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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff - Respondent,

vs. Appeal No. 18AP53 CR

DENNIS BRANTNER,

Defendant - Appellant.

BRIEF OF APPELLANT/DEFENDANT

ON APPEAL FROM THE CIRCUIT COURT FOR FOND DU LAC COUNTY, THE HONORABLE PETER L. GRIMM PRESIDING

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ISSUES PRESENTED FOR REVIEW

I. Whether the trial court erred in determining that there was sufficient evidence to establish that Fond du Lac County was a proper venue in which to charge Brantner with possession of illegal substances and bail jumping even though Brantner was brought to Fond du Lac County in police custody and remained in police custody at all relevant times.

II. Whether the trial court violated Brantner's constitutional protection against double jeopardy by imposing two sentences for possession of oxycodone under Wis. Stat. § 961.41(3g)(am) (2015-16) and two associated bail jumping sentences based on the jury's finding that Brantner simultaneously possessed twenty milligram and five milligram oxycodone pills because Wis. Stat. § 961.41(3g)(am) criminalizes possession of the substance not possession of different dosage pills of the substance.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The issues presented in this case are constitutional in nature and present issues of first impression in both law and fact. Therefore, the appellant recommends publication and welcomes oral argument.

STATEMENT OF THE CASE AND FACTS

The facts in this case are simple and largely undisputed. On March 27, 2015, Dennis Brantner exited a courtroom in the Kenosha County Courthouse to find two Fond du Lac County sheriff's deputies waiting in the hallway with a warrant for his arrest in connection with the 1990 murder of Berit Beck. (R.70: 124; App. 6).

Brantner and his attorney, Craig Powell, were leaving a hearing before Kenosha County Circuit Court Judge Chad G. Kerkman in a case that was filed

about a year earlier after the Fond du Lac County Sheriff's Office discovered an in-operable antique hunting rifle while executing a search warrant at Brantner's home in Kenosha. (R.72: 25). The rifle was a family heirloom passed down to Brantner's fourteen-year old son who lived in the home along with his mother and longtime partner of Brantner, Diane Epping. (Id. at 24-25; R.70: 164). Based on the presence of the rifle in the home, Brantner was charged with felon in possession of a firearm. (R.70: 164).

The encounter in the hallway outside Judge Kerkman's courtroom was not the first time Brantner and his attorney, Craig Powell, met the arresting officers. (R.72: 20-21). For over a year Brantner had been cooperating in their homicide investigation, voluntarily appearing for multiple rounds of interviews and fingerprinting. (Id). He had also provided repeated assurances that he would voluntarily report to the Fond du Lac County jail upon receiving notice of a warrant for his arrest. (Id). Nonetheless, the Fond du Lac County Sheriff's Office sent deputies to Kenosha County to retrieve Brantner by force and surprise. (Id).

Upon exiting the courtroom, Brantner was immediately handcuffed with a belly belt, patted down, and his pockets were searched. (R.70: 125-129; App. 7-11). He asked to briefly speak with attorney Powell before being transported away but was not allowed to. (Id. at 211). Instead, the officers escorted him out of the courthouse and into the backseat of their squad car. (Id. at 130; App. 12).

On the way to Fond du Lac, one officer sat next to Brantner in the backseat while the other officer drove. (Id). Brantner remained in handcuffs for the entire drive. (Id at 132; App. 14). When they arrived at the Fond du Lac County jail over two hours after their departure, Brantner was ordered to remove his clothes as part of the booking process. (Id. at 132-33, 204; App. 14-15). He complied, and when he handed his left boot over to one of the officers, she immediately reached inside and pulled out a plastic baggie containing an assortment of pills. (R.70: 77-78).

Roughly five months later, Brantner was returned to Judge Kerkman's courtroom for sentencing on the firearms charge and received a time served jail sentence of approximately eighty days. (R.72: 25). The following week, the Fond du Lac County District Attorney initiated this case with a ten-count criminal complaint. (R.72: 25).

The district attorney threw the book at Brantner, and then some. The complaint alleged three violations of Wis. Stat. § 961.41(3g)(am): possession of oxycodone pill, five milligram, possession of oxycodone pill, twenty milligram, and possession of acetaminophen/hydrocodone. It also alleged one count of possession of zolpidem[1] in violation of Wis. Stat. § 961.41(3g)(b), one count of

[1] Zolpidem is also known by the brand name Ambien. *See* https://www.webmd.com/drugs/2/drug-8862-8110 /zolpidem-oral/zolpidem-oral/details (last visited March 17, 2018).

possession of an illegally obtained prescription in violation of Wis. Stat. § 450.11(7)(h), and five counts of bail jumping (one for each possession charge). (R.1: 1-5). Each of the possession counts also included a penalty enhancer under Wis. Stat. § 961.495 for possession of controlled substances within 1000 feet of a jail. (Id.).

