MEMORANDUM DECISION

IN THE

Court of Appeals of Indiana

Luis J. Guillen,
Appellant-Defendant

v.

State of Indiana,
Appellee-Plaintiff

April 9, 2024

Court of Appeals Case No.
23A-CR-1919

Interlocutory Appeal from the Elkhart Superior Court

The Honorable Christopher J. Spataro, Judge

Trial Court Cause No.
20D05-1909-F6-1318

Memorandum Decision by Judge Weissmann
Chief Judge Altice and Judge Kenworthy concur.

Weissmann, Judge.

[1] Luis Guillen was arrested in Michigan at the end of a car chase he claims started in Michigan. The State of Indiana contends the chase began in Elkhart, Indiana. Both Michigan and Indiana filed criminal charges against Guillen, with each state alleging, among other things, that he fled police and drove while intoxicated.

[2] After Guillen was convicted in Michigan, he moved to dismiss the Indiana charges, claiming his criminal offenses occurred exclusively in Michigan and that Indiana was not the proper venue for his prosecution. He also claimed that double jeopardy principles barred his prosecution in Indiana after his conviction on the related charges in Michigan. In this interlocutory appeal, Guillen challenges the Indiana trial court's denial of his motion to dismiss. We affirm, finding Indiana has jurisdiction to prosecute Guillen's offenses.

Facts

[3] Elkhart Police Department Officer Justin Gage was on patrol on Indiana State Road 19 just before 2:00 a.m. in Elkhart County when he noticed Guillen's car. Guillen was driving left of the center line and braking rapidly, prompting Officer Gage to activate his emergency lights. Rather than stopping, Guillen accelerated and led Officer Gage on a chase into Michigan. The chase ended there only after Michigan police used spike sticks to flatten Guillen's tires. Once stopped, Guillen quickly exited his vehicle, fell to the ground, and drank an

unidentified liquid from a water bottle before being apprehended. Police soon observed that Guillen smelled of alcohol, was unsteady, and had slurred speech.

[4] While conducting an inventory search of Guillen's vehicle, Officer Gage discovered a small metal pipe in the road next to the driver's door. Guillen was taken to a Michigan hospital after refusing to perform field sobriety tests or to submit to a chemical test. There, Guillen admitted that he was intoxicated. Michigan police obtained a search warrant to retrieve Guillen's blood, the testing of which showed a blood alcohol content of .08.

[5] Guillen was charged in Indiana with Level 6 felony resisting law enforcement, Class A misdemeanor operating a motor vehicle while intoxicated, and Class C misdemeanor possession of paraphernalia. Guillen also was charged in Michigan with felonious resisting law enforcement, felonious fleeing a police officer by vehicle, misdemeanor operating a vehicle while intoxicated, and misdemeanor operating without a license. In the Michigan prosecution, Guillen pleaded guilty to and was convicted of felonious fleeing a police officer by vehicle and misdemeanor operating a vehicle while intoxicated. The other Michigan charges were dismissed.

[6] Six months later Guillen moved to dismiss his pending Indiana charges, contending that no Indiana court had jurisdiction "because there was no stop [of Guillen's vehicle] initiated by a marked patrol vehicle in the State of Indiana." App. Vol. II, pp. 40, 46-47. The State objected, arguing that Officer

Gage initiated the stop and Guillen committed the Indiana offenses while both Officer Gage and he were in Indiana.

[7] The Indiana trial court denied Guillen's motion to dismiss without conducting a hearing. Agreeing with the State, the court concluded Indiana had authority to prosecute Guillen on the pending charges because Officer Gage began the traffic stop from which Guillen fled while both were still in Indiana. The court further ruled that Indiana's double jeopardy clause does not preclude Guillen's prosecution for crimes committed in Indiana after he was convicted in Michigan of related crimes committed in Michigan.

[8] At Guillen's request, the trial court certified the case for interlocutory appeal. This Court accepted jurisdiction pursuant to Indiana Appellate Rule 14(B).

Discussion and Decision

[9] Guillen claims on appeal that Indiana lacks venue because Officer Gage initiated the stop by activating his emergency lights only after Guillen had crossed the border into Michigan. Guillen also claims that double jeopardy principles preclude his conviction on the Indiana charges after he was convicted of related charges in Michigan.

