St. John's Law Review

Volume 53
Number 3 *Volume 53, Spring 1979, Number 3*

Article 13

CPL § 310.50(2): Jury's Noncompliance with Trial Court's Instructions Does Not, Per Se, Require Resubmission of Verdict

Robin J. Stalbow

serve to put draftsmen of broad arbitration provisions on notice that if judicial resolution of the issue of compliance with conditions precedent is desired, the conditions must be express. Absent such a clear characterization, the question will be decided by the arbitrator.

Sharon M. Heim

CRIMINAL PROCEDURE LAW

CPL § 310.50(2): Jury's noncompliance with trial court's instructions does not, per se, require resubmission of verdict

Under CPL § 310.50(2), "the court . . . must direct the jury to reconsider" its verdict when the verdict "is not in accordance with the [trial] court's instructions . . . ."[140] Recently, however, in *People v. Robinson*,[141] the Court of Appeals held that unless the jury's intention with respect to individual counts of an indictment is unclear, the failure of a jury to comply with the court's instructions does not, per se, require resubmission of the case.[142]

The defendant in *Robinson* was charged with criminal sale, criminal possession with intent to sell and simple possession of a controlled substance.[143] Before submitting the case to the jury, the judge properly instructed it to consider the lesser included offenses[144] of criminal possession with intent to sell and simple possession

---

Educ. Ass'n, 84 Misc. 2d 675, 376 N.Y.S.2d 376 (Sup. Ct. Oswego County 1975). It is submitted that the *Norkin* decision will have the effect of minimizing the difference between commercial arbitration and collective bargaining.

[140] CPL § 310.50(2) provides in pertinent part:

> If the jury renders a verdict which in form is not in accordance with the court's instructions or which is otherwise legally defective, the court must explain the defect or error and must direct the jury to reconsider such verdict, to resume its deliberation for such purpose, and to render a proper verdict.

CPL § 310.50(2) represents a codification of CCP §§ 447-449 (1881) in revised form. *See* CPL § 310.50(2), commentary at 593 (1971).

[141] 45 N.Y.2d 448, 382 N.E.2d 759, 410 N.Y.S.2d 59 (1978).

[142] *Id.* at 452, 382 N.E.2d at 761, 410 N.Y.S.2d at 61.

[143] *Id.* at 451, 382 N.E.2d at 760, 410 N.Y.S.2d at 60. The defendant, Marion Robinson, was indicted for his alleged participation in two separate drug transactions. The six-count indictment charged him with criminal sale of a controlled substance in the second degree, N.Y. PENAL LAW § 220.41(1) (Supp. 1978-1979); criminal sale of a controlled substance in the third degree, *id.* § 220.39(1); two counts of criminal possession of a controlled substance with intent to sell in the third degree, *id.* § 220.16(1); criminal possession of a controlled substance in the fifth degree, *id.* § 220.09(1); criminal possession of a controlled substance in the seventh degree, *id.* § 220.03.

[144] 45 N.Y.2d at 451, 382 N.E.2d at 760, 410 N.Y.S.2d at 60. CPL § 1.20(37) defines lesser included offense as follows: "when it is impossible to commit a particular crime without

in the alternative and render a guilty verdict on no more than one of the two charges.[145] Despite these instructions, the jury convicted the defendant of both possession with intent to sell and simple possession.[146] The court dismissed the simple possession count *sua sponte*.[147] Upon the defendant's objection to this action,[148] the trial

concomitantly committing, by the same conduct, another offense of lesser grade or degree, the latter is, with respect to the former, a 'lesser included offense.'" CPL § 1.20(37) (1971). Whether an offense qualifies as a "lesser included offense" is determined with reference to the particular conduct at issue in the case rather than the abstract statutory definition of the crimes charged. *See* People v. Johnson, 39 N.Y.2d 364, 368, 348 N.E.2d 564, 566, 384 N.Y.S.2d 108, 110 (1976); People v. Stanfield, 36 N.Y.2d 467, 472, 330 N.E.2d 75, 78, 369 N.Y.S.2d 118, 122 (1975).

