COURT OF APPEALS
DECISION
DATED AND FILED

March 18, 2003

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 02-2550-CR **Cir. Ct. No. 01-CF-162**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MARK O. WILLIAMS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Door County: PETER C. DILTZ, Judge. *Affirmed*.

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Mark Williams appeals a judgment of conviction on six counts: two disorderly conduct charges, contrary to WIS. STAT. § 947.01; three assault by a prisoner charges, contrary to WIS. STAT. § 946.43(2m)(a); and

one battery by a prisoner charge, contrary to WIS. STAT. § 940.20(1).[1] Williams pled guilty to all but the battery charge, which was tried to the court and resulted in a guilty verdict.

¶2 The charges arise from two incidents that occurred at the Door County jail while Williams was being held on unrelated drug charges. Williams raises double jeopardy objections, claiming that one of the assault charges is multiplicitous and that the battery charge is identical in law to the assault charge for the same event. Williams also appeals a postconviction motion order denying him six days' sentencing credit, arguing that his custody in this case began the day the criminal complaint was filed.[2] We determine that Williams is not entitled to sentencing credit and that the charges against him do not violate the prohibition against double jeopardy. We therefore affirm the judgment and order.

BACKGROUND

¶3 Williams was incarcerated in the Door County jail awaiting trial on drug charges that are not the subject of this appeal. On October 30, 2001, he spit at deputy Keith Henry. On October 31, he threw urine at deputy Tammy Sternard through the food tray slot in his cell door. On November 6, Williams was charged with six various counts (the "jailhouse charges") based on these two days' incidents. The charges Williams challenges arise from the confrontation with Sternard. Additional facts are related as necessary in the discussion section.

[1] All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[2] Williams requested 106 days' credit. The trial court granted him 100 days' credit and he appeals only the portion of the order denying him the additional six days.

DISCUSSION

I. Sentencing Credit

¶4 Williams' initial appearance and bail hearing were held on November 12. Williams reasons, however, that because he was already in custody on unrelated charges, his "custody" on the jailhouse charges began on November 6 when the criminal complaint was filed. Thus, he claims entitlement to credit for the six days between the filing of the complaint and the bail hearing. The trial court denied the credit request.

¶5 Sentencing credit is governed by WIS. STAT. § 973.155(1)(a), which states: "A convicted offender shall be given credit toward the service of his or her sentence for all days spent in custody in connection with the course of conduct for which sentence was imposed." Neither party disputes the facts surrounding Williams' custody from November 6-12. Thus, whether Williams is entitled to sentencing credit involves application of a statute to undisputed facts, an issue of law subject to de novo review. *See* ***State v. Dentici,*** 2002 WI App 77, ¶4, 251 Wis. 2d 436, 643 N.W.2d 180.

¶6 In order to receive sentence credit, the offender must establish "(1) that he or she was in 'custody'" and "(2) that the custody was in connection with the course of conduct for which the sentence was imposed." ***Id.*** at ¶5. The law places the burden for demonstrating custody and its connection to the imposed sentence on the defendant seeking credit. *See* ***State v. Villalobos***, 196 Wis. 2d 141, 148, 537 N.W.2d 139 (Ct. App. 1995).

¶7 Williams claims that "if a defendant is already in custody on another matter, he becomes in custody in connection with the new action … when the

criminal complaint is filed." He cites to no legal authority for such a proposition but instead suggests only hypotheticals to explain why his claim should succeed. For instance, he suggests that had he bailed out on the drug charges on November 6, he would not have been released from jail because he was already in custody on the jailhouse charges. We first address the legal standard and then dispose of the hypothetical.

¶8 We undertook interpretation of WIS. STAT. § 973.155(1)(a) in ***State v. Demars***, 119 Wis. 2d 19, 349 N.W.2d 708 (Ct. App. 1984). There, the question was whether a detainer issued by Winnebago County, where Demars faced new charges, to Fond du Lac County, where Demars was incarcerated, triggered counting for sentencing credit. To answer this question, we considered the meaning of "custody." ***Id.*** at 22-23. Relying on BLACK'S LAW DICTIONARY 347 (5th ed. 1979), we noted that custody was defined in part as "the detainer of a man's person by virtue of lawful process or authority." ***Id.*** at 23. We then exemplified types of lawful process or authority that resulted in custody in a criminal case:

> Examples of lawful process or authority resulting in custody in a criminal case include arrest with or without a warrant, arrest upon a capias or bench warrant, unsatisfied bail requirements resulting in confinement, sentence to confinement, temporary detention pursuant to sec. 968.24, Stats., probation or parole holds, and periods of confinement imposed as a condition of probation.

Id. We concluded that because a detainer is not executed against a person, nor standing alone can it legally authorize custody, Demars was not entitled to sentence credit. ***Id.*** at 24.

