STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2015AP1195-CRLV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOSHUA JAVA BERRY,

Defendant-Appellant.

APPEAL FROM A NON-FINAL ORDER DENYING DISMISSAL ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE THOMAS J. MCADAMS, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Prosecution for two offenses can violate double jeopardy, but they must be identical in law and in fact. Here, the State charged Joshua Java Berry with possession of a firearm as a felon and with possession of a firearm by someone adjudicated delinquent, each of which requires the State to prove a different element. Do the charges violate double jeopardy?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request either oral argument or publication. This case may be resolved by applying well-established legal principles to the facts of this case.

SUPPLEMENTAL STATEMENT OF THE CASE

The State charged Berry with possession of a firearm as a felon. Pet-Ap. 1:3. Berry waived his right to a jury trial. Pet-Ap. 1:2. At the bench trial, Berry stipulated that on January 7, 2014, he possessed a firearm in Wisconsin. Pet-Ap. 1:3. He agreed that the firearm is admissible evidence, and agreed that the State could introduce his Florida concealed carry weapon (CCW) permit. Pet-Ap. 1:4. Berry also stipulated that he was convicted of a felony on July 20, 2004, and that the conviction has not been reversed. Pet-Ap. 1:4. The State did not present any witnesses. Pet-Ap. 1:8-12.

Berry testified on his own behalf. Pet-Ap. 1:18. Wisconsin police stopped a car Berry was a passenger in on January 7, 2014. Pet-Ap. 1:18. Berry, who had a gun in his possession, provided the officer with his CCW license from Florida. Pet-Ap. 1:18-20, 23. Berry believed that he could lawfully carry the gun because of his Florida CCW license and he assumed the license was valid in Wisconsin. Pet-Ap. 1:23-25. The court found Berry guilty of possession of a firearm as a previously convicted felon. Pet-Ap. 1:35.

Berry's attorney later discovered that Berry had not previously been convicted of a felony, but rather he pled to a misdemeanor. Pet-Ap. 2:3. The parties agreed that the court must vacate the conviction. Pet-Ap. 2:4. After a discussion about the remedy, the court vacated the finding of guilt and judgment of conviction. Pet-Ap. 2:19-20. The court stated that justice, not insufficient evidence, required this result. Pet-Ap. 2:20. The court did not enter a judgment of acquittal, but instead, dismissed the charge with prejudice. Pet-Ap. 2:22.

The court explicitly held that the United States and Wisconsin Constitutions did not bar the State from prosecuting Berry for possession of a firearm as someone who has been adjudicated

delinquent under Wis. Stat. § 941.29(2)(b). Pet-Ap. 2:23. The court concluded that the two crimes had different elements and that dismissal of the felon-in-possession charge did not bar the State from charging Berry with possession of a firearm as a person adjudicated delinquent. Pet-Ap. 2:23. The State intended to file the new charge. Pet-Ap. 2:24.

Berry moved the court for an order dismissing the charge of possession of a firearm by someone adjudicated delinquent on double jeopardy grounds. Pet-Ap. 3:2. The circuit court believed Berry's double jeopardy claim was weak because he stipulated to a nonexistent felony conviction at trial. Pet-Ap. 3:7. The court found that the trial was void because the process was wrong. Pet-Ap. 3:10. The court believed that the error at trial was a mistake, and compared it to a hung jury. Pet-Ap. 3:10. The court concluded that jeopardy did not attach and the subsequent charge did not violate due process. Pet-Ap. 3:10-11. And the circuit court found that the subsequent charge of possession by a person adjudicated delinquent was not barred. Pet-Ap. 3:7.

Berry filed a petition for leave to appeal this non-final order. The State opposed the petition. This court ordered briefing on the merits of the double jeopardy claim to complete its review mandated by *State v. Jenich*, 94 Wis. 2d 74, 97a, 288 N.W.2d 114 (1980).

ARGUMENT

I. This court should not grant Berry's petition because his double jeopardy rights have not been violated.

A. Standard of review.

The circuit court has discretion to decide whether to grant permissive appeals under Wis. Stat. § 808.03. *Jenich*, 94 Wis. 2d at 97a. The supreme court urges care when the court of appeals exercises that discretion when the order denies a motion to dismiss on double jeopardy grounds. *Id.* at 97a-97b.

A judgment or order not appealable as a matter of right may be appealed to the court of appeals in advance of a final judgment or

order upon leave granted by the court if it determines that an appeal will: "(a) Materially advance the termination of the litigation or clarify further proceedings in the litigation; (b) Protect the petitioner from substantial or irreparable injury; or (c) Clarify an issue of general importance in the administration of justice." Wis. Stat. § 808.03(2).

B. Legal principles.

Interlocutory appeals are disfavored in criminal cases. *See State v. Rabe*, 96 Wis. 2d 48, 59, 291 N.W.2d 809 (1980). That is because this court seeks to avoid "unnecessary interruptions and delays in the circuit courts and to reduce the burden on the appellate courts." *State ex rel. McCaffrey v. Shanks*, 124 Wis. 2d 216, 222, 369 N.W.2d 743 (Ct. App. 1985) (citing *Bearns v. ILHR Dep't*, 102 Wis. 2d 70, 74, 306 N.W.2d 22 (1981)). Because these interruptions and delays are adverse to effective, fair administration of criminal law, the policy against interlocutory appeals is exceptionally strong. *See, e.g., Di Bella v. U.S.*, 369 U.S. 121, 126 (1962); *McCaffrey*, 124 Wis. 2d at 222.

If the defendant has no substantial likelihood of success on appeal, he cannot satisfy any of the statutory criteria. *See State v. Webb*, 160 Wis. 2d 622, 632, 467 N.W.2d 108, *cert. denied*, 502 U.S. 889 (1991).

