STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 9, 2001
V	No. 225887 Oakland Circuit Court
MELISSA ANN NUTT, Defendant-Appellant.	LC No. 99-167397-FH

Before: Hoekstra, P.J., and Whitbeck and Meter, JJ.

WHITBECK, J. *(dissenting).*

The prosecutor appeals as of right from an order dismissing a charge of receiving or concealing stolen firearms against defendant Melissa Nutt.[1] The trial court concluded that the charge violated the constitutional guarantee against double jeopardy.[2] I agree with the trial court and therefore respectfully dissent.

I. Basic Facts And Procedural History

On December 10, 1998, Nutt, along with others, burglarized at least three Lapeer County residences, stealing four shotguns from one residence. Four days later, on December 14, 1998, officers from Lapeer and Oakland Counties executed a search warrant at her rental cabin in Oakland County, seizing three of the stolen shotguns, which she had concealed underneath a mattress. In January 1999, pursuant to a plea agreement, Nutt pleaded guilty in Lapeer Circuit Court to one count of second-degree home invasion.[3]

Nevertheless, in February 1999, the Oakland County prosecutor issued a felony warrant and information charging Nutt with receiving and concealing the stolen firearms.[4] After Nutt was bound over in Oakland Circuit Court, she moved to dismiss the charge, arguing that, given

[1] MCL 750.535b.

[2] US Const Am V; Const 1963, art 1, § 15.

[3] MCL 750.110a(3).

[4] MCL 750.535b.

her breaking and entering conviction in Lapeer County, the charge violated her right to be free from double jeopardy.[5] The trial court, relying on *People v Hunt (After Remand)*,[6] reasoned that concealing the weapons was part of the same transaction as the breaking and entering. Therefore, the trial court granted Nutt's motion to dismiss. The sole issue on appeal is whether the trial court properly dismissed the charge on double jeopardy grounds.

II. Double Jeopardy

A. Standard Of Review

This Court reviews a trial court's decision to dismiss a charge for an abuse of the trial court's discretion.[7] However, the decision to dismiss in this case depended in large part on how the trial court interpreted case law relevant to double jeopardy. Review de novo is appropriate when determining whether case law barred this prosecution.[8] The trial court's exercise of discretion in dismissing the charge must be viewed in light of how that question of law is resolved.

B. Legal Test And Application

The double jeopardy provision of the United States Constitution, US Const, Am V, and its counterpart in the Michigan Constitution, Const 1963, art 1, § 15, protect individuals against being punished more than once for the same offense[9] and against being prosecuted more than once for the same offense, no matter whether the prosecution results in acquittal or conviction.[10] Courts refer to this first type of double jeopardy problem as "multiple punishment" and the second type of double jeopardy problem as a "successive prosecution" or "multiple prosecution." This case involves the double jeopardy protection against multiple prosecutions for the same offense, a constitutional right intended "to preserve the finality of judgments in criminal prosecutions and to protect the defendant from prosecutorial overreaching."[11]

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[5] The Double Jeopardy Clause of the United States Constitution provides that no "person [shall] be subject for the same offense to be twice put in jeopardy of life or limb . . . ." US Const, Am V. Similarly, the Double Jeopardy Clause of the Michigan Constitution provides that "[n]o person shall be subject for the same offense to be twice put in jeopardy." Const 1963, art 1, § 15.

[6] *People v Hunt (After Remand)*, 214 Mich App 313; 542 NW2d 609 (1995).

[7] *People v Stephan Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1998).

[8] *People v Lugo*, 214 Mich App 699, 705; 542 NW2d 921 (1995).

[9] *People v Harding*, 443 Mich 693, 699; 506 NW2d 482 (1993).

[10] *People v Sturgis*, 427 Mich 392, 398; 397 NW2d 783 (1986).

[11] *Id*. at 398-399.

