

RECEIVED
03-15-2021
CLERK OF WISCONSIN
COURT OF APPEALS

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Appeal Case No. 2020AP2072

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

ALEC D. ALFORD,

Defendant-Respondent.

APPEAL FROM A FINAL ORDER GRANTING
DISMISSAL ENTERED IN THE WAUKESHA COUNTY
CIRCUIT COURT, THE HONORABLE J. ARTHUR
MELVIN III, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

Susan Lee Opper
District Attorney
Waukesha County

Lesli S. Boese
Deputy District Attorney
State Bar No. 1024374
Attorneys for Plaintiff-Appellant

Waukesha County District Attorney's Office
515 W. Moreland Blvd. Room G-72
Waukesha, WI 53188-2486
(262) 548-7076

TABLE OF CONTENTS

| | Page |
|---|------|
| STATEMENT OF THE ISSUES..... | 1 |
| STATEMENT ON ORAL ARGUMENT AND PUBLICATION | 2 |
| STATEMENT OF THE CASE..... | 2 |
| STANDARD OF REVIEW | 4 |
| ARGUMENT | 5 |
| CONCLUSION | 12 |

TABLE OF AUTHORITIES

| Cases | Page |
|--|-----------------|
| <i>Evans v. Michigan</i> , 568 U.S. 313 (2013) | 5, 6 |
| <i>State ex rel. Kalal v. Circuit Court for Dane Cty.</i> , 2004 WI 58, 271 Wis. 2d 633, 681 N.W.2d 110 | 4 |
| <i>State v. Anderson</i> , 219 Wis. 2d 739, 580 N.W.2d 329 (1998)... | 8 |
| <i>State v. Berry</i> , 2016 WI App 40, 369 Wis. 2d 211, 879 N.W.2d 802 | 10 |
| <i>State v. Davison</i> , 2003 WI 89, 263 Wis. 2d 145, 666 N.W.2d 18 | |
| <i>State v. Dreske</i> , 88 Wis.2d 60, 276 N.W.2d 324 (Ct. App. 1979) | 8, 11 |
| <i>State v. Henning</i> , 2004 WI 89, 273 Wis. 2d 352, 681 N.W.2d 871 | 8 |
| <i>State v. Rabe</i> , 96 Wis. 2d 48, 291 N.W.2d 809 (1980) | 8 |
| <i>State v. Rivera-Hernandez</i> , 2019 WI App 15, 386 Wis. 2d 352, 927 N.W.2d 161 | 4 |
| <i>State v. Saucedo</i> , 168 Wis. 2d 486, 485 N.W.2d 1 (1992) | 5 |
| <i>State v. Steinhardt</i> , 2017 WI 62, 375 Wis. 2d 712, 896 N.W.2d 700 | 5 |
| <i>State v. Ziegler</i> , 2012 WI 73, 342 Wis. 2d 256, 816 N.W.2d 238 | 4, 8, 11 |
| Constitutional Provisions | Page |
| U.S. Const. Amend. V | 7 |
| Wis. Const. Art. 1, Section 8 | 7 |
| Statutes | Page |
| Wis. Stat. § 939.71 (2018) | 5 |
| Wis. Stat. § 961.41(1)(cm)1r | 9 |
| Wis. Stat. § 961.573(1) | 9 |
| Wis. Stat. 809.22(1)(b) | 2 |
| Wis. Stat. 809.23(1)(b)4 | 2 |
| Other Authorities | Page |
| Wis. JI—Criminal 6020 | 9 |
| Wis. JI—Criminal 6050 | 9 |

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Appeal Case No. 2020AP2072

STATE OF WISCONSIN,

Plaintiff-Appellant,

vs.

ALEC D. ALFORD,

Defendant-Respondent.

APPEAL FROM A FINAL ORDER GRANTING
DISMISSAL ENTERED IN THE WAUKESHA COUNTY
CIRCUIT COURT, THE HONORABLE J. ARTHUR
MELVIN III, PRESIDING

BRIEF AND APPENDIX OF PLAINTIFF-APPELLANT

ISSUES PRESENTED

- I. Whether the circuit court erroneously granted Mr. Alford's motion to dismiss 2020CM1192 when it found that the previous dismissal with prejudice barred any subsequent prosecution.
- II. Whether the State violated Mr. Alford's right to be protected from Double Jeopardy when it filed new charges in 2020CM1192 after 2019CF597 was dismissed with prejudice.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat. 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat. 809.23(1)(b)4.

