COURT OF APPEALS
DECISION
DATED AND FILED

December 15, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP2239-CR **Cir. Ct. No. 2008CF311**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHARLES A. CLAYTON-JONES,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Sauk County: PATRICK TAGGART, Judge. *Affirmed and cause remanded for further proceedings*.

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 LUNDSTEN, P.J. In this interlocutory appeal, Clayton-Jones seeks dismissal of a sexual assault charge involving a ten-year-old boy filed in 2008. The charge was filed immediately after sentencing on a sexual assault charge

involving the same boy filed in 2006. Clayton-Jones argues that dismissal of the charge is required for two reasons: prosecutorial vindictiveness and a rule prohibiting a future prosecution when conduct is the subject of a "read-in" at sentencing. We reject each argument, affirm the order of the circuit court, and remand for further proceedings.[1]

Background

¶2 On September 8, 2006, Clayton-Jones was charged with one count of repeated sexual assault of the same child under WIS. STAT. § 948.025(1)(a), a Class B felony.[2] The criminal complaint charged that Clayton-Jones had sexual contact with a ten-year-old boy during the time the boy stayed at Clayton-Jones's home during the summer of 2006. The charge was based on the boy's description of sexual contacts with Clayton-Jones. The boy said that Clayton-Jones repeatedly had contact with the boy's penis and "butt" and that Clayton-Jones sometimes videotaped the sexual activity.

¶3 Under a plea agreement, the repeated sexual assault charge was amended to a single-act sexual assault charge under WIS. STAT. § 948.02(1)(b), also a Class B felony. Clayton-Jones agreed to plead no contest to the single-act charge, and the prosecution agreed to recommend no more than 12 years of initial confinement. Clayton-Jones was free to argue for any sentence. On April 29, 2008, Clayton-Jones pled no contest pursuant to this agreement.

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[1] This court granted leave to appeal the order denying Clayton-Jones's motion to dismiss the charge against him. *See* WIS. STAT. RULE 809.50(3) (2009-10).

[2] All further references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

¶4 On July 31, 2008, the prosecutor filed five bail jumping charges and moved to revoke Clayton-Jones's bond. The grounds for the charges and the motion were that Clayton-Jones violated the conditions of his bond by having contact with five young boys on July 26 and 27, 2008, and by lying to British authorities to obtain a duplicate British passport.[3] The following day, August 1, 2008, the court granted the State's motion to revoke bond, and Clayton-Jones was taken into custody pending sentencing.

¶5 On August 5, 2008, the prosecutor filed a motion seeking an order "relieving the State from its plea agreement to cap its argument at 12 years of Initial Confinement." In response, Clayton-Jones's attorney submitted a letter brief arguing, among other things, that the relief the prosecutor requested—keeping Clayton-Jones bound by his plea, but permitting the prosecutor to argue for more initial incarceration—was not an available remedy. The circuit court set a briefing schedule, directing the prosecutor to submit argument in support of her motion.

¶6 The prosecutor apparently concluded that the remedy she requested in her August 5 motion conflicted with controlling case law. The prosecutor stated at a later date that her research indicated that Clayton-Jones's attorney was correct—that the court could not relieve the prosecutor of her obligation under the plea agreement without vacating the entire agreement. Accordingly, rather than submit a brief in support of her August 5 motion, the prosecutor, on September 18, 2008, filed an amended motion, this time asking the court for "an order vacating

[3] Clayton-Jones had contact with four thirteen-year-old boys and one nine-year-old boy. Also, Clayton-Jones has dual American/British citizenship. His bond conditions required him to surrender his American and British passports.

the plea agreement." The prosecutor reconsidered this second request, and withdrew it the following day.

¶7 With no motion pending, the case proceeded to sentencing on November 11, 2008. At the sentencing hearing, the prosecutor explained, as noted above, that she withdrew her first motion because it was contrary to law. As to her amended motion seeking to vacate the entire plea agreement, she explained: "[I]t became very clear to the State that any delay that was going to occur as a result of a [hearing on the State's amended motion] essentially didn't give this victim any closure, didn't bring at least this one matter to a complete end, and there are plenty of other matters out there which need to be dealt with as well." The prosecutor agreed that she remained bound by the 12 years of initial incarceration cap recommendation, and the case proceeded to sentencing. Following sentencing arguments, the circuit court imposed 10 years of initial confinement and 15 years of extended supervision.

¶8 When the sentencing hearing was complete, the circuit court went off the record. After a pause, the circuit court briefly went back on the record:

> THE COURT: Counsel, the clerk has just provided me with a new criminal complaint. Do you wish to address that this morning?
>
> [Prosecutor]: No, Your Honor. We're going to do that later today or tomorrow.
>
> THE COURT: Okay. Court will be in recess then.

