COURT OF APPEALS
DECISION
DATED AND FILED

November 11, 2004

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 03-3055-CR **Cir. Ct. No. 00CF000275**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RACHEL W. KELTY,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Wood County: JAMES M. MASON, Judge. *Reversed and cause remanded with directions*.

Before Dykman, Lundsten and Higginbotham, JJ.

¶1 DYKMAN, J. Rachel Kelty pled guilty to two counts of first-degree reckless injury, then moved for postconviction relief on grounds that her conviction was multiplicitous and violated constitutional protections against double jeopardy. The trial court denied her motion, and she appeals. The State maintains that Kelty waived her right to raise a multiplicity challenge by pleading

guilty. We conclude Kelty did not expressly waive her double jeopardy claim as part of a plea agreement. We reverse and remand with directions to hold a hearing where the State may attempt to rebut Kelty's double jeopardy claims.

BACKGROUND

¶2 The criminal complaint against Kelty alleged that she fractured an infant baby's skull in two places with two different objects. At the preliminary hearing, the surgeon who treated the victim testified that "[i]n [his] opinion, there had to be two separate blows, indeed." At the plea hearing at which Kelty pled guilty to two counts of first-degree reckless injury, the trial court informed Kelty of her rights as to the charges against her. It stated:

> There are actually two charges here against you in that same—arising on September 14th, 2000. And one is—because the doctor testified—or would testify as he did at the preliminary hearing that there was a blunt—a blow with a blunt object to the child's head, and another with regard to an instrument that would have cut the child's head.
>
> So you're charged with two separate counts here; do you understand that?

¶3 Kelty moved to withdraw her guilty pleas on double jeopardy and ineffective assistance of counsel grounds. She claimed that her convictions were multiplicitous, and therefore prohibited by the Fourth and Fifth Amendments to the United States Constitution and article I, sections 7 and 8 of the Wisconsin Constitution. She asserted that she had not expressly waived her right against double jeopardy. She claimed that her trial counsel did not inform her of the possible defense of double jeopardy. The trial court denied the motion, finding that: "Kelty's express and explicit acknowledgment of the distinct facts in support of each separate charge indicates that double jeopardy is not an issue, finding alternatively that Kelty's pleas did constitute express waivers of double jeopardy,

and finding that Kelty has not proved that she received ineffective assistance of counsel." Kelty appeals.

DISCUSSION

¶4 "Multiplicity is the charging of a single criminal offense in more than one count. Multiplicitous charges violate the double jeopardy provisions of the Wisconsin and United States Constitutions." ***State v. Hubbard***, 206 Wis. 2d 651, 657-58, 558 N.W.2d 126 (Ct. App. 1996) (citations omitted). We review multiplicity claims using a two-part test. ***State v. Davison,*** 2003 WI 89, ¶¶43-45, 263 Wis. 2d 145, 666 N.W.2d 1. First, it must be determined whether the charged offenses are identical in law and fact. ***Id.*** at ¶43. If the offenses are identical in law and fact, it is presumed that the legislative body did not intend to punish the same offense under two different statutes. ***Id.*** "Conversely, if ... the charged offenses are different in law or fact, a presumption arises that the legislature did intend to permit cumulative punishments." ***Id.*** at ¶44 (citations omitted). Second, even if the charged offenses are *not* identical in law and fact, the court must still determine whether the legislature intended multiple offenses to be brought as a single count." ***Id.*** at ¶45 (citations omitted). To prove multiplicity at this juncture, the defendant must show a clear legislative intent not to authorize cumulative punishments. ***Id.***

¶5 Here, the parties dispute whether the charged offenses were identical in fact. The trial court did not reach this issue because it concluded that Kelty had waived her double jeopardy claims during the plea colloquy. On appeal, Kelty raises the narrow issue of whether she expressly waived her double jeopardy rights. Whether the record of the plea colloquy evidences express waiver is a question we review without deference to the trial court. *See* ***Racine Educ. Ass'n***

v. Board. of Educ., 145 Wis. 2d 518, 521, 427 N.W.2d 414 (Ct. App. 1988) (no special deference to trial court when its findings are based on documentary evidence).

