
31.8 Findings of Fact

A. Statutory Requirement

Before granting a mistrial, G.S. 15A-1064 requires the trial judge to make findings of fact "with respect to the grounds for the mistrial and insert the findings in the record of the case." *See also State v. Jones*, 67 N.C. App. 377 (1984) (stating that a trial judge should exercise his or her power to grant a mistrial cautiously after a careful consideration of all available evidence and only after making the requisite findings of fact on the basis of evidence before the judge at the time the judicial inquiry is made). Before the enactment of this statute, the common law only required that judges in capital cases find facts and set them out in the record whenever he or she declared a mistrial due to a manifest necessity. *State v. Lachat*, 317 N.C. 73 (1986).

If the findings of fact are not supported by the evidence in the record, the order of mistrial cannot stand. *Id.* (defendant entitled to dismissal of capital murder charge based on former jeopardy where first trial judge failed to make both an inquiry and factual findings as to why he felt the jury was hopelessly deadlocked and the record did not indicate that there was a deadlock); *see also State v. Chriscoe*, 87 N.C. App. 404 (1987) (trial judge erred in granting State's motion for mistrial where the evidence did not support his finding that there was a manifest necessity for a mistrial).

B. Purpose of Requirement

The purpose of G.S. 15A-1064 is to protect a criminal defendant's "valued right" guaranteed by the constitutional prohibition of double jeopardy to have his or her trial completed before a particular tribunal by "ensur[ing] that mistrial is declared only where there exists real necessity for such an order." *State v. Jones*, 67 N.C. App. 377, 382 (1984); *see also* G.S. 15A-1064 Official Commentary (making of findings of fact is "important when the rule against prior jeopardy prohibits retrial unless the mistrial is upon certain recognized grounds or unless the defendant requests or acquiesces in the mistrial"; effect of request or acquiescence is discussed in subsection F., below). A secondary purpose is "to ensure that a full record is made." *Jones*, 67 N.C. App. 377, 385; *see also State v. Lachat*, 317 N.C. 73 (1986) (findings of fact are required so that the

judge's conclusion as to the matter of law arising from the facts may be reviewed by the appellate courts).

C. Timing of Findings of Fact

To ensure full deliberation by the trial judge, the findings must be made *before* the mistrial is declared. To allow a judge to make retroactive findings in support of mistrial after it has already been granted would weaken the protections provided by G.S. 15A-1064. *State v. Jones*, 67 N.C. App. 377 (1984). *But see State v. Johnson*, 60 N.C. App. 369, 373 (1983) (noting that the reason for G.S. 15A-1064 was "valued highly by this Court" but finding that the declaration of mistrial before making findings of fact was harmless under the peculiar facts of the case where the trial judge had ordered the mistrial after experiencing chest pains during a heated trial of a drug case).

D. Failure to Make Findings

The requirements of G.S. 15A-1064 are mandatory and "'[e]ven the most exigent of circumstances do not justify circumvention of this rule.'" *State v. Jones*, 67 N.C. App. 377, 382 (1984) (citation omitted); *cf. Arizona v. Washington*, 434 U.S. 497 (1978) (while the U.S. Constitution does not require explicit findings supporting a manifest necessity before granting a mistrial, it does require that the record adequately disclose the necessity on which the order rests). The failure of the trial judge to make findings of fact is error. *See State v. Odom*, 316 N.C. 306 (1986); *see also State v. Lachat*, 317 N.C. 73 (1986). However, the failure to make findings, or the making of findings that do not comply with the statute, may be held harmless if the record shows ample factual support for the mistrial order. *See State v. Felton*, 330 N.C. 619 (1992); *State v. Pakulski*, 319 N.C. 562 (1987).

E. Necessity for Objection

In *noncapital* cases, the defendant must object to the trial judge's failure to make findings in support of a mistrial or the error is not subject to appellate review. *See State v. Pakulski*, 319 N.C. 562 (1987). The mandatory nature of G.S. 15A-1064 does not relieve a defendant of the duty to prevent avoidable errors and the resulting unnecessary appellate review by lodging an appropriate objection. *State* v. *Odom*, 316 N.C. 306, 311 (1986). In a *capital* case, the issue of the judge's failure to make findings of fact to support a mistrial will not be waived by the defendant's failure to object. *See Pakulski*, 319 N.C. 562; *State v. Lachat*, 317 N.C. 73 (1986); *see also infra* § 31.9E, Preservation of Double Jeopardy Issue for Appellate Review When Mistrial is Granted on State's Motion or by Trial Judge Ex Mero Motu (defendant's failure to object to declaration of mistrial waives later double jeopardy argument in noncapital case but not in capital case).

F. Motion Granted at Defendant's Request or with Defendant's Acquiescence

Generally, if a mistrial is granted based on a defendant's request, there can be no prejudice to the defendant resulting from a trial judge's failure to make findings of fact.

State v. White, 85 N.C. App. 81 (1987), *aff'd*, 322 N.C. 506 (1988); *State v. Moses*, 52 N.C. App. 412 (1981). However, where the defendant's motion for mistrial was based on prosecutorial misconduct, findings of fact "may be as essential to adequate review of his double jeopardy claim as in a case in which mistrial is ordered over the defendant's objection." *White*, 85 N.C. App. 81, 85 (finding harmless error where trial judge made no findings of fact when granting defendant's motion for mistrial because grounds for the mistrial based on prosecutorial misconduct were clear from the record; however, prosecutorial misconduct in this case did not bar retrial on double jeopardy grounds); *see also infra* § 31.9D, Mistrial Granted on Defendant's Motion or with Consent (discussing double jeopardy implications of mistrial granted on defendant's request).

Likewise, if the defendant acquiesces to a mistrial, a finding to that effect may cure the absence of other findings (subject to the above caveat about prosecutorial misconduct). *See* G.S. 15A-1064 Official Commentary ("If the defendant requests or acquiesces in the mistrial, that finding alone should suffice.").

Practice note: It is not clear what constitutes an acquiescence by the defendant to an order of mistrial. Obviously, if a defendant explicitly consents to the mistrial, he or she has acquiesced. *See, e.g.*, *State v. Boykin*, 255 N.C. 432 (1961) (defendant and his attorney consented to the mistrial and signed the order). To properly preserve the defendant's rights in cases where you do not want a mistrial, always unequivocally object to the order of mistrial on the record. *See State v. Johnson*, 60 N.C. App. 369 (1983) (no discussion of particulars but finding that defendant did not acquiesce in declaration of mistrial).
