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Court rules against retrying two former Symbol Technologies execs

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In a major victory for two former top executives of Symbol Technologies, a federal appeals court ruled Monday that the government cannot retry them on fraud charges because doing so would amount to double jeopardy.

A three-judge panel of the Second Circuit Court of Appeals in Manhattan said that a district court judge in Central Islip acted too hastily in September when he almost immediately declared a mistrial after a juror said it was deadlocked in the cases of Michael DeGennaro, Symbol's former senior vice president for finance, and Frank Borghese, former senior vice president and general manager.

Robert Nardoza, a spokesman for the U.S. Attorneys office in the Eastern District, said the office was reviewing the opinion before deciding whether to appeal it to the full appeals court in or to the Supreme Court.

U.S. District Judge Leonard Wexler declared the mistrial after jurors sent a note saying that they were deadlocked, adding, "We have exhausted all our options. This has been going on since Thursday [the second day of deliberations]."

DeGennaro, Borghese, along with Symbol's former chief financial officer Kenneth Jaeggi, and Symbol's former chief executive Tomo Razmilovic, were indicted in June of 2004 on charges of operating a massive securities fraud at the Holtsville-based company best known for helping to develop the bar-code reader.

Prosecutors charged that Symbol's top-management inflated the company's earnings by more than \$200 million using "a veritable playbook of corporate fraud," including techniques that had internal names such tango sheets, candy deals, channel stuffing and cookie jars. They each faced as much as twenty years in prison, if convicted. Razmilovic fled to Sweden which refuses to extradite him; the attorney for Jaeggi, who went to trial with DeGennaro and Borghese, had asked for the mistrial which Judge Wexler granted, so he did not appeal the mistrial ruling and still faces retrial.

Shortly after the mistrial declaration, defense lawyers said that they had talked with the jurors and a number submitted affidavits saying that they had decided to exonerate DeGennaro and Borhese on all charges and were deadlocked only on a single conspiracy count against Jaeggi.

Wexler said he would not consider the jurors affidavits, saying they might have been compromised because they were written after "defendants counsel and/or other representatives spoke to many of the jurors after they were discharged."

And the appeals court also did not focus on the jurors' claims in its ruling, but rather on the double jeopardy clause of the Fifth Amendment which bars the government from trying a person twice for the same offense.

The appeals court said that even if a trial has not resulted in a final verdict of guilt or innocence as in this case of a mistrial, it still could be "grossly unfair" to force defendants to undergo another trial.

Noting that the trial had gone on for six weeks and the jury had only deliberated for three days in a complex case involving a total of 21 charges, the appeals court said that "it was an abuse of discretion for a trial court to decide that a single jury note indicating deadlock created a 'manifest necessity' to declare a mistrial."

The court said that the judge could have taken a number of steps to insure fairness instead of declaring a mistrial, including instructing the jurors to continue their deliberations and instructing them on the importance of reaching a verdict.

Quoting a previous decision, the appeals court said that a second trial "increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted."

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