

2014 IL App (2d) 140106-U
No. 2-14-0106
Order filed August 19, 2014

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).

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of Winnebago County.
)	
Plaintiff-Appellee,)	
)	
v.)	No. 08-CF-447
)	
DIANE CHAVEZ,)	Honorable
)	Joseph G. McGraw,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE McLAREN delivered the judgment of the court.
Justices Jorgensen and Spence concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court properly denied defendant's motion to dismiss a charge on double-jeopardy grounds, as the court's grant of a new trial on the basis of trial error did not terminate defendant's original jeopardy.

¶ 2 Defendant, Diane Chavez, appeals the trial court's order denying her motion to dismiss an indictment on the basis of former jeopardy. She contends that the charge should be dismissed because the State failed to prove her guilty beyond a reasonable doubt at her first trial and double jeopardy precluded a retrial. We affirm.

¶ 3 Defendant was charged with obstructing justice (720 ILCS 5/31-4(a)(1) (West 2008)). The indictment alleged that she provided the police with false information, hampering their investigation of Richard Wanke, who was a suspect in a recent murder. Following a jury trial, defendant was found guilty. She moved for a new trial, arguing that the trial court erred by refusing to give the jury her tendered instruction stating that actual interference with an investigation was an element of the offense. The trial court granted the motion and ordered a new trial.

¶ 4 Defendant then moved to dismiss the charge on the ground of former jeopardy. She argued that, at her first trial, the State failed to prove beyond a reasonable doubt that she actually interfered with the investigation and, thus, double jeopardy barred a retrial. The court denied the motion and defendant appeals pursuant to Illinois Supreme Court Rule 604(f) (eff. July 1, 2006).

¶ 5 Defendant contends that the State's evidence was insufficient to prove that she obstructed justice in that it did not prove that she materially affected the officers' investigation. Accordingly, she maintains that principles of double jeopardy bar a retrial. The State responds that, regardless of the sufficiency of the evidence at the first trial, a retrial is permissible because defendant's jeopardy never terminated. We agree with the State.

¶ 6 Defendant's claim presents a question of law, which we review *de novo*. See *People v. Bellmyer*, 199 Ill. 2d 529, 537 (2002). Both the federal and state constitutions (U.S. Const., amend. V; Ill. Const. 1970, art. I, § 10) prohibit (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *People v. Placek*, 184 Ill. 2d 370, 376-77 (1998). However, the protection is triggered only if there has been some event, such as an acquittal, that terminates the original jeopardy. *Richardson v. United States*, 468 U.S. 317, 325-26 (1984); *People v.*

Smith, 338 Ill. App. 3d 254, 255 (2003). Thus, defendant cannot prevail on her claim unless her original jeopardy has terminated. It has not. *People v. Cordero*, 2012 IL App (2d) 101113, ¶ 3.

¶ 7 This case is controlled by *Cordero*. There, much like in this case, the defendant moved for either a judgment of acquittal or a new trial. The trial court denied an outright acquittal, but granted him a new trial on the ground that certain evidence had been improperly excluded. The defendant then moved to dismiss the charges based on double jeopardy. The trial court denied the motion and the defendant appealed. *Id.* ¶ 1. We affirmed, holding that, although the trial court granted the defendant a new trial on the basis of trial error, there was never an event, such as an acquittal, that terminated the defendant's original jeopardy. *Id.* ¶ 4. We contrasted that situation with the case where the appellate court reverses a conviction on the basis of trial error. In that case the appellate court must decide whether the trial evidence was sufficient to prove the defendant guilty beyond a reasonable doubt. If it was not, double jeopardy bars a retrial. *Id.* ¶ 6 (citing *People v. Taylor*, 76 Ill. 2d 289, 309 (1979)).

¶ 8 We found support for our holding in *Richardson*, where the Supreme Court found no bar to a retrial following a "hung jury," regardless of the sufficiency of the evidence at the first trial. We found no meaningful distinction between declaring a mistrial based on a hung jury and granting a new trial on the basis of trial error, noting that federal appeals courts since *Richardson* had reached the same conclusion. *Id.* ¶¶ 7-10. Thus, we concluded that the defendant's jeopardy in the first trial had never terminated and that the trial court properly declined to dismiss the charges.

¶ 9 *Cordero* controls here. Just as in *Cordero*, double jeopardy does not prevent retrying defendant, as none of the three events has occurred. Because she was granted a new trial, she has not been convicted, acquitted, or punished.

¶ 10 As the State points out, the only distinction between *Cordero* and this case is that in the former a new trial was granted based on the improper exclusion of evidence while this case involves a jury-instruction issue. We see no significance in this distinction and, indeed, *Cordero* referred to trial errors in general. Because the granting of a new trial did not terminate defendant's jeopardy from the first trial, she was not entitled to dismissal of the charge, regardless of the sufficiency of the evidence.

¶ 11 The judgment of the circuit court of Winnebago County is affirmed, and the cause is remanded.

¶ 12 Affirmed and remanded.