COURT OF APPEALS DECISION DATED AND RELEASED

JULY 29, 1997

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

NOTICE

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

No. 96-2990-CR

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

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

BRADLEY LEE BEARHART, JR.,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from an order of the circuit court for Burnett County: JAMES H. TAYLOR, Judge. *Affirmed in part; reversed in part and cause remanded.*

LaROCQUE, J. The State appeals an order dismissing its prosecution of Bradley Lee Bearheart, Jr., for hunting during a closed season. The trial court dismissed the complaint on the grounds that a previous prosecution of Bearheart, in tribal court for hunting on private lands, barred the State prosecution

under double jeopardy principles. Bearheart cross-appeals the trial court's conclusion that the State had jurisdiction to prosecute him even if there is no double jeopardy. This court reverses that portion of the order dismissing the action on double jeopardy grounds but affirms the order in all other respects.

The relevant facts are undisputed. Bearheart is a member of the St. Croix Band of Chippewa Indians. On November 9, 1994, Bearheart shot and killed a deer off-reservation on privately owned land in Burnett County. He was subsequently charged in tribal court with hunting on private lands contrary to § 6.15 of the tribal conservation code.[1] Bearheart admitted guilt in tribal court and received a $300 fine.

The State subsequently charged Bearheart with hunting during the closed season, contrary to § 29.99(11), STATS., and WIS. ADM. CODE § NR 10.01(3).[2] Bearheart moved to dismiss this prosecution on the following grounds:

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[1] Section 6.15 of the tribal code states as follows:

> **Hunting on Certain Private Lands Prohibited.** No member shall hunt deer on any privately-owned land except those lands which, pursuant to Chapter 77.16, Wis. Stats., have been designated as Forest Croplands or Open Managed Forest Lands.

There is no dispute that Bearheart was hunting on privately owned land not designated as forest croplands or open managed forest lands.

[2] Section 29.99(11), STATS., states that the relevant penalty for hunting deer during the closed season is "a fine of not less than $1,000 nor more than $2,000 or by imprisonment for not more than 6 months or both. In addition, the court shall order the revocation of all approvals issued to the person under this chapter and shall prohibit the issuance of any new approval under this chapter to the person for 3 years."

WIS. ADM. CODE § NR 10.01(3), Table (3)(e)1e states that the gun deer season extends "beginning on the Saturday immediately preceding the Thanksgiving holiday and continuing for 9 consecutive days."

> 1. The State lacks a prosecutable offense against the Defendant.
>
> 2. That exclusive jurisdiction lies with the St. Croix Chippewa Indians of Wisconsin to prosecute Bearheart for this alleged violation.
>
> 3. Pursuant to 18 U.S.C. § 1162(b) (1976), the State criminal jurisdiction is limited over Native Americans engaged in treaty-related activities.

The trial court denied the motion, finding that the State possessed a prosecutable offense and that it had jurisdiction to prosecute him. However, the court dismissed the action on double jeopardy grounds. The State now appeals the dismissal of the complaint, and Bearheart cross-appeals the trial court's order resolving the above issues adverse to his position.

This court first concludes that the state's prosecution is not barred by the principles of double jeopardy. Whether successive prosecutions constitute double jeopardy under the Fifth Amendment to the United States Constitution and art. I, § 8 of the Wisconsin Constitution is a question of law we decide de novo. ***State v. Sauceda***, 168 Wis.2d 486, 492, 485 N.W.2d 1, 3 (1992).

While Bearheart challenges the relevance of the "elements only" test derived from ***Blockburger v. United States***, 284 U.S. 299, 304 (1932), it appears that this court is not required to resolve this issue. Bearheart concedes that regardless of the outcome of the ***Blockburger*** test, a second prosecution by a separate, distinct sovereign is not prohibited where each sovereign possesses a prosecutable offense against the defendant. He cites ***State v. West***, 181 Wis.2d 792, 797, 512 N.W.2d 207, 209 (Ct. App. 1993), for the proposition that the "dual sovereignty" test, where applicable, renders the ***Blockburger*** test unnecessary. West, who was released on bail pending a trial on felony charges in Wisconsin, fled to Ohio and was subsequently convicted of felony theft in that jurisdiction.

Wisconsin then charged West with bail jumping because she violated a condition of her release on bail, namely, that she not commit any crime. Reaching the double jeopardy issue, this court stated that it was "not necessary" to apply the ***Blockburger*** test because the prosecution for bail jumping was "clearly permitted under the dual sovereignty doctrine." ***Id.*** It quoted ***Heath v. Alabama***, 474 U.S. 82, 88 (1985) (quoting ***Moore v. Illinois***, 14 How. 13, 20), as follows:

> [W]hen the same act transgresses the laws of two sovereigns, "it cannot be truly averred that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly punishable."

Thus, Bearheart concedes, if both the State and the tribe possessed a prosecutable offense against him, both prosecutions would be permissible under the dual sovereignty doctrine.

Bearheart, of course, asserts that the State does not possess a "prosecutable offense" against him. He asserts that the criminal complaint was defective because it did not charge an offense "known to law." Specifically, he asserts that the Wisconsin legislature has failed to prescribe penalties for members of the St. Croix tribe who hunt during the State-defined closed season on private land. He argues that § 29.99(11), STATS., is inadequate to include tribal members within its prohibition. This is so, he argues, because the State must prove, as to tribal members, the *additional* element that the hunting occurred on privately owned land not part of the forest crop or forest managed property programs.

