COURT OF APPEALS
DECISION
DATED AND FILED

February 22, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 00-3018-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JANNICE C. PETRY,

DEFENDANT-PETITIONER.

APPEAL from an order of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed*

¶1 VERGERONT, J.[1] Jannice Petry appeals the order denying her motion to dismiss the complaint charging her with operating a motor vehicle while

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

under the influence of an intoxicant and operating a motor vehicle with a prohibited alcohol concentration contrary to WIS. STAT. § 346.63(1)(a) and (b).[2] She contends the trial court erred because the double jeopardy clause bars this action since she was previously acquitted of causing the death of another by the operation or handling of a vehicle while under the influence of an intoxicant and with a prohibited alcohol concentration in violation of WIS. STAT. § 940.09(1)(a) and (b). She also contends the State should be estopped from bringing this action. We conclude that under the ***Blockburger***[3] "same elements test," the State is not barred from prosecuting Petry for violations of § 346.63(1)(a) and (b), and neither judicial estoppel nor issue preclusion bars this action. We therefore affirm.

¶2 The charges in this action under WIS. STAT. § 346.63(1)(a) (OWI) and (b) (PAC) and the charges in the prior action under WIS. STAT. § 940.09(1)(a) (homicide by OWI) and (b) (homicide by PAC) arose out of the same conduct. The complaints in both actions allege Petry was driving a vehicle that struck and killed Shannon Fairbanks, a pedestrian; at the time Petry was intoxicated; and a blood analysis performed within two hours showed Petry's blood alcohol concentration to be .22. After being acquitted in the prior action of homicide by OWI and homicide by PAC, the State filed the complaint in this action. Petry moved to dismiss on the grounds of double jeopardy and estoppel. The trial court concluded the double jeopardy clause did not bar this action because OWI and PAC were not lesser-included offenses of homicide by OWI and homicide by PAC, respectively, since the former two offenses each require proof of two

[2] We hereby grant Petry's motion for leave to appeal this nonfinal order pursuant to WIS. STAT. § 808.03(2).

[3] ***Blockburger v. United States***, 284 U.S. 299, 304 (1932).

additional elements—operation of a motor vehicle, as opposed to operation of any vehicle, and operation on a highway or premises held out to the public, as opposed to operation anywhere. The court did not address Petry's estoppel argument.

¶3 Whether a defendant's convictions violate the double jeopardy clause of the state and federal constitutions is a question of law that this court decides without deference to the trial court. ***State v. Lechner***, 217 Wis. 2d 392, 401, 576 N.W.2d 912 (1998). The double jeopardy clause embodies three protections: against prosecution for the same offense after acquittal, against prosecution for the same offense after conviction, and against multiple punishments for the same offense. ***Id.*** In this case Petry invokes the protection against prosecution for the same offense after acquittal—a successive prosecution challenge. In determining whether the State may successively prosecute a defendant for two offenses, we apply the test established in ***Blockburger v. United States***, 284 U.S. 299, 304 (1932). ***State v. Kurzawa***, 180 Wis. 2d 502, 524-25, 509 N.W.2d 712 (1994). Under this test, the State may not successively prosecute a defendant for two offenses unless each offense necessarily requires proof of an element the other does not. ***Id.*** In addition, the State may not prosecute an offense that is a lesser included offense of an offense that has already been prosecuted. ***Id.***, ***United States v. Dixon***, 509 U.S. 698 (1993).[4]

[4] Generally, the issue of lesser-included offenses arises in the context of deciding whether two crimes may be charged for the same conduct in the same action, and this invokes the protection against multiple punishments for the same offense. ***State v. Lechner***, 217 Wis. 2d 392, 401, 576 N.W.2d 912 (1998). However, the ***Blockburger*** test is applied both to the protection against successive prosecutions and the protection against multiple punishments. ***State v. Kurzawa***, 180 Wis. 2d 502, 524-25, 509 N.W.2d 712 (1994). Therefore, the analysis of whether one offense is a lesser-included offense of another is the same whether one invokes the protection against multiple punishments for the same offense or successive prosecutions for the same offense.

¶4 Under the ***Blockburger*** analysis, an offense is "lesser included" only if all of its statutory elements can be demonstrated without proof of any fact or element in addition to those that must be proved for the "greater" offense. ***State v. Kuntz***, 160 Wis. 2d 722, 754-55, 467 N.W.2d 531 (1991). An offense is not "lesser included" if it contains an additional statutory element. ***Id.*** at 755. The analysis "focuses on the statutes defining the offenses, not the facts of a given defendant's activity." ***State v. Carrington***, 134 Wis. 2d 260, 264, 397 N.W.2d 484 (1986). Thus, when applying the additional element test, the unique facts of a defendant's crime are irrelevant. ***Hagenkord v. State***, 100 Wis. 2d 452, 487-88, 302 N.W.2d 421 (1981).