At the preliminary hearing, Judge Richard J. Nuss presiding, Brantner moved to dismiss all charges on the basis that Fond du Lac County was an improper venue under the Wisconsin Constitution and statutes. (R.67: 27-28). He argued that his possession of the pills terminated when he was taken into custody in Kenosha County, and therefore, Fond du Lac County was an improper venue to file charges. (Id.). Judge Nuss denied the motion and ordered Brantner bound over for trial. (Id. at 29-30). Brantner then filed a motion to dismiss for defective bind-over, again arguing that Fond du Lac was an improper venue. (R.10). Judge Peter L. Grimm held a hearing and denied the motion. (R.15, R.68).

No meaningful plea bargaining followed. (R.70: 5). The negotiations started and ended with a take-it or leave-it offer from the district attorney to dismiss all charges in this case in return for a guilty plea in the homicide case. (Id.). Brantner swiftly rejected the offer and the case proceeded to a trial, which was held on held on January 6 and 7, 2016. (Id.; R. 71). Just before voir dire started, the district attorney voluntarily dismissed the penalty enhancers under § 961.495 without

explanation. (Id. at 28-30). The jury returned guilty verdicts on all counts. (R.28-37).

At the end of trial, defense counsel again moved to dismiss counts one and two for being duplicitous to counts three and four and to dismiss all charges due to lack of sufficient evidence to establish that Fond du Lac County was a proper venue, but the circuit court again denied the motions. (R.70 at 214-221). On the venue issue, the court reasoned that there was sufficient evidence in the record such that a reasonable jury could conclude beyond a reasonable doubt that Brantner had "actual physical control" of the pills in Fond du Lac County. (Id. at 220-21). On the multiplicity issue, the trial court reasoned that there were distinct facts that the pills had different "color, size, markings, and they [had] different milligrams thereto." (Id. at 217). The court went on to reason that the prosecution has wide discretion in charging crimes and that the factual distinctions with the pills were enough to allow for separate charges. (Id. at 218).

The sentencing hearing was not held until July 12, 2016, just after the State's thirteen-day homicide trial against Brantner ended in a hung jury. (R.72 at 19-20). On the morning of the hearing, the district attorney filed the transcript of the preliminary hearing in the homicide case and requested that Judge Grimm consider it in assessing Brantner's character for sentencing purposes. (Id. at 3). Brantner responded by requesting that Judge Grimm consider recusing himself

since he was the Fond du Lac County District Attorney at the time of Ms. Beck's murder and was involved in the initial investigation. (Id. at 3-4). Defense counsel argued that the State put the recusal question at issue at this late stage in the proceedings by attempting to inject the homicide case into this case. (Id.). Judge Grimm noted that he was not surprised by the district attorney's attempt to achieve a more severe sentence in this case based on the homicide charge. (Id. at 7). The court explained that given "how [the district attorney] views this case and vis-a-vis the other case and the State's posture of plea bargaining and motivations, it's been pretty obvious that this type of argument was going to come forward from the State, and I certainly expected it." (Id.). The court declined the district attorney's request to consider the homicide charge and Brantner's request for recusal. (Id. at 7, 55-56).

The district attorney proceeded to recommended a thirty-three-year prison sentence comprised of sixteen years and one-month initial confinement and seventeen years extended supervision. (Id. at 18). This recommendation was triple the recommendation in the presentence investigation report and would have committed Brantner to Department of Corrections ("DOC") custody until the age of ninety-six. *See* (Id. at 19, 59).

Defense counsel argued for a 180-day jail sentence. (Id. at 28-29). He began his remarks with the following observations about the district attorney's recommendation:

> Well, the State's recommendation I think is, frankly, a pretty transparent recommendation for this Court to substitute its sentence in this case for a case that the State hasn't been able to prove in a different courtroom. It is triple the PSI's recommendation, which I think is far in excess of what's necessary in this case.
>
> (Id. at 19-20).

Brantner was sentenced as follows. For counts one, two, five, seven, and nine, Brantner received five consecutive prison sentences totaling thirteen years and seven months, including six years and seven months initial confinement and seven years extended supervision. (Id. at 58-59). For counts one (possession of oxycodone, twenty milligram pill) and five (possession of acetaminophen/hydrocodone) the court imposed consecutive sentences of one-year initial confinement followed by two years of extended supervision. (Id. at 58). On count two (bail jumping), the court sentenced Brantner to three years of initial confinement and three years of extended supervision. (Id. at 59). For count seven (possession of zolpidem) the court imposed a thirty-day jail sentence, and for count nine (possession of prescription) a sentence of one hundred and eighty days jail. (Id.).

