COURT OF APPEALS
DECISION
DATED AND FILED

August 16, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2179-CR **Cir. Ct. No. 2007CF409**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAINE JOSEPH ADAM LINDERMAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for St. Croix County: ERIC J. LUNDELL, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. In 2007, Daine Linderman fired an assault rifle at several Wisconsin police officers and fled to Minnesota, where he was ultimately apprehended. He was convicted of numerous crimes in Minnesota federal court, where the sentencing authority considered Linderman's conduct in Wisconsin. He

was also convicted of crimes in Wisconsin, where his sentences were ordered to be served consecutively to his federal sentences. Linderman contends this violated his right to be free from double jeopardy. He also claims he is entitled to sentence credit for time he will serve on his federal sentences. Finally, he seeks to withdraw his Wisconsin pleas. We reject Linderman's arguments and affirm.

BACKGROUND

¶2 Linderman was charged in a fifteen-count complaint on October 19, 2007. All charges related to an August 24 attempt to serve Linderman with a felony arrest warrant. Linderman barricaded himself in an apartment, brandished an AR-15 assault rifle and announced to police, "I'm a felon with a gun, things are real fucking bad." Linderman made his escape after police evacuated the building. As Linderman exited the building, he smashed hallway lights and fired several shots directly at officer James Van Dusen. Linderman escaped in an SUV, firing multiple shots at Michael Dishno and other uniformed officers commanding him to stop. He fled to Minnesota, where he crashed the SUV, then took captive and shot a homeowner when the homeowner refused access to his vehicle. Linderman was subsequently arrested by Minnesota authorities.

¶3 On May 21, 2008, before the Wisconsin charges were resolved, Linderman reached a plea agreement with federal prosecutors for his crimes in Minnesota. Linderman was convicted in the United States District Court, District of Minnesota, for attempted carjacking, using firearms in relation to a crime of violence, and felon in possession of firearms.

¶4 Linderman reached a plea agreement with the State of Wisconsin after his Minnesota sentencing. He pled guilty to two counts of first-degree reckless endangerment for firing at Van Dusen and Dishno. He also pled guilty to

a single count of attempting to flee or elude a traffic officer. The remaining charges were dismissed.

¶5 Pursuant to the Wisconsin plea agreement, Linderman was allowed to argue for sentences concurrent to the federal sentences. At sentencing, Linderman's attorney noted that the federal court had considered Linderman's conduct in Wisconsin when applying the federal sentencing guidelines and that Linderman had received a longer federal sentence by approximately eleven and one-half years. The circuit court rejected Linderman's argument, reasoning that Linderman's crimes warranted additional incarceration. The court imposed the maximum sentence on each count, consecutive to the federal sentences and to one another.

¶6 Linderman then filed a motion to modify his sentence or, in the alternative, to withdraw his guilty plea. Linderman argued his state sentence was multiplicitous of his federal sentence in violation of the double jeopardy clauses of the United States and Wisconsin Constitutions. The circuit court rejected this argument as without merit. It also concluded Linderman was not entitled to plea withdrawal because he had not established manifest injustice.

DISCUSSION

¶7 Linderman first contends that his state sentence was a multiplicitous punishment in violation of the double jeopardy clauses of the Fifth Amendment of the United States Constitution and art. I, § 8 of the Wisconsin Constitution. Whether an individual's constitutional right to be free from double jeopardy has been violated is a question of law that this court reviews de novo. ***State v. Davidson***, 2003 WI 89, ¶15, 263 Wis. 2d 145, 666 N.W.2d 1.

¶8 The double jeopardy provisions of the United States and Wisconsin Constitutions embody three protections: "protection against a second prosecution for the same offense after acquittal; protection against a second prosecution for the same offense after conviction; and protection against multiple punishments for the same offense." ***State v. Lechner***, 217 Wis. 2d 392, 401, 576 N.W.2d 912 (1998). "All three protections implicate 'the same offense.'" ***Davidson***, 263 Wis. 2d 145, ¶20. Indeed, the "same offense" is the "sine qua non of double jeopardy." ***Id.***, ¶33.