¶5 Applying ***Blockburger***, we conclude OWI and PAC are not lesser-included offenses of homicide by OWI and homicide by PAC, respectively. We also conclude that OWI and homicide by OWI each require proof of an element the other does not, and that this is also true for PAC and homicide by PAC.

¶6 WISCONSIN STAT. § 346.63(1)(a) and (b) provides:

> Operating under influence of intoxicant or other drug. (1) No person may drive or operate a motor vehicle while:
>
> (a) Under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving; or
>
> (b) The person has a prohibited alcohol concentration.

In addition, WIS. STAT. § 346.61 provides:

> Applicability of sections relating to reckless and drunken driving. In addition to being applicable upon highways, ss. 346.62 to 346.64 are applicable upon all premises held out to the public for use of their motor vehicles, all premises provided by employers to employees for the use of their motor vehicles and all premises provided to tenants of rental housing in buildings of 4 or more units for the use of their motor vehicles, whether such premises are publicly or privately owned and whether or not a fee is charged for the use thereof. Sections 346.62 to 346.64 do not apply to private parking areas at farms or single-family residences.

WISCONSIN STAT. § 340.01(22)[5] defines highway as:

> (22) "Highway" means all public ways and thoroughfares and bridges on the same. It includes the entire width between the boundary lines of every way open to the use of the public as a matter of right for the purposes of vehicular travel. It includes those roads or driveways in the state, county or municipal parks and in state forests which have been opened to the use of the public for the purpose of vehicular travel and roads or driveways upon the grounds of public schools, as defined in s. 115.01(1), and institutions under the jurisdiction of the county board of supervisors, but does not include private roads or driveways as defined in sub. (46).

¶7 WISCONSIN STAT. § 940.09(1) provides in part:

> Homicide by intoxicated use of vehicle or firearm. (1) Any person who does any of the following is guilty of a Class B felony:
>
> (a) Causes the death of another by the operation or handling of a vehicle while under the influence of an intoxicant.
>
> (b) Causes the death of another by the operation or handling of a vehicle while the person has a prohibited alcohol concentration, as defined in s. 340.01(46m).

[5] The definitions in WIS. STAT. § 340.01 apply to WIS. STAT. chs. 340 to 341 unless a different meaning is expressly provided or indicated by the context. Section 340.01.

¶8 The jury instructions for WIS. STAT. § 346.63(1)(a) and (b) each provides that the first element of each offense is that the defendant operated a motor vehicle on a highway.[6] The second element for the OWI is that the defendant was intoxicated at the time of the operation of the motor vehicle, and the second element for the PAC is that the defendant had a PAC at the time of the operation of the motor vehicle. WIS JI—CRIMINAL 2663, 2660. According to the jury instructions for WIS. STAT. § 940.09(1)(a), the elements are: (1) the defendant operated a vehicle; (2) the defendant's operation of the vehicle caused the death of the victim; and (3) the defendant was under the influence of an intoxicant at the time of the operation of the vehicle. WIS JI—CRIMINAL 1185. The jury instructions for § 940.09(1)(b) are the same on the first two elements, but the third element is that the defendant had a PAC at the time of the operation of the vehicle. WIS JI—CRIMINAL 1186. There is no dispute that homicide by OWI and homicide by PAC offense each requires proof of causing death, which the corresponding OWI and PAC charges do not require. Therefore, we turn to whether OWI and PAC each requires proof of an element that homicide by OWI and homicide by PAC, respectively, do not require.

¶9 The first element of OWI and PAC requires proof that the defendant operated a motor vehicle on a highway, whereas there is no requirement in the corresponding homicide offenses that the operation occurred on a highway, and the operation required is of a vehicle, not a motor vehicle. Petry argues "motor vehicle" and "vehicle" have the same meaning, and she points in support to the complaint in the prior action, which alleged "operation of a motor vehicle …

[6] The instructions provide for a modification in cases involving "operating on premises held out to the public" instead of on a highway. WIS JI—CRIMINAL 2663, n.2; 2660, n.2.

contrary to 940.09(1)(a)" and "operation of a motor vehicle … contrary to 940.09(1)(b)." She also contends that, because motor vehicles are a subset of vehicles, proof that a vehicle is a motor vehicle does not require proof of an element or fact that proof of a vehicle does not require. We disagree with both these propositions for several reasons.

