COURT OF APPEALS DECISION DATED AND FILED

July 22, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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

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

Appeal No. 03-0755-CR

Cir. Ct. No. 01-CM-2297

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SCOTT E. BRANDSTETTER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Eau Claire County: LISA K. STARK, Judge. *Affirmed*.

¶1 PETERSON, J.[1] Scott Brandstetter appeals an order denying his postconvction motions after he was convicted on eight counts of bail jumping. The charges arose from four telephone calls Brandstetter made in violation of two

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

bonds. He was charged with two violations for each phone call. He argues that two charges for each phone call are multiplicitous and that half the bail jumping convictions should be vacated. We disagree and affirm the order.

BACKGROUND

¶2 Brandstetter had two bonds that prohibited him from having contact with his former wife, Lamis Eriksen. One bond was issued on April 4, 2001, and the other on October 8, 2001. Each was from a different case.[2] Brandstetter left telephone messages on Eriksen's answering machine on October 13, 2001; October 17, 2001; November 17, 2001; and November 24, 2001.

¶3 The State filed a criminal complaint on December 10, 2001, charging Brandstetter with thirteen counts each of misdemeanor bail jumping and violating a domestic abuse injunction. The State filed an amended complaint on June 12, 2002, charging Brandstetter with eight counts of bail jumping and four counts of violating a domestic abuse injunction.

¶4 A jury trial was held on June 19, 2002. Brandstetter was found guilty on all twelve counts. The trial court placed Brandstetter on probation, but he chose to be sentenced. The court initially sentenced him to six months in jail for each bail jumping count, to be served concurrently. The court also sentenced him to six months in jail for each domestic injunction violation, to be served concurrently to each other but consecutive to the six months for bail jumping.

[2] The April 4 2001, bond was associated with case No. 01-CM-567. The October 8, 2001, bond was associated with case No. 01-CM-1811.

¶5 Brandstetter filed a postconviction motion on January 8, 2003. He argued that he could not be convicted of two separate counts resulting from one single act, such as a phone call. He therefore requested that four of the bail jumping convictions be vacated. The court denied the motion.[3] Brandstetter appeals.

DISCUSSION

¶6 Whether Brandstetter may be convicted of multiple counts of bail jumping for committing a single act which violated two separate bonds is a question of constitutional fact that we review independently. *See* ***State v. Richter***, 189 Wis. 2d 105, 108, 525 N.W.2d 168 (Ct. App. 1994).

¶7 Brandstetter argues that, because each phone call consists of one volitional act, he cannot be charged with two violations for each phone call. He acknowledges that our decision in ***Richter*** is contrary to his argument. However, he maintains that case "was poorly reasoned." Instead, Brandstetter states that ***State v. Anderson***, 219 Wis. 2d 739, 580 N.W.2d 329 (1998), "undercuts the precedential value of ***Richter***."

¶8 In ***Anderson***, our supreme court noted the factors we must consider to determine whether charges are multiplicitous: (1) whether the charged offenses are identical in law and fact, and (2) if they are identical in only one respect–law or fact–whether the legislature intended the multiple offenses to be brought as a single count. ***Anderson***, 219 Wis. 2d at 746.

[3] Brandstetter also argued that he was entitled to a new trial because the State failed to prove he had intentionally violated the domestic injunctions. This motion was also denied; however, that issue is not part of this appeal.

¶9 Brandstetter argues that the charges here are identical in law because they fall under the same statute. Because the State agrees, we turn to the second question, whether the charges are identical in fact.

¶10 Brandstetter contends the charges are identical in fact because they are not significantly different in nature. ***Anderson*** states that in order to be significantly different, each count "must require proof of an additional fact that the other count does not." ***Id.*** at 750. Brandstetter argues that there is no distinction between the violations here because they result from bonds with identical language and require the same factual proof.

