

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 14, 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. 00-0074

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

COUNTY OF WASHINGTON,

PLAINTIFF-RESPONDENT,

v.

STEVEN R. SCHMIT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Washington County: DAVID C. RESHESKE, Judge. *Affirmed.*

¶1 NETTESHEIM, J.¹ Steven R. Schmit appeals from a forfeiture judgment of conviction for operating a motor vehicle while intoxicated (OWI) pursuant to a Washington county ordinance adopting WIS. STAT. § 346.63(1)(a).

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(g) (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

On appeal, Schmit contends that the County's dual charging of both OWI and a companion charge of operating a motor vehicle with a prohibited alcohol concentration (PAC) violated his due process rights and his protection against double jeopardy. Like the trial court, we disagree. We affirm the judgment.

FACTS AND TRIAL COURT PROCEEDINGS

¶2 The history of this case is not disputed. Schmit was arrested and charged with both OWI and PAC. He brought a motion to dismiss, challenging the dual prosecution of both charges. Schmit argued that WIS. STAT. § 885.235(1g)(c), which makes an alcohol concentration of 0.1 grams in 100 milliliters of blood prima facie evidence of operating under the influence of an intoxicant, allows for a finding of guilt on both charges on the same evidence. Schmit argued that this violated fundamental notions of fairness under double jeopardy and due process law. The trial court rejected Schmit's argument and denied his motion to dismiss.²

¶3 Thereafter, the parties entered into a stipulation reciting the underlying facts of Schmit's arrest, including a copy of the arresting officer's incident report. The stipulation further stated that these facts were sufficient to find Schmit guilty of either offense. However, if the court found Schmit guilty of OWI, the stipulation provided that the PAC charged would be dismissed. The stipulation also preserved Schmit's continuing objections as noted in his motion to dismiss. Based upon the stipulation, the trial court found Schmit guilty of OWI and dismissed the PAC charge.

² The appellate record does not include the trial court's decision.

DISCUSSION

¶4 On appeal, Schmit renews his due process and double jeopardy arguments. We reject this argument because *State v. Bohacheff*, 114 Wis. 2d 402, 407, 338 N.W.2d 466 (1983), has already answered the question against Schmit.

¶5 Double jeopardy protects against three interests: (1) protection against a second prosecution for the same offense after acquittal, (2) protection against a second prosecution for the same offense after conviction, and (3) protection against multiple punishments for the same offense. *See id.* Schmit does not identify which of these interests he is asserting in this case. Nonetheless, it is obvious that the first two protections are not in play. The County does not seek to prosecute Schmit after acquittal or conviction of the same offense. We therefore conclude that the double jeopardy protection that Schmit is asserting is the protection against multiple punishments for the same offense.

¶6 In *Bohacheff*, the supreme court addressed this aspect of double jeopardy protection. There, Bohacheff was dually charged with causing great bodily harm by operation of a motor vehicle while under the influence of an intoxicant and with a blood alcohol concentration of 0.1% or more pursuant to WIS. STAT. § 940.25(1)(a) and (b) (1981-82). *See Bohacheff*, 114 Wis. 2d at 404. Bohacheff argued that the dual prosecution violated his double jeopardy protections. *See id.* at 405. The supreme court disagreed. The court held that “the complaint does not violate double jeopardy protections because the statute subjects the defendant to only one conviction and one punishment.” *Id.*

¶7 Schmit argues that *Bohacheff* does not answer the question he raises in this case: whether an OWI charge and a PAC charge constitute the same offense because of WIS. STAT. § 885.235(1g)(c), which makes an alcohol

concentration of 0.1 grams or more prima facie evidence of intoxication. We disagree. The *Bohacheff* court said:

The defendant's position of multiple punishments rests on his assertion that (1)(a) and (1)(b) constitute one offense....

Since the court determines that the legislature did not authorize two convictions (and consequently no multiple punishments), there is, of course, no need for the court to resolve the second question posited by the parties, namely, whether the two statutory provisions set forth the same offense.

Bohacheff, 114 Wis. 2d at 408 n.6.

¶8 Contrary to Schmit's interpretation, we do not read *Bohacheff* to save the "same offense" issue for another day. Rather, the supreme court said that the statutory provision mandating only one conviction rendered it unnecessary to address that argument. That is the very situation presented by this case.³

CONCLUSION

¶9 Because Schmit was not exposed to multiple punishments, we need not address his argument that OWI and PAC constitute one offense by operation of WIS. STAT. § 885.235(1g)(c). We affirm the judgment.

By the Court.—Judgment affirmed.

³ Although Schmit also raises a due process argument, it is based on his core contention that WIS. STAT. § 885.235(1g)(c) renders OWI and PAC the same offense. As we have demonstrated, that is the very issue which the *State v. Bohacheff*, 114 Wis. 2d 402, 408 n.6, 338 N.W.2d 466 (1983), court said it did not have to address because the statute allowed for only one conviction.

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