¶10 First, the fact that Petry was operating a motor vehicle at the time of the incident and therefore the complaint in the prior action so alleged, is not relevant to the application of the ***Blockburger*** test: this test looks at the statutory elements the State must prove for each offense, not the facts in a particular case. Second, Petry's argument overlooks the requirement that the motor vehicle be operated on a highway, while the location of the operation of the vehicle in the homicide offenses is not an element of those offenses.

¶11 Third, the meanings of "vehicle" and "motor vehicle" are not identical. The general presumption is that when the legislature chooses different terms, it intends to signify different things. ***Johnson v. City of Edgerton***, 207 Wis. 2d 343, 351, 558 N.W. 2d 653 (Ct. App. 1996). The common meaning of the term vehicle includes many vehicles that are not included in the common meaning of motor vehicles, such as bicycles, snowmobiles, airplanes, boats, and railroad trains. In addition, the legislature has provided different definitions of each term, which are applicable in these statutes. The definition of "motor vehicle" applicable to WIS. STAT. § 346.63(1) is found at WIS. STAT. § 340.01(35) and provides:[7]

> (35) "Motor vehicle" means a vehicle, including a combination of 2 or more vehicles or an articulated vehicle,

[7] *See* footnote 4.

> which is self-propelled, except a vehicle operated exclusively on a rail. "Motor vehicle" includes, without limitation, a commercial motor vehicle or a vehicle which is propelled by electric power obtained from overhead trolley wires but not operated on rails. A snowmobile and an all-terrain vehicle shall only be considered motor vehicles for purposes made specifically applicable by statute.

¶12 The definition of "vehicle" applicable to WIS. STAT. § 940.09(1) is found at WIS. STAT. § 939.22(44) and provides:[8]

> "Vehicle" means any self-propelled device for moving persons or property or pulling implements from one place to another, whether such device is operated on land, rails, water, or in the air.

¶13 The comment to the jury instructions for WIS. STAT. § 346.63(2)(a), which makes it unlawful to cause injury to another by the "operation of a vehicle" while intoxicated or having a PAC, explains the distinction between "vehicle" and "motor vehicle" in this way. "Note that § 346.63(2)(a) uses the term 'vehicle,' not 'motor vehicle.' 'Motor vehicle' is used in subsection (1) of § 346.63. The Committee assumed that this difference was intentional on the part of the legislature, justified by the fact that offenses involving injury are considered more serious than simple operating offenses, thus leading to the inclusion of a broader category of conduct—namely, the operating of devices which do not fall within the definition of 'motor vehicle.'" WIS JI—CRIMINAL 2665, n.1.

¶14 We find this reasoning equally applicable to the difference between the term "motor vehicle" in WIS. STAT. § 346.63(1) and the term "vehicle" in WIS. STAT. § 940.09(1). The fact that "motor vehicle" is a narrower term than

[8] The definitions in WIS. STAT. § 939.22 apply to WIS. STAT. ch. 940 unless the context requires a different construction. Section 939.22(1).

"vehicle" does not mean, as Petry argues, that the former does not require proof of a fact that the latter does not require: just the opposite is true. Since all vehicles are not motor vehicles, proof that the defendant operated a vehicle is not sufficient to satisfy the first element of the OWI and PAC charges. There must also be proof it is a particular type of a vehicle, that is, a motor vehicle.

¶15 Petry relies on two cases in support of her argument that "vehicle" and "motor vehicle" have the same meanings, but neither case, we conclude, indicates that the terms are the same for the purposes of the ***Blockburger*** analysis. The court in ***State v. Caibaiosai***, 122 Wis. 2d 587, 595, 363 N.W.2d 574 (1985), does use the term "motor vehicle" and "vehicle" interchangeably when discussing WIS. STAT. §§ 363.63(1)(a) and 940.09(1)(a), but that case had nothing to do with the meaning of those terms as used in those statutes; instead the case addresses the affirmative defense in § 940.09(2). Petry cites language in ***State v. Sohn***, 193 Wis. 2d 346, 359, 535 N.W.2d 1 (Ct. App. 1995), that recognizes "the phrase 'motor vehicle' is generic common usage for all classes of self-propelled vehicles not operating on stationary rails or tracks." However, Petry overlooks the fact that the holding in ***Sohn*** supports the proposition that "vehicle" as used in § 940.09(1) has a different meaning than "motor vehicle" as used in WIS. STAT. chs. 340 through 346. We concluded that a tractor was a "vehicle" within the meaning of § 940.09(1) even though it was not a "motor vehicle" under WIS. STAT. § 345.05, governing municipal liability for motor vehicle accidents. ***Sohn***, 193 Wis. 2d at 356-59.