[10] We conclude that Guillen has not substantiated his venue claims and therefore has failed to show that the trial court erred in denying his motion to dismiss on that basis. We also find that the successive prosecutions in Michigan and Indiana are not barred by double jeopardy considerations.

I. Venue

[11] The right to be tried in the county in which the alleged misconduct occurred is both a statutory and a constitutional right. Ind. Const. art. 1, §13 ("In all criminal prosecutions, the accused shall have the right to a public trial . . . in the county in which the offense shall have been committed . . . ."); Ind. Code § 35-32-2-1(a) ("Criminal actions shall be tried in the county where the offense was committed . . . .").

[12] Although not an element of the offense, the State must prove venue by a preponderance of the evidence. *Baugh v. State*, 801 N.E.2d 629, 631 (Ind. 2004). When a criminal defendant challenges venue through a pretrial motion to dismiss, the defendant bears the burden of proving by a preponderance of the evidence those facts necessary to support the motion to dismiss. *See Smith v. State*, 993 N.E.2d 1185, 1188 (Ind. Ct. App. 2013). "If the motion is expressly or impliedly based upon the existence or occurrence of facts, the motion shall be accompanied by affidavits containing sworn allegations of these facts." Ind. Code § 35-34-1-8(a).

[13] If the trial court denies the motion to dismiss and the defendant appeals from that negative judgment, the defendant may prevail only by showing that the trial court's judgment was contrary to law—that is, the evidence is without conflict and leads inescapably to the conclusion that the party was entitled to dismissal. *Smith,* 993 N.E.2d at 1188-89. Guillen has not met that burden.

[14] Guillen's entire venue argument hinges on his claim that he committed only unspecified traffic infractions while he was in Indiana and that any criminal conduct occurred only after he crossed the border into Michigan. In other words, Guillen claims he did not flee Officer Gage in Indiana because Guillen already was in Michigan when Officer Gage began the stop by activating his emergency lights. *See* Ind. Code §§ 35-44.1-3-1(a)(3), (c)(1)(A) (2016) (defining resisting law enforcement, a Level 6 felony, as fleeing by vehicle "from a law enforcement officer after the officer has, by visible or audible means, including operation of the law enforcement officer's siren or emergency lights, identified himself or herself and ordered the person to stop").

[15] But Guillen has waived this issue by failing to support any of his argument's critical factual contentions with citations to the record. *See* Ind. Appellate Rule 46(A)(8)(a) (requiring that each contention in the appellant's brief be "supported by citations to . . . the Appendix or parts of the Record on Appeal relied on"); *Pierce v. State*, 29 N.E.3d 1258, 1267 (Ind. 2015) ("A litigant who fails to support his arguments with appropriate citations to legal authority and record evidence waives those arguments for our review.").

[16] Waiver notwithstanding, Guillen has not shown that the trial court's judgment is contrary to law. All of Guillen's venue claims ultimately rest on one factual allegation: that his criminal offenses were committed exclusively in Michigan. But he has failed—first in the trial court and now on appeal—to substantiate that assertion.

[17] The probable cause affidavit attached to the charging information reflects that Officer Gage spotted Guillen when both were driving on State Road 19 in Elkhart County, Indiana. The affidavit further reveals that Officer Gage activated his lights in apparent response to those observations, a high-speed chase ensued, and the chase ended in Michigan.

[18] In his motion to dismiss, Guillen baldly asserted that "Guillen was located in Michigan when [Officer Gage's] unmarked patrol vehicle engaged [its] emergency lights." App. Vol. II, p. 39. Guillen offered no citation to any document that supported this factual allegation, and we find no such document in the record on appeal. Contrary to Indiana Code § 35-34-1-8(a), Guillen also submitted no affidavits or other evidence to support the factual allegations on which his motion to dismiss was premised.

[19] In his memorandum in support of the motion to dismiss, Guillen repeated his allegation that Officer Gage activated his emergency lights only after Guillen entered Michigan and while Officer Gage was still in Indiana. *Id.* at 44-45. But, again, Guillen neglected to provide any supporting citation. *Id.*

[20] On appeal, Guillen does no better. He provides no evidentiary support for his assertion that "[t]he facts show that [Officer] Gage did not activate his emergency lights until *after* [Guillen] had already left the State of Indiana (for purposes of the criminal offense of Resisting Law Enforcement) and was driving in the State of Michigan." Appellant's Br., p. 9 (emphasis in original). In the statement of the facts portion of his brief, Guillen cites only the probable

cause affidavit, which does not support Guillen's factual allegations. Worse yet, Guillen attributes statements to the probable cause affidavit that do not appear within it.