In Michigan,[12] the courts determine whether multiple prosecutions are constitutionally sound by applying the "same transaction" test,[13] which essentially determines whether the prosecutor attempted to circumvent the double jeopardy limitation on multiple prosecutions by splitting the separate criminal acts that make up a single criminal transaction into a series of prosecutions.[14] A prosecutor violates a defendant's right to be free from double jeopardy by failing "to join at one trial all the charges against a defendant which grew out of a continuous time sequence and display a single intent and goal"[15] when the crimes at issue share the same intent.[16] However, because home invasion is a specific intent crime[17] and receiving and concealing stolen property is a general intent crime,[18] we must examine "whether the offenses are part of the same criminal episode, and whether the offenses involve laws intended to prevent the same or similar harm or evil, not a substantially different, or a very different kind of, harm or evil."[19]

The evidence presented at the preliminary examination indicated that Nutt broke into the Lapeer County residence on December 10, 1998, and stole three shotguns, among other things. The prosecutor now contends that the receiving and concealing offense did not occur until December 14, 1998, with this four-day interval demonstrating that these offenses were not part of the same criminal transaction. However, as the trial court concluded, the reasonable inference from the record is that, in connected actions, Nutt and her companions stole the firearms, transported them to the cabin where she was staying, and then concealed them under her mattress. These actions of stealing, transporting, and then concealing the firearms for four days are logically part of the same criminal episode.

In fact, this concealment was continually successful for four days because it prevented the police from discovering the weapons. The record is simply devoid of any evidence that would

[12] Because I ultimately conclude that prosecution in this case violates Const 1963, art 1, § 15, it is not necessary to determine whether this prosecution would be constitutional under the Fifth Amendment.

[13] *People v McMiller*, 202 Mich App 82, 85; 507 NW2d 812 (1993).

[14] *People v Gonzales*, 197 Mich App 385, 398; 496 NW2d 312 (1992).

[15] *Sturgis*, *supra* at 401.

[16] *Id*. at 401, n 3, citing *Crampton v 54-A Dist Judge*, 397 Mich 489, 502, n 9; 245 NW2d 28 (1976).

[17] MCL 750.110a(3) ("A person who breaks and enters a dwelling *with intent to commit a felony, larceny, or assault in the dwelling*, a person who enters a dwelling *without permission with intent to commit a felony, larceny, or assault in the dwelling*, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the second degree.") (emphasis added); see also *Hunt*, *supra* at 316.

[18] MCL 750.535b ("A person who receives, conceals, stores, barters, sells, disposes of, pledges, or accepts as security for a loan a stolen firearm or stolen ammunition, knowing that the firearm or ammunition was stolen, is guilty of a felony, punishable by imprisonment for not more than 10 years or by a fine of not more than $5,000.00, or both."); see also *Hunt*, *supra* at 316.

[19] *Crampton*, *supra* at 502.

suggest that Nutt committed the theft but then waited some period before receiving and concealing the weapons. Further, there is no evidence that any time gap was long enough to conclude that the concealment was completely unrelated to the theft.[20] I cannot agree with the prosecutor's contention that a crime is only *committed* at the time the police *discover* it.[21]

From the preliminary examination testimony by the shotguns' owner and the investigating officer, I gather that the evidence used to support this receiving and concealing charge is essentially identical to the evidence used to support Nutt's conviction of home invasion. The Oakland County prosecutor's reliance on the same evidence concerning the same events at issue in the Lapeer County case demonstrates that the separate crimes charged occurred in the same transaction. The facts of the home invasion are inextricably intertwined with the alleged receiving and concealing offense.

Further, both the second-degree home invasion statute and the receiving and concealing statute, when viewed broadly,[22] attempt to prevent and minimize the effect of property crimes. These statutes work with each other. The home invasion statute attempts to prevent the specific act of theft, while the receiving and concealing statute attempts to minimize the consequence of theft by preventing stolen property from being kept or transferred. Because the test for this multiple prosecution issue examines whether there are any "substantial" differences between the statutes, any small or technical differences between the home invasion and receiving and concealing statutes are irrelevant to the double jeopardy analysis.[23] Thus, I find it clear that the concealment not only occurred during the same criminal episode as the home invasion, the statutes Nutt violated are sufficiently similarly in purpose to conclude that these crimes should have been charged and tried with each other.

