IN THE COURT OF APPEALS OF IOWA

No. 9-234 / 08-1290
Filed May 29, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL DEAN RANDELL,
Defendant-Appellant.

Appeal from the Iowa District Court for Wapello County, Kirk A. Daily, District Associate Judge.

The defendant appeals from the district court's denial of his motion to dismiss on double jeopardy grounds. **AFFIRMED.**

Steven Gardner of Kiple, Denefe, Beaver, Gardner, & Zingg, L.L.P., Ottumwa, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Allen L. Cook, County Attorney, and Nathan W. Tucker, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Vogel and Miller, JJ.

VOGEL, J.

Michael Randell appeals from the judgment and sentence entered following his conviction for operating a commercial vehicle while disqualified. Randell asserts that the district court should have granted his motion to dismiss because judgment had been entered on his plea to a lesser-included offense of operating without a class A commercial driver's license, following trial but prior to judgment and sentence being entered on the greater charge. Because we agree with the district court that double jeopardy did not require the dismissal of the greater charge, we affirm.

I. Procedural History

On April 10, 2007, Randell was stopped while driving a commercial vehicle, which required a class A commercial driver's license (CDL). Randell did not have a class A CDL and admitted to officers that he was disqualified. Officers cited Randell for (1) operating a commercial vehicle without having a class A CDL, a simple misdemeanor, in violation of Iowa Code section 321.174 (2007); and (2) operating a commercial motor vehicle while disqualified, a serious misdemeanor, in violation of Iowa Code section 321.218(4).

On April 25, 2007, Randell made his initial appearance before a magistrate and pled not guilty to both charges. The magistrate did not set a trial date, but rather set the pending simple misdemeanor charge, no class A CDL, "for review due to other pending charges."

On May 31, 2007, in lieu of a preliminary hearing, the State filed a trial information, charging Randell with operating a commercial motor vehicle while

disqualified in violation of Iowa Code 321.218(4).[1] The State did not dismiss the pending citation for no class A CDL.

On April 14, 2008, a jury trial was held on the operating while disqualified charge. During the State's case in chief, the State offered into evidence a certified copy of Randell's driving record, an official notice sent to Randell's last known address informing him of his disqualified status, and an affidavit of mailing with a certificate of bulk mailing indicating that the notice of sanction was in fact mailed. Randell objected to the introduction of the State's three exhibits citing to a case then pending before the supreme court.[2] The district court admitted the State's three exhibits, subject to objection and reserved ruling on the objection. Following the close of all evidence, Randell moved for a "directed verdict," claiming "the state has failed to meet its burden of proof." The district court reserved ruling on Randell's motion. The case was submitted to the jury and that same day, the jury returned a guilty verdict. The district court requested briefs on the evidentiary motion for which it had reserved ruling.

On April 30, 2008, a magistrate scheduled trial on the simple misdemeanor charge, no class A CDL, for May 20, 2008, checking the form that trial was requested by the county attorney. On May 7, 2008, the trial was rescheduled for May 30, 2008. On May 29, 2008, without notice to the State, Randell filed a "petition to plead guilty" which included a written plea of guilty to

[1] On April 15, 2007, prior to filing the trial information, the State filed a complaint and affidavit as to the charge in violation of Iowa Code section 321.218(4).
[2] *State v. Shipley*, 757 N.W.2d 228 (Iowa 2008).

the misdemeanor charge and requested that he be sentenced that day.[3] Also on May 29, a magistrate, in an uncaptioned form, without indicating an acceptance of the plea or finding of guilt, waived time and sentenced Randell to a $100 fine.