¶6 Kelty contends that she did not expressly waive her right to be free from double jeopardy when she entered her guilty pleas. She argues that the record must show that she explicitly waived her multiplicity defense for the court to bar her double jeopardy challenge. The State asserts that Kelty explicitly acknowledged that she was pleading guilty to two separate counts of first-degree reckless injury and that she understood the factual basis for the charges. It contends that these acknowledgements were explicit admissions constituting waiver.

¶7 The State urges us to apply the rationale of ***United States v. Broce Construction Co., Inc.***, 488 U.S. 563, 109 S. Ct. 757 (1989). There, the Supreme Court held that defendants may not collaterally attack their guilty pleas by asserting double jeopardy violations. It reasoned that a guilty plea and conviction "comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and lawful sentence." ***Id.*** at 569.

¶8 In ***Hubbard***, we distinguished ***Broce*** on grounds that (1) the defendants in ***Broce*** sought to collaterally attack the judgment, whereas ***Hubbard*** sought review by direct appeal; and (2) the double jeopardy claim in ***Broce*** was not apparent on the pleadings and the plea colloquy, whereas in ***Hubbard*** the claim was ascertainable on the record:

> In ***Broce***, the defendants claimed double jeopardy as part of a collateral attack on allegedly multiplicitous charges, and a determination of the double jeopardy issue would have required the court to go beyond the record. Here, Hubbard's claim is on direct appeal from convictions where

> the potential double jeopardy violation is facially ascertainable on the record without supplementation.

Hubbard, 206 Wis. 2d at 655-56. We rejected the State's argument that Hubbard waived his double jeopardy claims in the plea agreement: "Absent an express waiver of his double jeopardy claim as part of a plea agreement, we fail to see how the agreement can constitute waiver of the double jeopardy claim when the plea itself does not." ***Id.*** at 656.

¶9 Here, the trial court concluded that Kelty sufficiently understood the factual basis for her two separate charges of first-degree reckless injury. However, ***Hubbard*** requires the defendant to expressly waive his or her double jeopardy rights before a court bars such a challenge. The record before us does not evidence Kelty's express waiver of her double jeopardy rights.

¶10 The State distinguishes ***Hubbard*** because the potential double jeopardy violation is not facially ascertainable on the record without supplementation. ***Id.*** The State also contends that some jurisdictions have extended ***Broce*** to direct appeals, citing ***United States v. Montilla***, 870 F.2d 549, 552-53 (9th Cir. 1989). We agree that we cannot determine from the record whether the charges were multiplicitous. However, we decline to extend ***Broce*** to direct appeals because to do so would modify ***Hubbard***, which we may not do. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 560 N.W.2d 246 (1997) (holding that the court of appeals may not overrule, modify or withdraw language from its published opinions).

¶11 Courts have long been less solicitous of defendants who collaterally attack a final judgment than of those who seek review by direct appeal. "'[A]n error that may justify reversal on direct appeal will not necessarily support a

collateral attack on a final judgment.'" ***United States v. Frady***, 456 U.S. 152, 165, 102 S. Ct. 1584 (1982) (quoting ***United States v. Addonizio,*** 442 U.S. 178, 184, 99 S. Ct. 2235 (1979) (footnotes omitted)). The reasons for this distinction are well established:

> "[I]ncreased volume of judicial work associated with the processing of collateral attacks inevitably impairs and delays the orderly administration of justice. Because there is no limit on the time when a collateral attack may be made, evidentiary hearings are often inconclusive and retrials may be impossible if the attack is successful.

Addonizio, 442 U.S. at 184 n.11 (citations omitted). "[N]arrowly limiting the grounds for collateral attack on final judgments [is] well known and basic to our adversary system of justice." ***Id.*** at 184. For these reasons, we follow ***Hubbard*** and decline to extend application of ***Broce*** to direct appeals. We therefore conclude Kelty has not waived her multiplicity claims.