For counts three, four, six, eight, and ten, the Court placed Brantner on probation for a total of eleven years, consecutive to the prison sentences. (Id. at 57). On counts three (possession of oxycodone, five-milligram pill) and four (bail jumping), the Court imposed and stayed sentences of one year of initial confinement with two years of extended supervision and one-year initial confinement with three years of extended supervision respectively. (Id. at 59). On the remaining three bail jumping counts, the court withheld sentencing. (Id.). All told, the Court ordered Brantner remain in DOC custody until the age of eighty-eight. *Compare* (R.3: 1) *with* (Id. at 59)

Brantner filed a post-conviction motion in the circuit court raising two issues. First, the multiple punishments imposed for possession of a single controlled substance violated his constitutional protections against double jeopardy. (R. 59 at 1). Second, Fond du Lac County was an improper venue under the Wisconsin Constitution and statues. (Id.). The circuit court denied the motion for both issues in a decision and order dated December 12, 2017 (R.61).

Finally, Brantner asks the Court to take judicial notice that on February 2, 2018, the homicide case against Brantner, 15-CF-176, was resolved by a plea agreement under which Brantner entered an Alford plea to second degree reckless homicide, and on March 2nd, he received a ten-year prison sentence, consecutive to the sentence in this case.

STANDARD OF REVIEW

I. The standard of review for whether there was sufficient evidence to establish that Fond du Lac County was a proper venue is *de novo*. This case involves application of undisputed facts to statutes and the constitutions of the United States and Wisconsin. Generally, the standard of review for issues regarding sufficiency of the evidence is extremely deferential to the trier of fact. *See State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). However, in this case all of the applicable facts are undisputed. When all of the material facts are undisputed, their application to the applicable law is solely an issue of law and is reviewed *de novo*. *State. v. Perry*, 215 Wis. 2d 696, 706, 573 N.W.2d 876 (Ct. App. 1997) ("challenging the trial court's interpretation of a statute and its application to facts which are largely undisputed."); *State v. Seibel*, 163 Wis. 2d 164, 171-72, 471 N.W.2d 226 (1991) (when the material facts of a search are undisputed, the question of whether the search violated the Fourth Amendment is one of law); *State v. Williams*, 104 Wis. 2d 15, 21-22, 310 N.W.2d 601 (1981).

II. The standard of review of whether counts I and II were multiplicitous to counts III and IV in violation of the Double Jeopardy clause is also *de novo*. The issue involves the interpretation of the constitution and statutes as they apply to undisputed facts and is therefore an issue of law. *See Perry*, 215 Wis. 2d at 706.

ARGUMENT

This case involves unusual circumstances and presents novel questions about the constitutional right of a person accused of a crime to be tried in the county where the alleged criminal acts occurred. It also presents a question of first impression about the authority of prosecutors to obtain convictions for multiple offenses under Wis. Stat. § 961.41(3g)(am) based on a person's possession of prescription pills containing different dosages of the same controlled substance.

At the time Brantner allegedly committed the crimes in this case, he was a suspect in the investigation into an unsolved murder that was committed almost thirty years earlier in Fond du Lac County. Brantner's alleged involvement in the murder is the only connection between Fond du Lac County and the charges in this case. At all times relevant to this case, Brantner lived in Kenosha County. Kenosha County is where he kept the pills prior to his arrest. Kenosha County is the only place where he brought the pills to within 1000 feet of the county jail and into the courtroom, and Kenosha County is the only place where he had an opportunity to abuse the pills. Yet the State charged, tried, convicted, and sentenced him in Fond du Lac County. By doing so, it violated his constitutional right to face charges in Kenosha County.

The State's violation of Brantner's right to face charges in Kenosha County has, at minimum, resulted in the appearance that he received disparate treatment

in this case. The appearance of disparate treatment stems from the Fond du Lac County District Attorney's exercise of prosecutorial discretion. To be clear, Brantner is not arguing or implying that the district attorney committed any misconduct in this case. Instead, Brantner contends that the appearance of disparate treatment he received warrants consideration because it highlights the core reasons that the constitutional right to a proper venue exists in the first place.

The zealousness with which the district attorney prosecuted this case also gives rise to the second issue on appeal: whether Brantner's constitutional rights were violated as a result of the district attorney's attempt to achieve a greater penalty than allowed by law by charging Brantner twice for possessing oxycodone once. Specifically, the prosecutor concocted separate offenses that are the same in law and fact based on Brantner's possession both five milligram pills and twenty milligram pills of oxycodone.