¶9 Similarly, a criminal complaint, standing alone, serves to put the accused on notice of the charges against him, not to authorize custody. *See* WIS.

STAT. § 968.01(2) ("The complaint is a written statement of the essential facts constituting the offense charged."). Williams was in custody from November 6-12 because he could not meet the bail requirements on the drug charges. His custody in connection with the jailhouse charges did not begin until November 12 when bail was set. At that point, he had two options—he could either post bail or not. If he posted bail, he would not be in custody in connection with the jailhouse charges, but with the unpaid bail on the drug charges. Because he could not meet bail on the drug charges, it would have been futile to post bail for the jailhouse charges. At that point, however, he was in custody in connection with both cases under the unfulfilled bail requirement example from ***Demars***.

¶10 If Williams had posted bail on the drug charges on November 6, after the criminal complaint had been filed, he may or may not have been detained by jail personnel. We have no idea what the sheriff would have done, nor does Williams. Assuming he had been detained, then he would have been in custody in connection with the jailhouse charges. However, under ***Demars***, his custody would have been by virtue of a warrantless arrest, not the criminal complaint, and not by unsatisfied bail requirements. In any event, in this case on these facts, Williams was not in custody in connection with the jailhouse charges until November 12, and he is not entitled to six days' sentencing credit.[3]

[3] We are aware of our supreme court's decision in ***State v. Jennings***, 2003 WI 10, No. 01-0507, where the court held that "the filing of a criminal complaint, without the issuance of a warrant, is sufficient to commence prosecution of a defendant who is already in custody …." ***Id.*** at ¶27. However, that case dealt with commencement of a criminal prosecution for purposes of tolling a statute of limitations. ***Id.*** at ¶6. It did not deal with custody and sentencing. Indeed, not every criminal complaint results in custody of the defendant and thus not every criminal complaint would fulfill ***Demars***' legal process requirement. *See* ***State v. Demars***, 119 Wis. 2d 19, 23, 349 N.W.2d 708 (Ct. App. 1984).

II. Double Jeopardy

¶11 Both the United States and Wisconsin Constitutions protect a criminal defendant against being twice placed in jeopardy for the same offense. *See* U.S. CONST. amend. V; WI CONST. art. I, § 8. The double jeopardy clause offers protection against (1) a second prosecution for the same offense after an acquittal; (2) a second prosecution for the same offense after a conviction; and (3) multiple punishments for the same offense. ***State v. Lechner***, 217 Wis. 2d 392, 401, 576 N.W.2d 912 (1998). In this case, the third protection is implicated.

¶12 "A defendant may be charged and convicted of multiple counts or multiple crimes arising out of one criminal act only if the legislature intended it." ***Id.*** at 402. To determine legislative intent, we consider (1) whether the charged offenses are identical in law and in fact and (2) if not identical in law and fact, whether the legislature intended the multiple offenses be charged in a single count. ***State v. Anderson***, 219 Wis. 2d 739, 746, 580 N.W.2d 329 (1998). Whether a defendant's convictions violate his or her rights against double jeopardy is a question of law we review de novo, without deference to the trial court. ***State v. Sauceda***, 168 Wis. 2d 486, 492, 485 N.W.2d 1 (1992).

¶13 The protection against multiple punishments for the same offense is generally invoked in a "continuous offense" case where a defendant argues that he or she has been punished for two or more counts of the same offense arising out of one criminal act. ***Lechner***, 217 Wis. 2d at 402. There may also be a "lesser included" case where a defendant argues that he or she has been punished for both a greater offense and a lesser included one, or when the charges are identical in law. ***Id***. Williams raises both challenges here, and while the focal point of our

analysis differs for each type, the test set forth above applies to both challenges. *See* ***id.***

¶14 Williams' double jeopardy claims arise from the confrontation with Sternard. While admitting that he splashed urine on Sternard but claiming he made two "flicks" of his wrist, Williams argues that the event is one ongoing offense, not two separate offenses, thus raising the "continuous offense" challenge. Sternard testified that the first splash hit her face and eyes and caused a burning sensation. Approximately thirty seconds passed before she was splashed a second time, although the second splash did not get in her eyes. For this reason, two assault charges were filed against Williams.[4] The State contends that there was a sufficient break in time between the splashes to constitute two distinct acts.

¶15 In addition to the assault charges, Williams was also charged with one count of battery by a prisoner for the urine that hit Sternard's eyes. He contends that battery and assault charges are identical in law, thus raising the "lesser included" challenge.