[145] Upon motion, the trial court must submit a lesser included offense to the jury for consideration in the alternative if there is a "reasonable view of the evidence which would support a finding that the defendant committed such lesser offense but did not commit the greater." CPL § 300.50(1) (1971); *see, e.g.*, People v. Johnson, 39 N.Y.2d 364, 367, 348 N.E.2d 564, 565, 384 N.Y.S.2d 108, 109 (1976); People v. Shuman, 37 N.Y.2d 302, 304, 333 N.E.2d 363, 364, 372 N.Y.S.2d 60, 61 (1975); People v. Asan, 22 N.Y.2d 526, 529-30, 239 N.E.2d 913, 915, 293 N.Y.S.2d 326, 328 (1968). CPL § 300.50 appears to be a codification of the "some basis in evidence" test articulated in People v. Mussenden, 308 N.Y. 558, 127 N.E.2d 551 (1955). The *Mussenden* court stated that "submission of . . . an included crime is justified only where there is some basis in the evidence for finding the accused innocent of the higher crime, and yet guilty of the lower one." *Id.* at 563, 127 N.E.2d at 554, *accord*, People v. Asan, 22 N.Y.2d 526, 239 N.E.2d 913, 293 N.Y.S.2d 326 (1968); People v. Malave, 21 N.Y.2d 26, 233 N.E.2d 269, 286 N.Y.S.2d 245 (1967); People v. Moran, 246 N.Y. 100, 158 N.E. 35 (1927).

Under CPL § 300.50(1) the court must evaluate the evidence in the light most favorable to the defendant. If there is some basis for acquitting him of the higher charge, the lesser included charges must be submitted to the jury, despite any belief the court may hold that the defendant is guilty of the more serious crime. People v. Shuman, 37 N.Y.2d 302, 304, 333 N.E.2d 363, 365, 372 N.Y.S.2d 60, 62 (1975) (citing People v. Mussenden, 308 N.Y. 558, 562, 127 N.E.2d 551, 554 (1955)); People v. Usher, 39 App. Div. 2d 459, 336 N.Y.S.2d 935 (4th Dep't 1972), *aff'd*, 34 N.Y.2d 600, 310 N.E.2d 547, 354 N.Y.S.2d 952 (1974). When a jury which has been instructed to render a verdict on lesser charges fails to do so, the defective verdict operates as an acquittal on each ignored count if it is accepted by the court. CPL § 310.50 (1971). Under the double jeopardy rule, the defendant cannot be retried on one of the ignored counts even if his conviction on the more serious charge subsequently is reversed. *See* People v. Dowling, 84 N.Y. 478 (1881). On the other hand, if the court failed to instruct the jury to render a verdict on lesser included counts, its silence is not equivalent to acquittal. *See* People v. Jackson, 20 N.Y.2d 440, 231 N.E.2d 722, 285 N.Y.S.2d 8, *cert. denied*, 391 U.S. 928 (1968).

It has been noted that both the state and the defendant benefit when lesser included crimes are considered by the jury. The prosecution benefits by having an additional opportunity to obtain a conviction even if it fails to prove some element of the higher crime, while the defendant is afforded the opportunity of being found guilty of a less serious crime than that charged. *See* People v. Mussenden, 308 N.Y. 558, 561-62, 127 N.E.2d 551, 553 (1955).

[146] 45 N.Y.2d at 451, 382 N.E.2d at 760, 410 N.Y.S.2d at 60. The jury found the defendant not guilty on the criminal sale of a controlled substance counts. *Id.*

[147] *Id.* Before dismissing the simple possession counts, the court recorded the verdict in accordance with CPL § 310.80.