C. *Hunt* And *Squires*

If applying double jeopardy principles did not lead me to conclude that this second prosecution is unconstitutional, case law would compel that conclusion. Nutt contends that *Hunt*, the case the trial court cited, bars this trial, while the prosecutor contends that *People v Squires*,[24] a newer opinion, controls the disposition of this appeal and mandates reversal.

In *Hunt*, on September 21, 1989, someone broke into a home in Eaton County and, among other things, stole an imitation Rolex watch.[25] The defendant pawned the watch the same

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[20] Compare *People v Martinez*, 58 Mich App 693, 694-695; 228 NW2d 523 (1975) (drug transactions involved two different amounts of narcotics and occurred nine days apart, and there was no evidence connecting the two transactions).

[21] See *People v Burgenmeyer*, 461 Mich 431, 438-439; 606 NW2d 645 (2000).

[22] *Sturgis, supra* at 399 ("It is . . . clear that 'the term "same offense" has *a different and broader meaning* in a case involving a subsequent prosecution than it does . . . where multiple punishments [are] imposed during a single trial.'") (emphasis added).

[23] *Crampton, supra* at 502

[24] *People v Squires*, 240 Mich App 454; 613 NW2d 361 (2000).

[25] *Hunt, supra* at 315.

day in Ingham County.[26] The Ingham County prosecutor charged the defendant with receiving and concealing the stolen watch, to which the defendant pleaded guilty.[27] Slightly more than one week later, the Eaton County police determined that the defendant was involved in the breaking and entering during which the watch was originally stolen.[28] The Eaton County Prosecutor charged the defendant with the breaking and entering.[29] After the Eaton County jury convicted the defendant, the trial court vacated the conviction on double jeopardy grounds.[30]

On appeal, the prosecutor in *Hunt* contended that the Eaton County conviction was proper. However, this Court disagreed, reasoning that the "breaking and entering and the possession of the stolen goods were clearly part of a single criminal episode in which defendant intended to convert the victim's property into his own."[31] The Court also noted that the breaking and entering and the receiving and concealing statutes "involved may be said to be intended to prevent similar harms."[32] Consequently, the Court affirmed the trial court's decision to vacate the conviction.[33]

Hunt is directly on point. Not only does *Hunt* involve a double jeopardy problem in the context of multiple prosecutions, as in this case, it also involved remarkably similar facts. The defendants in both cases committed a breaking and entering in a residence with the intent to commit larceny. The defendants in both cases actually stole personal property from the homes they broke into and entered. In both cases, the police were able to tie the theft offense to the defendant because of each defendant's role in receiving or concealing the property stolen. While the statutes under which each defendant was charged evidently were specific to the type of property stolen,[34] a watch versus firearms, and the type of residence they broke into and entered, these statutes are similar in their structure and purpose.[35]

Nevertheless, the prosecutor contends that this Court's opinion in *Squires* mandates a result opposite from the outcome in *Hunt*.[36] In *Squires*, the defendant, who broke into a house

[26] *Id*.

[27] *Id*.

[28] *Id*.

[29] *Id*.

[30] *Id*.

[31] *Id*.

[32] *Id*.

[33] *Id*.

[34] The *Hunt* opinion does not specify which receiving and concealing statute the prosecutor charged the defendant with violating. I presume that it was MCL 750.535, the general receiving and concealing statute.

[35] Compare MCL 750.110 (breaking and entering statute in *Hunt*) with MCL 750.110a (home invasion statute in this case) and MCL 750.535 (general receiving and concealing statute presumably at issue in *Hunt*) with MCL 750.535b (receiving and concealing firearms statute in this case).