This Court should hold that Fond du Lac County was an improper venue to prosecute this case as a matter of law because the criminal act of possessing the pills ended before Brantner was transported out of Kenosha County and vacate the judgments of conviction entered on all counts with prejudice. This Court should also conclude that the Stated violated the Double Jeopardy clauses of the United States and Wisconsin Constitutions by sentencing Brantner twice for possessing oxycodone once. If this Court concludes that venue in Fond du Lac

County was proper but the State violated Brantner's double jeopardy rights, then the case should be remanded to the circuit court for resentencing.[2]

I. The judgment of conviction against Dennis Brantner must be vacated because the State failed to introduce sufficient evidence at trial from which a reasonable jury could infer that Brantner committed the crimes charged in Fond du Lac County.

The convictions against Dennis Brantner in this case must be vacated because the State failed to introduce sufficient evidence at trial to support the jury's finding that Brantner committed the crimes charged in Fond du Lac County. The right of a person to face criminal charges in a local judicial venue has deep roots in American democracy. The American Colonists listed the need for such a right in the Declaration of Independence as one of the reasons justifying their new independence, and the debate over its inclusion in the United States Constitution was limited to arguments about how it could best be stated. *See* Kershen, Vicinage, 29 Okla. L. Rev. 801, 808 (1976). The right local venue in criminal proceedings also appears in Article I, Section 7 of the Wisconsin Constitution, which provides:

> "In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel; to demand the

[2] For the purposes of brevity and clarity, this argument only speaks about the possession charges, not the bail jumping charges. This is because each of the possession charges has a bail jumping charge connected with it. Every time a possession charge is mentioned in the argument, what is really meant is the possession charge *and* associated bail jumping charge.

> nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his behalf; and in prosecutions by indictment, or information, to a speedy public trial *by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law.*"
>
> (Emphasis added); *See also* Wis. Stat. § 971.19.[3]

The right to trial by a "jury of the county or district wherein the offense shall have been committed" has long been recognized in Wisconsin to encompass both a vicinage right, which limits the geographical area from which the jury pool may be drawn, and a venue right, which limits the geographical area in which the proceedings may be held. *State ex rel. Brown v. Stuart*, 60 Wis. 587, 19 N.W. 2d 429, 434 (1884); *In re Elrod*, 46 Wis. 530, 1 N.W. 175, 183 (1879). Although venue is not an element of any crime, in all criminal prosecutions the State must prove that venue is proper beyond a reasonable doubt. *E.g. Smazal v. State*, 31 Wis. 2d 360, 142 N.W.2d 808, 809.

Resolving the venue issue in this case requires interpretation of the meaning of possession under Wis. Stat. § 961.41 in the context the accused's constitutional

[3] The Sixth Amendment right under the United States Constitution to a trial by jury "in the State and district wherein the crime shall have been committed" is one of the few rights in the Bill of Rights that has not been incorporated onto the states under the Fourteenth Amendment. Engel, The Public's Vicinage Right: A Constitutional Argument, 79 N.Y.U. L. Rev. 1706-07 (2000).

right to local venue in criminal proceedings. The legislature has broad authority to establish the permissible location(s) for venue by including venue provisions in criminal statutes. *See In re Elrod*, 1 N.W. at 183. If a statute does not specify venue, then it "should be construed as far as possible in harmony with [its] policy" for purposes of determining where the crime was committed. *State ex rel. Schwenker*, 206 Wis. 600, 406 N.W. 406, 408 (1932). This involves evaluating the nature of the offense and the location where the criminal acts constituting the offense were committed. *See id.* The United States Supreme Court has ruled that the Sixth Amendment right to a local jury pool must be strictly construed in the absence of a directive from the legislature:

> These are matters that touch closely the fair administration of criminal justice and public confidence in it, on which it ultimately rests . . . . Questions of venue in criminal cases, therefore, are not merely matters of formal legal procedure. They raise deep issues of public policy in the light of which legislation must be construed. If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it.

United States v. Johnson, 323 U.S. 273, 276 (1944).

