STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0477

State of Minnesota,
Respondent,

vs.

Blake Charles Patton,
Appellant.

Filed November 25, 2019
Affirmed
Bjorkman, Judge

Anoka County District Court
File No. 02-CR-18-2820

Keith Ellison, Attorney General, St. Paul, Minnesota; and

James Hoeft, St. Francis City Prosecutor, Tyler W. Eubank, Assistant City Prosecutor, Barna, Guzy & Steffen, Ltd., Minneapolis, Minnesota (for respondent)

Brian M. Glodosky, Nicholas A. Anderson, Kelsey Law Office, P.A., Cambridge, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Jesson, Judge; and Smith, John, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

BJORKMAN, Judge

Appellant challenges his conviction for third-degree driving while impaired (DWI), arguing that it must be vacated because his conviction arose from the same behavioral incident as his hit-and-run conviction. We affirm.

FACTS

St. Francis Police Officer Ryan Larson was on routine patrol at 7:50 p.m. on April 20, 2018, when he received a dispatch that a car accident had occurred in neighboring Isanti County. The caller reported that his vehicle had been struck by a Ford truck that left the scene. When Officer Larson arrived at the caller's location, the caller reported that he tried to follow the truck but lost it when it drove through a ditch in an evasive maneuver. The caller described the truck and its driver, including the truck's license-plate number.

Officer Larson located and stopped the truck in St. Francis, Anoka County. Officer Larson identified appellant Blake Charles Patton as the driver. Upon questioning Patton, the officer detected a strong odor of alcohol and Patton admitted having two drinks. After Patton failed field sobriety tests, Officer Larson arrested him for DWI at 8:20 p.m. Patton agreed to take a breath test that revealed a 0.13 alcohol concentration.

Anoka County charged Patton with two counts of third-degree DWI under Minn. Stat. § 169A.26, subd. 1(a) (2016) (premised on a prior instance of driving while impaired). Isanti County then charged him with misdemeanor hit and run, in violation of Minn. Stat. § 169.09, subd. 2 (2016). Patton pleaded guilty to the hit-and-run offense and received a fine.

Patton moved to dismiss the DWI charges because he had already "been convicted of a crime which was the same behavioral incident." The district court denied the motion, finding the DWI and hit-and-run offenses did not occur in substantially the same place because they occurred approximately 6.5 miles apart and in different counties. The district court found that the hit-and-run offense was reported at 7:50 p.m. and Patton was arrested for DWI at 8:20 p.m. But the court found no evidence as to precisely when the first offense occurred. While declining to decide whether Patton's conduct demonstrated a continuous and uninterrupted course of conduct that demonstrates an individual state of mind, the district court stated that "it could not affirm that this was a continuous course of conduct."

Patton admitted that the pretrial issue was dispositive and agreed to a bench trial on stipulated facts under Minn. R. Crim. P. 26.01, subd. 4. The district court found Patton guilty and sentenced him to jail. Patton appeals.

D E C I S I O N

If a person engages in conduct that "constitutes more than one offense . . . , the person may be punished for only one of the offenses and a conviction . . . of any one . . . is a bar to prosecution for any other of them." Minn. Stat. § 609.035, subd. 1 (2016); *see State v. Bookwalter*, 541 N.W.2d 290, 294 (Minn. 1995) (stating that "the prohibition against multiple punishment contained in Minn. Stat. § 609.035 applies only if the multiple offenses arose out of a single behavioral incident"). The purpose of the statute is "to prohibit double punishment and at the same time to insure that punishment for a single incident of criminal behavior involving a multiplicity of violations will be commensurate with the criminality of defendant's misconduct." *State v. Johnson*, 141 N.W.2d 517, 521-

22 (Minn. 1966). The determination whether multiple offenses arose from the same behavioral incident necessarily depends on the particular facts and circumstances of the case. *State v. Reimer*, 625 N.W.2d 175, 177 (Minn. 2001). When applying the law to undisputed facts, as we do here, we review de novo whether the offenses were part of a single behavioral incident. *State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016).

In *Johnson*, our supreme court established the test that guides our analysis. After pleading guilty to driving over the center line, Johnson moved to dismiss a related DWI charge on the ground that its prosecution was barred by Minn. Stat. § 609.035 because it arose from the same behavioral incident. 141 N.W.2d at 520. The *Johnson* court recognized that when intent is not a factor, two or more offenses result from a single behavioral incident when they "occur at substantially the same time and place and arise out of a continuous and uninterrupted course of conduct, manifesting an indivisible state of mind or coincidental errors of judgment." *Id.* at 525; *see State v. Bauer*, 792 N.W.2d 825, 828 (Minn. 2011) (quoting *Johnson*).[1] Because Johnson committed the two offenses "within a period of a few minutes and a distance of two blocks," and his conduct "manifest[ed] an indivisible state of mind," the supreme court concluded that they flowed from the same behavioral incident. 141 N.W.2d at 525.

[1] Caselaw since *Johnson* requires the state to prove the divisibility of the criminal conduct by a preponderance of the evidence. *State v. Williams*, 608 N.W.2d 837, 841-42 (Minn. 2000); *State v. Clark*, 486 N.W.2d 166, 171 (Minn. App. 1992).