The very next day, on May 30, 2008, Randell filed a motion to dismiss the operating while disqualified charge on double jeopardy grounds. He asserted that because he had pled guilty and was sentenced for the lesser-included offense of no class A CDL, "prosecution for the greater offense is precluded and the greater offense should be dismissed." Thus, the district court would not be able to enter judgment and sentence him on the jury's verdict of guilty to the greater offense of operating while disqualified. The State resisted and asserted that (1) Randell's motion was untimely; (2) jeopardy had attached on the greater offense of operating while disqualified prior to Randell pleading guilty to the lesser offense of no class A CDL; and (3) Randell should not be entitled to use the double jeopardy clause to prevent the State from completing its prosecution on the greater offense when the State did not approve, have knowledge, nor consent to the plea on the lesser offense.

On July 21, 2008, following a hearing, the district court ruled on the directed verdict motion, for which it had reserved ruling, and the motion to dismiss on double jeopardy grounds. The district court denied Randell's motion for a directed verdict based upon the holding of the recently decided supreme court case of *State v. Shipley*, 757 N.W.2d 228 (Iowa 2008). Further, the district court denied Randell's motion to dismiss finding that jeopardy had attached on

[3] There is some confusion in the record as the plea was dated May 24, 2008, with a proof of mailing of May 27. The original file stamped date of May 27 was crossed out and it was refiled on May 29.

the greater offense, which occurred as a result of the jury being empanelled as well as returning a guilty verdict, prior to Randell's guilty plea and sentencing on the lesser offense. Thus, the remedy available to Randell would have been to move to bar the prosecution on the lesser-included offense, rather than the greater offense. Further, the court concluded "that [Randell's] plea of guilty to the lesser offense as an attempt to bar sentencing after the jury's verdict on the greater offense is not justified under the double jeopardy clause."

On August 7, 2008, the district court entered judgment and sentence on the operating while disqualified conviction. Randell was sentenced to thirty days in jail, which was suspended, and placed on unsupervised probation for one year. He was also ordered to pay a fine of $315, plus surcharge and court costs.[4] Randell appeals.

II. Scope of Review

Our review of constitutional claims is de novo. *State v. Butler*, 505 N.W.2d 806, 807 (Iowa 1993).

III. Double Jeopardy

The Double Jeopardy Clause provides a defendant with three basic protections: "It protects against a second prosecution for the same offense after an acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *Ohio v. Johnson*, 467 U.S. 493, 498, 104 S. Ct. 2536, 2540, 81 L. Ed. 2d 425,

[4] Randell did not receive the maximum fine for a violation of Iowa Code section 321.218, which provides for a fine of not less than $250 and not more than $1500. *See Jeffers v. United States*, 432 U.S. 137, 155, 97 S. Ct. 2207, 2218, 53 L. Ed. 2d 168, 182-83 (1977) (holding that the petitioner received the maximum fine and thus, sua sponte, it was necessary to decide whether cumulative punishments were permissible).

433 (1984). The issue raised in this case relates to multiple or subsequent prosecutions for the same offense after a conviction, as double jeopardy generally "prohibits prosecution of a defendant for a greater offense when he has already been tried and acquitted or convicted on the lesser included offense." *State v. Trainer*, 762 N.W.2d 155, 157 (Iowa Ct. App. 2008) (quoting *Johnson*, 467 U.S. at 501, 104 S. Ct. at 2542, 81 L. Ed. 2d at 434). However, subsequent prosecutions may not be prohibited under all circumstances. *Johnson*, 467 U.S. at 501-02, 104 S. Ct. at 2542, 81 L. Ed. 2d at 434-35; *State v. Franzen*, 495 N.W.2d 714, 717 (Iowa 1993).

The State and Randell agree that no class A CDL is a lesser-included offense of operating while disqualified. *See Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306, 309 (1932) (stating that the elements of two offenses are compared in order to determine whether they are separate offenses). Randell asserts as a result of his guilty plea to the lesser-included offense of no class A CDL, the State is prevented from completing its prosecution on the greater offense of operating while disqualified.[5] We disagree. It was not until after the jury returned a guilty verdict, but before judgment entered, that Randell pled guilty to the lesser-included offense of no class A CDL. Randell overlooks the fact that jeopardy attached to the greater offense of operating while disqualified once the jury was empanelled, which at that point precluded the State from prosecuting the lesser offense of no class A CDL. *See*

[5] We additionally note that Randell's plea to the lesser offense following his conviction of the greater charge waived any double jeopardy protection he would have had to that charge. *See Jeffers*, 432 U.S. at 154, 97 S. Ct. at 2218, 53 L. Ed. 2d at 182 (holding a defendant's "action deprived him of any right that he might have had against consecutive trials").