This court rejects this argument. The State need not prove that Bearheart was not exercising treaty rights. Bearheart's status as a tribal member, and his right to hunt on public land during the State-defined closed season, is an

affirmative defense to the crime described in § 29.99(11), STATS. "An 'affirmative defense' is defined as a matter which, assuming the charge to be true, constitutes a defense to it." ***State v. Slaughter***, 200 Wis.2d 190, 198, 546 N.W.2d 490, 494 (Ct. App. 1996). Thus, an affirmative defense does not directly challenge an element of the offense. ***Id.*** Here, Bearheart's status as a tribal member with certain treaty rights is a fact on which Bearheart bears the burden of production at trial. *See* ***State v. Staples***, 99 Wis.2d 364, 376-77 n.4, 299 N.W.2d 270, 276 n.4 (Ct. App. 1980). Because the complaint in this case adequately alleged an offense known to law, namely a violation of § 29.99(11), the State possessed a prosecutable offense against Bearheart.

This court concludes that because both the State of Wisconsin and the tribe possessed a prosecutable offense against Bearheart, the State's prosecution is permissible under the "dual sovereignty" exception to double jeopardy prohibitions. For that reason, that part of the trial court order dismissing the criminal complaint on double jeopardy grounds is reversed.

This court now proceeds to Bearheart's cross-appeal. Bearheart asserts that the St. Croix tribe possessed exclusive jurisdiction to regulate his conduct, even though he was hunting on private land. However, he points to case law holding that tribal regulation of treaty-protected activity on off-reservation, *public* land preempts contemporaneous State regulation of that activity. *See* ***Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO IV)***, 668 F. Supp. 1233, 1241 (W.D. Wis. 1987) ("effective tribal self-regulation of a particular resource or activity precludes state regulation of that resource or activity as to the tribes."). Bearheart concedes that ***LCO IV*** pertained to treaty-protected activity, namely, hunting on public land. The State's case is

distinguishable as it relates to hunting on *private* land not participating in the forest crop or forest managed property programs.

Hunting on private land is not an activity recognized and protected by the Chippewa treaties and subsequent agreement. The court in ***Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO VII)***, 740 F. Supp. 1400, 1421 (W.D. Wis. 1990), recognized that the tribe's treaty rights have been extinguished as to private lands. ***Id***. at 1420 (citing ***Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO I)***, 700 F.2d 341 (7th Cir. 1983), and ***Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin (LCO II)***, 760 F.2d 177 (7th Cir. 1985)). Thus, because Bearheart was not engaged in treaty-protected activity in this case, the holding in ***LCO IV,*** which states that effective tribal regulation of treaty-recognized activity preempts State regulation, is inapplicable. Bearheart concedes as much.

Nevertheless, Bearheart asks this court to extend the reasoning of ***LCO IV*** to apply to activity on private land. This court considers that possibility foreclosed by the plain language of ***LCO VII***, where the court ordered:

> 4) Plaintiffs [tribe members] may not exercise their usufructuary rights of hunting or trapping on private lands, that is, those lands that are held privately and are not enrolled in the forest cropland or managed forest lands programs under Wis.Stat. ch. 77; plaintiffs are subject to state hunting and trapping regulations when hunting or trapping on private lands;

LCO VII, 740 F. Supp. at 1426.

Furthermore, it is a well-settled rule that:

> Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held

> subject to nondiscriminatory state law otherwise applicable to all citizens of the State.

Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973). Thus, when a tribal member ventures off reservation land and onto privately owned land, this court must determine "whether, in the specific context, the exercise of state authority would violate federal law." ***White Mountain Apache Tribe v. Bracker***, 448 U.S. 136, 145 (1980). In this case, there is no provision of federal law that is violated by the State's regulation of Bearheart in this context. To the contrary, the regulation in this case is entirely consistent with federal case law. ***LCO VII***.

Bearheart argues that a State conviction would result in tribal members being treated like criminals, a result the court in ***LCO VII*** could not have intended. He argues that the court in that case would not have "conceived that a tribal member lawfully engaged in a treaty protected activity and who, either by mistake or neglect, crosses onto private lands, would be treated like a criminal. Such a conclusion works a chilling effect on the true free exercise of the right." This court disagrees. First, when a tribal member crosses onto private lands, he or she is no longer engaged in treaty-protected activity and the State may lawfully regulate his or her conduct. Second, it does not work a "chilling effect" on treaty-protected activity to require tribal members to educate themselves on the boundaries of privately-owned land. In this context, tribal members who cross onto privately owned land are treated no different from any other hunter who crosses into an area where hunting is prohibited, such as within 1,700 feet of a hospital or school. *See* § 29.22(1), STATS. No specific intent is required.

Finally, Bearheart asks this court to extend the preemption holdings of the ***LCO*** cases to apply to member activity on private land. He asserts that § 6.15 of the tribal code effectively regulates member activity on private land and

that therefore the State's ability to regulate the same activity should be preempted. This court declines to extend the holdings of those cases. To do so would be contrary to the plain language of ***LCO VII***. In addition, this court concludes that those holdings apply only to treaty-protected activities. When Bearheart crossed onto private land, he was no longer engaged in treaty-recognized activity and the State is not prohibited from regulating his conduct by nondiscriminatory regulations. We therefore affirm those parts of the trial court order finding that the State possessed jurisdiction to prosecute Bearheart.

In summary, this court reverses that portion of the trial court order dismissing the criminal complaint on double jeopardy grounds but affirms the court's findings that the State possessed a prosecutable offense against Bearheart and that it had jurisdiction to prosecute him.

By the Court.—Order affirmed in part; reversed in part and cause remanded.

This opinion will not be published. RULE 809.23(1)(b)4, STATS.