Because Patton was charged with both unintentional and general-intent crimes,[2] we focus on the three-prong *Johnson* test. Patton cites *Johnson* and other cases involving driving-related crimes to support his argument that his offenses arose from the same behavioral incident. In *Corning*, the defendant struck another vehicle and left the scene. 184 N.W.2d at 605. Police arrived "[s]hortly thereafter," and the complaining driver identified Corning's vehicle as it drove by. *Id*. An officer pursued Corning's vehicle, stopping it three blocks from the accident scene. *Id*. Given the proximity in time and place between the hit-and-run and DWI offenses, the supreme court focused on the third prong of the *Johnson* test. In rejecting the state's argument that the two offenses did not show an indivisible state of mind, the court reasoned that "the influence of alcohol was an important factor which could have caused relator to leave the scene of the accident . . . [,] confusedly circle the block, and . . . exhibit signs of erratic driving behavior for which he was subsequently arrested." *Id*. at 607. *State v. Gladden* is also instructive. 144 N.W.2d 779 (Minn. 1966). There, our supreme court concluded that DWI and careless-driving offenses that occurred "within a few minutes" and only "8 blocks" from each other arose from the same behavioral incident. *Id*. at 783.

The circumstances of Patton's offenses do not demonstrate the proximity of time and place that was present in *Johnson*, *Corning*, and other cases Patton cites. As to timing, the district court found that police issued the dispatch about the hit-and-run at 7:50 p.m.

[2] DWI offenses are unintentional crimes. *State v. Fichtner*, 867 N.W.2d 242, 253 (Minn. App. 2015), *review denied* (Minn. Sept. 29, 2015). The hit-and-run offense is a traffic violation, a general-intent crime. *State v. Corning*, 184 N.W.2d 603, 606 (Minn. 1971).

and Patton was arrested for DWI at 8:20 p.m. The actual time between Patton's two offenses likely exceeds 30 minutes as that time frame does not include the period during which the other driver pursued Patton before calling the police. Either way, we are not persuaded that the offenses occurred at *substantially* the same time. The undisputed 30-minute interval between Patton's offenses is markedly longer than those found in other cases. In *Corning*, the second offense occurred very close in time to the first offense—while police were obtaining initial information at the accident scene. 184 N.W.2d at 605. In *Gladden*, the offenses occurred "within a few minutes." 144 N.W.2d at 780. And the same in *Johnson*. 141 N.W.2d at 525.

As to place, the *Corning* offenses occurred within "three blocks" of each other, 184 N.W.2d at 605, the *Gladden* offenses occurred within "8 blocks" of each other, 144 N.W.2d at 783, and the *Johnson* offenses occurred within "two blocks" of each other, 141 N.W.2d at 525. These very short distances are a far cry from the 6.5-mile distance between where Patton committed his offenses. The parties cite no Minnesota caselaw holding that a distance of 6.5 miles constitutes "substantially the same [place]." Likewise, our research revealed no such case. Application of the second *Johnson* prong does not show that Patton's offenses occurred at substantially the same place.

In sum, the time and place prongs of the *Johnson* test do not support a determination that Patton's crimes arose from the same behavioral incident. Because the three prongs of the *Johnson* test—time, place, course of conduct—are joined by the conjunctive "and," all three must be satisfied to conclude that Patton's offenses arose from the same behavioral incident. *State v. Nelson*, 842 N.W.2d 433, 440 (Minn. 2014) (recognizing that "the term

'and' ordinarily has a conjunctive meaning"). The circumstances of this case do not meet the first two prongs of the *Johnson* test; we need not consider whether the two offenses arose from the same course of conduct.[3]

Finally, the state urges us to consider that the offenses occurred in two different counties. The district court found it significant that the offenses occurred in different counties, which have "independent law enforcement, independent investigators, independent prosecution, and independent court systems." But the issue before us is whether Minn. Stat. § 609.035, subd. 1, prohibits Patton from being sentenced for the DWI offense. The parties agree this case does not present the issue of serial prosecutions. The fact that the offenses occurred in two different counties does not inform our analysis of whether Patton may be sentenced on the DWI offense. The effect of Patton's commission of the offenses in two different counties may have legal import in other contexts, but it is irrelevant to our consideration of whether the crimes arose from the same behavioral incident under Minn. Stat. § 609.035, subd. 1. *Johnson* controls our analysis of that issue.

Because the time and place prongs of the *Johnson* test are not satisfied, we conclude that Patton's offenses were not part of the same behavioral incident under Minn. Stat.

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[3] We note that in *State v. Kooiman*, the supreme court held that the offenses of "drunkenness" and criminal negligence did not arise out of the same behavioral incident because they did not manifest an indivisible connection between the defendant's "state of mind and judgment." 185 N.W.2d 534, 536 (Minn. 1971). There, the criminal negligence occurred when Kooiman was involved in a vehicular accident that killed a man. He was later transported 30 miles to a hospital where he provided a blood sample that gave rise to the drunkenness charge. *Id*. at 535. The supreme court stated that "[d]riving a vehicle is in no way necessary to the offense of drunkenness" and it was unclear when the drunkenness offense occurred, "since it was a continuing violation whether [the defendant] was driving or not." *Id*. at 536.

§ 609.035, subd. 1. Accordingly, Patton is subject to sentencing for a single DWI offense and the hit-and-run offense. We are satisfied that imposition of sentences for both convictions is commensurate with the criminality of his conduct.

Affirmed.