

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:
	:
vs.	: NO. 01-10,747
	:
BRIAN I. WILLIAMS,	: CRIMINAL ACTION - LAW
	:
Defendant	: MOTION FOR RECONSIDERATION

OPINION AND ORDER

Before the Court is the Motion of the Commonwealth for reconsideration of this Court's Order entered at the conclusion of trial on March 8, 2002, which dismissed Count II, Simple Assault. That Order was entered after a jury trial on Count I, Aggravated Assault and Count II. The jury reached a verdict of not guilty as to the Aggravated Assault but did not reach a verdict as to the simple assault offense. The Court accepted the verdict pursuant to Pa.R.Crim.P. 648. At that time Defendant made a Motion for Judgment of Acquittal. This Court granted the Motion on the basis of what it deemed to be required under the provisions of Pa.R.Crim.P. 648(D).

This Court is now convinced that its ruling was entered in error. The Order of dismissal was entered following a discussion and argument of counsel as to whether or not a simple assault offense was a lesser-included offense in the aggravated assault charge, to which the Commonwealth acknowledged it would be. At that time this Court inappropriately applied the third sentence of the Rule in paragraph (D) and dismissed the simple assault charge. The Commonwealth did not strenuously oppose the dismissal at the time.

Upon considering the request for reconsideration, however, this Court is satisfied that it is the second sentence of subparagraph (D) of Rule 648 that controls. Under those provisions if the jury cannot agree with respect to a count in the information and if the count upon which it has agreed operates as an acquittal of the lesser-included offense to which they cannot agree, the count should be dismissed. Clearly the acquittal on aggravated assault does not operate as a matter of law as an acquittal of simple assault. See, *Commonwealth v. Irvin*, 393 A.2d 1042 (Pa. Super. 1978) at 1045; *Commonwealth v. Harris*, 582 A.2d 1319 (Pa. Super. 1990); *Commonwealth v. Kemmerer*, 584 A.2d 940 (Pa. 1991). Accordingly, the following Order is entered.

ORDER

This Court's Order of March 8, 2002, dismissing Count II, Simple Assault, and discharging Defendant is VACATED. Count II, Simple Assault, in the information is hereby reinstated. The bail previously posted in this matter, having not been vacated, is hereby directed to be continued. The direction that the costs shall be paid by Lycoming County is hereby VACATED.

The Commonwealth shall proceed with scheduling this matter for a pretrial conference at the earliest possible date in order that a jury selection and trial date can be established.

Notice of entry of this Order shall be given by the Prothonotary to all interested parties,
including but not limited to any surety on the bail.

BY THE COURT,

WILLIAM S. KIESER, JUDGE

cc: Nancy Borgess, CST
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Paul J. Petcavage, Esquire
Gary L. Weber, Esquire, Lycoming Reporter