A. Continuous Offense Challenge

¶16 Because Williams pled guilty to two separate assault offenses charged under the same statute, the offenses are identical in law. *See* ***Lechner***, 217 Wis. 2d at 414. Thus, we focus on the facts giving rise to each offense: whether a conviction for each offense requires proof of an additional fact that the other does not, ***id.***; whether the offenses are significantly different in nature, ***Anderson***, 219 Wis. 2d at 749; or whether the offenses are separated in time. *See*

[4] The third assault charge was for spitting at Henry.

State v. Trawitzki, 2001 WI 77, ¶28, 244 Wis. 2d 523, 628 N.W.2d 801. Accordingly, the question turns on whether the defendant's commission of the same offense at different times constitutes a single ongoing crime or two separate offenses. *See* ***Lechner***, 217 Wis. 2d at 414.

¶17 Sternard had been asked to speak with Williams regarding the spitting incident with Henry. Standing in front of his cell door, she attempted to explain that under jail procedure, Williams had a right to a hearing on the incident, but he repeatedly cursed at her and insisted she leave. Sternard stepped away from the door and wrote that Williams was refusing to cooperate in regard to his hearing. As she was making her notes, Williams continued to yell that she should leave. At one point, "he had said, if you don't leave, I'm going to throw piss at you, bitch."

¶18 Another inmate, whose cell was opposite Williams's cell, then called to Sternard. As she turned in response, Williams threw a cup containing urine, splashing the contents onto the right side of Sternard's face and into her eye. The urine caused a burning sensation and blurred Sternard's vision. She identified the contents as urine as she stepped aside to clear the liquid from her eyes. As Sternard wiped off her face, she observed that Williams was still agitated and swearing. Sternard noted that to leave the area she would have to cross in front of Williams' cell, and she radioed for assistance. She then attempted to leave the area before other deputies arrived. As she passed the cell, approximately thirty seconds after Williams splashed her with urine the first time, he threw urine at her again, soiling her hair and uniform.

¶19 Although the time interval separating the splashes was short, we are satisfied that each splash was the result of a "new volitional departure in

[Williams'] course of conduct." *See* ***Anderson***, 219 Wis. 2d at 750 (citation omitted). After she was hit the first time, Sternard moved away from the cell. She testified that she had been able to see into the cell from her position and that if she could see in, Williams could see out. Thus, Williams could see that Sternard was incapacitated. She radioed for assistance and attempted to leave the area, as Williams had insisted she do all along. Despite these intervening circumstances, Williams again threw urine when Sternard passed in front of him. Based on these facts in the record, we conclude there was a sufficient break in Williams' conduct to constitute two separate and distinct assaults against Sternard. The first incident had come to an end before the second began. *See* ***Lechner***, 217 Wis. 2d at 416.

¶20 This conclusion should not normally end our analysis. The second prong of the continuous offense challenge should be an inquiry into whether the legislature intended multiple charges, different in fact, be brought in a single count. ***Anderson***, 219 Wis. 2d at 751. Because we have determined that the assault charges are different in fact, we begin with the presumption that the legislature intended multiple punishments. ***Id.*** This presumption may only be overcome by a clear indication to the contrary. ***Id.*** Factors we consider in looking for a contrary intent are (1) statutory language; (2) legislative history and context; (3) the nature of the proscribed conduct; and (4) the appropriateness of multiple punishment. ***Id.*** at 751-52.

¶21 Williams, however, makes no attempt to rebut this presumption, claiming only that no factors clearly indicate the legislature intended multiple punishments for a single act. This argument is unavailing in a continuous offense challenge, as we have already determined there were multiple acts, not a single act. We decline to abandon our neutrality to further develop Williams' argument

for him. *See* ***State v. Gulrud***, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987).[5]

¶22 Incidentally, Williams focuses on a segment of the sentencing hearing in which the trial court spoke the words "not more than two real outbreaks." This, Williams argues, suggests the trial court meant that the assault on Sternard was only one chargeable "outbreak," and that the assault against Henry was the other outbreak. We disagree. In its written order denying the postconviction motions, the trial court wrote that the statement was irrelevant to its consideration of the double jeopardy issue. Rather, it was mentioning what it believed to be a slightly mitigating factor in the course of exercising its sentencing discretion. In any event, double jeopardy challenges are questions of law, not fact, and we would owe no deference to the trial court even if its statement could be construed to mean the court believed there was only one assault on Sternard.[6]

B. Lesser Included Challenge

¶23 Williams challenges the battery and an assault charge, arguing that they are the same in law thus raising a "lesser included" challenge. Under Wisconsin law, whether offenses are different in law is controlled by the "elements only" test set out in ***Blockburger v. United States***, 284 U.S. 299, 304

[5] We note that while implication of a defendant's constitutional rights should not be taken lightly, it is only the "identical in law and in fact" part of our analysis that implicates the double jeopardy provisions. ***State v. Trawitzki,*** 2001 WI 77, ¶22, 244 Wis. 2d 523, 628 N.W.2d 801. The second part of the test is not a constitutional inquiry, but a question of statutory interpretation. ***Id.***

[6] In addition, if Williams' interpretation were correct, the trial court would have likely dismissed one of the assault charges.