[36] See *Squires*, *supra*.

intending to steal property, actually stole several different items and then gave that property to friends.[37] He subsequently pleaded guilty of breaking and entering[38] and receiving and concealing property[39] over $100.[40] On appeal, the defendant argued that he could not be convicted of both breaking and entering and receiving and concealing because they were the same offense.[41] This was a *multiple punishment* double jeopardy argument, not a *multiple prosecution* argument.[42] Though *Hunt* was a multiple prosecution case, the defendant in *Squires* relied on a portion of *Hunt* that intimated that he could not be convicted of breaking and entering and receiving and concealing even if he had been prosecuted for both charges in the same case.[43] The *Squires* Court, however, rejected this argument.[44] The *Squires* Court pointed out that this statement concerning the possibility that breaking and entering and receiving and concealing property impermissibly punished defendants more than once for the same offense was obiter dicta because it "was not essential to determining the outcome in *Hunt*."[45]

The *Squires* Court then proceeded to examine whether there were any differences between the breaking and entering and receiving and concealing statutes.[46] The Court concluded that the statutes protected society in different ways and that they included different elements, requiring different proofs at trial.[47] The Court also determined that the statutes were not codified with each other in the penal code, which meant that they "they are not hierarchical or cumulative."[48] Considering these factors together, the Court concluded that the Legislature intended to permit punishment for both crimes committed at the same time[49] and, as a result, "that defendant's convictions under both statutes did not violate double jeopardy protections against multiple punishments."[50]

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[37] *Id.* at 455-456.

[38] MCL 750.110.

[39] MCL 750.535.

[40] *Squires*, *supra* at 455.

[41] *Id*. at 456.

[42] *Id*.

[43] See *id*. at 458, referring to *Hunt*, *supra* at 318, citing *People v Johnson*, 176 Mich App 312, 315; 439 NW2d 345 (1989) ("As noted by defendant and the trial court, had the charges against defendant been properly joined in a single prosecution, he could not have been convicted of both breaking and entering and receiving and concealing.").

[44] *Squires*, *supra* at 458.

[45] *Id*.

[46] *Id*. at 458-459.

[47] *Id*. at 459, 460.

[48] *Id*. at 459.

[49] *Id*. at 458.

[50] *Id*. at 461.

Squires supports my conclusion that affirming is the only constitutionally acceptable result in this case because it endorses the analytical distinction between multiple punishment and multiple prosecution when addressing double jeopardy issues. Because there is no doubt that *Hunt* is a multiple prosecution case and that *Squires* is a multiple punishment case, I believe that there is no question that, between the two, this Court plainly must follow *Hunt*, even under the reasoning advanced in *Squires*. The fact that *Squires* narrowly criticized the dicta in *Hunt* concerning multiple punishments has no practical effect on the binding precedent that *Hunt* creates for multiple prosecution cases.

III. The Lead And Concurring Opinions

Four aspects of the reasoning in the lead and concurring opinions prevent me from joining the conclusion that this Court must reverse the trial court's decision.

First, I agree with the statement in the concurring opinion that determining whether the time sequence in a crime passes the same transaction test requires a case-by-case analysis. To the extent that the concurring opinion suggests that the Court must apply the double jeopardy principles directly to the facts of the case in the absence of relevant case law, I have no quarrel. Nevertheless, I do think that case law is instructive when it comes to applying most legal tests, including double jeopardy's same transaction test. In fact, the rule of stare decisis, a guiding principle in the American jurisprudential emphasis on precedent, makes this not a question of choice, but largely one of obligation.[51] Moreover, a case-by-case analysis does not mean working with a completely blank slate, ignoring the reasoning in other relevant opinions. Rather, the analytical task is to take notice of the points of similarity and dissimilarity between a case under consideration and precedent, and then apply the relevant points in the precedent to the case at bar.[52]

This case might be slightly easier if it could be resolved by saying that neither *Hunt* nor *People v Flowers*[53] were relevant. At least, this would eliminate one facet of disagreement between this dissent and the lead opinion. However, I have already explained the very close similarity between the facts in *Hunt* and the facts of this case. Consequently, aside from the debate regarding whether *Flowers* or *Hunt* controls the outcome here, I think it necessary to apply precedent.