¶9 The new charge in this case was based on information available at the time of charging in the case that was the subject of the sentencing. The new complaint charged Clayton-Jones with child sexual assault under WIS. STAT. § 948.02(1)(b) for having "sexual intercourse, specifically fellatio," with the boy

during the summer of 2006 while the boy appeared to be "unconscious or sleeping."

¶10 Clayton-Jones moved to dismiss the complaint, arguing both a double jeopardy violation and that charging Clayton-Jones for conduct against the same child during the same time period covered by the original complaint violated the plea agreement. The circuit court denied these defense motions.

¶11 Clayton-Jones hired a new attorney and that attorney moved to dismiss based on double jeopardy grounds and prosecutorial vindictiveness. The circuit court denied that motion. Clayton-Jones petitioned this court requesting interlocutory review, and we granted leave to appeal.

¶12 For ease of discussion below, we refer to the charge and prosecution that resulted in the 2008 sentencing as the 2006 charge or the 2006 prosecution. We refer to the matter before us on interlocutory appeal as the 2008 charge or the 2008 prosecution.

Discussion

¶13 Clayton-Jones seeks dismissal of the charge in this case on two grounds. First, Clayton-Jones argues that prosecutorial vindictiveness prompted the filing of the charge. Second, he asserts that this prosecution violates a rule prohibiting a future prosecution when conduct is the subject of a "read-in" at sentencing.

¶14 In the following sections, we reject these two arguments, but first note two issues that are not before us. First, although some of Clayton-Jones's appellate arguments suggest that he believes the prosecutor made an improper end run around the plea agreement in the 2006 case, he does not argue that the charge

in this case was impermissible because it breached the plea agreement in the 2006 case. Second, the facts before us raise the specter that Clayton-Jones entered an unknowing plea in the 2006 prosecution because he incorrectly believed that the plea agreement resolved all possible charges arising out of conduct between himself and the boy. We have not explored these issues because they are not before us. For that matter, we do not have the full record of the 2006 case before us, and we do not know everything that may or may not have been argued in that case. Accordingly, we do not affirmatively condone the prosecutor's decision to file the 2008 charge. Rather, we address and reject the specific arguments before us.

A. Prosecutorial Vindictiveness

¶15 Clayton-Jones argues that the prosecutor acted with a vindictive motive when, after the sentencing on the 2006 charge, the prosecutor filed the 2008 charge. According to Clayton-Jones, the prosecutor filed the 2008 charge in retaliation for Clayton-Jones's "successful enforcement of the plea agreement, and for obtaining a sentence below the State's recommendation." We are not persuaded.

¶16 The general framework for a vindictive prosecution analysis was set forth in ***State v. Johnson***, 2000 WI 12, 232 Wis. 2d 679, 605 N.W.2d 846:

> In reviewing a prosecutorial vindictiveness claim, we are mindful of the fact that a prosecutor has great discretion in charging decisions and is generally answerable for those decisions to the people of the state and not the courts. We review a prosecutor's charging decisions under an erroneous exercise of discretion standard.
>
> In order to decide whether a prosecutor's decision to bring additional charges constituted prosecutorial vindictiveness in violation of the defendant's due process

> rights, we first must determine whether a realistic likelihood of vindictiveness exists; if indeed it does exist, then a rebuttable presumption of prosecutorial vindictiveness applies. If we conclude that no presumption of vindictiveness applies, we next must determine whether the defendant has established actual prosecutorial vindictiveness.
>
> The legal principles surrounding prosecutorial vindictiveness claims present questions of law that we review *de novo*. However, we review the lower court's finding of fact regarding whether the defendant established actual vindictiveness under the clearly erroneous standard.

Id., ¶¶16-18 (citations omitted). Thus, a defendant alleging a vindictive prosecution must show either actual vindictiveness or a reasonable likelihood of vindictiveness.

¶17 Clayton-Jones does not seriously argue that the record supports a finding of actual vindictiveness. As Clayton-Jones points out, to show actual vindictiveness, "'there must be objective evidence that a prosecutor acted in order to punish the defendant for standing on his legal rights.'" ***Id.***, ¶47 (*quoting* ***United States v. Whaley***, 830 F.2d 1469, 1479 (7th Cir. 1987)). And, as Clayton-Jones further points out by way of quoting case law: "A finding of actual vindictiveness requires 'direct' evidence, such as evidence of a statement by the prosecutor, which is available 'only in a rare case.'" ***United States v. Johnson***, 171 F.3d 139, 140 (2nd Cir. 1999) (citation omitted). No direct evidence of actual vindictiveness exists in this case.