C. The State did not violate Berry's right to be free from double jeopardy.

Jeopardy attached when Berry testified at his bench trial. *See State v. Seefeldt*, 2002 WI App 149, ¶ 12, 256 Wis. 2d 410, 647 N.W.2d 894. Limited exceptions to the general prohibition against double jeopardy are permitted when the trial is terminated before reaching a final resolution on the merits if the State can demonstrate a manifest necessity for asking for a mistrial. *Id.*

But jeopardy continues because of the mistake at trial. "The Double Jeopardy Clause does not necessarily act as a bar to a second trial for the same charge after conviction." *State v. Henning*, 2004 WI 89, ¶ 19, 273 Wis. 2d 352, 681 N.W.2d 871. Continued jeopardy is a legal fiction, but allowed because of the high price to society if an

accused had immunity from punishment because of a defect sufficient to constitute reversible error in the proceedings leading to conviction. *Id.* ¶¶ 20-21.

Here, the first trial was for possession of a firearm by a felon. The second trial would be for possession of a firearm by a person adjudicated delinquent. The second trial would be similar to a case where the conviction is overturned on appeal, and jeopardy would be continued. Even though, the circuit court, not an appellate court, overturned Berry's conviction, the same principle applies.

None of the exceptions to the principle of continued jeopardy apply. "Where the evidence is found insufficient to convict the defendant at trial, the defendant cannot again be prosecuted." *Henning*, 273 Wis. 2d 352, ¶ 22. Here, the original error was not based on insufficient evidence, but instead on a "mistake." Pet-Ap. 3:9. The second proceeding would merely be a continuation of the first. *See Henning*, 273 Wis. 2d 352, ¶¶ 20-21. The continued jeopardy under the different charge does not violate double jeopardy.

Even if jeopardy is not continued, the charges here are not identical in law. This court examines multiplicity claims under a two-part test. *State v. Eaglefeathers*, 2009 WI App 2, ¶ 7, 316 Wis. 2d 152, 762 N.W.2d 690. First, this court examines whether the offenses are identical in law and in fact. *Id.* And second, it determines whether the legislature intended to authorize multiple punishments. *Id.* If the charged offenses are identical in both law and fact, a presumption arises that the legislature did not intend to authorize cumulative punishments. *Id.* Conversely, if the charged offenses are not identical in law and in fact, a presumption arises that the legislature did not intend to preclude cumulative punishments. *Id.*

Since the charges are different, the State could have brought them in the same proceeding. The charge of possession of a firearm by someone adjudicated delinquent does not violate Berry's right to be free from double jeopardy.

Felon in possession of a firearm has two elements: (1) the defendant possessed a firearm, and (2) the defendant had been convicted of a felony before the date of the possession. Wis. Stat.

§ 941.29(2)(a). *See also* Wis. JI-Criminal 1343 (2011). Possession of a firearm by someone adjudicated delinquent also has two elements: (1) the defendant possessed a firearm, and (2) the defendant had been adjudicated delinquent for an act that if committed by an adult would be a felony. Wis. Stat. § 941.29(2)(b). Each count contains an element different from the other. Since the charges are different in law, the current charge under Wis. Stat. § 941.29(2)(b) does not violate Berry's constitutional right to be free from double jeopardy.

Berry relies on *U.S. v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), but it fails to offer Berry support. The question that the court addressed there was whether the State could appeal from a judgment of acquittal. *Martin Linen*, 430 U.S. at 566-67. The United States appealed and the Court concluded that it could not appeal without implicating double jeopardy. *Id.* at 571.

Here, the State is not appealing the judgment of acquittal. Instead, it charged Berry with a different crime. Since the new charge is different in law from the first charge, the new charge does not violate Berry's right to be free from double jeopardy.

Likewise, *State v. Sahr*, 812 N.W.2d 83 (Minn. 2012), does not support Berry's claims. *See* Berry's brief at 6. There, the Supreme Court of Minnesota concluded that dismissal of the original complaint constituted an acquittal. *Sahr*, 812 N.W.2d at 92. But the court did not address whether the new complaint with a different charge violated double jeopardy. *Id.* It offers no guidance here on whether the State's new complaint charging possession of a firearm by someone adjudicated delinquent violated double jeopardy.

And Berry's reliance on *Sanabria v. U.S.*, 437 U.S. 54 (1978). Berry's brief at 6, is also misplaced. *Sanabria* only discussed whether insufficient evidence of a charge constituted acquittal of that charge. *Sanabria*, 437 U.S. at 68-69. It did not address the issue here: whether subsequent prosecution of a different offense violated double jeopardy.

Berry stipulated that he had been convicted of a felony. Pet-Ap. 1:4. The court relied on that stipulation and found him guilty. Pet-Ap. 1:35. The only reason that conviction had to be reversed was

because Berry's stipulation was a mistake and he had not been convicted of a felony. Pet-Ap. 2:3-4. The court vacated the conviction and dismissed the charge. Pet-Ap. 2:22. The circuit court correctly concluded that jeopardy did not attach. Pet-Ap. 3:10-11.

But even if jeopardy attached, the subsequent prosecution of possession of a firearm by someone adjudicated delinquent does not violate double jeopardy. The State charged Berry under a different statute alleging he committed a crime that was different in law from the dismissed crime. Because the new charge is different in law from the dismissed charge, the new charge does not violate Berry's constitutional right to be free from double jeopardy.

CONCLUSION

For the foregoing reasons, the State requests that this court deny Berry's petition for leave to appeal.

Dated this 29th day of September, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,865 words.

Dated this 29th day of September, 2015.

_____
Christine A. Remington
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 29th day of September, 2015.

_____
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Assistant Attorney General