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DISTRICT II

January 2, 2019

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You are hereby notified that the Court has entered the following opinion and order:

2018AP53-CR State of Wisconsin v. Dennis Brantner (L.C. #2015CF457)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Dennis Brantner appeals from a judgment of conviction and an order denying his postconviction motion. He contends that the State failed to establish venue in his case. He further contends that two of his convictions were multiplicitous. Based upon our review of the

briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2015-16).[1] We affirm.

On March 27, 2015, detectives from the Fond du Lac County Sheriff's Office executed an arrest warrant for Brantner. Brantner had a court appearance in Kenosha County that day. Accordingly, the detectives arrested him as he was leaving the Kenosha County Courthouse. They handcuffed him, asked him if he had anything on him that they should know about, and patted him down. Thereafter, they drove him to the Fond du Lac County jail.

Upon arriving at the jail, Brantner was ordered to remove his clothing as part of the booking process. Brantner removed his left boot and gave it to the booking officer, who found a plastic baggie containing an assortment of pills. They included: thirty-five 20mg oxycodone pills, two 5mg oxycodone pills, two hydrocodone pills, eleven zolpidem pills, and four cyclobenzaprine pills. Brantner did not have a prescription for any of the pills.

The State charged Brantner with three counts of possession of narcotic drugs: one count for possession of the 20mg oxycodone pills, one count for possession of the 5mg oxycodone pills, and one count for possession of the hydrocodone pills. The State also charged Brantner with one misdemeanor count of possession of a controlled substance for the zolpidem and one misdemeanor count of possessing an illegally obtained prescription drug for the cyclobenzaprine. Finally, the State charged Brantner with five counts of felony bail jumping premised on the commission of the possession crimes. The case proceeded to trial.

[1] All references to the Wisconsin Statutes are to the 2015-16 version.

At trial, the State called several witnesses, including the detectives who arrested Brantner, the booking officer at the jail, and crime lab employees who identified the pills. After the State rested, Brantner moved for a directed verdict on the ground that there was insufficient evidence to support venue in Fond du Lac County where the case was being prosecuted. He also moved to dismiss one of the possession of oxycodone counts as multiplicitous. The circuit court denied both motions and submitted the case to the jury, which returned guilty verdicts on all counts.

After sentencing, Brantner filed a postconviction motion raising the same challenges to venue and multiplicity. Following a hearing on the matter, the circuit court denied the motion. Brantner now appeals.

On appeal, Brantner first contends that the State failed to establish venue in his case. He argues that there was insufficient evidence for the jury to conclude that he committed the charged crimes in Fond du Lac County.

"The term 'venue' refers to the locality of the prosecution; venue sets the particular judicial district in which a criminal charge is to be filed and in which it will be tried." ***State v. Anderson***, 2005 WI 54, ¶27, 280 Wis. 2d 104, 695 N.W.2d 731 (citation omitted). Although it is not an element of the crime, the State must prove venue beyond a reasonable doubt. ***State v. Lippold***, 2008 WI App 130, ¶10, 313 Wis. 2d 699, 757 N.W.2d 825. This can be done "by proof of facts and circumstances from which it may be reasonably inferred." ***Id.***

As relevant here, the State could prove venue beyond a reasonable doubt by showing that Brantner committed at least one element of the charged crimes in Fond du Lac County. WIS. STAT. § 971.19(1), (2); ***Lippold***, 313 Wis. 2d 699, ¶13. "We will not reverse a conviction based

upon the State's failure to establish venue unless the evidence, viewed most favorably to the [S]tate and the conviction, is so insufficient that there is no basis upon which a trier of fact could determine venue beyond a reasonable doubt." ***In Interest of Corey J.G.***, 215 Wis. 2d 395, 407-08, 572 N.W.2d 845 (1998).

Applying this standard, we conclude that there was sufficient evidence to establish venue in this case. As noted by the State, Brantner knew that he had pills in his boot at the time of his arrest in Kenosha County. He also knew that the detectives were taking him to Fond du Lac County pursuant to an arrest warrant. All Brantner had to do to avoid being charged with possession in Fond du Lac County was to disclose the pills at the time of his arrest.[2] He chose not to do so. By making that decision, Brantner maintained possession of the pills until they were discovered at the Fond du Lac County jail. Accordingly, a reasonable jury could determine venue in Fond du Lac County beyond a reasonable doubt.

Brantner next contends that two of his convictions were multiplicitous. Specifically, he complains that he was improperly charged twice for possessing oxycodone.

The issue of multiplicity arises when a defendant is charged in more than one count for a single offense. ***State v. Ziegler***, 2012 WI 73, ¶59, 342 Wis. 2d 256, 816 N.W.2d 238. The test to determine whether multiple counts are permissible is, first, whether the charges are identical in law and fact, and, second, whether the legislature intended to allow more than one unit of prosecution. *See* ***State v. Anderson***, 219 Wis. 2d 739, 746, 580 N.W.2d 329 (1998). If the

[2] Indeed, one of the detectives testified that if he had located the pills in Kenosha County, he "would have turned them over to one of the Kenosha County deputies that were standing there for their own processes" and there "would have been no reason" to charge Brantner in Fond du Lac County.

offenses are different in law or fact, then there is a presumption that the legislature intended multiple punishments. ***Id.*** at 751. The presumption may be rebutted only by showing clear intent to the contrary. ***Id.*** Questions of multiplicity and legislative intent are questions of law that we review de novo. *See* ***State v. Davison***, 2003 WI 89, ¶15, 263 Wis. 2d 145, 666 N.W.2d 1.

Here, we are satisfied that the counts of possessing oxycodone were different in fact. That is because each required proof of an additional fact that the other count did not, namely, the type of pills that Brantner possessed (i.e., 20mg oxycodone pills versus 5mg oxycodone pills). Brantner's possession of different types of pills suggests that he committed separate volitional acts to obtain them. Accordingly, we presume that the legislature intended multiple punishments for the behavior in question. *See* ***Anderson***, 219 Wis. 2d at 751. Because Brantner has not met his burden of overcoming this presumption, we reject his multiplicity challenge.[3]

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals

[3] To the extent we have not addressed any other argument raised by Brantner on appeal, the argument is deemed rejected. *See* ***State v. Waste Mgmt. of Wis., Inc.***, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) ("An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.").