COURT OF APPEALS
DECISION
DATED AND RELEASED

January 17, 1996

NOTICE

No. 95-2599-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

RONALD G. NADOLSKI,

Defendant-Appellant.

APPEAL from an order of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

MYSE, J. Ronald G. Nadolski appeals a nonfinal order denying his motion to dismiss the criminal complaint charging him with one count of theft by failure to return rental property in violation of § 943.20(1)(e), STATS.[1] Nadolski contends that double jeopardy bars prosecution for this offense because he was previously convicted for driving a motor vehicle without the owner's consent in violation of § 943.23(3), STATS., based on the

[1] This court granted leave to appeal this nonfinal order on September 21, 1995.

same incident. Because we conclude that prosecution of the two offenses is not precluded by the principles of double jeopardy, we affirm the order.

Nadolski was charged in Outagamie County with theft by failure to return a rental car. He had previously been convicted in Ozaukee County for operating a motor vehicle without the owner's consent based on the same incident. Nadolski moved both before the preliminary hearing and after he was bound over for trial for dismissal of the complaint based upon principles of double jeopardy. The trial court denied his motion to dismiss and Nadolski appeals.

The double jeopardy clause[2] protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishment for the same offense. ***State v. Kurzawa***, 180 Wis.2d 502, 515, 509 N.W.2d 712, 717 (1994). In this case, we are concerned with the second protection against subsequent prosecution. *See* ***State v. Dillon***, 187 Wis.2d 39, 51, 522 N.W.2d 530, 535 (Ct. App. 1994). Whether a subsequent prosecution violates a defendant's right against double jeopardy is a question of law that we review without deference to the trial court. ***State v. Jacobs***, 186 Wis.2d 219, 223, 519 N.W.2d 746, 748 (Ct. App. 1994).

Both parties agree that the "same elements" test of ***Blockburger v. United States***, 284 U.S. 299 (1932), is the accepted method for determining which offenses are the same for double jeopardy purposes. *See* ***Dillon***, 187 Wis.2d at 51, 522 N.W.2d at 535. Under the "same elements" test, we are required to analyze each offense to determine whether either is a lesser included offense of the other. ***Jacobs***, 186 Wis.2d at 223-24, 519 N.W.2d at 748. An offense is a lesser included one only if all its statutory elements can be demonstrated without proof of any fact or element except those proved for the "greater" offense. ***Id.*** at 224, 519 N.W.2d at 748. Accordingly, the State can successively prosecute Nadolski for the two offenses if each offense necessarily requires proof of an element the other does not. *See* ***Kurzawa***, 180 Wis.2d at 524, 509 N.W.2d at 721.

[2] The double jeopardy clause is contained in the Fifth Amendment to the United States Constitution and art. I, § 8, of the Wisconsin Constitution.

Our analysis reveals that each offense requires proof of an element that the other does not. The elements of theft by failure to return rental property under § 943.20(1)(e), STATS., are:

1. That the defendant had personal property in his possession or under his control because of a written lease or written rental agreement.
2. The defendant failed to return such property within ten days after the written lease or rental agreement expired.
3. The defendant intentionally failed to return the property.

See WIS J I—CRIMINAL 1455. In contrast, the elements of operating a motor vehicle without the owner's consent under § 943.23(3), STATS., are:

1. The defendant intentionally operated a motor vehicle without the consent of the owner even if the owner originally had consented to the taking, and
2. The defendant knew that such operation was without the owner's consent.

See WIS J I—CRIMINAL 1467.2. The elements of these offenses are dissimilar and it is clear that each offense requires proof of an element the other does not. Theft by failure to return rental property requires that there be a written lease or rental agreement while operating without the owner's consent does not. In addition, operating a motor vehicle without the owner's consent requires that the defendant operate the vehicle while the theft charge does not. Under the theft charge, the defendant need not operate the vehicle, just fail to return it. For example, a defendant could sell the rental vehicle before he ever operated it and still be liable for failure to return rental property. Therefore, we conclude that the "same elements" test is satisfied and double jeopardy is not violated.

Nadolski cites ***Brown v. Ohio***, 432 U.S. 161 (1977), as authority that prosecution for these two offenses is barred by the double jeopardy clause. In ***Brown***, the offenses charged were operating a motor vehicle without the owner's consent and auto theft. Using the "same elements" test, the court concluded that operating a motor vehicle without the owner's consent is a lesser-included offense of auto theft and therefore successive prosecutions are

precluded by the double jeopardy clause. ***Id.*** at 168. Operating a motor vehicle without the owner's consent required no proof beyond which was required for auto theft. ***Id.*** In this case, however, the elements are not comparable and neither offense is the lesser included offense of the other. Because different criminal statutes were charged in ***Brown*** than those charged here, ***Brown*** is inapposite to our analysis.

Nadolski further argues that the Wisconsin legislature did not intend that a defendant be prosecuted under both § 943.20(1)(e), STATS., and § 943.23(3), STATS. *See* ***State v. Rabe***, 96 Wis.2d 48, 63, 291 N.W.2d 809, 816 (1980). Nadolski points out that § 943.23(3), STATS., was created because the then existing law did not address a situation where an individual obtained possession of property lawfully by leasing or renting and continued to use it after the lease expired. *See* ***State v. Mularkey***, 195 Wis. 549, 551, 218 N.W. 809, 810 (1928); WIS J I—CRIMINAL 1467 cmt. 1. Nadolski argues that because § 943.23(3) was designed to address this gap in the former law, prosecution for both offenses was not envisioned by the legislature.

The problem with this analysis is that the two offenses are not mutually exclusive. An individual could fail to return rental property without operating the rented vehicle ten days after the lease expires. It is also possible to operate a motor vehicle without the owner's consent without obtaining possession of the vehicle by virtue of a rental agreement. Because the two offenses are not mutually exclusive, Nadolski's claim that the legislature did not envision successive prosecutions under these statutes is drawn into question.

In addition, once the "same elements" test is satisfied, as in this case, there is a presumption that the legislature intended to permit prosecution under each statute. ***State v. Johnson***, 178 Wis.2d 42, 49-50, 503 N.W.2d 575, 577 (Ct. App. 1993). This presumption can be overcome only by a clear indication of legislative intent to the contrary. ***Id.*** The fact that § 943.23(3) was designed to address a gap in the former law does not indicate a clear legislative intent to the contrary. Because neither offense is a lesser included one of the other, we are compelled to conclude that the legislature intended prosecutions under both statutes even though the offenses arise from the same fact situation. Accordingly, we affirm the order.

By the Court.—Order affirmed.

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