STATEMENT OF THE CASE

On March 14, 2018, Detective Lusmann was in contact with a confidential informant (CI) who indicated that he/she could purchase \$300 worth of crack cocaine from an individual that goes by the street name of “Tee.” This person was subsequently identified by Detective Lusmann as Alec D. Alford, the defendant. The CI indicated to Detective Lusmann that the defendant told him/her that \$300 would get him/her three to four grams of crack cocaine. After the controlled buy, the CI turned over a clear plastic baggie containing five individual corner cuts of an off-white chunky substance believed to be crack cocaine. Detective Lusmann weighed each of the baggies and they had a weight of 1.2 grams, .8 grams, .7 grams, .6 grams and .6 grams for a total of 3.9 grams. Detective

Lusmann did test a small portion of the white chunky substance and it did test positive for the presence of cocaine.

This case was originally charged in case number 2019CF597, charging Mr. Alford with one count of Delivery of Cocaine, second and subsequent offense, contrary to Wis. Stat. §§ 961.41(1)(cm)1r and 961.48(1)(b). On January 9, 2020, Judge Maria Lazar dismissed 19CF597 with prejudice for failure to promptly prosecute the case in accordance with defendant's request for prompt disposition pursuant to 971.11(2). (Oral Ruling Tr. 3:19-22; App. 3.) The State then filed new charges in case number 2020CM1192, charging the defendant with five counts of possession of drug paraphernalia, as a repeater, contrary to Wis. Stat. §§ 961.573(1) and 939.62(1)(a). (Oral Ruling Tr. 4:4-5; App. 4.) Both cases relied on the same set of facts. (*Id.* at 3:13-4:8; App. 4.)

On September 15, 2020, Mr. Alford filed a motion to dismiss the complaint in 2020CM1192 on the grounds that the charges were multiplicitous and violated double jeopardy. (Def. Amended Mot. 1; App. 10.) The State responded, arguing the charges were not multiplicitous nor did they violate double jeopardy because the dismissal with prejudice was not a dismissal on the merits, but rather a procedural dismissal with

no finding that the State could not prove its case. (State Response Ltr.; App. 13-14) Judge J. Arthur Melvin issued an oral ruling on October 29, 2020, granting Mr. Alford's motion to dismiss. (Oral Ruling Tr. 7:19-20; App. 7.) This ruling forms the basis for this appeal.

STANDARD OF REVIEW

This court reviews a circuit court's decision to grant a motion to dismiss for erroneous exercise of discretion. *See State v. Rivera-Hernandez*, 2019 WI App 15, ¶ 9, 386 Wis. 2d 352, 927 N.W.2d 161.

Statutory interpretation is a “question[] of law that this court reviews *de novo* while benefitting from the analyses of the . . . circuit court.” *State v. Ziegler*, 2012 WI 73, ¶37, 342 Wis. 2d 256, 816 N.W.2d 238 (citation omitted). The Court starts with the language of the statute; if the language is clear, the inquiry ends. *Id.* The Court interprets statutes “to avoid absurd or unreasonable results.” *State ex rel. Kalal v. Circuit Court for Dane Cty.*, 2004 WI 58, ¶ 46, 271 Wis. 2d 633, 681 N.W.2d 110.

Whether a defendant's convictions violate the Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution and Article I, Section 8 of the Wisconsin

Constitution, are questions of law appellate courts review *de novo*. *State v. Steinhardt*, 2017 WI 62, ¶11, 375 Wis. 2d 712, 896 N.W.2d 700 (citation omitted); *see also State v. Saucedo*, 168 Wis. 2d 486, 492, 485 N.W.2d 1 (1992) (citation omitted).

ARGUMENT

I. The Circuit Court Erroneously Granted Mr. Alford's Motion to Dismiss 2020CM1192.

- a. Wis. Stat. § 939.71 does not apply to this case because there was not a conviction or acquittal on the merits of the first case, 2019CF597.*

Wis. Stat. § 939.71 provides that “[i]f an act forms the basis for a crime punishable under more than one statutory provision of this state . . . a *conviction or acquittal on the merits* under one provision bars a subsequent prosecution under the other provision unless each provision requires proof of a fact for conviction which the other does not require.” Wis. Stat. § 939.71 (2018) (emphasis added). There are no Wisconsin criminal cases on this point, however the United States Supreme Court provided some guidance as to what a conviction or acquittal on the merits means in *Evans v. Michigan*, 568 U.S. 313 (2013).