¶12 Because we reverse on other grounds, we need not address Kelty's arguments relating to who should bear the burden of proof. We remand for a hearing where the State may attempt to rebut Kelty's double jeopardy claims.

By the Court.—Order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

¶13 LUNDSTEN, J. (*dissenting*). I conclude that controlling case law dictates that Kelty waived her right to directly challenge her convictions on double jeopardy grounds. Kelty might have, and perhaps still could, challenge her pleas based on ineffective assistance of counsel. I believe, however, that we are bound to apply the guilty plea waiver rule to Kelty's direct appeal because there is no meaningful distinction between a direct appeal and a collateral attack for purposes of the guilty plea waiver rule analysis in ***United States v. Broce***, 488 U.S. 563 (1989). Accordingly, I respectfully dissent.

¶14 First, the well-settled rule in Wisconsin is that, where applicable, United States Supreme Court interpretations of the federal double jeopardy provision control our interpretation as to both federal and state double jeopardy provisions.[1] Thus, unless we can identify a meaningful distinction between ***Broce*** and the facts before us, we must follow the ***Broce*** Court's double jeopardy analysis. In this instance, that double jeopardy analysis involves the guilty plea waiver rule.

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[1] ***State v. Davison***, 2003 WI 89, ¶18, 263 Wis. 2d 145, 666 N.W.2d 1 (the Wisconsin Supreme Court "accepts decisions of the United States Supreme Court as controlling interpretations of the double jeopardy provisions of both [the federal and the state] constitutions"); *see also* ***State v. Lechner***, 217 Wis. 2d 392, 401 n.5, 576 N.W.2d 912 (1998) ("[T]his court has accepted decisions of the United States Supreme Court, where applicable, as controlling the double jeopardy provisions of both constitutions."); ***State v. Church***, 223 Wis. 2d 641, 648 n.2, 589 N.W.2d 638 (Ct. App. 1998) ("Wisconsin courts accept the decisions of the United States Supreme Court as governing on the double jeopardy provisions of both constitutions.").

¶15 Second, I conclude that there is no meaningful distinction between ***Broce*** and this case. The defendants in ***Broce*** entered pleas to multiple counts of conspiracy and later sought to have charges vacated, arguing that the counts were multiplicitous. The ***Broce*** Court rejected this challenge, concluding that the defendants had waived their double jeopardy argument regardless whether they were aware of the waiver at the time of their pleas. Although the ***Broce*** appeal came to the Court in the context of a collateral attack, the Court's rationale did not suggest that application of the guilty plea waiver rule is limited to cases involving collateral attacks. To the contrary, all of the reasons the ***Broce*** Court gave for applying the waiver rule apply to direct appeals.

¶16 Rather than summarize ***Broce***, I will let it speak for itself:

> A plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence. Accordingly, when the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary. If the answer is in the affirmative then the conviction and the plea, as a general rule, foreclose the collateral attack. There are exceptions where on the face of the record the court had no power to enter the conviction or impose the sentence. We discuss those exceptions below and find them inapplicable. The general rule applies here to bar the double jeopardy claim.

Id. at 569.

> [In the case before us, the Tenth Circuit Court of Appeals'] holding was predicated on the court's view that, in pleading guilty, respondents admitted only the acts described in the indictments, not their legal consequences. As the indictments did not include an express statement that the two conspiracies were separate, the Court of Appeals reasoned, no such concession may be inferred from the pleas.

Id.

> [However, j]ust as a defendant who pleads guilty to a single count admits guilt to the specified offense, so too does a defendant who pleads guilty to two counts with facial allegations of distinct offenses concede that he has committed two separate crimes.

Id. at 570.

> [Respondents' attorney] avers that he did not discuss double jeopardy issues with respondents prior to their pleas, and that respondents had not considered the possibility of raising a double jeopardy defense before pleading. Respondents contend that, under these circumstances, they cannot be held to have waived the right to raise a double jeopardy defense because there was no "intentional relinquishment or abandonment of a known right or privilege."
>
> Our decisions have not suggested that conscious waiver is necessary with respect to each potential defense relinquished by a plea of guilty. Waiver in that sense is not required.