¶18 Instead, the question here is whether there is a "realistic likelihood of vindictiveness" carrying with it the presumption of vindictiveness. The core inquiry in this regard is whether the circumstances indicate that the challenged prosecutorial action was an "impermissible governmental response to non-

criminal, protected activity." ***Johnson***, 232 Wis. 2d 679, ¶28. As the ***Johnson*** court explained:

> The legal principles surrounding prosecutorial vindictiveness developed in a series of United States Supreme Court cases recognizing the basic principle that it is a violation of due process when the state retaliates against a person "for exercising a protected statutory or constitutional right."

Id., ¶20 (citation omitted).

¶19 We begin by disposing of Clayton-Jones's argument that the prosecutor retaliated because Clayton-Jones "obtain[ed] a sentence below the State's recommendation." The problem with this argument is that it does not assert retaliation in response to the exercise of a right. What Clayton-Jones points to here is an alleged reaction to the circuit court's sentencing decision, not a reaction to something Clayton-Jones did. *Cf.* ***id.***, ¶¶34-36, 38 (presumption of vindictiveness does not attach when a prosecutor responds to a mistrial by adding additional charges—"The retrial was necessary because of the jury's inability to reach a verdict, not because of the exercise of any right by the defendant.").

¶20 If Clayton-Jones instead means to assert that the prosecutor retaliated against Clayton-Jones for arguing for a lesser period of incarceration, we reject the assertion. It is illogical to suggest that the prosecutor thought Clayton-Jones should be punished for doing exactly what the plea agreement allowed and what any defendant in Clayton-Jones's position would have done—argue for a lesser sentence than the one recommended by the prosecutor.

¶21 We turn then to what we understand to be the main thrust of Clayton-Jones's vindictive prosecution argument—that the prosecutor filed the 2008 charge in retaliation for Clayton-Jones's opposition to the prosecutor's

motion asking to be relieved of her promise to recommend no more than 12 years of initial incarceration. We conclude there is no reason to suppose the prosecutor acted in retaliation on this basis.

¶22 We need not grapple with much of Clayton-Jones's motive discussion because what he describes does not focus on vindictiveness flowing from his opposition to the prosecutor's request to be relieved of recommending 12 years of initial incarceration. Rather, his discussion is largely directed at the prosecutor's apparent desire to find a way to subject Clayton-Jones to more incarceration time.

¶23 More specifically, and with respect to conduct involving the boy during the summer of 2006, Clayton-Jones attempts to persuade us that the prosecutor's action in filing the 2008 charge was motivated by a desire to increase the number of charges against Clayton-Jones and, thereby, increase the maximum total penalty he faced and perhaps the total sentence imposed on him. We agree that this is a reasonable inference from the record. Moreover, it is clear that the source of the prosecutor's motive was Clayton-Jones's subsequent conduct in 2008—contact with young boys and obtaining a British passport. We glean this from the close timing of the following sequence of events:

- Clayton-Jones's conduct violating the conditions of his bond.
- The filing of charges based on that conduct.
- The prosecutor's motion to be relieved of the 12-year cap.

Accordingly, to the extent that Clayton-Jones tries to persuade us that the prosecutor was motivated by a desire to find a way to increase Clayton-Jones's exposure to punishment, we agree with him, but it does not further his cause.

¶24 Other parts of Clayton-Jones's argument are similarly beside the point. For example, Clayton-Jones argues that "the timing and manner in which the complaint was filed" shows "a display of prosecutorial power and animus, staged to provide maximum emotional distress to Clayton-Jones, and maximum frustration to his counsel," which "strongly indicates that the prosecutor held personal stake in the outcome of the case, or attempted to seek self-vindication." Assertions like these do not focus on the correct issue—that is, whether the prosecutor acted in retaliation for Clayton-Jones's *opposition to one particular motion*.

¶25 The pertinent vindictiveness question we must address is whether the filing of the 2008 charge was motivated by a desire to punish Clayton-Jones for pointing out that the *means* the prosecutor hoped to employ to obtain a more harsh sentence was contrary to established law. Before answering this question, we provide a detailed chronology of the pertinent events.

