17

III. CONCLUSION

¶ 18 Based on the foregoing, we grant OSAD's motion to withdraw and affirm the trial court's judgment.

¶ 19 Affirmed.