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[51] See, generally, *Parker v Port Huron Hospital*, 361 Mich 1, 10; 105 NW2d 1 (1960) (limiting departure from otherwise binding precedent to "the rare case when it is clearly apparent that an error has been made, or changing conditions result in injustice by the application of an outmoded rule").

[52] See, e.g., *People v Watson*, 245 Mich App 572, 586, 591; 629 NW2d 411 (2001) (comparing the facts of published opinions to facts underlying the prosecutorial misconduct issue, even though the issue required a "case by case" analysis); *People v Echavarria*, 233 Mich App 356, 363-364; 592 NW2d 737 (1999) (examining the facts of *People v Booker [After Remand]*, 208 Mich App 163, 168; 527 NW2d 42 [1994], even though whether manifest necessity to declare a mistrial had to be determined on a "case by case" basis when considering whether retrial would violate double jeopardy).

[53] *People v Flowers*, 186 Mich App 652; 465 NW2d 43 (1990).

Second, as I have suggested, I firmly believe in the rule of stare decisis.[54] Yet, the lead opinion applies this principle to *Flowers* in a manner that tends to contradict the ordinary tenets of legal reasoning. Specifically, when judges look at case law to determine the outcome in a given case, we first ask whether the case law addresses the same legal question in the case at bar.[55] If the case law is unanimous in prescribing a particular outcome or legal conclusion, then resolving the case under consideration is relatively simple: we need only reach that outcome or conclusion.[56] If, however, the case law does not unanimously reach the same outcome or legal conclusion, judges must undertake an additional layer of analysis that focuses on determining which published opinion controls the disposition of the case at bar.[57] For the most part, this is a factual inquiry.[58] The published opinion that has the facts closest to the case under consideration controls the outcome or legal conclusion.[59] Only if there are two or more opinions that are legally on point and have facts similarly close to the case being decided is it necessary to decide which case is dispositive under the precedent rule set in MCR 7.215(I). In other words, in this context,[60] MCR 7.215(I) serves as a tie-breaking rule.

In this case, it is clear that there are numerous published opinions addressing double jeopardy in general. I was able to exclude from this large number of cases those opinions addressing multiple punishments, like *Squires*, because they do not address the multiple prosecution problem in this case. The subset of double jeopardy opinions addressing the multiple prosecution problem, including *Hunt* and *Flowers*, are relevant to the analysis of Nutt's predicament to the extent that their facts allow. Before determining that *Flowers* controls in this case because it was the first case published, it is incumbent on this Court to determine whether it is more factually analogous to the situation this case presents than *Hunt.*

Hunt, not *Flowers*, clearly "wins" when it comes to the facts. While I have no reason to challenge the reasoning the *Flowers* panel applied to the facts it was considering, I think it relevant that, unlike *Hunt*, the *Flowers* opinion identifies very few facts underlying the charged offense and double jeopardy issues. At a practical level, this absence of information works against applying *Flowers* instead of *Hunt*; how would we ever know if *Flowers* was more like

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[54] See MCR 7.215(I).

[55] See, generally, *People v Sobczak-Obetts*, 463 Mich 687, 706-708; 625 NW2d 764 (2001) (determining that a line of cases with a different legal foundation did not control the outcome in the case).

[56] See *In re Parole of Bivings*, 242 Mich App 363, 371; 619 NW2d 163 (2000) ("It is well settled that, absent an error that renders a sentence invalid, a circuit court lacks authority to modify the sentence a defendant has begun to serve. . . . [Therefore, t]he circuit court was without authority to revisit that sentence.") (citations omitted).

[57] See *Traverse City Light and Power Bd v Home Ins Co*, 209 Mich App 112, 116-118; 530 NW2d 150 (1995).

[58] *Id*. at 118.

[59] *Id*.; see also *Warren v Caro Community Hosp*, 457 Mich 361, 367-369; 579 NW2d 343 (1998).

