COURT OF APPEALS DECISION DATED AND FILED

February 9, 1999

Marilyn L. Graves
Clerk, Court of Appeals of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 98-2398-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GARY MAHLUM,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Affirmed.*

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

PER CURIAM. Gary Mahlum was convicted of five counts of theft and five counts of felon in possession of a firearm stemming from his theft, at one time, of five handguns from one residence. Mahlum appeals on the grounds that he should have been convicted of only one count each of the two crimes. He contends that to hold otherwise violates his double jeopardy rights. We disagree;

the counts are not multiplicitous because each requires proof of different facts, and the legislature intended separate penalties. We therefore affirm.

Mahlum was arrested for traffic violations while driving a stolen vehicle. The vehicle was impounded and searched. Officers discovered five handguns.[1] The State subsequently charged Mahlum with five counts of felon in possession of a firearm, one for each handgun, in violation of § 941.29(a), STATS., and five counts of theft of a firearm, one for each handgun, in violation of § 943.20(1)(a), STATS.[2] Mahlum moved to dismiss all but one count each of theft and felon in possession of a firearm on the grounds that the additional four counts were multiplicitous and therefore violated his double jeopardy rights. The trial court denied his motion. Mahlum was convicted and sentenced on each of ten counts. He contends that he should have been convicted of only one count of each offense, that all the additional counts of each charge are identical in law and fact and that the legislature intended he be subject to only one punishment for each charge. The trial court rejected these arguments and we do also.

Both the state and federal constitutions protect a defendant from being punished twice for the same offense.[3] One of the protections embodied in the double jeopardy clause, and the one pertinent to this case, is "protection

[1] The handguns were: (1) a Ruger .44 Magnum Super Redhawk revolver; (2) a .357 caliber Blackhawk revolver; (3) a 9mm Lorcin semiautomatic; (4) an FIE .22 caliber revolver; and (5) a .45 caliber Hafdasa semiautomatic.

[2] Other charges filed against Mahlum and of which he was convicted are not at issue here.

[3] The double jeopardy clauses of the federal and state constitutions are the same in scope and purpose. *See* ***Day v. State***, 76 Wis.2d 588, 591, 251 N.W.2d 811, 812-13 (1977). Therefore, this court has accepted decisions of the United States Supreme Court as controlling the double jeopardy provisions of both constitutions. ***Id***.

against multiple punishments for the same offense." ***State v. Sauceda***, 168 Wis.2d 486, 492, 485 N.W.2d 1, 3 (1992) (citing ***North Carolina v. Pearce***, 395 U.S. 711, 717 (1969)). Multiplicitous charges result when a single criminal offense is charged in more than one count. ***State v. Grayson***, 172 Wis.2d 156, 159, 493 N.W.2d 23, 25 (1992). Such charges are impermissible because they violate the double jeopardy provisions of the Wisconsin and United States Constitutions. ***Id***.

Whether a defendant's double jeopardy rights are violated is a question of law we review independently. *See* ***Sauceda***, 168 Wis.2d at 492, 485 N.W.2d at 3. A defendant may be prosecuted for more than one crime arising from the same conduct without offending double jeopardy protections. ***Id***. at 493, 485 N.W.2d at 4. When a defendant is subjected to a single trial on multiple charges arising out of the same conduct, two questions must be answered: (1) are the two charges identical in law and fact; and (2) if they are not, did the legislature intend the multiple offenses to be brought as a single count. *See* ***State v. Anderson***, 219 Wis.2d 740, 747, 580 N.W.2d 329, 333 (1988). If we respond negatively to both questions, the charges are not multiplicitous. ***Id***. at 748-52, 580 N.W.2d at 333-35.

The first test is whether each offense requires proof of an additional element or fact that the other offense or offenses do not. There is no dispute here that the additional counts are identical in law, so we will address only whether they are different in fact. Multiple punishments are permissible if each offense requires proof of an additional element or fact that the other offense or offenses do not. ***Sauceda***, 168 Wis.2d at 493-94 n.8, 485 N.W.2d at 4 n.8. If the first part of the multiplicity test is satisfied, we begin the second part by presuming the legislature intended to permit cumulative punishments. ***State v. Carol M.D.***, 198 Wis.2d 162, 173, 542 N.W.2d 476, 480 (Ct. App. 1995). This presumption may

only be rebutted by a clear indication to the contrary. *See* ***Missouri v. Hunter***, 459 U.S. 359, 367 (1983). We consider four factors to determine legislative intent in a multiplicity analysis: (1) statutory language; (2) legislative history and context; (3) the nature of the proscribed conduct; and (4) the appropriateness of multiple punishment. *See* ***Grayson***, 172 Wis.2d at 160, 493 N.W.2d 25-26. We determine the legislature's intent by relying on a "common sense reading of the statute that will give effect to the object of the legislature and produce a result that is reasonable and fair to offenders and society." ***Id***. at 162, 493 N.W.2d at 26. If we determine that the legislature intended that the charges be brought as a single count, the charges are multiplicitous and impermissible, because they violate the intent of the legislature. *See* ***id***. at 159 n.3, 493 N.W.2d at 25 n.3.

