

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 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. 00-1160-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY L. DORSCHNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Affirmed.*

¶1 CANE, C.J.¹ Jeffrey Dorschner appeals a judgment convicting him of operating a motor vehicle while intoxicated, third offense, in violation of WIS.

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

STAT. § 346.63(1)(a). The State charged Dorschner with both operating a motor vehicle while intoxicated (OWI), pursuant to § 346.63(1)(a), and operating a motor vehicle with a prohibited alcohol concentration (PAC), pursuant to § 346.63(1)(b). Dorschner challenged the State's dual prosecution of both offenses on due process and double jeopardy grounds. The trial court rejected his argument, and subsequently Dorschner pled guilty to OWI and the PAC charge was dismissed.

¶2 The sole issue on appeal is whether the simultaneous prosecution under both WIS. STAT. § 346.63(1)(a) and (1)(b) violate notions of fundamental fairness and double jeopardy. Dorschner does not request this court to declare the statutes unconstitutional. Instead, he argues that the courts should be required to submit only one charge to the jury as a matter of fundamental fairness and avoidance of double jeopardy.

¶3 Since Dorschner filed his brief, this court has addressed and rejected the identical arguments in *State v. Raddeman*, 2000 WI App 190, 618 N.W.2d 258.² In *Raddeman*, the State charged the defendant with both OWI and PAC. Raddeman challenged the State's dual prosecution of both offenses on due process and double jeopardy grounds, which are the same arguments Dorschner makes in this case. This court concluded that the supreme court's decision in *State v. Bohacheff*, 114 Wis. 2d 402, 338 N.W.2d 466 (1983), was dispositive when it held there could be no double jeopardy because the legislature did not authorize

² This court notes that Dorschner's attorney has filed a notice of voluntary dismissal in light of *State v. Raddeman*, 2000 WI App 190, 618 N.W.2d 258. However, the notice does not contain Dorschner's signature as required by this court. Therefore, instead of waiting to learn if Dorschner signs the notice and because this court has already written the opinion, the opinion is released without acting on the notice of voluntary dismissal.

two convictions. Consequently, there could not be multiple punishments. *See Raddeman*, 2000 WI App at ¶8.

¶4 As in *Raddeman*, Dorschner also contends there is a due process violation because it is fundamentally unfair to require him to twice defend against the same charge. He reasons that the multiple charges increase the risk that he will be convicted of at least one of the charges even though he may prevail with the fact finder on the other charge. He also contends that the multiple charging procedure invites juror confusion.

¶5 This argument was specifically rejected in *Raddeman*. Again relying on *Bohacheff*, this court concluded that the dual prosecution procedure was fair to the offenders and society. *See Raddeman*, 2000 WI App at ¶¶ 12-13. This court also rejected any suggestion that the State should be required to make a pretrial election between the two charges and quoted the holding in *Bohacheff* where it said:

It is apparent from the statute that in allowing the prosecutor to proceed upon a violation of both paragraphs (a) or (b) for acts arising out of the same incident and in providing for two verdicts, the legislature intended not to authorize two convictions *but to ensure that the prosecutor would not be forced to elect the charge or the mode of proof before trial and risk a variance between the evidence and the charge.*

Id. at 416 (emphasis added).

¶6 Because both the supreme court in *Bohacheff* and this court again in *Raddeman* have declared the dual prosecution procedure set out in WIS. STAT.

§ 346.63(1)(c)³ fair to all concerned, this court also rejects Dorschner's due process challenge. In conclusion, the State's dual prosecution of Dorschner for both OWI and PAC does not violate his double jeopardy protection or his due process rights.

By the Court.—Judgment affirmed.

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

³ WISCONSIN STAT. § 346.63(1) provides in part:

(c) A person may be charged with and a prosecutor may proceed upon a complaint based upon a violation of par. (a) or (b) or both for acts arising out of the same incident or occurrence. If the person is charged with violating both pars. (a) and (b), the offenses shall be joined. If the person is found guilty of both pars. (a) and (b) for acts arising out of the same incident or occurrence, there shall be a single conviction for purposes of sentencing and for purposes of counting convictions under ss. 343.30(1q) and 343.305. Paragraphs (a) and (b) each require proof of a fact for conviction which the other does not require.

