COURT OF APPEALS
DECISION
DATED AND FILED

September 3, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1257-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY G. HENSCHEL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Manitowoc County: DARRYL W. DEETS, Judge. *Affirmed.*

ANDERSON, J. In this appeal, Jeffrey G. Henschel alleges that Manitowoc County has a mandatory policy of jailing all arrested drunk drivers for twelve hours which is violative of the Double Jeopardy Clause's prohibition against multiple punishment for the same offense. We reject Henschel's argument and affirm because he has failed to prove beyond a

reasonable doubt that the application of § 345.24, STATS., was violative of his double jeopardy rights.

As the result of a traffic accident, Henschel was arrested by a City of Kiel police officer for operating while intoxicated (OWI) in violation of § 346.63(1)(a), STATS.[1] After submitting to a blood test at an area hospital, Henschel was transported to the Manitowoc County Jail and detained under the requirements of § 345.24, STATS.

In a pretrial motion, Henschel sought dismissal of the complaint on the grounds that his double jeopardy rights had been violated. He alleged that law enforcement officers in Manitowoc County had a mandatory policy of jailing all arrested drunk drivers for twelve hours and that this constituted an act of punishment. In support of this motion, he relied on a portion of the police report prepared after his arrest in which the arresting officer wrote that after the blood test he "transported Jeffrey to the Manitowoc County Jail for his mandatory twelve hour hold."

During the hearing on his motion, Henschel relied solely upon the motion, the attached police report and a supporting memorandum of law. The memorandum of law represented that as part of the mandatory jail policy there was a blanket refusal to release drunk drivers to sober responsible adults or to release a drunk driver when his or her blood alcohol level fell below 0.04% by weight. Henschel did not present any evidence at the motion hearing. After hearing argument of counsel, the trial court denied the motion. Subsequently,

[1] When the results of the blood test showed a blood alcohol concentration of 0.219% by weight, Henschel was also charged with operating a motor vehicle with a prohibited blood alcohol concentration in violation of § 346.63(1)(b), STATS.

Henschel entered a no contest plea to his second offense OWI and his sentence was stayed pending appeal.[2]

On appeal, Henschel acknowledges that under § 345.24(1), STATS., a person arrested for drunk driving is to be detained for twelve hours, or until his or her blood alcohol concentration is less than 0.04%, or the drunk driver may be released after arrest to a responsible adult. He reads this statute to give law enforcement officers discretion when deciding whether to release an accused drunk driver. Henschel contends that law enforcement officers in Manitowoc County have refused to exercise this discretion and have elected "to carte blanche confine all drunk drivers for not less than 12 hours—regardless of whether there are individuals available to whom the driver can be released or whether the driver is below .04%." He argues that the legislature did not authorize a mandatory twelve-hour hold and that law enforcement's abandonment of discretion in favor of a mandatory hold "can only be viewed as intending to punish the driver." He concludes that because his twelve-hour detention was an act of punishment, the complaint should be dismissed on double jeopardy grounds.

The State argues that Henschel failed to present any evidence that law enforcement officers have instituted a mandatory twelve-hour detention policy in lieu of the alternatives of releasing a drunk driver to a responsible adult or releasing a drunk driver when his or her blood alcohol drops below 0.04%. Nonetheless, the State contends that the legislatively mandated sobering up period

[2] Ordinarily, a plea of guilty or no contest waives all nonjurisdictional defenses and defenses occurring prior to the plea, including claims of constitutional error; however, double jeopardy is an exception to the guilty-plea-waiver rule. *See* ***State v. Hubbard***, 206 Wis.2d 650, 654, 558 N.W.2d 126, 128 (Ct. App. 1996).

of twelve hours is not a punishment and Henschel's double jeopardy rights have not been violated.

Henschel is not arguing that as written § 345.24(1), STATS., is violative of his double jeopardy rights. In fact, that argument could not prevail because the Wisconsin Supreme Court has already held that the statute's purpose is remedial:

> [S]ec. 345.24, Stats. 1977, provides that a person arrested for driving while under the influence of an intoxicant 'may not be released until four hours have elapsed.' This severe treatment is dramatic evidence of the legislature's intent and recognition of the need to protect the public from drunken drivers. Undoubtedly, this provision was enacted to prevent drunken drivers from returning to the road while intoxicated. Presumably, this four-hour statutory limitation sought to provide an adequate time allowance for the arrested intoxicant's blood alcohol content to metabolize to a safer level, equal to or less than .05 percent. Restraining those drivers who pose a danger to themselves and the public for the four-hour statutory period constitutes a preventive measure, designed to promote public safety. [Footnote omitted.]

State v. Welsh, 108 Wis.2d 319, 337, 321 N.W.2d 245, 254-55 (1982), *vacated on other grounds and remanded*, 466 U.S. 470 (1984). And, in Wisconsin when the principal purpose of a statute is remedial, it is not violative of a person's double jeopardy rights. *See* ***State v. McMaster***, 206 Wis.2d 30, 42-43, 556 N.W.2d 673, 678 (1996).

What Henschel is arguing is that as applied by law enforcement in Manitowoc County, § 345.24(1), STATS., is violative of his double jeopardy rights. Henschel has the burden of establishing beyond a reasonable doubt that the Manitowoc County law enforcement's application of the statute violates the double jeopardy clause. *See* ***Oshkosh v. Winkler***, 206 Wis.2d 537, 541-42, 557 N.W.2d 464, 467 (Ct. App. 1996).

Henschel's motion lacks any evidentiary substance. The customary common law rule is that the moving party has the burden of proof. *See* ***State v. McFarren***, 62 Wis.2d 492, 499-500, 215 N.W.2d 459, 463-64 (1974). This requires the moving party to present evidence, not assertions of fact, in support of a legal argument. Henschel's reliance upon one line in a police officer's report is not enough. The police officer's reference to a "mandatory twelve hour hold" is subject to two reasonable interpretations. First, as Henschel interprets the statement, it means that throughout all of Manitowoc County there is a mandatory hold and drunk drivers are never released under the other two statutory options. Second, the statement can be interpreted as a shorthand reference to all three alternatives in § 345.24(1), STATS. Because there are at least two reasonable interpretations, it was incumbent upon Henschel, as the moving party, to present evidence at the motion hearing supporting his interpretation of the statute.

Henschel also failed to carry the burden of proof on his assertion that he "was not given the opportunity to be released to a responsible adult nor was he tested at any time to determine whether his blood alcohol concentration was 0.04% or less." He makes this assertion in his "Statement of Facts and Case" in his appellate brief and provides a record cite. Unfortunately, the record cite is to a page of his trial court motion and an unsworn statement by trial counsel. We must ignore this assertion because there are no facts in the record that support the statement in the brief or in the motion. *See* ***Jenkins v. Sabourin***, 104 Wis.2d 309, 313-14, 311 N.W.2d 600, 603 (1981).

In order to have carried his heavy burden of proving that the application of § 345.24(1), STATS., violated his double jeopardy rights, Henschel was required to present evidence proving beyond a reasonable doubt that he was jailed for twelve hours and not given the opportunity to be released to a

responsible adult nor was he tested at any time to determine whether his blood alcohol concentration was 0.04% or less. Rather than attempt to fulfill his burden of proof and present evidence to the trial court and make a record for appeal, Henschel chose to rely upon assertions of his trial counsel. This he cannot do and expect this court to reverse the trial court. Without any facts in the record that establish beyond a reasonable doubt that as applied in Manitowoc County § 345.24(1) is violative of Henschel's double jeopardy rights, we must affirm the judgment of the trial court.

By the Court.—Judgment affirmed.

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