COURT OF APPEALS
DECISION
DATED AND FILED

April 3, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-2476-CR **Cir. Ct. No. 98-CT-163**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GERALD C. MCCONNELL,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Green Lake County: WILLIAM M. MC MONIGAL, Judge. *Affirmed*.

¶1 NETTESHEIM, P.J.[1] Gerald C. McConnell appeals from a judgment of conviction for operating a motor vehicle while intoxicated (OWI) pursuant to WIS. STAT. § 346.63(1)(a). McConnell argues that the State's

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (1999-2000). All statutory references are to the 1999-2000 version.

simultaneous prosecution of him for both OWI and operating a motor vehicle with a prohibited alcohol concentration (PAC) pursuant to § 346.63(1)(b) violated his double jeopardy protection and due process rights. We hold that this appeal is governed by this court's previous opinion in ***State v. Raddeman***, 2000 WI App 190, 238 Wis. 2d 628, 618 N.W.2d 258, *review denied*, 2000 WI 121, 239 Wis. 2d 312, 619 N.W.2d 94 (Wis. Oct. 17, 2000) (No. 00-0143-CR). We affirm the judgment of conviction.

¶2 The facts are straightforward. Following his arrest, the State charged McConnell with both OWI and PAC. McConnell challenged this dual prosecution on double jeopardy and due process grounds. The trial court denied the motion. McConnell then pled no contest to both charges and the court entered a judgment of conviction on the OWI charge.[2]

¶3 McConnell renews his due process and double jeopardy arguments on appeal. In ***Raddeman***, under similar facts and relying on the supreme court's opinion in ***State v. Bohacheff***, 114 Wis. 2d 402, 338 N.W.2d 466 (1983), we rejected the same arguments registered by McConnell in this appeal. ***Raddeman***, 2000 WI App 190 at ¶1.

¶4 McConnell argues that we failed to grasp the actual argument that was made in ***Raddeman***. He contends that our rejection of the double jeopardy and due process arguments in ***Raddeman*** was incorrectly based on the double jeopardy protection against multiple punishments for the same offense. ***Id***. at ¶4. Instead, McConnell argues that the arguments in ***Raddeman*** were premised on the

[2] While permitting a prosecution for both OWI and PAC, WIS. STAT. § 346.63(1)(c) allows but one conviction.

additional double jeopardy protections against a second prosecution for the same offense after acquittal or conviction. ***Id***. Because we missed this critical distinction, McConnell argues that our decision in ***Raddeman*** is wrong.[3]

¶5 We disagree with McConnell's assessment of our decision in ***Raddeman***. In that opinion, we noted Raddeman's argument that the OWI charge and the PAC charges were the "same offense" for purposes of double jeopardy because the law permitted the fact finder to base a finding of guilt on both charges on the amount of alcohol concentration. ***Id***. at ¶6. We rejected this argument based on the supreme court's language in ***Bohacheff***, which we quoted. ***Raddeman,*** 2000 WI App 190 at ¶7. That language held that the bar against multiple convictions rendered moot any argument that the multiple charges were for the "same offense" under the other two protections afforded by double jeopardy law. ***Id***. For the same reasons, we rejected the due process arguments in ***Raddeman***. ***Id***. at ¶¶9-13. Thus, the disagreement between McConnell and this court lies not in whether we missed the crucial issue in ***Raddeman***, but rather in our different readings of ***Bohacheff***.

¶6 We acknowledged in ***Raddeman*** that certain language in ***Bohacheff*** created ambiguity as to the scope of the decision. ***Raddeman***, 2000 WI App 190 at ¶8. Our task in ***Raddeman*** was to resolve that ambiguity. We did so, and our holding is the law until, or unless, the supreme court declares otherwise.

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[3] McConnell fears that we might be insulted by his argument that our decision in ***Raddeman*** is wrong. McConnell's fear is unwarranted. McConnell is entitled to challenge our previous decision, and he has done so in a professional manner and via a well-written brief. Moreover, if McConnell wants to further challenge the correctness of ***Raddeman*** in this case by petition for review to the supreme court, he must make that argument at that level.

By the Court.—Judgment affirmed.

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