STATE OF WISCONSIN
SUPREME COURT

Appeal No. 2018AP53-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

DENNIS BRANTNER,

Defendant-Appellant-Petitioner.

REPLY BRIEF OF DEFENDNAT-APPELLANT-PETITIONER

On Review of a Decision of the Court of Appeals, District II, Affirming a Judgment of Conviction and Order Denying Postconviction Relief Entered in the Circuit Court for Fond du Lac County, the Honorable Peter L. Grimm Presiding.

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I. Brantner did not possess the pills in Fond du Lac County as a matter of law.

A. Legal Standard

In his Opening Brief, Brantner maintained that the Court should resolve the venue issue in this case by applying the standard applied by federal courts in determining where an offense was committed when legislature has not spoken on the question. (Brantner's Br. 15.) That is the situation in this case because the effective language of the relevant statutory and constitutional provisions is identical: "in the county where the [criminal offense] was committed." Wis. Stat. § 971.19; Wisc. Const. Art. I, § 7. When the statutes are silent regarding where an offense is deemed to be committed, federal courts interpret the statutory provision in light of the policies underlying the constitutional right to venue and a jury of the vicinage under Article I, § 3 and the Sixth Amendment of the federal Constitution. *See United States v. Anderson*, 328 U.S. 699, 703 (1946); *United States v. Cabrales*, 524 U.S. 1, 7 (1998).

As the State points out in its brief, disputes over venue which do not involve a specific venue provision arise much more frequently under federal law than under state law. (State's Br. 14.) In Wisconsin, the issue is not only rare, it appears to be an issue of first impression. Thus, resolving the venue issue in this case requires deciding standard that applies in determining where a crime was committed when the facts are undisputed and none of the provisions of § 971.19 apply. The Court should apply the rule applied by federal courts or a similar rule that takes into account the policies underlying the individual's rights in the location of criminal proceedings and the

types of government practices the rights are designed to protect against.

Finally, even if the Court agrees with the State and concludes that Brantner's constitutional interests are irrelevant to determining where he committed the offenses, the Court should nonetheless hold that Fond du Lac County was an improper venue. As Brantner argued in his Opening Brief, under any reasonable view of the evidence, Kenosha County is the only place where Brantner ever had the power to exercise control of the pills. (Brantner's Br. 19.)

B. The officers terminated Brantner's possession of the pills when they arrested him in Kenosha County.

According to the State, "Brantner did not have to be able to reach the bag with his hand to possess the pills. He could have easily told the officers at the time of his arrest." (State's Br. 11). Effectively, the State argues that Brantner maintained possession of the pills solely by manifesting an intent to exercise control over them. (State's Br. 11-12). The State's claim that Brantner maintained physical control over the pills through the power of thought is odd. Brantner is unable to find any authority from any jurisdiction holding that an individual maintained constructive possession of an item on his person without maintaining actual physical possession it. Brantner did not possess the pills by exercising mind control over them.

The definition of "possessed" in the jury instructions iterates the two general legal definitions of possession, sometimes referred to as 'actual possession' and 'constructive' possession.' Wis. JI–Criminal 920 (2016); *In re Interest of R.B.*, 108 Wis. 2d 494, 497, 322 N.W.2d 502

(Ct. App. 1982). Both definitions of possession include a mental state element and a control element. Wis. JI–Criminal 920 (2016) Brantner's knowledge of the pills' location, standing alone, was insufficient to satisfy the control element of the legal definition of possession. *See Interest of R.B.*, 108 Wis. 2d 494.

Finally, Brantner was arrested in the Kenosha County Courthouse with his attorney standing a few feet away. Brantner asked to speak to his attorney before being transported away, and the officer's denied his request. If Brantner was required to tell the officers about the pills to terminate his possession of them, then Brantner was effectively required to choose between the protections of the right to remain silent and the right to venue. Holding that an individual is required to choose between the protections of two constitutional rights without the advice of counsel would be unprecedented. *See State v. Schultz*, 152 Wis. 2d 408, 423, 448 N.W.2d 424 (1989)*; McGautha v. California*, 402 U.S. 183, 213 (1974); *Simmons v. United States*, 390 U.S. 377 (1968); *State v. Bangert*, 131 Wis. 2d, 246, 269-72, 389 N.W.2d 12 (1986).