[21] For instance, Guillen's statement of facts cites to the probable cause affidavit for the assertion: "Once [Guillen] left Indiana, and was driving in Michigan, [Officer] Gage activated his emergency lights and attempted to initiate a traffic stop." *Id.* at 7. The probable cause affidavit says nothing about Guillen having crossed the border before Officer Gage activated his lights.

[22] In the State's response to Guillen's motion to dismiss, the State cited extensively from Officer Gage's "report," which is not part of the record before this Court. According to the State, Officer Gage alleged in his report, "I activated my emergency lights and attempted to initiate a traffic stop on State Road 19, south of State Line Road [in Elkhart County]." App. Vol. II, p. 50. The State further alleged in its response that Officer Gage's "report" revealed that Guillen responded to the lights by accelerating "north bound on State Road 19 and then east bound . . . on M205 at speeds of approximately 60 miles per hour[]." *Id.* The State repeats these allegations on appeal.

[23] In Guillen's reply brief, he acknowledges Officer Gage's "report" but argues that it actually supports Guillen's claim that Indiana is not the proper forum for his prosecution. Apparently quoting from the report, Guillen argues that "[t]he officer driving the unmarked police car initially saw Appellant 'on State Road 19, south of Quail Ridge Drive,' .3 miles south of the Michigan State Line."

Appellant's Reply Br., p. 5. But the record contains no evidence that Quail Ridge Drive is .3 miles south of the Michigan State Line.

[24] In any event, Guillen specifically acknowledges that he "could have possibly been in Indiana," which is "also South of State Line Road," if Officer Gage was "driving on [Guillen's] bumper" when Officer Gage activated his emergency lights. *Id.* In other words, Guillen concedes that the alleged offenses could have been committed in Indiana if Officer Gage was following closely behind Guillen.

[25] When denying Guillen's motion to dismiss, the trial court apparently relied on Officer Gage's "report" as well. The court determined Officer Gage began the traffic stop and that Guillen fled Officer Gage while both were still in Indiana. The trial court therefore concluded venue existed in Indiana and denied Guillen's motion to dismiss on that basis. Guillen, by not revealing any evidence in the record contradicting that ruling, has failed to meet his burden on appeal. He has not established that the evidence is without conflict and leads inescapably to the conclusion that the trial court erred in finding Indiana has venue and denying his motion to dismiss. *See Smith*, 993 N.E.2d at 1188-89.

II. Double Jeopardy

[26] Guillen next challenges the trial court's ruling that he may be prosecuted in Indiana on charges similar to those for which he was convicted in Michigan. He claims that his conviction on the Indiana charges would violate the double jeopardy clause in Article 1, Section 14 of the Indiana Constitution. Double

jeopardy claims present questions of law that we review de novo. *Morales v. State*, 165 N.E.3d 1002, 1007 (Ind. Ct. App. 2021).

[27] Successive prosecutions in different states do not implicate either the federal or state double jeopardy prohibitions, as neither constitutional provision "bar[s] overlapping convictions between dual sovereign entities." *State v. Johnson*, 183 N.E.3d 1118, 1123 (Ind. Ct. App. 2022), *trans. denied*. Indiana and Michigan are dual sovereign entities. *See Wilson v. State*, 270 Ind. 67, 383 N.E.2d 304, 306 (1978) ("dual sovereigns" in the double jeopardy context was intended to include other states); *Heath v. Alabama*, 474 U.S. 82, 89 ("States are no less sovereign with respect to each other than they are with respect to the Federal Government.").[1]

[28] But Guillen also relies on Indiana Code § 35-41-4-5 (Successive Prosecution Statute), which, unlike the federal and state constitutions, does protect a defendant from prosecution in both Indiana and another jurisdiction for certain types of conduct. The statute provides:

