COURT OF APPEALS
DECISION
DATED AND FILED

November 4, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 99-1132

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

VILLAGE OF PORT EDWARDS,

PLAINTIFF-RESPONDENT,

V.

GREG D. TERRY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Wood County: DENNIS D. CONWAY, Judge. *Affirmed.*

¶1 VERGERONT, J.[1] Greg Terry appeals a judgment of conviction for operating a motor vehicle while intoxicated (OWI). Terry contends the conviction and resulting forfeiture violated his constitutional right against double jeopardy because he had already been punished for the offense when the police held him in

[1] This appeal is decided by one judge pursuant to § 752.31(2)(c), STATS.

custody for twelve hours pursuant to § 345.24(1), STATS. We conclude the twelve-hour hold did not constitute punishment for purposes of double jeopardy and we therefore affirm.

¶2 Terry was arrested for OWI as a first offense in violation of PORT EDWARDS MUNICIPAL ORDINANCE no. 110, adopting § 346.63(1), STATS.[2] This was a civil rather than criminal offense because he was subject to only a forfeiture between $150 and $300. *See* § 346.65(2)(a), STATS.; *see also* § 939.12, STATS. After the arrest Terry was held in police custody for twelve hours pursuant to § 345.24(1), STATS., which provides:

> **Officer's action after arrest for driving under influence of intoxicant.** (1) A person arrested under s. 346.63(1) … or an ordinance in conformity therewith … may not be released until 12 hours have elapsed from the time of his or her arrest or unless a chemical test administered under s. 343.305 shows that the person has an alcohol concentration of less than 0.04, but the person may be released to his or her attorney, spouse, relative or other responsible adult at any time after arrest.

Terry testified at the motion hearing that he was not informed of any way in which he could be released sooner. He argues that, because he was not told he could be released to a responsible adult, the twelve hours he spent in police custody

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[2] Section 346.63(1), STATS., provides, in pertinent part:

> **Operating under influence of intoxicant or other drug.** (1) No person may drive or operate a motor vehicle while:
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> (a) Under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog, under the influence of any other drug to a degree which renders him or her incapable of safely driving, or under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving; or
>
> (b) The person has a prohibited alcohol concentration.

constituted punishment for purposes of double jeopardy, and the subsequent civil conviction and forfeiture, which he contends is also punishment for double jeopardy purposes, should be barred as a second punishment for the same offense.

¶3 The double jeopardy clauses of the United States and Wisconsin Constitutions[3] protect against multiple punishments for the same offense. *See* ***State v. Church***, 223 Wis.2d 641, 649, 599 N.W.2d 638, 642 (Ct. App. 1998), *review granted*, 225 Wis.2d 487, 594 N.W.2d 382 (1999). The issue presented in this case is whether Terry's twelve-hour confinement in police custody following his arrest for OWI constitutes punishment for purposes of double jeopardy. We conclude it does not.[4]

¶4 Whether the twelve-hour hold is considered punishment for double jeopardy purposes is a question of law, which we decide de novo. *See* ***State v. McMaster***, 206 Wis.2d 30, 36, 556 N.W.2d 673, 675-76 (1996). Although the twelve-hour hold authorized in § 345.24(1), STATS., is not labeled a criminal punishment, we must apply the two-prong test reiterated in ***McMaster*** to determine if it is punishment for purposes of double jeopardy. First we consider whether the legislature intended the twelve-hour hold to be remedial, and, if it did, we then consider whether there are aspects of the statute "that are so punitive either in effect or nature as to render the overall purpose to be one of punishment." ***McMaster***, 206 Wis.2d at 43-44, 556 N.W.2d at 679.

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[3] *See* U.S. CONST. amend. V; WIS. CONST. art. 1, § 8.

