COURT OF APPEALS
DECISION
DATED AND RELEASED

October 12, 1995

No. 94-0861-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JAMES N. SUTHERLAND,

Defendant-Appellant.

APPEAL from judgment of the circuit court for La Crosse County: MICHAEL J. MULROY, Judge. *Affirmed*.

Before Eich, C.J., Gartzke, P.J., and Vergeront, J.

PER CURIAM. James Sutherland appeals from a judgment convicting him of one count of theft by fraud and nineteen counts of forgery. Sutherland argues that his convictions violate the Double Jeopardy clauses of the United States and Wisconsin constitutions because they constitute multiple punishments for the same crime. We conclude that they do not and affirm the judgment.

Sutherland ran a small business, National Limousine Service. For over a year, he billed Soo Line Railroad for services National Limousine Service did not actually provide by filing false vouchers with the company. He was convicted of both theft by fraud and forgery for his actions.

A criminal defendant is protected against being twice placed in jeopardy for the same offense under both the United States and Wisconsin constitutions.[1] The Double Jeopardy Clause embodies three protections. "`It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishment for the same offense.'" ***State v. Kurzawa***, 180 Wis.2d 502, 515, 509 N.W.2d 712, 717, *cert. denied*, 114 S. Ct. 2712 (1994), quoting ***North Carolina v. Pearce***, 395 U.S. 711, 717 (1969). This case involves only the last of the three protections. "Whether an individual has been placed twice in jeopardy for the same offense is a question of law, and we owe no deference to the circuit court's determination." ***State v. Harris***, 161 Wis.2d 758, 760, 469 N.W.2d 207, 208 (Ct. App. 1991).

The Wisconsin Supreme Court has established a two-part test to determine whether multiple punishments may be imposed upon a defendant in a single prosecution. ***State v. Sauceda***, 168 Wis.2d 486, 493-95, 485 N.W.2d 1, 4 (1992). The first question is whether the offenses are identical in law and in fact. ***Id.*** If they are, then the offenses are multiplicitous. ***State v. Grayson***, 172 Wis.2d 156, 159, 493 N.W.2d 23, 25 (1992). If the charges are different in law or fact, they still may be multiplicitous if the legislature intended them to be brought as a single count. ***Id.*** Offenses that are multiplicitous under that second test do not offend the Double Jeopardy Clause. As the supreme court stated in ***Grayson***:

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[1] The Double Jeopardy Clause of the United States Constitution provides: "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." U.S. CONST. amend. V. The Wisconsin Constitution states: "[N]o person for the same offense may be put twice in jeopardy of punishment." WIS. CONST. art. I, § 8. Sutherland briefly suggests that the protections against double jeopardy provided by the Wisconsin Constitution differ from those provided by the United States Constitution, but does not develop this argument. Because the State constitutional protection against double jeopardy parallels the federal constitutional protection, we do not consider them separately. *See* ***State v. Killebrew***, 115 Wis.2d 243, 246 n.2, 340 N.W.2d 470, 473 (1983).

> Only the first factor of the multiplicity test implicates the double jeopardy clauses of the state and federal constitutions. Once it is determined that the offenses are different in law or fact, double jeopardy concerns disappear.
>
> The second factor of the test is solely a question of statutory interpretation. Criminal charges that are multiplicitous under this factor are impermissible because they contravene the will of the legislature.

Id. at 159 n.3, 493 N.W.2d at 25 (citation omitted).

Forgery and theft by fraud do not contain the same legal elements. As the State aptly explains:

> Theft by fraud requires that the defendant actually have received title to the property of another by a false representation and that the owner was actually deceived and defrauded by the representation, while forgery does not. Forgery requires the making or alteration of a document, while theft by fraud does not.[2]

Because these two crimes do not contain the same legal elements, "double jeopardy concerns disappear." ***Grayson,*** 172 Wis.2d at 159 n.3, 493 N.W.2d at

[2] The elements of theft by fraud are: (1) the defendant made a false representation to the owner of the property; (2) the defendant knew that the representation was false; (3) the defendant made the representation with intent to deceive and to defraud; (4) the defendant obtained title to the property by the false representation; (5) the owner of the property was deceived by the representation; and (6) the owner of the property was defrauded by the representation. WIS J I—CRIMINAL 1453 (1991). The elements of forgery are: (1) the document at issue was a writing by which legal rights or obligations are created or transferred; (2) the defendant falsely made the document, and it was made to appear to have been made by another person; and (3) the defendant falsely made the document with intent to defraud. WIS J I—CRIMINAL 1491 (1991).

25. Conviction of both forgery and theft by fraud does not constitute multiple punishment for the same offense.[3]

Sutherland next contends that his conviction of both crimes violates § 939.66, STATS., because the convictions were both based on the same factual circumstances. The statute provides that, upon conviction for a crime, "the actor may be convicted of either the crime charged or an included crime, but not both." Subsection (1) of the statute defines an included crime as "[a] crime which does not require proof of any fact in addition to those which must be proved for the crime charged."

Notwithstanding the legislature's use of the word "fact" in § 939.66, STATS., the supreme court has ruled that the test for determining whether a crime is an included crime of another under § 939.66 is whether the crimes have the same legal elements. *See* ***State v. Carrington***, 134 Wis.2d 260, 264, 397 N.W.2d 484, 486 (1986). The supreme court explained:

> It is well settled that under this court's interpretation of sec. 939.66(1), Stats. ..., this court uses the "elements only" test to determine whether one offense is included within another....
>
> The elements only test focuses on the statutes defining the offenses, not the facts of a given defendant's activity....
>
> ....
>
> One commentator has suggested that the elements only test contravenes the statutory language of sec. 939.66(1). Several commentators criticize the elements only test as being too rigid and as lacking the flexibility which permits a fact finder to fit the

[3] Our conclusion that conviction of both crimes does not constitute multiple punishment for the same offense is in accord with the recent decision of the supreme court that successive prosecutions for theft by fraud and forgery do not violate the Double Jeopardy Clause. *Cf.* ***Kurzawa,*** 180 Wis.2d at 509, 509 N.W.2d at 715.

> verdict to the conduct proved. Other commentators recognize the elements only test as providing the significant advantages of judicial economy and certainty. Once a decision establishes that a crime is a lesser included offense, that decision settles the issue for all cases and all parties absent a modification of the statutes defining the crimes.

Id. at 264, 266, 397 N.W.2d at 486-87 (citation omitted). Under ***Carrington,*** we must reject Sutherland's argument that his conviction of both crimes violates § 939.66 because the convictions are based on the same facts. Section 939.66, as interpreted by the supreme court, focuses on the legal elements of the offenses, not the factual circumstances, in determining whether one offense is included within another.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.