¶26 After the plea but before sentencing, authorities obtained evidence that Clayton-Jones violated the conditions of his bond by having contact with multiple young boys and by obtaining a British passport. On July 31, 2008, the prosecutor filed charges based on this information and sought revocation of Clayton-Jones's bond. Five days later, the prosecutor filed a motion requesting an order relieving her from her agreement to cap her initial confinement recommendation at 12 years. In response, Clayton-Jones's attorney submitted a letter brief, aptly pointing to the following language in ***State v. Zuniga***, 2002 WI App 233, 257 Wis. 2d 625, 652 N.W.2d 423:

> According to the State's understanding of the law, when a defendant breaches the plea agreement between the plea taking and sentencing, the defendant's plea remains on the table while the State is relieved from performing the

> promise that induced the plea. That is incorrect. Our supreme court has instructed that when a breach is material and substantial, the remedy is to vacate the plea agreement and the guilty plea, placing both parties to the agreement back to their preagreement positions. *See* ***State v. Rivest***, 106 Wis. 2d 406, 414, 316 N.W.2d 395 (1982). They can then either negotiate a new agreement or proceed to trial.

Id., ¶11. This ***Zuniga*** language constitutes a clear rejection of the proposition that Clayton-Jones's violation of the conditions of his bond should relieve the prosecutor of her obligation under the plea agreement while simultaneously keeping Clayton-Jones bound to his plea. Not surprisingly then, the prosecutor declined the opportunity offered to her by the circuit court to provide further argument in favor of her motion.[4] The prosecutor later commented that her research indicated that Clayton-Jones's attorney was correct—that the court could not relieve the prosecutor of her obligation under the plea agreement without vacating the entire agreement.

¶27 The only reasonable conclusion to draw from these facts is that the prosecutor simply learned that her request was legally impermissible. There is no reason to suppose that the prosecutor continued to desire the impermissible remedy—one that might well have been cause for later reversal on appeal—after the prosecutor learned that it was contrary to established law. This situation does

[4] Rather than pursue her motion, the prosecutor filed an amended motion requesting that the entire agreement be vacated. The amended motion was short-lived. The day after it was filed, the prosecutor withdrew the amended motion. It cannot be seriously argued that the filing of the amended motion and its prompt withdrawal should affect our vindictiveness analysis. At most, these actions show that the prosecutor temporarily considered starting over with the prosecution in order to add additional charges or negotiate a different plea agreement, but abandoned the idea before Clayton-Jones even responded to it. This is consistent with our observation that the prosecutor apparently came to regret the plea agreement, but it does not indicate retaliation based on Clayton-Jones's attorney's act of bringing controlling case law to the attention of the circuit court.

not show that the prosecutor was attempting to punish Clayton-Jones for his opposition to what the prosecutor apparently came to realize was her own flawed motion.

¶28 In addition, we agree with the State that the situation here is unlike the cases brought to our attention in which vindictive cause and effect have been found to exist. *See, e.g.*, ***Blackledge v. Perry***, 417 U.S. 21, 22-23 (1974) (after defendant was tried and convicted of a misdemeanor and acted to trigger a statutory right to a trial *de novo* in a higher court, the prosecutor filed a felony charge based on the same conduct); *see generally* ***Johnson***, 232 Wis. 2d 679, ¶¶19-32 (the "presumption of vindictiveness arises when a prosecutor files more serious charges against a defendant after the defendant appeals his conviction and wins a new trial," ***id.***, ¶32).

¶29 Because Clayton-Jones was not entitled to the presumption of vindictiveness, we do not address his arguments to the effect that the prosecutor did not rebut the presumption.

B. Dismissal Based On Read-In Status

¶30 Clayton-Jones asserts that the 2008 prosecution violates the prohibition on double jeopardy. He does not, however, make a typical double jeopardy argument. For example, Clayton-Jones does not argue that the conduct underlying his conviction on the 2006 charge is the same conduct underlying the 2008 charge within the meaning of ***Blockburger v. United States***, 284 U.S. 299 (1932), or its progeny. Rather, Clayton-Jones relies on a Wisconsin "read-in" rule. He argues that the conduct underlying the 2008 charge was effectively "read in" for purposes of sentencing on his 2006 charge and that Wisconsin case law prohibits the subsequent prosecution of a "read-in."

¶31 We initially note that Clayton-Jones seeks to invoke a "read-in" rule that has no clear application here, where there was no discussion about any conduct or charge being "read in." We glean from the cases Clayton-Jones cites, and our own research, that if charged conduct is expressly dismissed and considered as a "read-in" for sentencing purposes, the conduct underlying that dismissed and read-in charge may not provide a basis for a subsequent prosecution. *See* ***State v. Straszkowski***, 2008 WI 65, ¶93, 310 Wis. 2d 259, 750 N.W.2d 835 ("[A] defendant's agreement to read in a charge affects sentencing in the following manner: ... a read-in has a preclusive effect in that the State is prohibited from future prosecution of the read-in charge."); *see also* ***Robinson v. City of West Allis***, 2000 WI 126, ¶¶41-42, 239 Wis. 2d 595, 619 N.W.2d 692 (defendant agreed to have charges read in for consideration at sentencing, and the supreme court commented that "read-ins ... have a preclusive effect in the criminal context in that the state is prohibited from future prosecution of the read-in charges"); ***State v. Floyd***, 2000 WI 14, ¶¶4, 26, 232 Wis. 2d 767, 606 N.W.2d 155 (under a plea agreement, charges were dismissed and read in for sentencing purposes, and the supreme court commented that "[a]n offender does not run the risk of consecutive or concurrent sentences based on read-in charges").