(1931), and codified in WIS. STAT. § 939.66(1).[7] *See* ***Lechner***, 217 Wis. 2d at 405. In ***Blockburger***, the United States Supreme Court held that where the same act constitutes a violation of two different statutory provisions, the test under double jeopardy is whether each provision requires proof of a fact that the other does not. ***Blockburger***, 284 U.S. at 304.

¶24 Williams was charged with battery by a prisoner contrary to WIS. STAT. § 940.20(1), which states: "Any prisoner confined to a state prison or other state, county or municipal detention facility who intentionally causes bodily harm to an officer, employee, visitor or another inmate of such prison or institution, without his or her consent, is guilty of a Class D felony." Thus, according to the jury instructions, the State must prove the following elements to convict a defendant on a battery by a prisoner charge: (1) the defendant was a prisoner confined to a state prison or other detention center; (2) the defendant intentionally caused harm to the victim; (3) the victim was an officer, employee, visitor, or another inmate of the prison or detention center; (4) the defendant caused bodily harm to the victim without the victim's consent, and (5) the defendant knew that the victim was an officer, employee, visitor, or other inmate of the center. WIS JI—CRIMINAL 1228.

¶25 Williams was also charged with assault by an inmate, contrary to WIS. STAT. § 946.43(2m)(a), which states:

[7] WISCONSIN STAT. § 939.66(1) states:

> Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included crime, but not both. An included crime may be any of the following: (1) A crime which does not require proof of any fact in addition to those which must be proved for the crime charged.

> Any prisoner confined to a state prison or other state, county or municipal detention facility who throws or expels … urine … or other bodily substance at or toward an officer, employee or visitor of the prison or facility or another prisoner of the prison or facility under all of the following circumstances may be fined not more than $10,000 or imprisoned for not more than 2 years or both:
>
> 1. The prisoner throws or expels … urine … with the intent that it come into contact with the officer, employee, visitor or other prisoner.
>
> 2. The prisoner throws or expels the … urine … with the intent either to cause bodily harm to the officer, employee, visitor or other prisoner or to abuse, harass, offend, intimidate or frighten the officer, employee, visitor or other prisoner.
>
> 3. The officer, employee, visitor or other prisoner does not consent to the … urine … being thrown or expelled at or toward him or her.

To succeed on an assault by a prisoner charge, the State must prove (1) the defendant was a prisoner confined to a state prison or other detention center; (2) the victim was an officer, employee, visitor, or another inmate of the prison or detention center; (3) the defendant threw or expelled a bodily substance toward the victim with the intent that the substance come into contact with the victim; (4) the defendant intended to cause bodily harm or abuse, harass, offend, intimidate, or frighten the victim; and (5) the victim did not consent to having the bodily substance thrown or expelled toward him or her. WIS JI—CRIMINAL 1779A.

¶26 Battery by a prisoner requires that the State prove actual bodily harm; assault by a prisoner contains no such requirement. Battery also requires that the defendant knew the identity of the victim as an officer, employee, visitor, or inmate of the detention center. Assault has no such knowledge requirement. Assault by a prisoner requires that the assault be committed with a bodily substance—such circumstance need not be shown in a battery case.

¶27 Because battery and assault by a prisoner both contain elements unique to themselves, the charges are different in law. Because the battery and assault charges are not lesser included offenses of each other, we presume the legislature intended to permit cumulative punishments for both offenses. ***Sauceda***, 168 Wis. 2d at 495.

¶28 Williams cites ***Whalen v. United States***, 445 U.S. 684, 691-92 (1980), claiming there is an assumption that a legislature ordinarily does not intend to punish the same offense under two separate statutes. While this rule may be helpful in jurisdictions without an explicit rule, our legislature enacted WIS. STAT. § 939.65, which states: "[I]f an act forms the basis for a crime punishable under more than one statutory provision, prosecution may proceed under any or all such provisions." Williams raises no authority other than ***Whalen*** to rebut the presumption of cumulative punishments and again, we decline to develop his argument for him. *See* discussion *infra* ¶20.

¶29 The battery and assault charges are not identical in law, and Williams has not rebutted the presumption that the legislature intended multiple punishments arising out of one act. There was no violation of double jeopardy under the "lesser included offense" analysis. The two assault charges for splashing urine are based on two distinct acts. The charges are not multiplicitous under the "continuous offense challenge," and thus there is no double jeopardy violation. Finally, Williams was not in custody in this case until November 12, and he is not entitled to an additional six days' sentence credit.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.