RECEIVED
07-16-2018
CLERK OF COURT OF APPEALS
OF WISCONSIN

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

STATE OF WISCONSIN,

Plaintiff - Respondent,

vs.

Appeal No. 18AP53 CR

DENNIS BRANTNER,

Defendant - Appellant.

REPLY BRIEF OF APPELLANT/DEFENDANT

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

Taylor Rens
State Bar No. 1098258
P.O. Box 14218
West Allis, WI 53214
(414) 810-2678
trens@krlawwi.com
Attorney for the Defendant-Appellant

ARGUMENT

I. Fond du Lac County was an improper venue in this case because Brantner's possession of the pills terminated in Kenosha County.

In this case, there was not sufficient evidence to establish that Fond du Lac County was a proper venue because there was no evidence to show that Brantner committed any crimes within that county. As the State correctly points out, to establish that Brantner commited the crimes in Fond du Lac County it needed to introduce evidence that he "possessed" the substances there. *See* Wis. Stat. § 961.41(3g)(am). To satisfy any of the three formulations of possession, the State is required to prove that Brantner had control of the pills or control over the area where the pills were located. *See* Wis. JI–Criminal 6030 (2016).

The State's reasoning regarding the control element is limited to the bare assertion that Brantner had control of the pills because they were on his person and he failed to share this information with the officers. (State's Br. at 11.) The State's thin reasoning shows how little control Brantner in fact had over his person and his surroundings. Brantner never possessed the pills in Fond du Lac County because he was at all times in the direct physical custody of multiple law enforcement officers and therefore never had control over any area in that County.

A. Brantner's possession of the pills terminated in Kenosha County.

At all stages of the proceedings, from pre-trial through appeal, Brantner has argued that he did not possess the pills in Fond du Lac because he never had control of them there. Yet the State has not presented this Court with a fully developed argument regarding the control aspect of possession. (State's Br. at 9-12.) It simply asserts that Brantner had control over the pills because they were on his person. (State's Br. at 10-11.) The State does not attempt to explain why the fact that the pills were on his person is sufficient to support a finding that they were in his possession. (State's Br. at 9-12).

Brantner did not have possession of the pills even though they were on his person because he did not have the power or authority to do anything with them. The fact that he could have informed the officers of the pills' location is irrelevant to whether he had possession of them. Telling the officers that the pills were in his boot would not, in itself, have done anything to affect the pills themselves. The officers simply could have ignored any comment Brantner made.

The State seems to argue that the fact that Brantner had the opportunity to tell the officers about the pills supports the inference that

the pills were in an area over which he had control. (State's Br. at 9-12.) It reasons that he could have relinquished his control by telling the officers that they were on his person, and therefore, the pills were in an area under his control. *Id*.

The State's reasoning is flawed because it is based on the unfounded assumption that the police would have had to respond to Brantner's statement by immediately removing the pills from his person. In reality, Brantner could not have compelled the officers to do anything with the pills. Telling the officers about the pills when he was in custody would simply have presented them with a choice about what to do with the pills. Although officer Vergos testified that if he would have located the pills at the time of the arrest he would have turned them over to Kenosha authorities, Brantner certainly could not have coerced him to do so. Nor could Brantner told the officers as they were driving up the interstate and compelled them to exit the interstate to conduct a search. Even if Brantner had informed the officers about the pills before entering Fond du Lac, he would have had no control over what they did with that information. Therefore, his ability to inform the officers about the pills does not support the inference that they were under his control.

As a final point, the State's unsupported assertion that "legislative intent in criminalizing possession is simply not at issue" is difficult to understand since the State agrees that the venue issue in this case is subject to *de novo* review. The outcome of this case is predicated on this Court's interpretation of the relevant statutes. Legislative intent necessarily applies to such analysis. *E.g.*, *Heidersdorf v. State*, 5 Wis. 2d 120, 123, 92 N.W.2d 217 (1958).

