

**SUPREME COURT OF WISCONSIN**

Case No.: 95-0314-CR

Complete Title  
of Case:

State of Wisconsin,  
Plaintiff-Respondent,  
v.  
Larry R. Dowe,  
Defendant-Appellant-Petitioner,

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REVIEW OF A DECISION OF THE COURT OF APPEALS  
Reported at: 197 Wis. 2d 848, 541 N.W.2d 218  
(Ct. App. 1995)  
PUBLISHED

Opinion Filed: January 24, 1997  
Submitted on Briefs:  
Oral Argument: September 10, 1996

Source of APPEAL

COURT: Circuit  
COUNTY: Waukesha  
JUDGE: Marianne E. Becker

JUSTICES:

Concurred:  
Dissented:  
Not Participating:

ATTORNEYS: For the defendant-appellant-petitioner there were briefs and oral argument by *Bryan J. Borman*, assistant state public defender.

For the plaintiff-respondent the cause was argued by *Stephen W. Kleinmaier*, assistant attorney general, with whom on the brief was *James E. Doyle*, attorney general.

Amicus curiae brief was filed by *Robert R. Henak* and *Shellow, Shellow & Glynn, S.C.*, Milwaukee for the Wisconsin Association of Criminal Defense Lawyers.

This opinion is subject to further editing  
and modification. The final version will  
appear in the bound volume of the official  
reports.

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STATE OF WISCONSIN

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**FILED**

**JAN 24, 1997**

Marilyn L. Graves  
Clerk of Supreme Court  
Madison, WI

REVIEW of a decision of the Court of Appeals. *Reversed and  
cause remanded.*

¶1 ANN WALSH BRADLEY, J. This case is before the court on a petition for review filed by the defendant, Larry R. Dowe. The defendant seeks review of a court of appeals' decision<sup>1</sup> affirming a non-final order of the circuit court for Waukesha County, Marianne E. Becker, Judge, denying his motion to dismiss.

The defendant argues that because possession of marijuana with intent to deliver<sup>2</sup> is a lesser-included offense of being a dealer in possession of marijuana without a tax stamp,<sup>3</sup> the State's act of charging him with both offenses constitutes double jeopardy.

¶2 In State v. Hall, No. 94-2848-CR (S. Ct. Jan. 24, 1997), this court held that the drug tax stamp statute is unconstitutional. Thus, we do not reach the double jeopardy

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<sup>1</sup> State v. Dowe, 197 Wis. 2d 848, 541 N.W.2d 218 (1995)

<sup>2</sup> Wis. Stat. § 161.41(1m)(h)1 (1991-92).

<sup>3</sup> Wis. Stat. § 139.95(2) (1991-92).

issue presented in this case, because the defendant cannot be prosecuted for being a dealer in possession of marijuana without a tax stamp. Instead, we reverse and remand to the circuit court for further proceedings on the charge of possession of marijuana with intent to deliver and with directions to dismiss with prejudice the drug tax stamp charge.

*By the Court.*—Reversed and cause remanded with directions.