[148] The defendant contended that the verdict was inconsistent and illegal because the jury misunderstood the court's instructions. 45 N.Y.2d at 451, 382 N.E.2d at 760, 410 N.Y.S.2d at 60.

court polled the jurors,[149] who indicated that they did intend to convict the defendant of both charges.[150] The trial judge concluded that the verdict was neither inconsistent nor illegal[151] and refused to resubmit the case to the jury for reconsideration.[152] The Appellate Division, First Department, affirmed.[153]

On appeal, the Court of Appeals affirmed. Judge Jasen, writing for a unanimous Court, rejected the defendant's contention that resubmission was mandated under CPL § 310.50(2) solely because the jury's verdict did not conform to the trial court's instructions.[154] The Court distinguished the issue in *Robinson* from that presented in *People v. Salemmo*,[155] in which the resubmission of a nonconforming verdict was upheld.[156] While both *Salemmo* and *Robinson* involved a jury's failure to consider lesser included counts only in the alternative despite instructions to the contrary, Judge Jasen noted that the sole issue before the *Salemmo* Court was whether the trial court's decision to resubmit a not guilty verdict on one of the charges was precluded under CPL § 310.50(2).[157] Addressing

---

[149] *See* note 167 *infra*.

[150] 45 N.Y.2d at 451, 382 N.E.2d at 760, 410 N.Y.S.2d at 61.

[151] Since each count in an indictment is regarded as a separate indictment, a finding of guilt on some counts and innocence on others does not necessarily constitute a legally defective verdict. *See* Dunn v. United States, 284 U.S. 390, 393 (1932); People v. Delorio, 33 App. Div. 2d 350, 353, 308 N.Y.S.2d 131, 135 (3d Dep't 1970); People *ex rel* Troiani v. Fay, 13 App. Div. 2d 999, 1000, 216 N.Y.S.2d 394, 397 (2d Dep't 1961). Where the crimes have identical elements, however, a verdict of guilty on one and not guilty on the other is repugnant and therefore defective. *See, e.g.*, People v. Gross, 51 App. Div. 2d 191, 197-98, 379 N.Y.S.2d 885, 893 (4th Dep't 1976); People v. Bullis, 30 App. Div. 2d 470, 472, 294 N.Y.S.2d 331, 333 (4th Dep't 1968). Similarly, a verdict convicting a defendant and acquitting a codefendant is legally defective if the evidence does not support the inconsistent finding. People v. Munroe, 190 N.Y. 435, 438, 80 N.E. 476, 478 (1908). In addition, if the jury finds a defendant guilty of two inconsistent crimes based upon one act, its verdict is regarded as "repugnant." People v. Clarke, 56 App. Div. 2d 851, 851, 392 N.Y.S.2d 65, 66 (2d Dep't 1977). *But cf.* People v. Broome, 21 App. Div. 2d 899, 899, 251 N.Y.S.2d 747, 749 (2d Dep't 1964), *rev'd on other grounds*, 15 N.Y.2d 985, 207 N.E.2d 603, 260 N.Y.S.2d 6 (1965) (conviction of inconsistent crimes based upon one act does not require reversal of entire judgment or new trial). A mistake by the jury with regard to the law of intent has also been said to result in mandatory resubmission. *See* People v. Haymes, 34 N.Y.2d 639, 311 N.E.2d 509, 355 N.Y.S.2d 376 (mem.), *cert. denied*, 419 U.S. 1003 (1974).

[152] 45 N.Y.2d at 451, 382 N.E.2d at 760, 410 N.Y.S.2d at 61.

[153] 56 App. Div. 2d 756, 756, 392 N.Y.S.2d 35, 36 (1st Dep't 1977). In a dissenting opinion, Justice Murphy argued that the trial court did not have the power to dismiss the simple possession count under CPL § 310.50(2). 56 App. Div. 2d at 757, 392 N.Y.S.2d at 37 (Murphy, J., dissenting) (citing People v. Salemmo, 38 N.Y.2d 357, 360, 342 N.E.2d 579, 580, 379 N.Y.S.2d 809, 811 (1976)); *see* note 163 *infra*.

