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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0228**

State of Minnesota,
Respondent,

vs.

Samantha Dione Zornes,
Appellant.

**Filed November 5, 2018
Affirmed
Worke, Judge**

Beltrami County District Court
File Nos. 04-CR-17-1774, 04-CR-16-1327, 04-CR-17-1142

Lori Swanson, Attorney General, St. Paul, Minnesota; and

David L. Hanson, Beltrami County Attorney, David P. Frank, Assistant County Attorney,
Bemidji, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Abigail H. Rankin, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Johnson, Judge; and Bratvold,
Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant argues that the district court erred by imposing sentences for fifth-degree controlled-substance crime and driving while impaired (DWI) because the offenses were part of a single behavioral incident. We affirm.

FACTS

On June 20, 2017, Deputy Nohre stopped appellant Samantha Dione Zornes for driving through a closed area in a construction zone. After making contact, Deputy Nohre observed that Zornes's pupils were constricted and not reacting to light. When Deputy Nohre learned that Zornes had an outstanding warrant, he informed her that he would be taking her into custody. Zornes exited the vehicle, and Deputy Nohre observed a spoon containing a white residue and a small piece of cotton on the floor of the driver's side of the vehicle. Based on his training and experience, the deputy believed that Zornes was using heroin. Deputy Nohre and other officers searched the vehicle and found Suboxone, a Schedule II controlled substance, and a small bundle of suspected heroin. After failing field sobriety tests, Zornes was also arrested for DWI.

Zornes pleaded guilty to fifth-degree controlled-substance crime—possession of Suboxone and fourth-degree DWI. Zornes stated that she used Suboxone and heroin the “morning before” her arrest and believed that at least one of the controlled substances was still in her bloodstream when she was driving. The district court sentenced Zornes to a stay of imposition for the felony fifth-degree controlled-substance-crime conviction and 90 days in jail for the DWI conviction. This appeal followed.

DECISION

Zornes argues that the district court erred by imposing sentences for both her Suboxone-possession and DWI convictions because the offenses occurred during the same behavioral incident. When the facts are not in dispute, as is the case here, we review de novo “whether multiple offenses form part of a single behavioral act.” *State v. McCauley*, 820 N.W.2d 577, 591 (Minn. App. 2012) (quotation omitted), *review denied* (Minn. Oct. 24, 2012).

“[I]f a person’s conduct constitutes more than one offense . . . the person may be punished for only one of the offenses” Minn. Stat. § 609.035, subd. 1 (2016). For the purpose of determining whether the offenses are part of a single behavioral incident, the parties agree that fifth-degree controlled-substance possession is an intentional crime and DWI is a nonintentional crime. *See State v. Bauer*, 792 N.W.2d 825, 827-28 (Minn. 2011) (stating that an analysis of whether offenses arise from a single behavioral incident depends first on whether any of the crimes have an intent element); *State v. Clement*, 277 N.W.2d 411, 412-13 (Minn. 1979) (stating that DWI is a nonintentional crime for purposes of Minn. Stat. § 609.035); *State v. Ali*, 775 N.W.2d 914, 918 (Minn. App. 2009) (stating that fifth-degree controlled-substance crime is treated as an intentional crime), *review denied* (Minn. Feb. 16, 2010). When the offenses include intentional and nonintentional crimes, this court looks at whether the offenses “(1) occurred at substantially the same time and place and (2) arose from a continuing and uninterrupted course of conduct, manifesting an indivisible state of mind or coincident errors of judgment.” *State v. Bauer*, 776 N.W.2d 462, 478 (Minn. App. 2009) (quotation omitted), *aff’d*, 792 N.W.2d 825.

Zornes contends that the offenses occurred at substantially the same time and place because both occurred on June 20, 2017, in her car. Zornes also contends that her actions to “possess, use, and drive under the influence of Suboxone were part of a continuous course of conduct.” She argues that the state failed to present evidence that the offenses arose from distinct behavioral incidents. *See State v. Williams*, 608 N.W.2d 837, 841-42 (Minn. 2000) (stating that the state has the burden of establishing by a preponderance of the evidence that offenses did not occur as part of a single behavioral incident).