This case presents a novel issue of first impression in Wisconsin about the meaning of "possession" under Wis. Stat. § 961.41 in the context of a defendant's

right to local venue in criminal proceedings. This is a novel issue because the question is not *whether* Brantner possessed contraband, but rather *when* his possession terminated. No Wisconsin appellate court case has dealt with the issue of whether a suspect maintains possession of contraband that remains on his person while in police custody following arrest. Although there are many appellate court cases interpreting the meaning of "possession," they deal with the issues of constructive possession and whether the defendant ever completed the initial criminal act of taking possession. *See e.g. State v. Peete*, 185 Wis. 2d 4, 517 N.W.2d 149, 153-54 (1994), *See id*; *State v. R.B.*, 108 Wis. 2d 494, 322 N.W.2d 502 (Wis. App. 1982); *Schmidt v. State*, 77 Wis.2d 370, 253 N.W.2d 204 (1977); *Schwartz v. State*, 192 Wis. 414, 212 N.W.2d 664 (1927). None of the analyses in the cases go to the issue of when the act of possession ends. *See id.* As such, the venue issue in this case should be resolved through application of general principles of statutory and constitutional interpretation, considerations of the need to protect the integrity of the right to local venue in criminal proceedings, and common sense about what it means to possess something.

A. Under no reasonable view of the evidence did Brantner ever have control of the pills in Fond du Lac County.

The jury was instructed that "'[p]ossessed' means that the defendant knowingly had actual physical control of a substance. A substance is also in a

person's possession if it is in an area over which the person has control and the person intends to exercise control over the substance." (R.71: 286). The State failed to prove that Brantner possessed the pills in Fond du Lac County because under any reasonable view of the evidence, Brantner lost actual physical control over the pills in Kenosha County. *See State v. Pharr*, 115 Wis. 2d 334, 349, 340 N.W.2d 498 (1983). The undisputed evidence presented at trial established that (1) Brantner was brought to Fond du Lac County against his will, (2) in police custody, and (3) by surprise. (R.70: 125-132; App. 7-14).

Brantner was arrested by two Fond du Lac County sheriff's deputies inside the Kenosha County Courthouse. (R.70: 124; App. 6). The officers proceeded to escort him outside and force him into the back of a police car while still in handcuffs. (R.70: 130-31; App. 12-13). One of the officers sat in the backseat with Brantner while the other drove; The doors were locked. (Id.). At this point, in Kenosha County, the pills were inside of Brantner's boot and out of his reach. (R.70: 129-130; App. 11-12). The officers then drove out of Kenosha County, through Racine, Milwaukee, and Washington counties, and arrived at the Fond du Lac County jail. (R.70: 131; App. 13). At no point during the trip was Brantner allowed to exit the vehicle. (R.70: 132; App. 14). Shortly after arriving at the station, the officers ordered Brantner remove his boots, and when he complied, they immediately discovered the pills inside. (R.70: 177-78).

Under any reasonable view of the evidence, Brantner had no control over whether the pills entered Fond du Lac County, and he had no control over what happened to the pills after he was brought there. Brantner had physical control over the pills in Kenosha County earlier that day when he voluntarily brought them to the Kenosha County Courthouse. However, he lost his control over the pills when he was handcuffed, locked in the backseat of the police car, and driven to Fond du Lac. From the time he was arrested until the time the pills were removed from his person, he had no control over the pills. He could not ingest, sell, destroy or otherwise dispossess himself of them. He could not do anything except leave them right where they were. Conversely, before he was arrested, he could do anything he wanted with the pills. The difference is that when Brantner crossed into Fond du Lac County travelling at a speed of approximately seventy miles per hour, he, and his boots, were under the direct and complete physical control of the two police officers present with him in the vehicle.

B. Brantner's possession of the pills ended when he was arrested in Kenosha County because he was surprised by the arrest and lost the choice to move the pills of his own volition.

The fact that Brantner was taken to Fond du Lac County by surprise is relevant too. Broadly speaking, criminal laws are written to prohibit certain bad acts. Yet the true aim is at the choices people make rather than the actions they

take. That is why mistake, necessity, and coercion are perfect defenses to many crimes. *See* Wis. Stat. §§ 939.42, 939.43, 939.46. For example, a person who is forced to commit a crime with a gun to his head cannot be held criminally liable (except in the case of homicide) because the nature of the choice underlying the criminal act is different than when a person commits the same crime of his own volition. *See* Wis. Stat. § 939.46. This fundamental characteristic of criminal law is relevant to determining when the criminal behavior in this case ended for purposes of venue because it is evidences legislative intent with respect to criminal behavior generally.