[154] 45 N.Y.2d at 452, 382 N.E.2d at 761, 410 N.Y.S.2d at 61.

[155] 38 N.Y.2d 357, 342 N.E.2d 579, 379 N.Y.S.2d 809 (1976).

[156] 45 N.Y.2d at 452, 382 N.E.2d at 761, 410 N.Y.S.2d at 61.

[157] Id. at 453, 382 N.E.2d at 761, 410 N.Y.S.2d at 61. The defendant in *Salemmo* was indicted for his alleged involvement in an illegal narcotics transaction. Although the jury was

the question not presented in *Salemmo*, the *Robinson* Court stated that "resubmission is required only where the verdict . . . exhibits a confusion on the part of the jury such that its intention with respect to individual counts . . . is uncertain."[158]

In *Robinson*, Judge Jasen concluded, the jury clearly intended to convict the defendant of possession with intent to sell, while its guilty verdict with respect to the simple possession charge was "mere surplusage."[159] The Court observed that to jurors unfamiliar with the concept of lesser included offenses, a conviction of possession would appear entirely consistent with a conviction of possession with intent to sell.[160] In addition, Judge Jasen noted, it has been a common practice of appellate courts to dismiss convictions on a lower charge when it would have been impossible for the defendant to have committed the greater offense without having committed the lesser included offense as well.[161] He perceived no reason why the

---

properly instructed, it found the defendant guilty of both criminal sale and criminal possession with intent to sell a dangerous drug, while acquitting him of the lesser charge of criminal possession. 38 N.Y.2d at 359, 342 N.E.2d at 579, 379 N.Y.S.2d at 810-11. As a result of its noncompliance with instructions, the trial judge resubmitted the verdict to the jury, whereupon it found the defendant guilty solely of criminal possession. *Id.*, 342 N.E.2d at 580, 379 N.Y.S.2d at 811. On appeal, the *Salemmo* defendant invoked the portion of CPL § 310.50(2) which provides that "if it is clear that the jury intended to find a defendant not guilty upon any particular count, the court must order that the verdict be recorded as an acquittal of such defendant upon such count." CPL § 310.50(2) (1971). Affirming the defendant's conviction, the *Salemmo* Court concluded that the verdict's inherent inconsistency reflected the jury's confusion. Since it was impossible to find that the first verdict was a clear indication of the jury's intention to acquit on the simple possession count, the Court reasoned, entry of an acquittal was not statutorily mandated. 38 N.Y.2d at 361, 342 N.E.2d at 581, 379 N.Y.S.2d at 812.

[158] 45 N.Y.2d at 453, 382 N.E.2d at 761, 410 N.Y.S.2d at 61.

[159] *Id.* at 453, 382 N.E.2d at 761, 410 N.Y.S.2d at 62. A verdict which is otherwise valid is not rendered defective by the presence of an unauthorized finding by the jury, often termed "surplusage." In People v. Syph, 74 Misc. 2d 466, 344 N.Y.S.2d 47 (Sup. Ct. Erie County 1973), for example, a recommendation of "leniency" which accompanied the jury's guilty verdict was deemed "surplusage," since it could be excised without impairing the otherwise valid verdict. In extending the concept of "surplusage" to include an improper guilty verdict on a lesser included charge, Judge Jasen relied on the decision in United States v. Howard, 507 F.2d 559 (8th Cir. 1974). Addressing facts similar to those in *Robinson*, the *Howard* court observed that, since it found the defendant guilty of the greater offense, the jury "must necessarily have concluded that all of the elements of the lesser included offenses were present." *Id.* at 563 (citation omitted).

[160] 45 N.Y.2d at 453, 382 N.E.2d at 761-62, 410 N.Y.S.2d at 62.