In *Evans*, the United States Supreme Court distinguished between substantive acquittals and procedural acquittals in the

double jeopardy context. Substantive rulings, which include “a ruling by the court that the evidence is insufficient to convict,” a “factual finding [that] necessarily establish[es] the criminal defendant's lack of criminal culpability,” and any other “rulin[g] which relate[s] to the ultimate question of guilt or innocence,” stand apart from procedural rulings, which include rulings on questions that “are unrelated to factual guilt or innocence,” but “which serve other purposes,” including “a legal judgment that a defendant, although criminally culpable, may not be punished” because of some problem like an error with the indictment. *Evans v. Michigan*, 568 U.S. 313, 319, 133 S. Ct. 1069, 1075, 185 L.Ed.2d 124, 133-34 (2013) (citations omitted). “[T]he law attaches particular significance to an acquittal,” so a merits-related ruling concludes proceedings absolutely. *Id.* at 319 (citations omitted). In contrast, a “termination of the proceedings against [a defendant] on a basis unrelated to factual guilt or innocence of the offense of which he is accused,” i.e., some procedural ground, does not pose the same concerns, because no expectation of finality attaches. *Id.* at 319-20.

Here, there was no ruling on insufficiency of proof, no factual finding as to petitioner's lack of culpability, no jury

empaneled at the time, or any other factor suggesting that the trial court's ruling amounted to a "court-decreed acquittal" that would bar retrial. Rather, the trial court's ruling was merely a recognition of the procedural error of the case not being brought within the required timeframe as required by the request for prompt disposition. At no point did the trial court acknowledge any inability on the State's part to prove the charges beyond a reasonable doubt.

II. Mr. Alford's Double Jeopardy Rights Were Not Violated Because The New Charges Are Different in Law.

Even if this court finds that the dismissal of 2019CF597 was on the merits, this court should still find that Mr. Alford's double jeopardy rights were not violated. The protection against double jeopardy under Article I, sec. 8 of the Wisconsin Constitution, which is nearly identical to the language in the Fifth Amendment to the U.S. Constitution, provides that "no person for the same offense may be put twice in jeopardy of punishment." Wis. Const. Art. 1, Section 8. *See also* U.S. Const. Amend. V. There are three situations in which double jeopardy applies: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same

offense. *See State v. Henning*, 2004 WI 89, ¶ 16, 273 Wis. 2d 352, 681 N.W.2d 871. Neither the first nor second situations apply to this case, which leaves this court to determine whether Mr. Alford is at risk of multiple punishments for the same offense.

To answer this question, this court engages in a multiplicity analysis. Multiplicity arises where the defendant is charged in more than one count for a single offense. *State v. Dreske*, 88 Wis.2d 60, 74, 276 N.W.2d 324 (Ct. App. 1979). The approach for determining whether a charge is multiplicitous is two-fold. *State v. Rabe*, 96 Wis. 2d 48, 63, 291 N.W.2d 809 (1980). First, the court must determine whether the offenses are “identical in law and fact.” *Id.* If the charges are identical in law and fact, they are multiplicitous and cannot be charged in more than one count. *See State v. Anderson*, 219 Wis. 2d 739, 747, 580 N.W.2d 329 (1998). If the charges are not identical in law or fact, the court turns to the second step and looks to the legislative intent of allowing or prohibiting multiple punishments for the same offense. *State v. Davison*, 2003 WI 89, ¶ 49, 263 Wis. 2d 145, 666 N.W.2d 1. If the charges are different in law or fact, the presumption arises that

the legislature intended to allow multiple punishments. *State v. Ziegler*, 2012 WI 73, ¶ 62, 342 Wis. 2d 256, 816 N.W.2d 238.

The charges in Mr. Alford's cases are different in law. Delivery of cocaine requires proof of the following elements: (1) The defendant delivered a substance, (2) The substance was a controlled substance, (3) The defendant knew or believe that the substance was a controlled substance, and (4) The substance was cocaine. Wis. Stat. § 961.41(1)(cm)1r; Wis. JI—Criminal 6020. Possession of drug paraphernalia requires proof of the following elements: (1) The defendant possessed an item, (2) The item in question was drug paraphernalia, and (3) The defendant possessed drug paraphernalia with the primary intent to use it to ingest, inhale, or otherwise introduce into the human body a controlled substance. Wis. Stat. § 961.573(1); Wis. JI—Criminal 6050. Each count contains an element different from the other. Since the charges are different in law, the charges in 2020CM1192 do not violate Mr. Alford's constitutional right to be free from double jeopardy.