Id. at 572-73 (citation omitted).

> The [defense attorney's] affidavit, as a consequence, has no bearing on whether respondents' guilty plea served as a relinquishment of their opportunity to receive a factual hearing on a double jeopardy claim. Relinquishment derives not from any inquiry into a defendant's subjective understanding of the range of potential defenses, but from the admissions necessarily made upon entry of a voluntary plea of guilty. The trial court complied with Rule 11 in ensuring that respondents were advised that, in pleading guilty, they were admitting guilt and waiving their right to a trial of any kind. *A failure by counsel to provide advice may form the basis of a claim of ineffective assistance of counsel, but absent such a claim it cannot serve as the predicate for setting aside a valid plea.*

Id. at 573-74 (emphasis added).

> We added [in ***Blackledge***], however, an important qualification:

> "We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge does not waive a claim that—*judged on its face*—the charge is one which the State may not constitutionally prosecute."
>
> In neither [***Blackledge v. Perry***, 417 U.S. 21 (1974), nor ***Menna v. New York***, 423 U.S. 61 (1975)] did the defendants seek further proceedings at which to expand the record with new evidence. In those cases, the determination that the second indictment could not go forward should have been made by the presiding judge at the time the plea was entered on the basis of the existing record….
>
> Respondents here, in contrast, pleaded guilty to indictments that on their face described separate conspiracies. They cannot prove their claim by relying on those indictments and the existing record.

Id. at 575-76 (citation omitted).

¶17 The ***Broce*** holding applies to the situation before this court, that situation being a defendant who pleads to two crimes which on their face form distinct chargeable offenses and who later seeks remand for the purpose of additional proceedings to demonstrate that the two crimes were actually one for purposes of double jeopardy analysis.

¶18 The majority in this case declines to apply ***Broce*** because "to do so would modify [our holding in ***State v. Hubbard***, 206 Wis. 2d 651, 558 N.W.2d 126 (Ct. App. 1996)], which we may not do." Majority at ¶10. I disagree. The pertinent language from ***Hubbard*** is this:

> The State argues that Hubbard has waived the double jeopardy issue by pleading no contest to the six charges. Ordinarily, a plea of guilty or no contest waives all nonjurisdictional defenses and defenses occurring prior to the plea, including claims of constitutional error. ***State v. Princess Cinema of Milwaukee, Inc.***, 96 Wis. 2d 646, 651, 292 N.W.2d 807, 810 (1980). The Wisconsin Supreme Court, however, has held that double jeopardy is

> an exception to the guilty-plea-waiver rule. ***State v. Morris***, 108 Wis. 2d 282, 284 n.2, 322 N.W.2d 264, 265 (1982). ***United States v. Broce***, 488 U.S. 563 (1989), cited by the State, is distinguishable. In ***Broce***, the defendants claimed double jeopardy as part of a collateral attack on allegedly multiplicitous charges, and a determination of the double jeopardy issue would have required the court to go beyond the record. *Id*. at 574-76. Here, Hubbard's claim is on direct appeal from convictions where the potential double jeopardy violation is facially ascertainable on the record without supplementation. We conclude that Hubbard's no contest pleas establish his "factual guilt" on the six counts but do not bar his claim that, judged on their face, the charges violate double jeopardy. *See* ***Menna v. New York***, 423 U.S. 61, 62 n.2 (1975).

State v. Hubbard, 206 Wis. 2d 651, 655-56, 558 N.W.2d 126 (Ct. App. 1996) (footnote omitted).

¶19 Thus, in ***Hubbard***, we identified two distinguishing facts and indicated that those *two* differences justified not following ***Broce***. Here, however, we have just one of those distinguishing facts, that is, a direct appeal instead of a collateral attack. Why should the direct appeal/collateral attack distinction matter? The ***Hubbard*** decision does not tell us. The majority suggests that this distinction matters because of general policies limiting the scope of collateral attacks, citing to cases that do not involve double jeopardy claims. Majority at ¶11. But the ***Broce*** Court did not rely on any such general policy to apply the guilty plea waiver rule. The pertinent question here is whether there is any reason to think the ***Broce*** Court would have reached a different result had it been faced with a direct appeal. I conclude the answer is no. There are often "distinctions" between controlling cases and subsequent cases, but we are obliged to determine whether such "distinctions" matter.

