STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JOSHUA RICHARD REDWINE,

Defendant-Appellee.

Before: Kelly, P.J., and Owens and Schuette, JJ.

PER CURIAM.

Plaintiff appeals as of right an order dismissing this case on double jeopardy grounds. We reverse and remand this case to the trial court for further appropriate proceedings.

I. FACTS

Defendant pled guilty in a prior case to a charge of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v). In this case, defendant is charged with felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227, and possession of a firearm during commission of a felony, MCL 750.227b, based on possession of a handgun during the same incident. The trial court dismissed the present case under the "same transaction" test because the charges in the present case arose from the same transaction as the prior cocaine possession charge.

II. STANDARD OF REVIEW

Plaintiff argues that the trial court improperly applied the overruled "same transaction" test in holding the charges in this case were barred by double jeopardy protections, and that under the correct "same elements" test of *People v Nutt*, 469 Mich 565; 677 NW2d 1 (2004), the current charges are not barred. We review this double jeopardy issue do novo. *Id*. at 573.

III. ANALYSIS

In *Nutt*, our Supreme Court overruled the "same transaction" test relied on by the trial court in holding that the successive prosecution in this case was barred by double jeopardy principles. *Id*. at 575. Rather, under *Nutt*, the "same elements" test of *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932), controls when a successive prosecution is

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barred by either the federal or state constitutional protection against double jeopardy. *Nutt*, *supra* at 596. Under the *Blockburger* test, a subsequent prosecution for a crime from the same transaction is not barred as a subsequent prosecution for the "same offense" if establishing each crime "requires proof of a fact that the other does not." *Id*. at 576. Clearly, the subsequent prosecution for the firearms crimes in this case is not barred based on defendant's prior prosecution for the cocaine possession crime. Obviously, establishing the cocaine possession crime in the earlier case would require a showing that defendant possessed cocaine, while possession of cocaine is not an element of the firearms charges in this case. Conversely, establishing that defendant possessed a firearm would be required to establish that defendant committed the firearm crimes charged in this case, but would not be required to establish the cocaine possession charge in the prior case. Thus, the trial court erred in granting defendant's motion to dismiss on double jeopardy grounds.

Defendant's arguments regarding res judicata and plaintiff's alleged abuse of discretion in failing to join the cocaine possession and firearm charges in a single prosecution under MCR 6.120 are without merit. We are confident that res judicata is properly applied only to civil cases. "Res judicata bars re-litigation of *claims* that are based on the same transaction or events as a prior suit." *Stoudemire v Stoudemire*, 248 Mich App 325, 334; 639 NW2d 274 (2001) (emphasis added). A "claim" is ordinarily understood as an alleged cause of action brought by one party against another party in civil litigation, not as encompassing a *charge* of a crime in a criminal case. Moreover, in *Nutt*, our Supreme Court referred to prior case law that noted the doctrines of collateral estoppel and res judicata as applied to civil actions were "the equivalent of the same transaction test." *Nutt*, *supra* at 586. This reflects an understanding that the civil law doctrine of res judicata is inapplicable to criminal cases.[1] As to the prosecutorial abuse of discretion argument, MCR 6.120(A) provides, "The prosecuting attorney *may* file an information or indictment that charges a single defendant with any two or more offenses" (emphasis added). Defendant is effectively asking us to review plaintiff's failure to join the cocaine possession charge and the firearm charges in a single prosecution under MCR 6.120(A) in the same manner that we would review a discretionary decision of a trial court for an abuse of discretion. However, a charging decision by a prosecutor is reviewed only for an abuse of power "to determine if the prosecutor acted contrarily to the Constitution or law." *People v Russell*, 266 Mich App 307, 316; 703 NW2d 107 (2005). Plaintiff had discretion under MCR 6.120(A) whether to join multiple charges in the same case, and constitutional double jeopardy protections did not require joining the cocaine possession charge and firearm charges in the same case; therefore, plaintiff did not abuse its power by failing to do so.

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[1] In support of his argument, defendant cites to a particular page of the lead opinion in *People v Goss* (*After Remand*), 446 Mich 587, 600; 521 NW2d 312 (1994) (Levin, J.). However, Justice Levin's opinion is not the majority opinion. In fact, there was no majority opinion in *Goss* and the relevant page of Justice Levin's lead opinion in that case contains no language that could reasonably be interpreted as expressing a view that res judicata should be recognized as applicable to criminal cases. A majority of the Court, with different rationales, concluded that res judicata could not be applied to bar a defendant from re-litigating whether he committed an armed robbery in a subsequent criminal prosecution. *Id*. at 590-591 (Levin, J., joined by Cavanagh, C.J.), 611 (Brickley, J., joined by Mallett, J.). This does not establish that res judicata has any applicability to criminal cases.

    We reverse the trial court's order dismissing this case and remand this matter to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

                                        /s/ Kirsten Frank Kelly
                                        /s/ Donald S. Owens
                                        /s/ Bill Schuette