¶11 As Brandstetter concedes, ***Richter*** is exactly on point with the facts of this case. There, we applied the same standard Brandstetter notes was applied in ***Anderson***. We determined that three convictions for bail jumping were valid where the charges arose from one phone call made in violation of three separate bonds. While the counts were identical in law, they were not identical in fact.

> In each of the three cases there were separate bonds issued by the court. We agree with the trial court that if the State were put to their proof, they would be required to prove up the condition in each bond. Each count would require proof of facts for conviction which the other two counts would not require because each bond would give rise to an individual factual inquiry. Under Wisconsin law, offenses which are the same in law are different in fact if those offenses are either separated in time or are significantly different in nature. … We conclude that the three separate bonds issued in this case created three significantly different chargeable offenses.

Richter, 189 Wis. 2d at 109-10 (citations omitted).

¶12 Because the charges were identical in law and not in fact, we turned to the second factor, which looked at legislative intent. We stated:

> There is no indication from the plain language of [WIS. STAT. § 949.49, the bail jumping statute] that the legislature intended to limit the allowable unit of prosecution. To import into the bail jumping statute that a defendant can only be charged with one offense even if the act violates separate bonds would be not to construe, but to rewrite the statute. … That is a job for the legislature, not for this court.

Id. at 110. We determined the legislature did not intend the multiple offenses to be brought as a single count. ***Id.*** Consequently, the charges were not multiplicitous.

¶13 Brandstetter's reliance on ***Anderson*** for the standard whether a case is multiplicitous is correct. However, the opinion does not lead to the result urged by Brandstetter. Anderson violated two separate conditions of one bond. One was to refrain from drinking alcohol and the other was a no-contact provision. Although Anderson only committed one act, contacting the victim while intoxicated, the act constituted two separate offenses. Each was significantly different from the other. Thus, while the charges were identical in law, they were not identical in fact. Brandstetter argues that he only violated one provision with each phone call, not multiple conditions as in ***Anderson***. He therefore maintains that his charges are identical in law and fact and that he can only be charged with one crime for each phone call.

¶14 Contrary to Brandstetter's argument, ***Anderson*** does not overrule or undercut ***Richter***. The two cases dealt with different circumstances. ***Anderson*** dealt with violation of the conditions of one bond. ***Richter*** dealt with violations of two bonds. We disagree that ***Richter*** is poorly reasoned. It applies the same test

as ***Anderson*** to a different set of facts. Those facts are identical to the facts here. Therefore, ***Richter*** controls our outcome.[4]

¶15 We note that other cases similarly show how one act can result in multiple charges. In ***State v. Rabe***, 96 Wis. 2d 48, 53, 291 N.W.2d 809 (1980), Rabe was charged with four counts of homicide resulting from one automobile accident. The supreme court determined that killing multiple people in one accident constitutes as many offenses as there are victims. ***Id.*** at 52-53. Brandstetter argues this case does not apply because here there was only one victim, Eriksen. However, Brandstetter violated two separate bonds, just as Rabe committed four separate homicides.

¶16 Further, in ***State v. Trawitzki***, 2001 WI 77, ¶¶4-5, 244 Wis. 2d 523, 628 N.W.2d 801, Trawitzki was charged with multiple counts of theft and concealing stolen property after he stole ten firearms from a residence. There was one act of theft that resulted in multiple counts because each charge required identity of the firearm. ***Id.***, ¶28. Thus, each count was different from the others. ***Id.*** Brandstetter argues that ***Trawitzki*** involved stealing multiple distinct items, whereas here there were only four distinct phone calls. However, Brandstetter violated multiple and distinct bonds, just as Trawitski violated the theft statute multiple times.

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[4] Even if ***State v. Richter***, 189 Wis. 2d 105, 525 N.W.2d 168 (Ct. App. 1994), was poorly reasoned, we are bound by precedent. ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997).

¶17 The charges against Brandstetter are identical in law but not in fact. ***Richter*** holds that the legislature did not intend to limit prosecution in cases like this. Therefore, we conclude the charges are not multiplicitous.

By the Court.—Order affirmed.

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