[161] *Id.*, 382 N.E.2d at 762, 410 N.Y.S.2d at 62. The Court cited cases in which larceny convictions were dismissed when the defendant also was convicted of robbery. People v. Lee, 39 N.Y.2d 388, 390, 348 N.E.2d 579, 581, 384 N.Y.S.2d 123, 124 (1976); People v. Johnson, 39 N.Y.2d 364, 370, 348 N.E.2d 564, 567, 384 N.Y.S.2d 108, 111 (1976); People v. Grier, 37 N.Y.2d 847, 848, 340 N.E.2d 471, 471, 378 N.Y.S.2d 37, 38 (1975) (mem.); People v. Pyles, 44 App. Div. 2d 784, 784, 355 N.Y.S.2d 104, 105 (1st Dep't 1974). In addition, the Court cited a number of cases in which criminal possession of controlled substances charges were dis-

same power of dismissal should not be exercised in the first instance by the trial court.[162]

The *Robinson* decision appears to represent an attempt on the part of the Court of Appeals to dispel any misapprehensions that might have been created by a particularly broad statement that appeared in the *Salemmo* opinion. Although the *Salemmo* Court stated that "the law now specifically mandates that a court direct the jury to reconsider its verdict where the form of the verdict is not in accord with . . . instructions,"[163] the *Robinson* opinion indicates that resubmission is not always required in cases where the intention of the jury is readily discernible despite its failure to follow instructions.[164]

It is submitted, however, that this limitation on the general mandate imposed by CPL § 310.50(2) has no application in situations where the verdict is defective for reasons other than the jurors' noncompliance with the court's instructions regarding lesser included offenses.[165] Where the jury finds the defendant guilty of two

missed when the defendant was convicted of criminal sale counts as well. People v. Rivers, 59 App. Div. 2d 847, 847, 399 N.Y.S.2d 12, 12-13 (1st Dep't 1977); People v. Rodriguez, 54 App. Div. 2d 949, 949, 388 N.Y.S.2d 331, 332 (2d Dep't 1976); People v. Lugo, 53 App. Div. 2d 650, 650, 384 N.Y.S.2d 492, 492 (2d Dep't 1976). In each of these cases, the defendant was convicted of both the lesser included offense and the more serious crime after the trial court failed to instruct the jury of its duty to consider the charges in the alternative. The convictions on the lesser included offenses were dismissed by the appellate courts under CPL § 300.40(3)(b), which provides: "[a] verdict of guilty upon the greatest count submitted is deemed a dismissal of every lesser count submitted. . . ." CPL § 300.40(3)(b) (1971). Although none of these cases involved dual convictions in contravention of the trial court's specific instructions, the *Robinson* Court did not find the distinction significant. 45 N.Y.2d at 454, 382 N.E.2d at 762, 410 N.Y.S.2d at 62.

[162] 45 N.Y.2d at 454, 382 N.E.2d at 762, 410 N.Y.S.2d at 62.

[163] 38 N.Y.2d at 360, 342 N.E.2d at 580, 379 N.Y.S.2d at 811. The *Salemmo* Court contrasted the language in CPL 310.50(2) with the provisions of one of its predecessors, CCP § 447 (repealed 1970), which gave the trial judge discretion to return a verdict to the jury for reconsideration when " 'it appears to the court that the jury have mistaken the law.' " 38 N.Y.2d at 360, 342 N.E.2d at 580, 379 N.Y.S.2d at 811 (quoting Code Crim. Proc. § 447 (repealed 1970)). This discussion in *Salemmo* apparently prompted the dissenters to the appellate division's decision in *Robinson* to conclude that the trial court erred in refusing to resubmit the case. *See* 56 App. Div.2d at 757, 392 N.Y.S.2d at 37 (Murphy, J., dissenting).