¶20 Moreover, it is apparent to me that if, in ***Hubbard***, we had focused our attention solely on the direct appeal/collateral attack distinction, we would

have realized that it is a distinction without a difference. In contrast, our reliance on the second distinction—relating to the need for further factual development—is firmly grounded in ***Broce***. The ***Broce*** Court addressed that distinction in the context of explaining that it provides a reason *not* to apply the normal waiver rule:

> [W]hen the judgment of conviction upon a guilty plea has become final and the offender seeks to reopen the proceeding, the inquiry is ordinarily confined to whether the underlying plea was both counseled and voluntary. If the answer is in the affirmative then the conviction and the plea, as a general rule, foreclose the collateral attack. *There are exceptions where on the face of the record the court had no power to enter the conviction or impose the sentence. We discuss those exceptions below and find them inapplicable.* The general rule applies here to bar the double jeopardy claim.
>
> ….
>
> An exception to the rule barring collateral attack on a guilty plea was established by our decisions in [***Blackledge v. Perry***, 417 U.S. 21 (1974), and ***Menna v. New York***, 423 U.S. 61 (1975)], but it has no application to the case at bar.
>
> ….
>
> In neither ***Blackledge*** nor ***Menna*** did the defendants seek further proceedings at which to expand the record with new evidence. In those cases, the determination that the second indictment could not go forward should have been made by the presiding judge at the time the plea was entered on the basis of the existing record.

Broce, 488 U.S. at 569, 574-75.

¶21 We are not the first court to address this topic post-***Broce***, but it appears not to have been addressed often. My own research has not uncovered a case from any jurisdiction where a court declined to follow ***Broce*** simply because the appeal at hand was a direct appeal rather than a collateral attack. The authority

I have located, including one case identified by the State, concludes the opposite—that the guilty plea waiver rule discussed in ***Broce*** applies to direct appeals. *See* ***United States v. Pollen***, 978 F.2d 78, 84 (3d Cir. 1992), *cert. denied*, 508 U.S. 906 (1993) ("If an indictment does not raise Double Jeopardy concerns on its face, and the defendant who has pleaded guilty would only be able to demonstrate a Double Jeopardy violation through an evidentiary hearing, then such claim, whether brought by collateral attack or direct appeal, must be rejected."); *see also* ***United States v. Vaughan***, 13 F.3d 1186, 1188 (8th Cir.), *cert. denied*, 511 U.S. 1094 (1994) (applying ***Broce*** in a direct appeal, after recognizing that the Court's holding in ***Broce*** was that a "guilty plea does foreclose a double jeopardy attack on a conviction unless, as in ***Menna***, 'on the face of the record the court had no power to enter the conviction or impose the sentence.'"); ***United States v. Montilla***, 870 F.2d 549, 552-53 (9th Cir. 1989) (applying ***Broce*** in a direct appeal).

¶22 In sum, ***Hubbard*** neither holds, nor provides any analysis supporting the proposition, that the difference between a direct appeal and a collateral attack, *by itself*, is a sufficient reason not to apply the general guilty plea waiver rule of ***Broce***. Because we are now faced with this single distinction, we may reach a different result. Further, because I am unable, in light of the analysis used in ***Broce***, to identify a meaningful distinction between ***Broce*** and the direct appeal before us, I conclude the guilty plea waiver rule applies here.

¶23 This is not to say that Kelty was left no avenue of relief if she believed she entered an unknowing plea. As in other instances in which defendants enter an unknowing plea because their defense attorney failed to explain a viable defense, the normal avenue of showing that her plea was

unknowingly entered because of ineffective assistance of counsel was, and perhaps still is, available to Kelty. *See* ***Broce***, 488 U.S. at 573-75.

¶24 For these reasons, I respectfully dissent.