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[1] We also note that Indiana's substantive double jeopardy tests do not appear to apply here. Established in *Powell v. State*, 151 N.E.3d 256 (Ind. 2020) and *Wadle v. State*, 151 N.E.3d 227 (Ind. 2020), and recently clarified by *A.W. v. State*, No. 23S-JV-40, 2024 WL 1065820 (Ind. March 12, 2024), those tests deal with convictions in a single trial, not successive convictions in different states. *Wadle*, 151 N.E.3d at 247 ("[T]he substantive bar to double jeopardy restrains" courts from "convicting and punishing a defendant in a single trial beyond what the statutes clearly permit."); *Powell*, 151 N.E.3d at 263 ("Substantive double-jeopardy claims principally arise in one of two situations: (1) when a single criminal act or transaction violates multiple statutes with common elements, or (2) when a single criminal act or transaction violates a single statute and results in multiple injuries."). At the least, we can say that our Supreme Court has not extended the *Wadle* and *Powell* decisions to apply to successive prosecutions by separate jurisdictions, despite having at least two potential opportunities to do so. *See State v. Johnson*, 183 N.E.3d 1118 (Ind. Ct. App. 2022), *trans. denied*; *Kalozi v. State*, 222 N.E.3d 412 (Ind. Ct. App. 2023), *trans. denied*.

> In a case in which the alleged conduct constitutes an offense within the concurrent jurisdiction of Indiana and another jurisdiction, a former prosecution in any other jurisdiction is a bar to a subsequent prosecution for the same conduct in Indiana, if the former prosecution resulted in an acquittal or a conviction of the defendant . . . .

Ind. Code § 35-41-4-5. In other words, a prior conviction or acquittal in another jurisdiction bars a subsequent Indiana state prosecution for the "same conduct." *Johnson*, 183 N.E.3d at 1123.

[29] As successive prosecutions by separate states are not barred by either the state or federal constitutions, we do not rely on "constitutionally-based double jeopardy analysis" when determining whether the Successive Prosecution Statute bars an Indiana prosecution. *Kalozi v. State*, 222 N.E.3d 412, 415 (Ind. Ct. App. 2023). Instead, "our analysis centers on comparing the substance of the specific factual allegations contained in the charging instruments to determine if the offenses alleged therein are based on the same conduct." *Johnson*, 183 N.E.3d at 1123. We consider each of the Indiana charged offenses separately.

A. Fleeing Charge

[30] Indiana and Michigan separately charged Guillan with a fleeing police offense as follows:

	Charge Related to Fleeing
Michigan Charging Information	"[T]he defendant . . . being the driver of a motor vehicle to whom was given a visual or audible signal by hand, voice, emergency light, or siren by Officer Tanner Sinclair, a police officer who was in uniform and the officer's vehicle was identified as an official police vehicle, acting in the lawful performance of his/her duty, directing the defendant to bring his/her motor vehicle to a stop, did willfully fail to obey such direction by increasing the speed of the motor vehicle and/or attempting to flee or elude the officer . . . ."
Indiana Charging Information	"Guillen did knowingly flee from a law enforcement Officer to wit: Officer Justin Gage, after the officer had, by visible or audible means, including operation of the siren or emergency lights of said law enforcement Officer, identified himself and order [Guillen] to stop and [Guillen] used a vehicle to commit said offense . . . ."

App. Vol. II, pp. 5, 103.

[32] Indiana thus charged Guillen with using a vehicle to flee Officer Gage after Officer Gage signaled him to stop. The State of Indiana has alleged both in the trial court and on appeal that Officer Gage signaled Guillen to stop in Indiana and that Guillen began fleeing Officer Gage in Indiana.

[33] Michigan charged Guillen with using a vehicle to flee a Michigan police officer, Tanner Sinclair, after he signaled Guillen to stop. Michigan alleged this offense occurred in Michigan, meaning that Officer Sinclair signaled Guillen to stop after Guillen crossed the border into Michigan.

[34] Guillen claims the Successive Prosecution Statute must apply to his Indiana fleeing charge because he committed only traffic infractions in this state. But we have already rejected this claim. Guillen has offered no basis for finding that his flight from Officer Sinclair in Michigan was the same conduct as his flight from Officer Gage in Indiana. The record simply reveals that Guillen allegedly fled an Indiana police officer at the beginning of the chase in Indiana and that he fled Officer Sinclair in Michigan at some later point in the chase.