The facts in this case are analogous to the facts in *State v. Berry*. In *Berry*, the Court of Appeals, District I, held that the State did not violate the defendant's double jeopardy rights when the State charged the defendant with possession of a

firearm as someone who has been adjudicated delinquent contrary to Wis. Stat. § 941.29(2) in Milwaukee County Case Number 2014CF4520 after a charge for felon in possession of a firearm contrary to Wis. Stat. § 941.29(2)(a) was dismissed with prejudice in Milwaukee County Case Number 2014CF90. *State v. Berry*, 2016 WI App 40, ¶ 17, 369 Wis. 2d 211, 879 N.W.2d 802. In 2014CF90, the circuit court found Berry guilty of possession of a firearm as a previously convicted felon. *Id.* at ¶ 4. After the trial, and prior to sentencing, Berry's counsel discovered that Berry had in fact not been convicted of a felony, but had rather pled guilty to a misdemeanor. Accordingly, the circuit court vacated the judgment of conviction from the bench trial in Milwaukee County Case Number 2014CF90. The circuit court did not enter a judgment of acquittal, but instead dismissed the charge with prejudice. *Id.* at ¶ 5. The State subsequently charged Berry with possession of a firearm as someone who has been adjudicated delinquent contrary to Wis. Stat. § 941.29(2)(b) in Milwaukee County Circuit Court Case No. 2014CF4520. *Id.* at ¶ 6. Both cases relied on the same traffic stop as the factual basis for the charge. *Id.* The Court of Appeals found that the charge for possession of a firearm as someone who has been adjudicated

delinquent did not violate the defendant's constitutional right to be free from double jeopardy because each charge required proof of different elements, i.e. one requires a felony conviction and the other requires an adjudication of delinquency on or after April 21, 1994 that, if committed by an adult, would constitute a felony. *Id.* at ¶ 11. Likewise, in this case the charge for possession of drug paraphernalia requires proof of different elements than the charge for delivery of cocaine. Therefore, this Court should find that the charge for possession of drug paraphernalia does not violate the defendant's constitutional right to be free from double jeopardy.

The second part of the multiplicity analysis asks whether the legislature intended that the charged offenses be brought only as a single count. If the charges are different in law or fact, the presumption arises that the legislature intended to allow multiple punishments. *Ziegler*, 2012 WI at ¶ 62. Because the charges in 2020CM1192 are different in law from those in 2019CF597, this court should presume the legislature intended to allow multiple punishments. At this point, "it is the defendant's burden to show a clear legislative intent that

cumulative punishments are not authorized.” *Davison*, 2003 WI at ¶ 45.

CONCLUSION

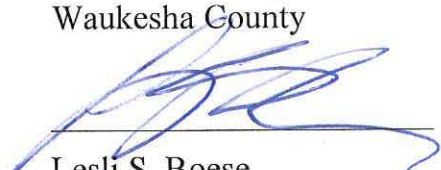
The circuit court, by Judge Melvin, erroneously dismissed the State’s criminal complaint in 2020CM1192, which charged Mr. Alford with five counts of Possession of Drug Paraphernalia, when the circuit court decided the State could not issue new charges based on the same set of facts as used in 2019CF597. This Court should find that Wis. Stat. § 939.71 does not bar the State from filing charges for possession of drug paraphernalia based on the same set of facts as the dismissed charge for delivery of cocaine. In addition, the State did not violate Mr. Alford’s double jeopardy rights as the charges filed in the new complaint were completely different charges than those filed in the first case.

As a result of the trial court’s erroneous decision, we ask this Court to reverse the decision of the circuit court, and remand this case for proceedings consistent with the opinion.

Dated this 5th day of March, 2021.

Respectfully submitted,

Susan Lee Oppen
District Attorney
Waukesha County




Lesli S. Boese
Deputy District Attorney
State Bar No. 1024374

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 word count of this brief is 2,870.

3/15/21
Date



Lesli S. Boese
Deputy District Attorney
State Bar No. 1024374

CERTIFICATE OF COMPLIANCE WITH 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 s. 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.

3/15/21
Date


Lesli S. Boese
Deputy District Attorney
State Bar No. 1024374

P.O. Address:

Waukesha County District Attorney's Office
515 W. Moreland Blvd. Room CG-72
Waukesha, Wisconsin 53188
(262) 548-7076
Attorneys for Plaintiff-Appellant.