[164] The result in *Robinson* is in accord with those portions of CPL § 310.50(2) which permit the entry of a judgment of acquittal "if it is clear that the jury intended to find [the] defendant not guilty upon any . . . count." Similarly, the decision seems consistent with one of the predecessors of CPL § 310.50(2), which provided that improper verdicts should be returned to the jury until such time as they were rendered in a form "from which it [could] be clearly understood what [was] the intent of the jury . . . ." CCP § 448 (repealed 1970). Indeed, by refusing to require the trial court to perform the ritual of resubmission where the jury's intent is clear, the *Robinson* Court seems to have restored to a limited extent the trial court discretion implicit in the former rule.

[165] In People v. Flowers, 44 App. Div. 2d 842, 355 N.Y.S.2d 642 (2d Dep't 1974), and People v. Daughtry, 86 Misc. 2d 397, 381 N.Y.S.2d 730 (Sup. Ct. App. T. 2d Dep't 1974) (per

crimes with mutually exclusive elements, for example, the verdict would be illegal as well as nonconforming.[166] In such a case, a polling of the jurors could not serve to cure the defect[167] and resubmission should be required notwithstanding the trial judge's belief that the jury's underlying intention is clear. In contrast is the situation where the jury returns convictions on more than one included offense. Although not required by the *Robinson* decision, it is suggested that a polling of the jurors, conducted *prior* to the dismissal of the lesser included offenses, would provide a needed safeguard and insure that juries' intentions are accurately reflected in the recorded verdicts.[168]

Robin J. Stalbow

---

curiam), *aff'd without opinion*, 38 N.Y.2d 972, 348 N.E.2d 613, 384 N.Y.S.2d 156 (1976), appellate courts held that a trial judge erred in directing a not guilty verdict on an unauthorized use of a vehicle charge after the jury returned a guilty verdict on that count as well as on a count charging criminal possession of stolen property in the first degree. Both the *Flowers* and the *Daughtry* court concluded that, under such facts, CPL § 310.50(2) mandated the resubmission of the case for reconsideration by the jury. In both cases, however, the verdicts were improper because a finding of guilt with respect to unauthorized use of a vehicle is legally incompatible with a finding of guilt with respect to criminal possession of stolen property. *Compare* N.Y. PENAL LAW § 165.05 (1975 & Supp. 1978-1979) *with* N.Y. PENAL LAW §§ 165.40-.50 (1975). Thus, *Flowers* and *Daughtry* may be contrasted with *Robinson*, in which the verdict was technically defective but not substantively inconsistent. In light of this distinction, it seems reasonable to assume that the *Robinson* ruling leaves undisturbed the holdings in *Flowers* and *Daughtry*.

[166] *See* note 151 *supra*.

[167] Polling the jury is an orthodox method for dispelling any doubts concerning a verdict and has ample statutory support. CPL § 310.80 (1971) provides in pertinent part:

> [T]he jury must, if either party makes such an application, be polled and each juror separately asked whether the verdict announced by the foreman is in all respects his verdict. If upon . . . the separate inquiry any juror answers in the negative, the court must refuse to accept the verdict and must direct the jury to resume its deliberation.

In addition to the statutory provision requiring polling upon motion, it has been held that a trial judge on his own motion may poll the jury if any "suspicion or doubt was aroused" upon announcement of the verdict. People v. Orr, 138 Misc. 535, 537, 246 N.Y.S. 673, 676 (Madison County Ct. 1930). Thus, it probably is not improper for the trial judge to poll the jury to eliminate any ambiguity when a verdict of guilty on two or more inclusory counts is rendered contrary to instructions. *Accord*, United States v. Howard, 507 F.2d 559 (8th Cir. 1974). Nevertheless, the polling procedure should not be used as a shortcut when there are indications of faulty jury deliberations.

[168] It is the trial judge's responsibility to prevent legally-defective verdicts from being entered upon the court's records. *See* People v. Salemmo, 38 N.Y.2d 357, 360, 342 N.E.2d 579, 580, 379 N.Y.S.2d 809, 811 (1976).