B. Since Brantner did not commit the crimes in Fond du Lac County, the convictions against him must be vacated.

Although the State concedes that the convictions must be vacated pursuant to Wis. Stat. § 971.19 if the prosecution failed to prove venue at trial, its contends that the Wisconsin Supreme Court has definitively ruled that Article I, § 7 of the Wisconsin Constitution does not provide a constitutional right to venue. This contention is misleading and therefore warrants a response. (State's Br. 8.) The State supports its contention by citing to dicta in a footnote in which cites to "speculation" in a prior decision that Article I, § 7 was modeled after the Sixth Amendment to the United States Constitution. *See State v. Mendoza*, 80 Wis. 2d 122, 138 n.3, 258 N.W. 2d 260; (State's Br. 13.) However, the question whether Article I, § 7 includes a right to venue has never been squarely presented to a Wisconsin

appellate court, and a review of cases discussing the issue reveals that it remains an open question. *See State ex rel. Brown*, 60 Wis. 587, 19 N.W. 429, 433 (1884) (Article I, § 7 "simply defines and limits the locality from which a jury may be taken for the trial of such offenses, *and secures to him the right to a trial within these same limits*.) (emphasis added); *Oborn v. State*, 143 Wis. 249, 126 N.W. 737, 742, (1910) ("The Constitution makes no provision for a change of venue in a criminal case, so any such change must be referable *to some statute which is in harmony with the* ***guaranteed right***, unless such right may be waived) (emphasis added); *Wheeler v. State*, 24 Wis. 52, 53-54 (1869) ("The statute pur-porting to authorize a change of venue on the motion of the prosecutor, against the objection of the accused, is in conflict with the constitution, and void.").

Nonetheless, this Court's ruling on whether prosecution presented sufficient evidence to establish Fond du Lac County as an appropriate venue is dispositive of whether Brantner's convictions must be vacated under Wis. Stat. § 971.19 even if no constitutional right exists.

II. Brantner's two convictions for possessing oxycodone are multiplicitous because they are the same in law and fact and the legislature did not intend to permit cumulative punishments.

A. Brantner's convictions for possessing 5 mg and 20 mg oxycodone pills are the same in fact because they were not significantly different nature, and the State did

not allege or attempt to prove that Brantner committed two courses of criminal conduct that were separated in time.

Brantner's convictions for possessing 5 mg and 20 mg oxycodone pills are the same in fact because they were not significantly different nature, and the State did not allege or attempt to prove that Brantner committed two courses of criminal conduct at different times. When a defendant argues that prosecution impermissibly divided a single criminal act into multiple charges, "the pertinent question is whether the State has alleged facts which, if proven, demonstrate a new volitional departure." *See State v. Koller*, 2001 WI App 253, ¶ 34, 248 Wis. 2d 259, 635 N.W.2d 838.

In its brief to this Court, the State contends for the first time that Brantner committed two courses of criminal conduct that were separated in time and therefore significantly different in nature. (State's Br. at 19). The State reasons that Brantner must have obtained the pills from two different sources at different times because Brantner was recorded saying that he obtained his pills from his brother and his brother did not have a current valid prescription for 20 mg oxycodone when he was interviewed following Brantner's arrest. (State's Br. 18-19)

The State's argument fails because the prosecution never alleged nor attempted to prove that the pills were obtained from different sources or at

different times. *See Koller*, 248 Wis. 2d at ¶ 34. The criminal complaint did not draw such a distinction, and the prosecution did not attempt to prove separate courses of conduct at trial. At no point during the proceedings below did the prosecution claim that Brantner possessed the pills on any date other than March 27, 2015. Had the prosecution alleged and proven that the pills did in fact come from two different sources, then the State's position would be valid. *See id*. However, this was never put at issue at trial. (*See generally* R.70.) Because Brantner was never put on notice that he needed to defend against allegations of two separate courses of criminal conduct, a finding by this Court that the crimes are different in fact because they were separated in time would violate Brantner's due process right to be "informed of the nature and cause of the accusations" against him. *See State v. Elverman*, 2015 WI App 91, ¶ 18, 366 Wis. 2d 169, 873 N.W.2d 528.

B. Whether or not the offenses were the same in law and fact, they are multiplicitous because the legislature only intended to allow a single punishment under Wis. Stat. § 961.41(3g)(am).