¶9 Offenses are the same if they are identical in law and fact. ***Id.*** To determine whether offenses are identical in law, Wisconsin has adopted the elements-only test articulated in ***Blockburger v. United States***, 284 U.S. 299, 304 (1932). *See* ***Davidson***, 263 Wis. 2d 145, ¶24. Under the elements-only test, offenses are not legally identical if "each provision requires proof of a fact which the other does not." ***Blockburger***, 284 U.S. at 304. Offenses are not identical in fact if the "facts are either separated in time or of a significantly different nature." ***State v. Anderson***, 219 Wis. 2d 739, 749, 580 N.W.2d 329 (1998). The appropriate question is whether the acts allegedly committed are "so significantly different in fact that they may properly be denominated separate crimes although each would furnish a factual underpinning or a substitute legal element for the violation of the same statute." ***Id.***

¶10 Under this framework, Linderman's double jeopardy contention lacks arguable merit. All of Linderman's offenses are distinguishable either legally or factually. Linderman was convicted in Minnesota of attempted carjacking, *see* 18 U.S.C. § 2119, using firearms in relation to a crime, *see* 18

U.S.C. § 924(c)(1)(a), and felon in possession of a firearm, *see* 18 U.S.C. § 922(g)(1).[1] He was convicted in Wisconsin of two counts of first-degree reckless endangering safety, *see* WIS. STAT. § 941.30(1), and one count of fleeing or eluding an officer, *see* WIS. STAT. § 346.04(3).[2] Each federal offense requires proof of a fact different from the Wisconsin offenses.

¶11 In any event, Linderman concedes that his federal and state prosecutions were proper and did not violate his double jeopardy right. Indeed, Linderman's brief clarifies that he "does not take umbrage with his Federal *prosecution*, which fell within the guidelines, nor does he advance protestation with his State of Wisconsin *prosecution* that falls within the limitations of the State statutes. The objection lies with the fact that the *punishment* of the sentences are *consecutive* to each other for the very same activity and course of conduct."

¶12 Linderman has not cited any authority for the proposition that double jeopardy prohibits a state from imposing a consecutive sentence if another jurisdiction considers the out-of-state conduct in applying that jurisdiction's sentencing guidelines. The general rule in Wisconsin is that a sentencing court is "obliged to acquire the 'full knowledge of the character and behavior pattern of the convicted defendant before imposing sentence.'" ***State v. Leitner***, 2002 WI 77, ¶45, 253 Wis. 2d 449, 646 N.W.2d 341. A sentencing court may even consider uncharged and unproved offenses, and the facts relating to offenses for which the defendant has been acquitted. ***Id.*** Permitting a court to consider

[1] All references to the United States Code are to the 2006 edition unless otherwise noted.

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

unrelated conduct as part of a comprehensive review of the defendant's character is not tantamount to punishing the defendant twice for the same offense.

¶13 Despite Linderman's repeated references to "multiplicity," he fails to conduct a proper analysis of that issue. Multiplicity arises when a defendant is charged in more than one count, and punished accordingly, for a single offense. ***Davidson***, 263 Wis. 2d 145, ¶34. In addition to the double jeopardy analysis, a court presented with a multiplicity claim must also analyze whether the legislature intended multiple offenses to be brought as a single count.[3] ***Id.***, ¶45. "Use of the term 'multiplicitous' should be limited to situations in which the legislature has not authorized multiple charges and cumulative punishments." ***Id.***, ¶37. Yet Linderman's brief does not even address legislative intent. We generally decline to consider issues not specifically raised, *see* ***Waushara Cnty. v. Graf***, 166 Wis. 2d 442, 451, 480 N.W.2d 16 (1992), and remind counsel that "it is the defendant's burden to show a clear legislative intent that cumulative punishments are not authorized," *see* ***Davidson***, 263 Wis. 2d 145, ¶45.

