

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 16, 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. 99-3310-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-APPELLANT,

V.

HELEN J. LECKER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Brown County:
WILLIAM C. GRIESBACH, Judge. *Reversed and cause remanded.*

¶1 PETERSON, J.¹ The State appeals an order dismissing two criminal charges against Helen J. Lecker for operating a motor vehicle: (1) while under the influence of intoxicants (OWI), contrary to WIS. STAT. § 346.63(1)(a);

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(f). All statutory references are to the 1997-98 edition.

and (2) with a prohibited alcohol concentration, contrary to WIS. STAT. § 346.63(1)(b). Lecker was also charged with two counts of causing great bodily harm by operation of a vehicle while under the influence of an intoxicant and with a prohibited alcohol concentration, contrary to WIS. STAT. § 940.25(1)(a), (1)(b). The circuit court dismissed the OWI and prohibited alcohol charges because it concluded that they were lesser-included offenses of the two injury-related charges. Because the dismissed charges are not lesser-included offenses, the order is reversed.

BACKGROUND

¶2 The complaint originally charged Lecker with the injury-related offenses. It alleged that in September 1999, Lecker had excessively used alcohol, drove her automobile through the barriers at a construction site in Ashwaubenon, and struck and seriously injured one of the workers. After the preliminary hearing, the State filed an amended information adding the OWI and prohibited alcohol offenses. Lecker objected on the grounds that those offenses are lesser-included of the injury-related offenses and therefore violate her constitutional right to be free from being twice placed in jeopardy for the same offense. The circuit court agreed and dismissed the additional charges.

DISCUSSION

¶3 Whether an individual has been twice placed in jeopardy for the same offense in violation of the Fifth Amendment to the United States Constitution and art. I, § 8 of the Wisconsin Constitution is a question of law this court reviews without deference to the circuit court. *See State v. Saucedo*, 168 Wis. 2d 486, 492, 485 N.W.2d 1 (1992).

¶4 The double jeopardy clause embodies three protections: "protection against a second prosecution for the same offense after acquittal; protection against a second prosecution for the same offense after conviction; and protection against multiple punishments for the same offense." *Id.* at 492 (citation omitted).

¶5 Lecker argues that she is being subjected to punishment for committing a greater offense and a lesser-included offense. This argument raises the third protection against multiple punishments for the same conduct. *See, e.g., State v. Lechner*, 217 Wis. 2d 392, 402, 576 N.W.2d 912 (1998). Wisconsin uses a two-fold analysis to determine whether multiple punishments may be imposed upon the defendant. The first component of the test involves the application of the "elements only" test set out in *Blockburger v. United States*, 284 U.S. 299, 304 (1932), and codified in WIS. STAT. § 939.66(1). *See Lechner*, 217 Wis. 2d at 405. If each charged offense is not considered lesser-included of the other, this court presumes that the legislature intended to permit cumulative punishments for both offenses. *See Saucedo*, 168 Wis. 2d at 495. The second component of the analysis involves an inquiry into other factors that could evidence a contrary legislative intent. *See id.*

A. Lesser-Included

¶6 In the context of a lesser-included challenge, the "elements only" test involves an analysis of whether each offense requires proof of an additional element that the other does not. *See id.* at 493-94 n.8. Applying that test to the offenses involved here, this court concludes that the OWI and prohibited alcohol offenses are not lesser-included of the injury-related offenses. There are two additional elements required for conviction of the OWI and prohibited alcohol

offenses that are not required for conviction of the injury-related offenses.² Both the OWI and prohibited alcohol offenses require proof that the actor (1) operated a *motor* vehicle, and (2) operated a motor vehicle on a highway or on premises held out for public use. *See* WIS. STAT. §§ 346.63(1), 346.61.

¶7 WISCONSIN STAT. § 340.01(35) defines "motor vehicle" as

a vehicle, including a combination of 2 or more vehicles or an articulated vehicle, which is self-propelled, except a vehicle operated exclusively on a rail. "Motor vehicle" includes, without limitation, a commercial motor vehicle or a vehicle which is propelled by electric power obtained from overhead trolley wires but not operated on rails. A snowmobile and an all-terrain vehicle shall only be considered motor vehicles for purposes made specifically applicable by statute.

¶8 WISCONSIN STAT. § 346.61 restricts the application of the OWI and prohibited alcohol charges to highways and

all premises held out to the public for use of their motor vehicles, all premises provided by employers to employees for the use of their motor vehicles and all premises provided to tenants of rental housing in buildings of 4 or more units for the use of their motor vehicles, whether such premises are publicly or privately owned and whether or not a fee is charged for the use thereof. Sections 346.62 to 346.64 do not apply to private parking areas at farms or single-family residences.

¶9 Convictions on the injury-related offenses do not require proof of either of these elements. An actor could be convicted on the injury-related offenses for (1) operating *any* vehicle, and (2) operating a vehicle *anywhere*. *See* WIS. STAT. § 940.25(1)(a), (1)(b). For a crime to be lesser-included of another, "it

² Lecker correctly concedes that the injury-related offense requires proof of an element not required for convictions of the OWI and prohibited alcohol charges: namely, that the actor's operation of the vehicle caused great bodily harm. *See* WIS. STAT. §§ 940.25(1)(a), (1)(b).

must be ‘utterly impossible’ to commit the greater crime without committing the lesser.” *Randolph v. State*, 83 Wis. 2d 630, 645, 266 N.W.2d 334 (1978) (citation omitted). That is not the case here. Therefore, the OWI and prohibited alcohol offenses are not lesser-included of the injury-related offenses.

B. Legislative Intent

¶10 Because OWI and prohibited alcohol offenses are not lesser-included, this court presumes that the legislature intended to permit cumulative punishments. See *Sauceda*, 168 Wis. 2d at 495. This presumption may be rebutted only if other factors clearly indicate a contrary legislative intent. See *State v. Kuntz*, 160 Wis. 2d 722, 755, 467 N.W.2d 531 (1991). Factors that may indicate a contrary legislative intent regarding multiple punishment include the language of the statutes, the legislative history, the nature of the proscribed conduct, and the appropriateness of multiple punishment. See *id.* at 756. Lecker has not attempted to identify any factors that might indicate a legislative intent contrary to allowing both convictions. This court will not abandon its neutrality to develop this argument for her. See *State v. Gulrud*, 140 Wis. 2d 721, 730, 412 N.W.2d 139 (Ct. App. 1987). Accordingly, the circuit court’s order is reversed and the cause is remanded for further proceedings.³

³ Because it is unnecessary, this court does not address the State’s alternative argument that, even if multiple convictions are not allowed, the State may still charge and prosecute Lecker for lesser-included offenses.

By the Court.—Order reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE
809.23(1)(b)4.