[4] The Village also argues that the forfeiture imposed for Terry's civil OWI conviction was not a criminal punishment for purposes of double jeopardy under ***State v. Thierfelder***, 174 Wis.2d 213, 495 N.W.2d 669 (1993). In light of our conclusion that the twelve-hour hold was not punishment, we need not decide whether the forfeiture in this case was punishment.

¶5 Terry concedes that the intended purpose of § 345.24(1), STATS., is to keep an intoxicated person from having access to a car until there has been a sufficient lapse of time to permit the person to become sober and that this purpose is remedial. However, he argues that the effect of the sanction in this case went beyond the purpose of the statute. Terry contends that, because he had a right to be released to a responsible adult and because he was not told of that right, the twelve-hour hold amounted to a sanction of incarceration, which, he argues, is ordinarily imposed as a penalty for criminal conduct.

¶6 We disagree that a person arrested for OWI has a right to be released to a responsible adult. Section 345.24(1), STATS., provides that the arrestee "may be released" to certain individuals, not that the police must release the arrestee to certain individuals. Terry asserts that the police were obligated to inform him of their option of releasing Terry to a responsible adult and he cites ***City of Madison v. Two Crow***, 88 Wis.2d 156, 276 N.W.2d 359 (Ct. App. 1979), *overruled on other grounds*, ***State v. Braunsdorf***, 98 Wis.2d 569, 575, 297 N.W.2d 808, 811 (1980), as support. That case interpreted a general statute governing the release of persons arrested for ordinance violations. The statute, § 66.114(1), STATS., provided that police "may accept from [the arrested] person a bond, in an amount not to exceed the maximum penalty for such violation, with sufficient sureties, *or* his own personal bond upon depositing the amount thereof in money, for his appearance in the court…." *See* ***Two Crow***, 88 Wis.2d at 162 n.5, 276 N.W.2d at 362 (emphasis added). We concluded that the choice of posting a bond or cash bail was with the accused and the police must inform the accused of his or her alternatives. *See* ***id.*** at 163-64, 276 N.W.2d at 363. The statute in this case does not involve an option for the defendant, but instead an option for the police—the police "may" release the person to a responsible adult. Therefore, the statute does

not require the police to inform the accused of the officer's option of releasing the accused.

¶7 Having decided that § 345.24(1), STATS., does not prohibit an officer from detaining an arrestee for twelve hours without informing the arrestee that the officer could release him or her to a responsible adult, we next consider whether the confinement authorized by this statute constitutes punishment for double jeopardy purposes. Terry suggests that because jail is a common sanction for criminal behavior, it is punishment in this case. However, both the supreme court and our court have, in other contexts, considered confinement to be remedial in certain circumstances. *See* ***State v. Carpenter***, 197 Wis.2d 252, 267-68, 541 N.W.2d 105, 111 (1995) (the indefinite period of confinement in a secure facility for sexually violent persons under ch. 980, STATS., is remedial and not punishment for purposes of double jeopardy); ***State v. Fonder***, 162 Wis.2d 591, 597-99, 469 N.W.2d 922, 926 (Ct. App. 1991) (prison disciplinary action that extends the inmate's mandatory release date is not punishment for double jeopardy purposes). We acknowledge that twelve hours in jail may serve some deterrent or punitive goals and may have some punitive effect, but that is not the test. Rather the test is whether the statute is so punitive in nature or effect as to render it punishment for purposes of double jeopardy. *See* ***McMaster***, 206 Wis.2d at 46, 556 N.W.2d at 680. The principal purpose of § 345.24(1)—keeping intoxicated persons from driving—is not punitive, and the fact that a punitive motive or effect may also be present does not make the action punishment. *See* ***Fonder***, 162 Wis.2d at 596, 496 N.W.2d at 925.

¶8 We conclude that § 345.24(1), STATS., does not constitute punishment for purposes of double jeopardy even though it permits an individual to be held in custody for twelve hours without the opportunity for release.

By the Court.—Judgment affirmed.

This decision will not be published. *See* RULE 809.23(1)(b)4, STATS.