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Experts Give Karen Read's Double Jeopardy Claim Slim Odds

By **Chris Villani**

Law360 (August 30, 2024, 4:52 PM EDT) -- Karen Read, the Massachusetts woman whose murder case garnered national attention before ending in a mistrial, could struggle to convince a state appellate court that jurors coming forward to say they unanimously voted to acquit her on some charges is enough to trigger double jeopardy, experts told Law360.

Attorneys for Read acknowledge that they hope to bring an issue of first impression to the state's Supreme Judicial Court when they ask the appellate panel to reverse a Superior Court justice's ruling denying her the dismissal of two of the three charges she is facing.

Prosecutors say they intend to retry Read in January on charges that she intentionally drove into her boyfriend, Boston police officer John O'Keefe, in January 2022 after a night of drinking.

The criminal trial ended with the jury telling Superior Court Justice Beverly J. Cannone they were hopelessly deadlocked. Since the mistrial was declared, the defense says five jurors have directly or indirectly told them that the panel was unanimous that Read was not guilty of two charges, including the top charge of second-degree murder.

The defense is arguing that "unprecedented" development is enough to toss that charge and a count of leaving the scene of an accident causing personal injury or death. But Eric Christofferson, a litigator in DLA Piper's Boston office, said the appeal is "going to be a really uphill battle."

"There is a general principle that neither litigants nor judges should invade the province of the jury. What happens in the jury room is supposed to stay in the jury room," Christofferson said. "There is going to be a lot of sausage-making going on behind closed doors, and the system allows that to happen."

Read has had supporters sometimes numbering in the hundreds show up at the courthouse. Interest in the case has been fueled by a blogger amplifying the defense argument that Read was framed and O'Keefe was actually killed inside a Canton, Massachusetts, home and left on the front lawn.

O'Keefe's family recently filed a wrongful death suit against Read and the bars where they were seen drinking that night.

In denying the post-trial motion to dismiss the criminal charges, Justice Cannone noted that the defense consented to a mistrial being declared and that no formal judgment of acquittal was ever entered.

Michelle Peirce, a defense attorney with Hinckley Allen & Snyder LLP, said that reasoning is likely to win at the appellate level as well.

"The system is set up to have a very formal, official verdict read in court with the jury present, and that didn't happen here," Peirce said. "Whether it should have, would have, could have, is a different question. That didn't happen here, and courts are loath to relitigate what a jury did or didn't do when you don't have that full-blown verdict."

Martin G. Weinberg of Martin Weinberg PC, one of Read's attorneys, says it should have happened and that the onus was on the prosecution to push for a deeper dive into what the jury was thinking

before the declaration of a mistrial. In an interview, he said there is a long series of both federal and state precedent that puts the burden on the prosecution to seek out alternatives to a second trial.

"Here, there was a viable alternative: to ask the jurors what the impasse was related to," he said. "Was it all counts? Or just one?"

According to the defense, the jurors said they deadlocked on a single charge: manslaughter while operating under the influence.

Read has yet to formally appeal, but has, through Weinberg, signaled her intent to do so. He said Read's case is unique.

"**I know of no case, ever, where five jurors, or almost half of the jury, has independently reached out and said, 'Wait, we acquitted the defendant on two of the three charges, including the most serious one,''' Weinberg said.**

The defense has argued that Justice Cannone should at least engage in more fact finding as to where the jury stood at the end of the weekslong trial. Weinberg cited the Boston Marathon bomber, whose death penalty case, even years after the trial, is still being litigated to see whether the jurors were thoroughly vetted before being seated.

Pace Law School Professor Bennett Gershman, an expert in constitutional law, criminal justice, and legal ethics, said the Marathon case is distinct from Read's in that it involves claims that the jurors were potentially biased.

"If it's not an impartial jury, the constitution is violated," Gershman said, adding that he thinks Justice Cannone was right to deny the defense motion to dismiss.

"[The trial is] over. It's no longer a viable case or a viable claim," he said. "I think this is [a] very, very weak motion, and I don't see any basis for a court getting involved here."

George Varghese, a former federal prosecutor and current WilmerHale partner, said the place to further probe the jury was in the courtroom and would have been a good move on the part of Justice Cannone.

"The judge could have been more inquisitive as to the nature of the deadlock," Varghese said. "If a jury is telling you it's deadlocked, it behooves the court, the parties, the public, to ask, 'Are you deadlocked on everything? Is a partial verdict possible?'''

As a prosecutor in the Boston U.S. attorney's office, Varghese was part of the trial team in the case of Barry Cadden, the New England Compounding Center owner who faced murder charges tied to contaminated drugs that came from his lab. The jury acquitted Cadden of murder, but curiously wrote numbers in the "guilty" and "not guilty" boxes on the verdict form.

Within minutes of the judge in that case taking what the prosecution thought was an incorrect verdict, Vaghese said his team began discussing next steps. But, once the jury emerges into society and has the ability to read up on the case or talk to non-jurors about it, there was no practical mechanism to bring them back to deliberate some more.

"It's kind of done, at that point," he said.

The Norfolk County district attorney's office, which is prosecuting Read, agrees. In a statement following Justice Cannone's ruling, office representative David Traub said, "We believe that the judge's decision is consistent with almost 200 years of case law. We are moving forward to trying this case January 27."

In her ruling, Justice Cannone also noted that it was the defense, not the government, that pushed for a Tuey-Rodriguez charge, the state's version of the so-called dynamite instruction encouraging a jury to try to reach a unanimous decision.

Defense attorney Tom Hoopes of Libby Hoopes Brooks & Mulvey PC praised the defense team for the way it handled the end of the trial and said he didn't blame them for making the unlikely-to-succeed double jeopardy argument.

"You should really float the balloon, but they don't win very often," Hoopes said. "Judges are really encouraged not to put their fingers in the jury's pie unless invited, and here they didn't say anything."

Hoopes added that, as a defense attorney, he would not have pressed for a partial verdict, noting that it could have turned a deadlocked panel into a conviction and a mistrial is the next best thing for the defense next to a not guilty verdict.

"I would have played the first part exactly as they played it," Hoopes said. "Any day your client is not hooked is a good day."

The Commonwealth is represented by Adam Lally and Laura McLaughlin of the Norfolk County district attorney's office.

Read is represented by Martin G. Weinberg of Martin Weinberg PC, David Yannetti of Yannetti Criminal Defense Law Firm, and Alan Jackson of Jackson Werksman.

The case is Commonwealth v. Read, case number 2282CR00117, in Norfolk County Superior Court.

--Editing by Kelly Duncan.
