SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC 2002-000277 12/23/2002

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

STATE OF ARIZONA GERALD R GRANT

v.

JAVIER IVAN JIMENEZ CRAIG W PENROD

FINANCIAL SERVICES-CCC
REMAND DESK CR-CCC
TEMPE JUSTICE CT-WEST

MINUTE ENTRY

WEST TEMPE JUSTICE COURT

Cit. No. #5967199

Charge: 1. DUI ALCOHOL
2. DUI BAC .10 WITHIN 2 HRS.
3. FAIL TO OBEY TRAFFIC CONTROL DEVICE

DOB: 06/01/66

DOC: 12/15/00

This Court has jurisdiction of this appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. Section 12-124(A).

This case has been under advisement since the time of oral argument. This Court has considered and reviewed the record of the proceedings from the West Tempe Justice Court, the exhibits made of record and the Memoranda submitted by Appellant. Appellee, the State of Arizona, has chosen not to file a brief in this case.

The only issue presented for review is whether the trial judge erred by coercing the jury into reaching a verdict when they announced that they were hung.

Appellant, Javier Ivan Jimenez, was arrested and charged on December 15, 2000 with Driving While Under the Influence of Intoxicating Liquor, a class 1 misdemeanor in violation of A.R.S. Section 28-1381(A)(1); Driving with a Blood Alcohol Content Greater than .10 within 2 Hours of Driving, a class 1 misdemeanor in violation of A.R.S. Section 28-1381(A)(2); and Failure to Obey a Traffic Control Device, a civil traffic offense in violation of A.R.S. Section 28-644(A). Appellant entered pleas of Not Guilty, and his case proceeded to trial on April 5, 2002 before the Honorable David H. Fletcher, West Tempe Justice of the Peace. The record reflects that late in the day of April 12, 2002, the jury foreman informed the judge in open court, that the jury was hung, and that they could not agree on a verdict. The following conversation occurred in open court between the trial judge and the jury foreperson:

> JURY FOREMAN: Your Honor, we're hung. We need some direction. I guess, I haven't filled out the paperwork. We can't agree on a verdict.
>
> THE COURT: Okay. You're not hung until I tell you you're hung, and you're not hung.
>
> JURY FOREMAN: Okay.
>
> THE COURT: You've heard all of the evidence in this case. I could decide this case, and you folks are going to decide this case; and you may resume your deliberations.[1]

Thereafter, the jury returned with guilty verdicts as to Counts 1 and 2. Appellant was found responsible for count 3, the civil traffic offense. Appellant has filed a timely Notice of Appeal in this case.

The issue is whether the trial judge erred in making remarks intended to coerce the jury into resuming deliberations and reaching a verdict in this case. Appellant cites State v. McCutcheon[2], for the proposition that "(a) trial judge must be careful not to appear to influence a jury into making a particular decision or coerce a jury into a verdict that the jury would otherwise (not) reach without compromising the beliefs of one or more jurors."[3] The trial judge's role is not to coerce or intimidate a jury into reaching a verdict, but rather to inquire whether the jurors are deadlocked, or if there is the possibility of additional discussion and

[1] R.T. of April 12, 2002, at page 3.
[2] 150 Ariz. 317, 723 P.2d 666 (1986).
[3] Appellant's Opening Memorandum at page 3.

further deliberations that might produce a verdict without inquiry to the individual jurors' consciences. The record in this case does not reflect that the trial judge inquired whether believed it was possible to reach a verdict.

The record in this case further reflects that the trial judge used language that could only be described as intimidating: "You're not hung until I tell you you're hung, and you're not hung."[4] More importantly, the trial judge informed the jurors that he could decide the case, and ordered the jury to decide the case, and then abruptly excused the jurors to resume their deliberations.[5] Such language can only be characterized as coercive and improper. Given the coercive nature of the trial judge's comments, this Court cannot say that this error was harmless. In fact, it appears that this error goes to the very heart of the case.

IT IS THERFORE ORDERED reversing the judgments of guilt and sentences imposed as to Counts 1 and 2.

It further appears that Count 3 (Failure to Obey a Traffic Control Device) was a case tried to the bench, not involving a jury trial. Therefore, as to Count 3 only,

IT IS ORDERED affirming the finding of responsibility and sanction imposed.

IT IS FURTHER ORDERED remanding this case back to the West Tempe Justice Court for a new trial and all future and further proceedings consistent with this opinion.

[4] R.T. of April 12, 2002, at page 3.
[5] Id.