STATE OF WISCONSIN

IN SUPREME COURT

No. 2023AP645-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CARL LEE MCADORY,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

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INTRODUCTION

The State opposes Carl Lee McAdory's petition for review. The court of appeals applied established Wisconsin and United States Supreme Court precedent when it rejected McAdory's challenge to the circuit court's post-remittitur actions and his corollary claim that the circuit court's actions violated his right to be free from double jeopardy. *State v. McAdory*, 2024 WI App 29. (Pet-App. 3–24.) Should this Court disagree and grant review, however, the State respectfully requests that this Court overrule the authority that provoked the peculiar procedural history underlying this appeal: *Town of Menasha v. Bastian*, 178 Wis. 2d 191, 195, 503 N.W.2d 382 (Ct. App. 1993).

DISCUSSION

This Court should deny McAdory's petition for review for two reasons.

First, the court of appeals' published opinion is well-reasoned and consistent with Wisconsin and United States Supreme Court precedent. Wis. Stat. § (Rule) 809.62(1r)(d).

Starting with McAdory's challenge to the circuit court's post-remittitur actions, the court of appeals correctly determined that the circuit court "had authority to take, and was not barred from taking," certain post-remittitur actions after McAdory's first appeal and his only trial. (Pet-App. 5.) These actions included reopening McAdory's judgment of conviction for operating a motor vehicle while under the influence of an intoxicant ("OWI"), dismissing that OWI charge in lieu of retrying it, and entering judgment on a charge of operating a motor vehicle with a restricted controlled substance in his blood ("RCS") for which the jury returned a guilty verdict at his earlier trial. (Pet-App. 5, 8–9.)

The court made several key observations supporting that decision. It noted that Wis. Stat. § 346.63(1)(c) permits

the State to file a criminal complaint charging a defendant with a combination of related traffic offenses "for acts arising out of the same incident or occurrence," including operating while under the influence of an intoxicant, operating with a prohibited alcohol concentration, and operating with a restricted controlled substance in one's blood. (Pet-App. 8–9.) And it also recognized that Wis. Stat. § 346.63(1)(c) mandates "'a single conviction for purposes of sentencing' and counting convictions" when a defendant is charged and found guilty of more than one of those charges. (Pet-App. 9.)

More importantly, the court astutely observed that "the somewhat sparse language of" Wis. Stat. § 346.63(1)(c) "does not explicitly address the procedures to be used to accomplish the result of a single conviction." (Pet-App. 8–9.) Absent that statutory direction, the court turned to its own precedent, which interpreted Wis. Stat. § 346.63(1)(c) "to mean that 'the defendant is to be sentenced on one of the charges, and the other charge is to be dismissed.'" (Pet-App. 9 (quoting *Bastian*, 178 Wis. 2d at 195).) Read in concert with *Bastian*, the court aptly concluded that Wis. Stat. § 346.63(1)(c) "implicitly authorizes circuit courts, in the procedural posture here, to accomplish the intended goal of a single conviction" by the actions taken in McAdory's case. (Pet-App. 11.)

Turning to his remaining claim, the court correctly held that McAdory could not show that the circuit court's actions which he challenged fell "within any of the three categories of prohibited practices created by the Double Jeopardy Clause, as interpreted by the United States Supreme Court," namely "a second prosecution for the same offense after acquittal," "a second prosecution for the same offense after conviction," or "multiple punishments for the same offense." (Pet-App. 21–22 (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled on other grounds by Alabama v. Smith*, 490 U.S. 794, 798 (1989)).) Having so decided, the court rejected each of McAdory's arguments concerning his purported expectation

of finality in the dismissal of his RCS charge after his trial and his position that his RCS charge could not be revived as it was dismissed with prejudice. (Pet-App. 22–24.)

In short, the court of appeals correctly concluded, based on current Wisconsin and United States Supreme Court precedent, that the circuit court maintained the authority to enter judgment on the jury's verdict finding McAdory guilty of operating with a restricted controlled substance at his first and only trial and that doing so did not violate his right to be free from double jeopardy. There is no reason for this Court to grant review to reaffirm the same.

That said, the second reason that this Court should deny McAdory's petition is that his case meets none of this Court's criteria for review. This Court grants discretionary review "only when special and important reasons are presented." Wis. Stat. § (Rule) 809.62(1r). Cases fitting that description generally present "real and significant question[s] of federal or state constitutional law," "a need for the supreme court to consider establishing, implementing or changing a policy within its authority," opportunities to "develop, clarify or harmonize the law," a conflict in existing legal precedent, or even an issue "ripe for reexamination" due to "the passage of time or changing circumstances." Wis. Stat. § (Rule) 809.62(1r)(a)–(e).

Here, McAdory maintains that review is warranted because his petition (1) "raises a real and significant question concerning the prohibition against double jeopardy under the federal and state constitutions," and (2) "offers the Court an opportunity to develop, clarify, and harmonize the law" as it relates to what he labels "the unsettled question of how the State and circuit courts should approach guilty verdicts under more than one subpart of [Wis. Stat.] § 346.63(1)—a situation that frequently occurs, and is certain to recur, in courtrooms statewide." (McAdory's Pet. 10.) And he also later argues that review is necessary to impose upon the State an added burden

of either filing a cross-appeal in such situations, even though the State has suffered no adverse decision, or at least frame additional issues to preserve arguments during a defendant's direct appeal. (McAdory's Pet. 27–31.)