[60] Of course, MCR 7.215(I) also guides this Court's decisions when it disagrees with established precedent.

this case than *Hunt* from the six shorts paragraphs that make up the *Flowers* opinion? Further, *Flowers* involved armed robbery[61] and possessing stolen property,[62] offenses that are substantively different from the charges the prosecutors in Lapeer and Oakland Counties brought against Nutt. In contrast, the defendant in *Hunt* faced charges highly similar to the charges in this case.[63] When it comes to the facts of *Hunt* and *Flowers*, in my view, there is no tie to be broken with MCR 7.215(I) because *Hunt* is the closer case.

Third, I cannot agree that reversal is warranted in this case because of the distinction the lead opinion draws between the date when Nutt committed the home invasion and the date when the police discovered the concealed the firearms. Yes, the *Hunt* Court distinguished the facts of the case it was considering from *Flowers* on the basis that the crimes in *Flowers* occurred on different days while the crimes in *Hunt* occurred during the "same criminal episode."[64] However, the Supreme Court has since clarified, in a general sense, that a single offense "can take place over an extended period."[65] There is no question here that the single receiving and concealing offense took place over a number of days and was a logical extension of the home invasion. This case would be much different if, for example, there were evidence that Nutt and others committed home invasion, one of her accomplices took physical possession of the firearms, and then at some later time that accomplice gave Nutt the firearms to hide. However, there is no evidence of similar circumstances in this case. Rather the record suggests that sequence of events between the home invasion and receiving and concealing offenses is unbroken, making them part of the same transaction.

Finally, I disagree with the emphasis both the lead opinion and the concurrence give to the distinctions between the two statutes at issue here. Under the lead opinion's approach, which the concurrence adopts, the double jeopardy protection against multiple prosecutions disappears unless the charges at issue are virtually identical. In part, this results from the fact that the lead opinion relies on *Squires* and *People v Peerenboom*,[66] both of which are multiple punishment cases.[67] In contrast, the binding Supreme Court authority involving multiple prosecutions that discusses the relationship between offenses emphasizes that only if "the offenses involve laws intended to prevent the same or similar harm or evil, not a *substantially different*, or a *very different kind* of, harm or evil"[68] would they not be considered part of the same transaction for the purpose of double jeopardy. Plainly, this standard tolerates some differences, likely because comparing the similarity of the offenses in this context is intended to illustrate whether the offenses can be logically viewed as part of the same transaction. In fact, this Court in *Hunt*

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[61] MCL 750.529.

[62] MCL 750.535(1).

[63] See nn 17, 18, 35, *supra*.

[64] See *Hunt*, *supra* at 317.

[65] *Burgenmeyer*, *supra* at 439.

[66] *People v Peerenboom*, 224 Mich App 195; 568 NW2d 153 (1997).

[67] See *Squires*, *supra* at 456; *Peerenboom*, *supra* at 200.

[68] *Crampton*, *supra* at 502 (emphasis added); see also *Sturgis*, *supra* at 399.

determined that receiving and concealing and crimes involving breaking and entering are sufficiently similar to pass the same transaction test.[69]

IV. Conclusion

In applying *Hunt* to the facts of this case I am mindful that the purpose of the prohibition against multiple prosecutions is to level the playing field between prosecutors and defendants.[70] I certainly do not laud Nutt's alleged criminal behavior and acknowledge that there is no evidence of bad faith underlying the Oakland County prosecutor's approach in this case.[71] However, the prosecutor has never articulated any manifest necessity that would justify this separate prosecution.[72] Moreover, the disposition of this case is exactly the sort of "vexatious" proceeding against which double jeopardy protects.[73] Because the trial court applied the correct analysis and reached the correct legal result in this case, I would conclude that it did not err in granting the motion to dismiss.

/s/ William C. Whitbeck

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[69] See *Hunt, supra* at 317, citing *People v Leonard Adams*, 202 Mich App 385, 387; 509 NW2d 530 (1993).

[70] *Flowers, supra* at 258-259.

[71] See *Gonzalez, supra* at 396 (splitting prosecutions can make plea bargain illusory).

[72] See *People v Herron*, 464 Mich 601-603; 628 NW2d 528 (2001).

[73] *People v Robideau*, 419 Mich 458, 485; 355 NW2d 592 (1984).