Moreover, possession crimes are, by nature, continuing offenses. *United States v. Midstate Horticulture Co.*, 306 U.S. 161, 166 (1939). "A continuing offense is a course of conduct that takes place over time, as opposed to a single incident." *State v. Lis*, 2008 WI App 82, ¶ 7, 311 Wis. 2d 691, 751 N.W.2d 891. Criminal liability attaches upon completion of the initial criminal act, but the criminal conduct continues until "the defendant performs the last act that, viewed alone, is a crime." *Id.* The legislature criminalized possession of controlled substances because it recognized "that the abuse of controlled substances constitutes a serious problem for society," and therefore, the possession of controlled substances has a "substantial and detrimental effect on the health and general welfare of the people of this state." Wis. Stat. § 961.001(1m). The reason why neither the severity of the

offense nor number of offenses committed depends on the duration of possession is because the danger to society arises when a person takes possession, continues while the person maintains possession, and then ends when the person loses access to the pills--whether because he used them or was taken into police custody with them on his person. *See* Wis. Stat. § 961.001.

All of the choices that Brantner made to engage in criminal behavior were made in Kenosha County. Under any reasonable view of the evidence, that is where he was kept the pills, where he made the choice to bring them to within 1000 feet of a jail and inside a courtroom, and the only place where he ever had an opportunity to abuse them. *See generally* (R.70). These are the behaviors the legislature intended to curb by prohibiting possession of controlled substances. *See* Wis. Stat. § 961.001.

The case would be different if, for example, the police had provided Brantner with twenty-four hours notice of his pending arrest. If that had happened, then an attempt by Brantner to conceal the pills on his person for the purpose sneaking them into the Fond du Lac County jail could reasonably be considered an act that extended his possession of the pills beyond the point at which he was arrested. *See Schwenker*, 240 N.W. at 409 ("There are crimes which may be committed by one in a county in which he has not been physically present . . . . These [] cases turn on the proposition that in legal contemplation a crime is

committed in the place where the doer's act takes effect.") (citations omitted). In such a case, Brantner's "mental processes [] claimed as the foundation for th[e] prosecution and the evil intent accompanying" would have "take[n] effect" in Fond du Lac County. *See id.* That is not what happened though. Instead, Brantner was arrested and taken to Fond du Lac County by surprise. The element of surprise, combined with the extent to which Brantner was physically restrained, means that the course of criminal conduct that the legislature intended to prohibit ended when Brantner was arrested, not when the officers eventually removed the pills from his person.

C. Finding that venue was appropriate in Fond du Lac County will lead to absurd and unreasonable results.

A conclusion by this Court that venue in Fond du Lac County was proper could lead to unreasonable or absurd results and should therefore be avoided. *See Peete*, 185 Wis. 2d at 8, (citing *State v. Pham*, 137 Wis. 2d 31, 34, 403 N.W.2d 35 (1987)). Holding that venue was proper in Fond du Lac County could encourage law enforcement to manufacture venue and artificially increase penalties in future cases. For example, every time the police find a controlled substance on a suspect's person during the jail booking processes that was not discovered during the initial search incident to arrest, the suspect would be subject to a penalty enhancer under Wis. Stat. § 961.495 for possession within 1000 feet of a jail. The same would be

true if they happened to pass by a public park, youth center, community center, school, multiunit public housing project, or public swimming pool on the way there. *See* Wis. Stat. § 961.495. Applying penalty enhancers in such circumstances, as the district attorney initially attempted to do in this case, would result in disparate punishments based solely on the whims of the police, as opposed to the bad choices made by defendants. *See* (R.3: 1-3).

Similarly, if this Court concludes that a suspect maintains possession of any contraband that happens to remain on his person following arrest, then the State could manufacture venue in certain cases. For example, if an officer feels an item on a suspect's person during a search incident to arrest that seems to be a controlled substance, the officer could leave the object on the suspect's person, load him in the back of a police car, and drive him anywhere that the State wanted to file charges. Or, when executing an arrest warrant across county lines in a twenty-year-old unsolved homicide case, the police could simply conduct a less than thorough search incident to arrest in hopes of discovering some contraband later, as plausibly may have happened in this case. *See* (R.70: 130; App. 12). In all cases, the suspect in the back of the car would be powerless to avoid possessing the pills in the county or counties where the police take him. Allowing police to manufacture venue in this way would yield absurd and unreasonable results by

directly and unfairly undercutting the rights of the accused to be tried in the county where the criminal acts were committed.

D. The prosecution of Brantner in this case highlights the importance of protecting integrity of the constitutional right to local proceedings in criminal proceedings.