Brantner did not possess the pills in Fond du Lac County, and the convictions were obtained in violation of his right to be charged in Kenosha County under Art. I, § 7, and Wis. Stat. § 971.19.

C. The Court should resolve this case without reaching the question whether the Wisconsin Constitution

includes a right to venue, and Brantner did not waive his jury of the vicinage claim.

Brantner agrees with the State that the Court does not need to resolve the question whether Art. I, § 7, of the Wisconsin Constitution provides a right to venue to decide this case. (State's Br. 7). The right to venue appears in the Magna Carta, the Declaration of Independence, the United States Constitution, Art. III, § 2, and the State agrees it has always been a right in the State of Wisconsin. *See* (State's Br. 17.) The significance of Brantner's interest in the venue of these proceedings does not turn on whether his right was statutory or constitutional.

Even if Brantner does not have a constitutional right to venue, he does have a clearly established right to be tried by a jury of the county where the crimes were committed. *See* Art. I, § 7; (State's Br. 17-21). The State asserts, however, that Brantner failed to preserved an Art. I, Sec. 7 claim for appeal. (State's Br. 24.) The rule that appellate review is limited to issues that were raised in the trial court is based on considerations of fairness and notice to the opposing party and judicial economy. *State v. Caban*, 210 Wis. 2d 605, 563 N.W.2d 501 (1997). From the preliminary hearing onward, Brantner has consistently asserted that proceedings in Fond du Lac County violated his right to have the proceedings held in Kenosha County. (R. 67:27-28); (R. 70:218-20); (R.81:61). The Court should find that Brantner's repeated assertions that Fond du Lac County was an improper venue sufficient to preserve a jury of the vicinage claim.

II. The two possession of oxycodone counts are identical in fact because neither count required the State to prove an additional fact that the other count did not.

Whether multiple offenses are different in fact under the second prong of the *Blockburger* test presents an evidentiary question which is "essentially the same" as the "elements only" test applied under the first prong to determine whether multiple offenses are different in law. *State v. Sauceda*, 168 Wis. 2d 486, 493 n. 8, 485 N.W.2d 1 (1992); *see also*, *State v. Rabe*, 96 Wis. 2d 48, 67, 291 N.W.2d 48 (1980) Offenses are different in fact if they are either: (1) based on proof of multiple acts of the defendant that were separated in time, or (2) significantly different in nature. *State v. Trawitzki*, 2001 WI 77, ¶ 28, 244 Wis. 2d 523, 628 N.W.2d 801. In turn, offenses are significantly different in nature if an element of each offense required proof of an additional fact that the other offense did not. *Id*. The facts the State is required to prove in a criminal prosecution are the facts that the jury is required to unanimously find beyond a reasonable doubt. *State v. Sarfraz*, 2014 WI 78, 356 at ¶ 43, n. 9, Wis.2d 460, 851 N.W.2d 235.

The jury instructions separate § 961.41(3g)(am) into three elements: (1) defendant knowingly possessed a substance, (2) that was a controlled substance, and (3) defendant knew it was a controlled substance. Wis. JI-Criminal 6030. The jury instructions treat the penultimate clause as an exception clause establishing an affirmative defense, and in *State v. Williamson*, 58 Wis. 2d 514, 524, 206 N.W.2d 613 (1973), the Court held that the last clause is an exemption clause establishing an affirmative defense. The State charged Brantner

with three counts under § 961.41(3g)(am): two for possession of oxycodone and one for possession of hydrocodone. (R. 1:1-2.)