[35] This Court faced a similar set of facts in *Brewer v. State*, 35 N.E.3d 284 (Ind. Ct. App. 2015). Brewer claimed the Successive Prosecution Statute barred his Indiana conviction for resisting law enforcement when he had already been convicted in Kentucky of fleeing a Kentucky police officer. Rejecting this claim, the *Brewer* Court reasoned:

> The [Successive Prosecution S]tatute only applies when "the alleged conduct constitutes an offense within the concurrent jurisdiction of Indiana and another jurisdiction." I.C. § 35-41-4-5. That is not the case with respect to his Kentucky conviction for fleeing from the Kentucky officer and his Indiana conviction for resisting Indiana's law enforcement. Brewer's act of fleeing/evading Officer Keller of the Henderson County, Kentucky, Sheriff's Department was an offense wholly within the jurisdiction of the Commonwealth; Indiana has no jurisdiction to prosecute Brewer for his act of fleeing/evading a Kentucky officer within Kentucky. Likewise, Brewer's offense of resisting Officer Chapman of the Evansville, Indiana, Police Department was wholly within Indiana's jurisdiction; Brewer cites no authority for the proposition that Kentucky could—or did—prosecute him for his act of resisting Indiana's law enforcement within Indiana. *See Vest*, 930 N.E.2d at 1227. Thus, the alleged conduct underlying Brewer's Indiana conviction for resisting law

> enforcement is not "within the concurrent jurisdiction of Indiana and another jurisdiction." I.C. § 35-41-4-5. Accordingly, the double jeopardy statute did not prohibit Indiana's prosecution of Brewer for this offense.

Id. at 286.

[36] Guillen also does not argue that Indiana could charge Guillen with fleeing Michigan police in Michigan or that Michigan could charge him with fleeing Indiana police in Indiana. Therefore, Guillen has not shown that the alleged conduct underlying his resisting law enforcement charge in Indiana—that is, his flight from Officer Gage in Indiana—is "within the concurrent jurisdiction of Indiana and another jurisdiction." Ind. Code § 35-41-4-5. The Successive Prosecution Statute does not bar Indiana's prosecution of Guillen for resisting law enforcement.

B. Intoxication Charge

Both Indiana and Michigan also charged Guillen with driving while intoxicated:

	Charge Related to Driving While Intoxicated
Michigan Charging Information	"[T]he defendant . . . did, operate a motor vehicle on a highway, U.S. 12 – Ontwa Township, while under the influence of alcoholic liquor and/or a controlled substance and/or having an alcohol content of 0.08 grams or more per 100 milliliters of blood . . . ."

Indiana Charging Information	"Guillen did operate a vehicle while intoxicated in a manner that endangered a person . . . ."

App. Vol. II, pp. 5, 103.

[38] Guillen faces the same problem with the intoxicated driving-related charges that he did with the flight-based charges. *Supra* ¶¶ 35-36. He has not shown that Indiana could charge him with driving while intoxicated in Michigan or that Michigan could charge him with driving while intoxicated in Indiana. Therefore, Guillen has provided no basis for finding that the alleged conduct underlying his driving while intoxicated in Indiana is "within the concurrent jurisdiction of Indiana and another jurisdiction." Ind. Code § 35-41-4-5. The Successive Prosecution Statute does not bar his prosecution on this charge.

C. Possession of Paraphernalia

[39] Guillen also seeks a finding that the Successive Prosecution Statute bars his prosecution in Indiana for possession of paraphernalia. But Guillen was not charged with any similar offense in Michigan. The Successive Prosecution Statute, by its plain language, applies only when the same conduct is charged in two sovereign jurisdictions. Ind. Code § 35-41-4-5.

[40] Given that Guillen has failed to show that the Successive Prosecution Statute

bars any of the charges that he faces in Indiana, the trial court did not err in denying Guillen's motion to dismiss. We affirm the trial court's judgment.

Altice, C.J., and Kenworthy, J., concur.

ATTORNEY FOR APPELLANT

Connie Caiceros
Elkhart, Indiana

ATTORNEYS FOR APPELLEE

Theodore E. Rokita
Attorney General of Indiana

Ellen H. Meilaender
Deputy Attorney General
Indianapolis, Indiana