State v. Lasley, 705 N.W.2d 481, 493 (Iowa 2005) ("In a trial by jury, jeopardy attaches when the jury is empanelled and sworn."); *State v. Jacobson*, 197 Iowa 547, 549, 197 N.W. 638, 639 (1924) (stating that an acquittal or conviction of a greater offense prohibits the subsequent prosecution of a lesser-included offense); *see also Brown v. Ohio*, 432 U.S. 161, 168-69, 97 S. Ct. 2221, 2226-27, 53 L. Ed. 2d 187, 196 (1977) (discussing that one convicted of a greater offense may not be subjected to a second prosecution for a lesser-included offense); *Jeffers v. United States*, 432 U.S. 137, 150-51, 97 S. Ct. 2207, 2216, 53 L. Ed 2d 168, 180 (1977) (discussing that after a conviction or acquittal of one offense, a subsequent trial for either a lesser-included or greater offense is generally prohibited by the Double Jeopardy Clause). The Double Jeopardy Clause protects a defendant from a *second* prosecution; therefore, under these circumstances, the remedy available to Randell would have been to move to dismiss the lesser offense of no class A CDL. *See Johnson*, 467 U.S. at 498, 104 S. Ct. at 2540, 81 L. Ed. 2d at 433 ("[The Double Jeopardy Clause] protects against a *second* prosecution for the same offense after conviction." (emphasis added)). Instead Randell pled guilty to the lesser offense in an attempt to thwart the State's ongoing prosecution of the greater offense. *See also Butler*, 505 N.W.2d at 808 ("The protection embodied in the Double Jeopardy Clause is personal and may be waived by a defendant's voluntary actions and choices." (citing *Jeffers*, 432 U.S. at 54, 97 S. Ct. at 2218, 53 L. Ed. 2d at 182)).

Furthermore, this court recently examined a similar case in *State v. Trainer*, 762 N.W.2d 155, 158 (Iowa Ct. App. 2008), where a defendant was charged with a lesser-included offense of trespass and a greater offense of

second-degree burglary. The offenses were not charged together as the trespass was brought in a citation by the arresting officer and the burglary charge was then brought in a trial information. *Trainer*, 762 N.W.2d at 158-59. The defendant "withdrew her not guilty plea and pled guilty to the lesser-included offense of trespass in what appeared to the State to be an effort to avoid prosecution on the pending [greater offense of burglary]." *Id.* at 159. We held the fact that the charges were brought in separate proceedings was not dispositive, but rather the defendant was not allowed to use the Double Jeopardy Clause as a sword in a case that implicated none of the concerns that the Double Jeopardy Clause was designed to protect against. *Id.* at 158-59.

We find *Trainer* controlling in the present case. Randell "is not entitled to manipulate the proceedings against [him] and to use the Double Jeopardy Clause as a sword." *Id.* at 158 (citations omitted). Additionally, like *Trainer*, this case "does not involve any prosecutorial overreaching that the Double Jeopardy Clause is designed to protect." *Id.* (citing *Johnson*, 467 U.S. at 501, 104 S. Ct. at 2542, 81 L. Ed. 2d at 435); *see Butler*, 515 N.W.2d at 807 ("The constitutional prohibition against double jeopardy is based upon principles of finality and the prevention of prosecutorial overreaching. 'It serves principally as a restraint on the courts and prosecutors.'" (citations omitted)). Therefore, we agree with the district court that in this situation, the Double Jeopardy Clause does not prohibit the State from completing its prosecution of the greater offense. We affirm.

AFFIRMED.