¶32 However, what neither Clayton-Jones nor our own non-exhaustive review of the case law makes clear is what must minimally occur before alleged conduct is treated as a "read-in" for purposes of the Wisconsin rule prohibiting a future prosecution.

¶33 We need not, however, further explore this topic because Clayton-Jones's argument suffers a more fundamental flaw—his "read-in" argument relies on a factual assertion unsupported by the record. As we explain in detail below, Clayton-Jones wrongly asserts that the sentencing court in the 2006 prosecution

had before it a description of the conduct that forms the basis for the 2008 charge. This assertion is key to Clayton-Jones's argument for the following reason. If the sentencing court in the 2006 prosecution did not know about the conduct underlying the 2008 charge, it necessarily follows that the conduct could not have been, in any meaningful sense, "read in" or considered for sentencing purposes in the 2006 case.

¶34 So far as the record before us discloses, the only information about the conduct underlying the 2006 charge before the sentencing court in that case is the description contained in the criminal complaint. In pertinent part, the complaint reads:

> [The boy asserted that Clayton-Jones] makes him wear baggy underwear so [Clayton-Jones] could touch him there (pointing to the genital area). [Clayton-Jones] wiggles around [the boy's] wiener and scratches [the boy's] butt alot this summer. [The boy] wrote this happened fifty times. On two occasions, [Clayton-Jones] also took a tan rubber thing and put it in his butt. [The boy] reported that [Clayton-Jones] videotaped this activity in the bedroom more than one time. [The boy] also reported that [Clayton-Jones] showed him a video on the computer in the upstairs computer room that had three boys going to camp and doing nasty stuff.

Clayton-Jones points to an allegation of fellatio in a police report, but we find no indication in the record that this report was brought to the attention of the sentencing court.

¶35 Accordingly, the only specific conduct brought to the attention of the sentencing court in the 2006 prosecution was that Clayton-Jones "wiggles around [the boy's] wiener and scratches [the boy's] butt" and that Clayton-Jones "took a tan rubber thing and put it in [the boy's] butt."

¶36 The 2008 complaint contains a different allegation. The complaint alleges "fellatio" as the charged conduct, and states that a police officer viewed a video recording obtained during a search of Clayton-Jones's residence and that the video shows Clayton-Jones "place [the boy's] penis into Clayton-Jones' mouth" and "manipulate [the boy's] penis in Clayton-Jones' mouth." Thus, the 2008 complaint charges and describes fellatio, but the 2006 complaint does not.

¶37 Clayton-Jones argues that the term "wiggles" in the 2006 complaint is nonspecific and that it might include the oral contact charged in the 2008 complaint. We disagree. The common understanding of the term "wiggle" does not bring to mind putting something in a person's mouth. We do not believe that a reasonable judge would understand the "wiggles" statement in the 2006 complaint as an allegation of fellatio. Similarly, we reject Clayton-Jones's apparent suggestion that the sentencing court would have assumed that, if Clayton-Jones "wiggled" and "manipulated" the boy's penis "fifty times," then Clayton-Jones must have also performed fellatio on the boy.

¶38 Finally, we note that we have considered Clayton-Jones's argument that reversal is required because the *amendment* of the 2006 charge—from a repeated-acts charge under WIS. STAT. § 948.025 to a single-act charge under WIS. STAT. § 948.02—constituted a "constructive" read-in of the "entire course of conduct summarized in the original complaint." It is sufficient to say that this argument similarly and erroneously presupposes that the conduct summarized in the 2006 complaint included fellatio.

¶39 In sum, the sentencing court in the 2006 prosecution did not know about the alleged fellatio when it sentenced Clayton-Jones and, therefore, that conduct could not have been "read in" and considered for sentencing purposes in

that case. Thus, the "read-in" rule that Clayton-Jones relies on has no application here.

Conclusion

¶40 For the reasons above, we affirm the order of the circuit court and remand for further proceedings.

By the Court.—Order affirmed and cause remanded for further proceedings.

Not recommended for publication in the official reports.