Finally, the manner in which the district attorney prosecuted this case highlights the disparate impact of charging Brantner in Fond du Lac County instead of Kenosha. As argued below, the district attorney's decision to throw the book at Brantner appears to reflect his belief that Brantner committed a murder in Fond du Lac County almost thirty years ago. *See* (R72: 7, 25). Several facts point to this conclusion. First, the district attorney filed charges seeking a greater penalty than the maximum allowed by law. That is, he divided a single crime of possession of oxycodone into two crimes--one for possession of oxycodone, five milligram, and one for possession of oxycodone, twenty milligram. *See* (R.3: 1). He also attached a penalty enhancer to each possession count alleging possession of the substances within 1000 feet of Fond du Lac County jail before dismissing the enhancers without explanation just moments before voir dire started. (Id.). Second, the district attorney refused to engage in meaningful plea negotiations. (R.70: 5). The negotiations started and ended with an offer to drop all charges in this case in exchange for a guilty plea in the homicide case. (Id.). Third, the district attorney

asked the court to increase the severity of the sentence in this case based on the homicide charge just days after the homicide trial ended with no conviction. (R72: 19-20). Fourth, the district attorney recommended a thirty-three-year prison sentence, three times longer than the DOC's recommendation. (Id. at 9). Finally, the district attorney made this recommendation despite his claim that there was no evidence or reason to believe that Brantner abused or sold the drugs that he was being sentenced for possessing. (Id. at 11-12).

* * * *

To summarize, this Court should hold that Brantner never had "actual physical control" of the pills in Fond du Lac County because he was arrested by surprise in Kenosha County with the pills on his person and transported to Fond du Lac County in police custody against his will. In the interim, he never had the opportunity to relinquish control of the pills. He never made a choice to bring the pills to Fond du Lac County, and he never had the ability to ingest or otherwise control the pills after he was brought there. Therefore, Brantner's "actual physical control" of the pills terminated in Kenosha County, the crimes were not committed in Fond du Lac County, and Brantner's constitutional right to be tried in Kenosha County was violated.

II. The Circuit Court violated Dennis Brantner's constitutional protection against double jeopardy by imposing multiple punishments for a single crime.

A. Punishing Brantner twice for possession of oxycodone and the associated bail jumping charges violates the double jeopardy clauses of the United States and Wisconsin Constitutions.

Dennis Brantner's constitutional protection against double jeopardy under the United States and Wisconsin Constitutions was violated because he was convicted and punished multiple times for the single offense of possession of oxycodone, a schedule II controlled substance under Wisconsin law. U.S. Const. amend. VI; Wisc. Const. Art. I § 8; Wis. Stat. § 961.41(3g)(am).

Courts apply a two-part test to determine whether imposing multiple punishments based on a single course of conduct runs afoul of double jeopardy clause. First, courts determine if the offenses are different in law or fact. *State v. Stevens*, 123 Wis. 2d 303, 321, 367 N.W.2d 788 (1985). Offenses are different in law if "each offense requires proof of a fact not required by the other." Offenses are different in fact if each is based upon different conduct, "separated in time or significantly different in nature." *Id.* at 321-22. Second, courts must look to the intent of the legislature. *See Leonard v. Warden*, 631 F. Supp. 1403, 1407 (E.D. Wis. 1986). The double jeopardy clause prevents the sentencing court from handing out greater punishment than the legislature intended. *Id*. Thus, two offenses that are the same in law and fact may give rise to separate convictions for which

cumulative punishment may be imposed if imposing separate sentences is consistent with the legislative intent. *See Garrett v. United States*, 471 U.S. 773 (1985). However, a court "will not interpret a . . . criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what the legislature intended." *Ladner v. United States*, 358 U.S. 169, 178 (1958).

Wisconsin courts have clarified that "offenses which are the same in law are different in fact if those offenses are either separated in time or are significantly different in nature." [4] *Stevens*, 123 Wis. 2d at 322. Here, the two possession of oxycodone offenses are not different in fact because they are not separated in time, and they are identical in nature. They are not separated in time because Brantner was convicted for possessing the all of the pills over the course of a single period of time. (R.70 121-35; App. 3-17). They are also plainly identical in nature. Offenses that are the same in law are different in nature if one "count requires proof of an additional fact" demonstrating a separate "'volitional departure in the defendant's course of conduct.'" *State v. Anderson*, 580 N.W.2d 329, 219 Wis.2d 739 (Wis. 1998) (quoting *State v. Eisch*, 96 Wis. 2d 25, 36, 291 N.W.2d 800 (1980)) (other citations

[4] It is well settled that possession of multiple types of controlled substances gives rise to multiple offenses that are different in law. *See e.g.*, *Melby v. State*, 70 Wis. 2d 368, 380-81, 234 N.W.2d 634 (1975). Brantner does not contend that the sentences he received for possessing different types substances violated his constitutional rights.

omitted). The district attorney did not even attempt to prove an "additional fact" constituting "a new volitional departure" in Brantner's course of conduct, and none was proven. *See Eisch*, 96 Wis. 2d 25, 36. The possibility that Brantner may have committed separate courses of criminal conduct was never discussed at any point in the proceedings.