FELON IN POSSESSION COUNTS

We confine our analysis to determining whether the counts are identical in fact. We conclude that they are not. Although the counts are not separate in time or of a significantly different nature, they require proof of additional separate facts.[4] The State was required to prove for each separate count that the named handgun was "a firearm" within the meaning of § 941.29, STATS. The trial court instructed the jury that to convict it had to find each of the five handguns was a "weapon which acts by the force of gunpowder." *See* WIS J I—CRIMINAL 1343 (1997). This is in accord with established law. *See* ***State v. Rardon***, 185 Wis.2d 701, 705, 518 N.W.2d 330, 331-32 (Ct. App. 1994). Therefore, for each count the State had to prove that the distinct identified handgun was a firearm. Proof that one of the handguns was a firearm could not be used to prove that another of the handguns was also a firearm. Because the charges are not identical in fact, the first part of the test is satisfied.

We next address whether Mahlum has clearly shown that the legislature did not intend to permit cumulative punishments. Without citation to any authority, Mahlum would have us conclude that the potential for multiple punishments far exceeds the level of punishment the legislature intended when felons possess multiple firearms. We cannot so conclude. The statute punishes possession of "a firearm,"[5] a reference to the singular. The statute is contained

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[4] As we read our supreme court's decisions, that is sufficient. *See* ***State v. Anderson***, 219 Wis.2d 740, 580 N.W.2d 329 (1998); ***State v. Rabe***, 96 Wis.2d 48, 291 N.W.2d 809 (1980).

[5] Section 941.29, STATS., provides in relevant part:

(continued)

within a chapter denominated "CRIMES AGAINST PUBLIC HEALTH AND SAFETY," and subsec. (2) of § 941.29, STATS., "is aimed at keeping firearms away from felons, because the legislature has determined that felons are more likely to misuse firearms." ***State v. Coleman***, 206 Wis.2d 199, 210, 556 N.W.2d 701, 705 (1996). Each handgun Mahlum possessed gave him another opportunity to misuse a firearm either by selling it on the black market or keeping it for his own criminal use. We conclude that the legislature intended to punish a felon separately for each firearm possessed.

THEFT COUNTS

We similarly conclude that the first part of the test is satisfied. To establish the grade of the offense,[6] the State had to prove, for each count, Mahlum stole that specific handgun and that it was a firearm. Evidence regarding one handgun could not be used as evidence regarding another. Since each theft charge required independent proof, the counts are not identical in fact.

Mahlum has again failed to show by clear evidence that the legislature did not intend multiple punishments. His argument is circuitous: the presumption that the legislature intended to permit cumulative punishments is

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> (2) A person specified in sub. (1) is guilty of a Class E felony if he or she possesses a firearm under any of the following circumstances:
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> (a) The person possesses a firearm subsequent to the conviction for the felony or other crime, as specified in sub. (1) (a) or (b).

[6] Section 943.20(3)(d)5, STATS., changes the grade of the offense when the item stolen is a firearm. *See* ***State v. Spraggin***, 71 Wis.2d 604, 615-16, 239 N.W.2d 297, 306 (1976). It was necessary for the jury to determine that each of the handguns stolen was indeed a firearm. ***Id***.

outweighed by the presumption that the legislature intended the statute to comply with the guarantee against double jeopardy. The statutory scheme evinces an intent to permit cumulative punishments. Section 943.20(3)(d)5, STATS., provides:

> (3) PENALTIES. Whoever violates sub. (1):
>
> ….
>
> (d) If the value of the property does not exceed $2,500 and any of the following circumstances exist, is guilty of a Class D felony:
>
> ….
>
> 5. The property is a firearm.

Use of the singular "a firearm" indicates an intent to permit a separate punishment for each firearm. Because each firearm stolen constitutes a separate and distinct threat to the public, separate punishment for each firearm is appropriate.

We hold that the multiple counts of the two charges each requires proof of separate and distinct facts and that the legislature intended to permit multiple punishments for each firearm.

By the Court.—Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.