As the State correctly points out, courts use a four part test in determining legislative intent in multiplicity analysis: (1) statutory language; (2) legislative history and context; (3) the nature of the proscribed conduct; and (4) the appropriateness of multiple punishments

for the conduct. *Multaler*, 252 Wis. 2d 54, ¶ 59. Application of these factors to the present case points to the conclusion that the prosecution's charging decision is inconsistent with legislative intent.

First, the plain language of Wis. Stat. § 961.41(3g) does not establish a graduated penalty scheme based on possession of different dosages of a substance. The State's interpretation, by contrast, would create a graduated sentencing scheme with several additional potential penalties. The penalty would gradually increase based on how many different dosages of the prescription controlled substances were possessed. Such a graduated penalty scheme is inconsistent with the plain language of § 961.41(3g).

Further, the language of § 961.41(3g) is distinguishable from the statutes at issue in the cases that the State cites in support of its position, *Multaler* and *Trawitzki*. In both of the cases the statute in question denoted a clear unit of prosecution. *See Multaler*, 252 Wis. 2d 54, ¶ 64; *Trawitzki*, 244 Wis. 2d 523, ¶ 31. In *Trawitzki*, the relevant statute read that someone violated the statute if he or she stole "a firearm." *See* Wis. Stat. § 943.20(3)(d)(5) (1997-98). Key to the court's reasoning in determining that the legislature intended to allow for multiple punishments for individual stolen firearms was the fact that the unit of prosecution was a single firearm. *Trawitzki*, 244 Wis. 2d 523, ¶ 31. Similarly, in *Multaler*, the child

pornography statute in question said that a person violated the statute if he or she possessed "any photograph . . . or other pictorial reproduction." *See* Wis. Stat. § 948.12 (1997-98). Again, the court keyed in on the fact that the legislature chose to use the singular form. *See Multaler*, 252 Wis. 2d 54, ¶ 64. The court reasoned that "[t]he singular formulation of these items covered under the statute modified by the term 'any' is evidence that the legislature intended prosecution for each photograph or pictorial reproduction." *Id*. In contrast, in this case the statute indicates that someone is guilty if they "possess[] or attempts to possess a controlled substance." Wis. Stat. § 961.41(3g)(am). The lack of a unit of a prosecution in the statute in this case indicates that the legislature only intended to allow for one punishment based on the criminal defendant's single incidence of possession of any amount of a controlled substance.

Even if the statute is ambiguous as to the the unit of prosecution, the United States Supreme Court has previously decided that such cases should be resolved in favor or the criminal defendant, "against the imposition of harsher punishment." *Bell v. United States*, 349 U.S. 81, 84 (1955). As the Court articulated, in cases where the unit of prosecution in a criminal statute is ambiguous, "the ambiguity should be resolved in favor of lenity." *Id*.; *see also State v. Rabe*, 96 Wis. 2d 48, 70, 291 N.W.2d 809 (1980)

(comparing *Bell*'s lenity rule with the traditional Wisconsin doctrine that "penal statutes are generally construed strictly to safeguard a defendant's rights.").

Reading § 961.41(3g) in a broader statutory context also undermines the State's argument that § 961.41(3g) includes the graduated penalty structure. The immediately preceding subsections explicitly establish a graduated penalty scheme for delivery and possession with intent to deliver certain controlled substances, such as cocaine and heroin. Wis. Stat. § 961.41(1)-(1m). For drug users, on the other hand, the legislature opted to treat persons with addictions more severely than "persons who casually use or experiment with controlled substances" by creating penalty enhancers for repeat offenders. Wis. Stat. §§ 961.001(2)-(3).

Given the penalty scheme established by the legislature, it would be inappropriate to impose multiple punishments based solely on differences in the dosages of the substance that a person possessed. *See Multaler*, 252 Wis. 2d at ¶ 59. The following example helps illustrate this point. Oxycodone is available in many varieties: 5 mg, 7.5 mg, 9 mg, 10 mg, 13.5 mg, 15 mg, 18 mg, 20 mg, 27 mg, 30 mg, 36 mg, 40 mg, 60 mg, 80 mg, and 160 mg. *See* Drugs.com, https: //www.drugs.com/dosage/oxycodone.html (last visited July 16, 2018).