As for part two of the test, upholding the State's theory of prosecution would lead to absurd results that the legislature could not have rationally intended.A simple hypothetical helps to illustrate why. Person A is caught possessing a total of five pills containing a single type of controlled substance: a 5 mg, 10 mg, 15 mg, 20 mg, and 25 mg pill. Person B is caught possessing five-hundred 60 mg pills of the same substance. Under the district attorney's theories of guilt, the person possessing 75 mg would be subject to a penalty five times more severe than the person caught possessing 3000 mg. It is unlikely that the legislature intended to allow for such a disparity.

Instead, as the courts have observed, the legislature "elect[ed] to punish drug offenses on a graduated basis, depending upon the defendant's status as a mere possessor or presumptive dealer as well as his or her status as a first-time offender or a repeater." *State v. Hughes*, 2000 WI 24, ¶ 34, 233 Wis. 2d 280, N.W.2d 607, 621. This is a relatively unremarkable observation about legislative intent since the legislature wrote its intent into the law. Wis. Stat. §§ 961.001, 961.001(1m)-

(3). Absent proof of intent to manufacture, distribute, or traffic, it takes guesswork plus an imaginative interpretation of the English language to adopt the district attorney's interpretation of the legislature's stated intent. *Cf*. *Ladner*, 358 U.S. at 178. The legislature did not intend to allow for disparate penalties based solely on differences between the dosages of the individual pills possessed; It said so itself. Wis. Stat. §§ 961.001, 961.001(1m)-(3).

"The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units." *Brown v. Ohio*, 432 U.S. 161, 169 (1977). It is also too formidable to allow prosecutors to achieve an end-around by adding an element to an offense and proving a factual distinction that is irrelevant under the statute. *See id*.; (R.3). The two possession of oxycodone offenses for which Brantner was sentenced are the same in law and in fact. Therefore, they are multiplicitous and violate Brantner's constitutional right to be free from double jeopardy.

B. In order to satisfy the requirements of the double jeopardy clause, Brantner must be resentenced.

The appropriate remedy for the violation of Brantner's double jeopardy rights in this case is resentencing on all counts. As a general rule, "when a defendant is convicted of and sentenced for two offenses which are later held to

be the same offense, and when one conviction and sentence is vacated on double jeopardy principles, the validity of both punishments is implicated, the sentences for both offenses are illegal, and resentencing on the valid conviction is permissible." *State v. Martin*, 121 Wis. 2d 670, 681, 360 N.W.2d 43 (1985). An exception to this rule exists when the invalidation of the multiplicitous sentences does not "disturb[] the overall sentence structure or frustrate[] the intent of the original dispositional scheme." *State v. Church*, 2003 WI 74, ¶26, 262 Wis. 2d 678, 665 N.W.2d 141. Whether to resentence a defendant after one of the defendant's convictions is dismissed as multiplicitous is within the sound discretion of the trial court. *State v. Sinks*, 168 Wis. 2d 245, 255, 483 N.W.2d 286 (1992).

In this case, vacating two of the four multiplicitous convictions for possession of oxycodone and bail jumping will disturb the overall sentence structure. Vacating two of the convictions necessarily requires the Court to vacate two sentences imposed consecutive to other sentences because the Court imposed consecutive sentences for each of the four multiplicitous counts. Brantner's period of confinement will be different depending on which of the multiplicitous convictions the Court vacates. Invalidating consecutive sentences will disrupt the overall sentencing structure, so the Court should grant Brantner's request to be resentenced on all counts. *See State v. Sherman*, 2008 WI App 57, ¶¶ 11-12, 310 Wis. 2d 248, 750 N.W.2d 500.

CONCLUSION

For the foregoing reasons, Brantner respectfully requests this Court REVERSE the Decision and Order of the Circuit Court and REMAND the case for further proceedings consistent with the Court's opinion.

Dated this 5th day of April, 2018.

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CERTIFICATION

I certify that this brief conforms with the rules contained in WIS. STAT. §§ 809.19(8)(b) and (c), for a brief produced using proportional serif font. The length of the portions of this brief described in WIS. STAT. § 809.19(1)(d), (e) and (f) is 6982 words. See WIS. STAT. § 809.19(8)(c)1.

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CERTIFICATION OF COMPLIANCE WITH RULE 809.19

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. § 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 the opposing party.

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CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with WIS. STAT. § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the

circuit court; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues. I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decisions of the administrative agency. I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with annotation that the portion of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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