This Court's prior decisions involving multiplicity challenges to convictions obtained under the same statute(s) clearly identify and define the different facts supporting the different convictions. *E.g.*, *State v. Pal*, 2017 WI 44, 374 Wis. 2d 759, 893 N.W.2d 848, (failed to assist victim A and victim B); *State v. Anderson*, 219 Wis. 2d 739, 580 N.W.2d 329 (1998) (consumed alcohol and made contact with girlfriend), *State v. Multater*, 2002 WI 35, ¶ 58, 252 Wis. 2d 54, 643 N.W.2d 437 (possessed different images depicting child pornography). *Trawitzki*, 244 Wis. 2d, ¶ 28 (a Smith & Wesson handgun); In these cases, the Court adopted an unambiguous unit of prosecution defined using statutory language. *Id.*; *see also*, *State v. Grayson*, 493 N.W.2d 23, 172 Wis.2d 156 (1992) (upholding each 120 period of failure to pay child support as a unit of prosecution).

In this case, by contrast, the State does not attempt to clearly identify the different facts that it was required to prove under each possession of oxycodone count, nor does it clearly define the unit of prosecution it is asking this Court to adopt. The State begins the *Blockburger* analysis by asserting that "Brantner's two charges for possession of oxycodone each required proof of a different evidentiary fact, namely, the type of oxycodone pills that Brantner possessed without a valid prescription." (State's Br. 28.) But the State does not attempt to defend this assertion with an argument, which is noteworthy for three reasons.

First, under the long-standing practice in Wisconsin, the type of controlled substance medication possessed and the source from

which it was obtained are facts that a defendant is required to prove to successfully assert the affirmative defense under the exception clause of § 961.41(3g)(am). *See* Wis. JI-Criminal 6030; *Williamson*, 58 Wis. 2d at 524. If the prosecution is required to prove the type of oxycodone possessed without a prescription, then the exception clause of § 961.41(3g)(am) establishes an element rather than an affirmative defense. Second, if the exception clause establishes an affirmative defense, then asserting that the prosecution was required to prove the source and type of the pill in order to disprove the affirmative defense under each count is equivalent to asserting that the offenses are different in fact because each required Brantner to prove a different fact. It is unsurprising that the State asserts without arguing that it has the burden to prove *the type of the type of controlled substance* and the unlawful source in every case.

Instead, the State argues that the offenses are different in fact for two other reasons. First, the State argues that the offenses are separated in time because Brantner had to have obtained possession of the white pills and pink pills from his brother at different times. (State's Br. 29.) However, in the next paragraph of its brief, the State argues that both convictions stand even if the jury found that he obtained "all of the pills from his brother at the same time." The State misses the mark by citing *Multater*, 252 Wis. 2d, ¶ 58. *Multater* does not support the conclusion that the offenses in this case were separated in time even if the jury concluded that Brantner committed one continuous act of possession. *Id.*

Second, the State argues the offenses are different in nature because the pills had to have come from different prescription bottles,

meaning Brantner necessarily committed two criminal acts that are "significantly different in nature. . . requiring a new volition departure in [his] course of conduct." (State's Br. 29.) This argument puts the cart before the horse. The rule under the *Blockburger* test is that offenses are significantly different in nature if each offense requires proof of a fact that the other offense does not. *Trawitzki*, ¶ 28. The State's argument applies the rule in reverse: each offense requires proof of a different fact *if the offenses are significantly different in nature*. Applying the rule in reverse, as the State does, untethers the *Blockburger* analysis from the principles of evidence law and grounds it in statutory interpretation.

The only argument that State seems not to explicitly make is the one it implicitly makes: different types of prescription oxycodone medications are different controlled substances, just as hydrocodone and oxycodone are different controlled substances. The essence of the State's argument is the same as the State's argument in *Melby v. State*, 70 Wis. 2d 368, 380-81, 234 N.W.2d 634 (1975), which the State does not mention in its brief. *Melby* involved a multiplicity challenge to convictions obtained under a statutory scheme predating the current Uniform Controlled Substances Act. *Id*. The defendant argued that the statutory subsections listing the different illegal substances established different means of committing the crime of possessing a dangerous drug. *Id*. The Court disagreed and held that the different substances listed in the statute established alternative elements that the State was required to prove beyond a reasonable doubt, not alternative modes of committing the offense. *Id.*

Under the reasoning of *Melby*, Brantner's possession of oxycodone and possession of hydrocodone convictions are different in fact because each count required the State to prove he possessed a different type of controlled substance. *See id*. But if the same is true of the two possession of oxycodone offenses, as the State contends, then a unanimous jury finding that a person knowingly possessed oxycodone is not necessarily sufficient to support a conviction for possession of oxycodone; The verdict is not guilty if half the jurors conclude that only the white pills contain oxycodone and the other half conclude only the pink pills do.