He is wrong in all three respects. To begin, McAdory's case does not present a real or significant question concerning the constitutional right to be free from double jeopardy—or at least not an *unanswered* question. As the court of appeals accurately observed, the United States Supreme Court has interpreted the Double Jeopardy Clause as establishing only three prohibited practices, none of which occurred in McAdory's case. (Pet-App. 21.) While McAdory disagrees with the court's assessment, his arguments fail to negate the court of appeals' aptly supported conclusion that none of the circuit court's actions subjected him to any of the practices barred by the Double Jeopardy Clause.

As for McAdory's proffered opportunity to develop the law to define how circuit courts should effectuate the single-conviction goal of Wis. Stat. § 346.63(1)(c), the court of appeals has now already provided that guidance. It recognized that what occurred in McAdory's case complied with state statute and existing state precedent. (Pet-App. 10–13.) While McAdory is correct that there may be a "better solution" to the problem tackled by the court of appeals, he fails to show a need for this Court to establish that procedure in this case. And more to the point, he fails to explain why his proffered practice of "staying" proceedings surrounding those charges that do not result in a judgment and sentencing is the only proper approach or that it enjoys any support under Wisconsin law. (McAdory's Pet. 21.)

Finally, this Court should summarily reject McAdory's pitch to require that the State file prophylactic cross-appeals or preserve in its response brief defending against a criminal defendant's direct appeal any and all issues that *might* prove relevant at some future proceeding. (McAdory's Pet. 27–31.)

But the State had no reason to cross-appeal from McAdory's original judgment of conviction because it was not seeking to modify the judgment. Wis. Stat. § (Rule) 809.10(2)(b). Rather, the State tried to defend McAdory's OWI conviction on appeal, albeit unsuccessfully, and not until this Court released its decision reversing McAdory's OWI conviction did the State even suffer an adverse decision upon which it could bring an appeal. Wis. Stat. § 974.05(1)(a) (authorizing the State to appeal from a "[f]inal order or judgment adverse to the state"). There is simply no tenable reason to adopt McAdory's proposed rule requiring the State to file futile cross-appeals or pursue hypothetical appellate arguments for fear that certain future arguments raised in the circuit court may be deemed forfeited.

Still, should this Court disagree and grant review, the State will ask that this Court overrule *Bastian* because it misinterpreted Wis. Stat. § 346.63(1)(c), prompting one of the central problems underlying McAdory's appeal. To that point, while the State opposes most of McAdory's argument, he is correct in one critical respect: *Bastian* read into Wis. Stat. § 346.63(1)(c) a requirement that the legislature did not impose, namely that all but one of a defendant's charges must be *dismissed* if he is ultimately found guilty of more than one charge listed in the statute that arises from the same incident. (McAdory's Pet. 19–20.) However, that is not what the statute says, and *Bastian* provided no basis for interpreting the statute in such a way.

Moreover, problems with *Bastian* do not end with its lacking analysis and rationale. As long as it remains good law, *Bastian* will continue to invite in other cases across the state the procedural posture underlying this appeal. Indeed, but for *Bastian*, the State would have had no reason to dismiss McAdory's RCS charge following his trial, and as a result, a central question underlying this appeal—whether the circuit court could reinstate McAdory's dismissed RCS charge and

enter judgment on the jury's verdict—never would have come to fruition.

Perhaps worst of all, *Bastian* hinders the legislature's goal of "the vigorous prosecution of" those offenses for which the jury found McAdory guilty. Wis. Stat. § 967.055(1)(a). To be clear, the legislature likely never could have foreseen that Wis. Stat. § 346.63(1)(c) might someday bar the State from retrying a defendant for crimes that a jury found him guilty of committing, all because State failed to predict that the defendant may someday establish reversable error relevant to one of those charges but not others. Neither the legislature nor the court of appeals likely intended for this result, yet as long as *Bastian* remains good law, the State will be forced to rely on blind luck in deciding which charge(s) to dismiss at the end of a defendant's trial, lest it be barred from reviving those same charges if a defendant prevails on future appeal.

In sum, the State maintains that the court of appeals' decision is sound and that further review is unwarranted, but should this Court disagree, the State continues to preserve its argument that *Bastian* was wrongly decided and should be overruled if this Court grants McAdory's petition for review.

CONCLUSION

This Court should deny McAdory's petition for review.

Dated this 13th day of June 2024.

Respectfully submitted,

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Electronically signed by:

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FORM AND LENGTH CERTIFICATION

I hereby certify that this response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a response produced with a proportional serif font. The length of this response is 1,784 words.

Dated this 13th day of June 2024.

Electronically signed by:

John W. Kellis
JOHN W. KELLIS

CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Supreme Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 13th day of June 2024.

Electronically signed by:

John W. Kellis
JOHN W. KELLIS