¶16 We conclude WIS. STAT. § 346.63(1)(a) and (b) each requires proof that the vehicle operated by the defendant is a motor vehicle and that it is operated on the highway, and neither WIS. STAT. § 940.09(1)(a) nor (b) requires proof of

either of these facts. Accordingly, OWI is not a lesser-included offense of homicide by OWI and PAC is not a lesser-included offense of homicide by PAC.

ESTOPPEL

¶17 Petry contends the doctrine of judicial estoppel bars this action because the State charged Petry in the prior action with committing offenses under WIS. STAT. § 940.09(1)(a) and (b) "with a motor vehicle," and it should not now be permitted to argue that operating a motor vehicle is not an element of those charges. Judicial estoppel is applied by courts in the exercise of their discretion to prevent parties from manipulating the judicial process by taking positions that are inconsistent. ***State v. Fleming***, 181 Wis. 2d 546, 557, 510 N.W.2d 837 (Ct. App. 1993). It is not applied when a litigant's assertions are based on inadvertence rather than an intent to manipulate. ***Id.*** at 558.

¶18 We do not agree with Petry that by using the term "motor vehicle" in the complaint in the first action, the State intended to take the position that § 940.09(1) required proof that Petry operated a motor vehicle rather than a vehicle. Indeed, Petry tells us in her brief that in the first action she requested an instruction on the lesser-included offenses of OWI and PAC, but it was not given because the prosecutor objected on the ground that § 940.09(1) required the operation of a vehicle, whereas WIS. STAT. § 346.63 required the operation of a vehicle. Thus, when the State did take a position in the prior action, it asserted the same position as in this action. We conclude there is no basis for applying the doctrine of judicial estoppel to bar this action.

¶19 Petry also contends the doctrine of collateral estoppel bars this action. Collateral estoppel, now known as issue preclusion in Wisconsin, prevents the relitigation of an issue of fact or law in a subsequent action that has been

actually litigated and decided in a prior action. ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 550-51, 525 N.W.2d 723 (1995). Petry relies on ***Ashe v. Swenson***, 397 U.S. 436, 444-46 (1970), which holds that the guarantee against double jeopardy includes the right of the defendant to preclude relitigation of an issue that was decided in a prior criminal action in which the defendant was acquitted.[9] Recognizing that in a criminal action there is a general verdict, the Supreme Court explained how a court is to determine whether to apply issue preclusion in a subsequent criminal action:

> [The court is to] examine that record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.

Id. at 444.

¶20 In ***Ashe***, the Supreme Court concluded, based on a review of the evidence presented in the prior action and the jury instructions given in the prior action, that no reasonable jury could have acquitted the defendant in the prior action without deciding there was a reasonable doubt that he was one of the robbers, and, therefore, the State was precluded from bringing a subsequent action charging him with robbery for the same incident but with respect to a different victim. ***Id.*** at 446-47.

[9] We recognize that issue preclusion is included in the protection against double jeopardy. ***Ashe v. Swenson***, 397 U.S. 436, 444-46 (1970). *See also* ***State v. Kurzawa***, 180 Wis. 2d 502, 524-25, 509 N.W.2d 712 (1994). We have addressed it in a separate section along with judicial estoppel because that is how Petry has organized her arguments.

¶21 We are unable to undertake the analysis required by ***Ashe*** because we do not have anything in the record from the prior action beyond the complaint, the information, and the instructions on the lesser-included offenses that Petry sought in the prior action. Based on those documents, we certainly cannot conclude that no reasonable jury could have acquitted Petry without finding there was a reasonable doubt on the facts the State must prove under WIS. STAT. § 346.63(1)(a) and (b). Most significantly, it is possible a reasonable jury could have acquitted Petry because it determined there was a reasonable doubt her operation of the vehicle caused the death of the victim, in which case Petry is not entitled under ***Ashe*** to preclude litigation of any of the issues the jury must decide in this action.[10] As the appellant, it is incumbent upon Petry to provide us with the record necessary to review the issues she raises on appeal. ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26, 496 N.W.2d 226 (Ct. App. 1993) Therefore, we conclude Petry has not established that issue preclusion bars this action.

[10] The respondent argues Petry asserted the affirmative defense that the victim's death would have occurred even if she had been exercising due care and had not been intoxicated or had a PAC, that the jury was instructed on this defense, and the bulk of the proof centered on this issue. Petry objects to this argument because these are matters not contained in the record before the trial court. We do not base our rejection of Petry's issue preclusion argument on these assertions of what occurred in the prior action but, as stated above, on our inability to review this issue because of the lack of a sufficient record concerning the prior action.

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.