In short, to argue that unanimous jury agreement on all three elements in the jury instructions is not necessarily sufficient to support a conviction is to argue that the elements of the offense are wrong. As Brantner argued in his Opening Brief, "each count required proof of an additional fact that the other did not, but only because the State added an extra element to each offense." (Brantner's Br. 26). The possession of oxycodone offenses are identical in law and fact. Therefore, the State convicted and punished Brantner twice for a single legislatively defined offense, and the Court presumes that Brantner's double jeopardy rights were violated. *State v. Derango,* 2000 WI 89 ¶ 30, 236 Wis. 2d 721, 613 N.W. 2d 721.

B. The State Fails to Articulate a Clearly Defined Proposed Unit of Prosecution, and its argument is not derived from clear legislative intent.

The presumption that Brantner's double jeopardy rights were violated may only be rebutted by "clear legislative intent to the contrary." *Id*. Legislative intent under a multiplicity analysis is

determined by applying four factors: (1) statutory language; (2) legislative history and context; (3) the nature of the proscribed conduct; and (4) the appropriateness of multiple punishments. *Anderson*, 219 Wis. 2d at 739. This is the same statutory interpretation test that is applied in determining whether a statute lists alternative elemetns or alternative modes of committing the offense. *United States v. Franklin*, 2019 WI 64, ¶ 7, 928 N.W.2d 545. Brantner reiterates his application of these four factors in his Opening Brief and makes the following points in response to the State's argument.

As with the State's application of the *Blockburger* test, the most noteworthy aspect of the State's application of the statutory interpretation factors is the argument that it does not make. Specifically, despite using the phrase "unit of prosecution" numerous times, the State does not clearly identify the unit of prosecution it is proposing. (State's Br. 34-37). Instead, it simply asserts that it "charged Brantner with one count of possession of a controlled substance for each of the types of oxycodone pills he possessed without a valid prescription, which is expressly what Wis. Stat. § 961.41(3g)(am) proscribes." But the statutory language does not expressly proscribe possession of *each type of each type* of controlled substance. § 961.41(3g)(am); Wis. JI-Criminal 6030; *Williamson*, 58 Wis. 2d at 524; *see also*, *Melby*, 70 Wis. 2d at 380-81. The statute establishes criminal liability for any person who possesses a Schedule II Controlled Substance, unless the person can prove that he is an exempt person or that he lawfully obtained all of the substance from an exempt person for medical purposes. *Id.* It prohibits possession of

a "controlled substance," not a controlled substance prescription medication. § 961.41(3g)(am).

A second indication that the State's position is based on creative statutory interpretation rather than clear legislative intent is the unanswered question whether the State was required to prove third mental state element in this case: that Brantner knowingly possessed two types of oxycodone without two valid prescriptions. If the answer is yes, then defining offenses according to types of prescription medications may result in strict liability offenses. If the answer is no, then the State failed to prove each element of the offense under under both counts. The jury was instructed that it was required to find that Brantner knew he possessed the substance oxycodone, but it was not instructed that it was required to find that he knew he possessed two types of oxycodone prescription medications. (R. 71:279-81.)

The State's position is not supported by clear legislative intent. The unit of prosecution is clearly stated in § 961.41(3g)(am), a controlled substance, and the elements of the offense are clearly defined by the various substances listed under § 961.16.

Conclusion

The Court should conclude that the State violated Brantner's statutory and constitutional right to have the proceedings held where the offenses were committed. The Court should also conclude that the State convicted Brantner twice for possessing oxycodone once in violation of his constitutional protection against double jeopardy.

* * * *

Dated this 4th day of September, 2019.

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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 2989 words. See Wis. Stat. § 809.19(8)(c)1.

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