

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 2, 2000

Cornelia G. Clark
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 WIS. STAT. § 808.10 and RULE 809.62.

No. 99-1533-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BOBBY L. DUPREE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. KREMERS, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Deininger, JJ.

¶1 PER CURIAM. Bobby L. Dupree appeals his conviction of possession of cocaine with intent to deliver contrary to WIS. STAT.

§ 961.41(1m)(cm)3. (1997-98),¹ possession of THC contrary to § 961.41(3g)(e), and failure to pay the controlled substances tax on the cocaine contrary to WIS. STAT. § 139.89. The issues on appeal are whether the trial court's jury instruction on the controlled substances tax offense impermissibly omitted a necessary element, whether that omission warrants a new trial in the interest of justice, and whether Dupree's conviction for both possession with intent to distribute and failure to pay the tax violates the constitutional proscription against double jeopardy. Because we conclude that the jury instruction issue was waived and there is controlling precedent governing the double jeopardy issue, we affirm.

¶2 Dupree objects to the form of the jury instruction provided on the offense of failure to pay the controlled substance tax. However, because Dupree did not object to this jury instruction at trial, we do not have the authority to reach the issue on appeal. *See State v. Schumacher*, 144 Wis. 2d 388, 409, 424 N.W.2d 672 (1988).

¶3 Dupree also argues that, although the issue was waived, we should exercise our powers of discretionary reversal under WIS. STAT. § 752.35 because the real controversy—whether or not he was a dealer—was not fully tried. We are unconvinced by this argument. The trial court properly instructed the jury on the dealer issue of WIS. STAT. § 139.87(2), even though the language was not what Dupree would now choose.

¶4 As a final argument, Dupree asserts that double jeopardy bars his conviction for both possession of cocaine with intent to deliver and violation of

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

the drug tax stamp law. Double jeopardy prevents a defendant from being convicted under more than one statute for the same criminal act if one crime is an included crime of the other. *See State v. Eastman*, 185 Wis. 2d 405, 411, 518 N.W.2d 257 (Ct. App. 1994).

¶5 The precise issue raised by Dupree was decided in *State v. Dowe*, 197 Wis. 2d 848, 541 N.W.2d 218 (Ct. App. 1995), *rev'd on other grounds*, 207 Wis. 2d 129, 557 N.W.2d 812 (1997). That decision stated that

possession of a controlled substance with intent to deliver is not a lesser-included offense of a tax stamp violation. The crime of possession with intent to deliver requires the State to prove, *inter alia*, that the defendant actually intended to deliver what he or she *knew* or believed to be [a controlled substance]. The tax stamp statute, by contrast, requires the State to prove, *inter alia*, that the defendant is a “dealer” within the meaning of § 139.87(2), STATS., and that the defendant has not paid the appropriate tax on the controlled substance Possession of a controlled substance with intent to deliver requires no such proof. From this comparison, it is self-evident that these crimes require the State to prove different elements.

Id. at 852 (citations omitted). The appellant admits that *Dowe* is still a valid precedent binding this court. In light of that decision, Dupree’s convictions are not barred by double jeopardy, and we will not reverse them on that basis. Accordingly, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