Person A, a first time offender and casual drug user, is caught with one pill of each of the fifteen different dosages of oxycodone (521 mg total). Person B, a drug addict with two prior possession convictions, is caught with fifteen 100 mg oxycodone pills, and Person C, a first time offender and drug dealer, is caught with one hundred 10 mg pills of oxycodone. Person A would face a fifty-two and a half year sentence, person B a 7.5 year sentence as a repeat offender, and person C a fifteen year sentence for possession with intent to distribute. *See* §§ 939.50(e),(i); 961.41(3g); 961.41(1m); 961.48(1)(b). In other words, under the State's proposed penalty scheme for possession, the first time offender casual drug user would be subject to a more severe penalty than the habitual offender and the drug dealer, even though the user possessed the smallest quantity. Such results would be entirely unsupported by the legislature's stated intent and the plain meaning of § 961.41(3g).

The State's interpretation would also upset the uniform penalty scheme that § 961.41(3g) established for possession schedule I and II controlled substances. For example, prescription methamphetamine is only available this three different dosages: 5 mg, 10 mg, 15 mg. *See* Drugs.com, https://www. drugs.com/dosage/methamphetamine.html (last visited

July 18, 2018). Thus, even though oxycodone and methamphetamine are both schedule II controlled substances, the maximum sentence for possession of methamphetamine would only be a 10.5 years, roughly one-quarter the maximum penalty for possession of oxycodone.

Moreover, the State misconstrues the language of Wis. Stat. § 961.41(3g)(am) when it argues that the language of the statute indicates that someone can be charged with a new crime for every dosage they possess not covered under a valid prescription. While it is true that a person who obtains a controlled substance pursuant to a valid prescription cannot be guilty of possessing it, that in no way implies that the State can bring a new charge for every dosage not covered under the prescription, and the State does not even attempt to point to language indicating otherwise. Instead, the language only provides an exception for the legal possession of prescription controlled substances. If someone possesses *any* pills that are not dispensed by a pharmacist pursuant to a valid prescription then the person can still be found guilty of possession even if they have a prescription for identical pills of the same substance. The State's baseless assertion that the prescription exception creates a new offense per dosage or type of pill is completely unfounded.

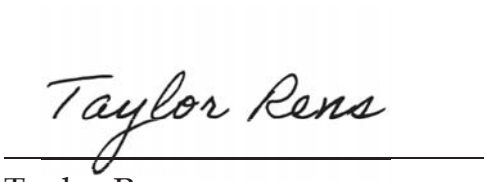
Finally, the State's claim that it had to prove that Brantner possessed 5 mg oxycodone and 20 mg oxycodone without a valid prescription is dubious at best. Instead, the State was required to prove that Brantner possessed oxycodone that was not obtained pursuant to a valid prescription. The State's own expert witness, Dr. Joseph Wermling, testified that the tests used by the State Crime Laboratory cannot determine the amount of controlled substance contained in a prescription pill. (R. 70:151-53.) Instead, a small fragment of each pill is tested for the sole purpose of determining whether it contains any amount of the substance. (*Id.* at 152.) Dr. Wermling further testified that it is impossible to identify the amount of controlled substance contained in a prescription pill based on the physical appearance of the pill. (*Id.* at 153.) In other words, the State presented undisputed evidence at trial that it has no idea how much oxycodone was contained any of the pills. (*See* Id.)

CONCLUSION

For the foregoing reasons, Brantner respectfully requests that this Court reverse the decision of the circuit court.

Dated this 16th day of July, 2018.

Respectfully Submitted:



Taylor Rens
State Bar No. 1098258
Krug & Rens, LLC
P.O. Box 14218
West Allis, WI 53214
(414) 810-2678
trens@krlawwi.com
ATTORNEY FOR THE DEFENDANT

CERTIFICATION

I hereby 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 2910 words. See WIS. STAT. § 809.19(8)(c)1.

Taylor Rens

Taylor Rens

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.

Taylor Rens

Taylor Rens