Zornes relies on *State v. Guscette*, in which this court determined that a district court erred by imposing sentences for both fifth-degree possession of methamphetamine and DWI. *See* No. A13-2402, 2015 WL 506363, at *6-7 (Minn. App. Feb. 9, 2015), *review denied* (Minn. Apr. 14, 2015).¹ In that case, when an officer made contact with Guscette after finding her asleep in the driver’s seat of a vehicle, he believed that she was exhibiting signs of intoxication. *Id.*, at *1. After Guscette failed a field sobriety test, officers searched her purse and found a clear glass pipe with a white substance on the inside, which tested positive for methamphetamine. *Id.*, at *1-2. Guscette was convicted of fifth-degree controlled-substance crime and DWI, and the district court imposed sentences for both offenses. *Id.*, at *2. This court concluded that the state failed to present evidence regarding where Guscette first took possession of the pipe; thus, there was no evidence to support a finding that the offenses were committed at different times. *Id.*, at *7. This court stated that the facts of the case were similar to a case in which the defendant was convicted of

¹ *Guscette*, an unpublished opinion, is not binding authority. *See* Minn. Stat. § 480A.08, subd. 3(c) (2016) (“Unpublished opinions of the Court of Appeals are not precedential.”).

DWI and an open-bottle violation and the supreme court stated that the two offenses were part of the same behavioral incident. *Id.*; see *City of Moorhead v. Miller*, 295 N.W.2d 548 (Minn. 1980).

Guscette does not support Zornes's argument that her offenses are part of a single behavioral incident. While there was no evidence in *Guscette* regarding where Guscette took possession of the pipe, here, Zornes stated that she used heroin and Suboxone the "morning before," and believed that at least one of the controlled substances was still in her bloodstream when she was stopped for driving in the restricted area. The record shows that Zornes had possession of the Suboxone before she was driving under the influence, indicating that the two offenses did not occur at substantially the same time and place. And even if the possession of Suboxone occurred at substantially the same time and place as the DWI, there was not a continuing course of conduct because Zornes admitted to also using heroin, which could have been the controlled substance in her bloodstream when she was driving. The record indicates that the possession of Suboxone and the DWI were not part of a single behavioral incident because Zornes was likely under the influence of Suboxone and/or heroin when she was driving.

Zornes also relies on *Miller*, the case cited in *Guscette*, in which the supreme court determined that a DWI and an open-bottle violation arose from the same behavioral incident. See 295 N.W.2d at 550. But the combination of controlled-substance-possession and DWI offenses is distinguishable from the combination of open-bottle and DWI offenses because, while a controlled-substance-possession offense can occur independent of a vehicle, an open-bottle crime can occur only in a vehicle.

The record shows that Zornes possessed the Suboxone at least a day before she drove under the influence and used it the “morning before” the day she was arrested. Thus, her decision to acquire the Suboxone and her decision to use it and heroin before driving are two separate decisions that occurred at different times and manifest distinct errors in judgment. Further, Zornes’s possession of Suboxone was illegal the moment she acquired it, not when she was later stopped by police while driving impaired by it. Thus, again, the criminal acts occurred at different times and manifested distinct errors in judgment. Finally, the two offenses did not occur in a continuous course of conduct because Zornes used the controlled substances the day before her arrest for personal use and she committed the DWI offense the following night and was driving for reasons unconnected to the drug possession. The police reports, which Zornes reviewed and agreed were “essentially true and correct,” indicated that Zornes was driving “to help” one of the vehicle’s occupants who had been “dealing with a lot of things.” The other occupants denied knowledge of any illegal drug use in the vehicle. Because there is evidence that the offenses did not occur at the same time and place and did not arise from a continuing and uninterrupted course of conduct, the district court did not err by imposing two sentences.

Affirmed.