¶14 The remedy Linderman seeks for his allegedly multiplicitous sentence is also flawed. Linderman wants his sentence reversed, and the matter remanded to the circuit court with directions that eleven and one-half years of his sentence be ordered concurrent to the federal sentence. Wisconsin law does not

[3] Under a multiplicity claim, the result of the double jeopardy analysis—whether the charges are identical in law and fact—establishes a presumption of legislative intent. If the offenses are identical in law and fact, we presume that the legislative body "did not intend to punish the same offense under two different statutes." ***State v. Davidson***, 2003 WI 89, ¶43, 263 Wis. 2d 145, 666 N.W.2d 1. If the offenses are different, however, "a presumption arises that the legislature did intend to permit cumulative punishments." ***Id.***, ¶44. Both presumptions may be rebutted by a showing of clear legislative intent to the contrary. ***Id.***, ¶¶43-44.

permit partially concurrent sentences. *See* ***Grobarchik v. State***, 102 Wis. 2d 461, 470, 307 N.W.2d 170 (1981).

¶15 Finally, we note that even if Linderman had been punished for the same offense in Wisconsin and Minnesota (he was not), we would still reject his double jeopardy claim. As the circuit court correctly noted, "[A]n act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each." ***United States v. Lanza***, 260 U.S. 377, 382 (1922). The double jeopardy provisions of the United States and Wisconsin Constitutions protect against only a "second prosecution … after a first trial for the same offense *under the same authority*." ***Id.*** (emphasis added).

¶16 Linderman next argues that he is entitled to eleven and one-half years' sentencing credit pursuant to WIS. STAT. § 973.155(1)(a). Under paragraph (1)(a), a convicted offender must be given sentence credit "for all days spent in custody in connection with the course of conduct for which sentence was imposed." Linderman argues that he was sentenced in federal court "to an additional eleven and a half … years for his 'criminal acts in Wisconsin.'"

¶17 We reject Linderman's repeated contention that he was sentenced in Minnesota for crimes in Wisconsin. Linderman was sentenced in Minnesota for his crimes in Minnesota. "[O]ne sentence does not arise from the same course of conduct as another sentence unless the two sentences are based on the same

specific acts."[4] ***State v. Tuescher***, 226 Wis. 2d 465, 475, 595 N.W.2d 443 (Ct. App. 1999).

¶18 In any event, a convict is not entitled to sentence credit for prospective custodial confinement pursuant to unrelated charges. This is evident from the plain language of WIS. STAT. § 973.155(1)(a)1.-3., under which credit must be given for confinement while the offender is awaiting trial, being tried, or awaiting imposition of sentence after trial. Linderman requests credit for time he has not yet served, for confinement that does not meet the enumerated criteria.

¶19 Finally, Linderman contends he is entitled to withdraw his guilty pleas. He claims he "reasonably believed that he had a binding plea agreement, with the State of Wisconsin, based on the federal sentencing guidelines," and suggests that the State somehow breached that agreement by recommending a consecutive sentence. However, the plea agreement set forth on the record clearly indicates that the State would argue for state sentences consecutive to the federal sentences. The State did not breach the plea agreement by doing so.

¶20 Linderman suggests that he is entitled to plea withdrawal because the sentencing court imposed an illegal sentence. As we have explained, there was nothing illegal about the court's decision to make Linderman's state sentences consecutive to his federal sentences. A defendant normally will not be allowed to

[4] ***State v. Tuescher***, 226 Wis. 2d 465, 479, 595 N.W.2d 443 (Ct. App. 1999), makes clear that two sentences are based on the same specific acts if the same conduct forms a factual predicate for the criminal charges. Two sentences are not based on the "same specific acts" merely because a sentencing court considers conduct that later forms the basis for criminal charges in another jurisdiction. *See* ***State v. Beets***, 124 Wis. 2d 372, 383, 369 N.W.2d 382 (1985) ("[U]nless the acts for which the first and second sentences are imposed are truly related or identical, the sentencing on one charge severs the connection between the custody and the pending charges.").

withdraw a guilty plea absent a demonstration of manifest injustice. ***State v. Bangert***, 131 Wis. 2d 246, 288, 389 N.W.2d 12 (1986). Linderman has failed to make such a showing.

By the Court.—Judgment and order affirmed.

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