COURT OF APPEALS
DECISION
DATED AND FILED

April 29, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP1612-CR

Cir. Ct. Nos. 2007CF138
2008CF52

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DANIEL P. CARD,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Marquette County: RICHARD O. WRIGHT, Judge. *Affirmed*.

Before Dykman, P.J., Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Daniel Card appeals an order allowing him to be retried on a charge that previously resulted in a hung jury. We affirm.

¶2 Card was charged with and tried on multiple counts arising out of a series of events relating to controlled substances being removed from a law enforcement evidence room. Pertinent here, Card was charged with one count of burglary and one count of possession of the controlled substance oxycodone without a prescription, both on the same day. Card is a sheriff's deputy. The State's burglary theory was that Card entered an evidence room without authorization and with intent to steal. The State's possession theory was that Card obtained oxycodone pills from the evidence room and, thus, possessed them.

¶3 The jury found Card guilty on the possession charge, but deadlocked 11 to 1 in favor of acquittal on the burglary charge. When the State sought to retry Card on the burglary charge, Card then moved for dismissal, arguing a double jeopardy violation. The circuit court denied the motion, and we granted leave to appeal.

¶4 Card first argues that retrial on the burglary charge is barred by the prohibition against double jeopardy. Card concedes that he could have been convicted of both possession and burglary. He concedes that under the "elements-only" test of ***Blockburger v. United States***, 284 U.S. 299, 304 (1932), he could have been convicted and punished for each crime following a single trial because each crime contains an element that the other does not. Card argues, however, that the ***Blockburger*** test alone is inadequate when a defendant faces successive trials. Card asserts that "a principal concern in barring double jeopardy" is the "ordeal of successive trials." According to Card, our supreme court has recognized that the United States Supreme Court has moved beyond the elements-only test in cases involving a second trial. We are not persuaded that retrial on the burglary charge would constitute a double jeopardy violation.

¶5 First, Card asserts that we should apply more than the ***Blockburger*** test, but he does not specify what the "more" is. Card places primary reliance on ***United States v. Dixon***, 509 U.S. 688 (1993), but his discussion focuses on a part of the lead opinion that was not joined by a majority of the court.[1] Card argues that ***Dixon*** "offers guidance on a more practical test in [Card's] situation," but Card does not tell us what that test is. Rather, he merely asserts that the facts of his case fit "within the framework" of ***Dixon***.

¶6 Moreover, it appears a majority of justices in ***Dixon*** agree that the ***Blockburger*** test is the complete test for purposes of measuring double jeopardy in second prosecutions. The non-majority part of the lead opinion that Card relies on, joined by two justices, ultimately applies only the ***Blockburger*** test, concluding: "Because Dixon's drug offense did not include any element not contained in his previous contempt offense, his subsequent prosecution violates the Double Jeopardy Clause." ***Dixon***, 509 U.S. at 700. And, at least three concurring justices applied only the ***Blockburger*** test. *See* ***Dixon***, 509 U.S. at 713-20 (Rehnquist, C.J., concurring in part and dissenting in part).

¶7 Card discusses other double jeopardy cases, but we fail to see that any of them stand for the proposition that the prospect of a second trial affects double jeopardy analysis. Rather, the proper question is whether jeopardy has

[1] In his opening brief, Card relies on portions of the lead opinion in ***United States v. Dixon***, 509 U.S. 688 (1993), by Justice Scalia, to support his argument for a standard beyond ***Blockburger***. However, in his reply brief, Card acknowledges that the section of the opinion he relies on was the opinion of only two justices. Although that discussion was contained in the lead opinion, the note at the beginning of the opinion clearly states that it is the opinion of the court only as to parts I, II, and IV, while Card relies on part III. ***Dixon***, 509 U.S. at 691.

terminated with respect to the particular crime that is the subject of the current prosecution.

¶8 Card's reliance on ***Green v. United States***, 355 U.S. 184 (1957), is misplaced, but the decision is nonetheless instructive. Card points to the following from ***Green***:

> [T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id. at 187-88. The double jeopardy *analysis* in ***Green***, however, did not involve the fact that Green was tried a second time. A second trial may be one of the evils that results from a double jeopardy violation under some circumstances, but it is not part of the double jeopardy analysis. Rather, as we explain below, the ***Green*** analysis focused on whether the jury had, in effect, acquitted Green of first-degree murder.

¶9 Green set fire to a building and the fire killed a woman. ***Id.*** at 185. He was charged with arson and first-degree murder. The jury convicted Green of arson, but passed up the first-degree murder charge in favor of a lesser-included second-degree murder conviction. ***Id.*** at 185-86. Green appealed his second-degree murder conviction, and that conviction was reversed. ***Id.*** at 186. Following remand, the Government again tried Green on the first-degree murder charge, and this time obtained a conviction. ***Id.***

¶10 The problem in ***Green*** was that Green's first jury agreed not to convict him of first-degree murder, but instead convicted him of the lesser-

included charge of second-degree murder. Under these circumstances, the Court deemed that jeopardy terminated because the jury's action was akin to a unanimous not guilty verdict for first-degree murder. ***Id.*** at 188-91. Had the jury convicted Green of arson, but deadlocked on the murder charges, there is no doubt that Green could have been tried a second time for first-degree murder, regardless of the fact that he had already faced a trial in which he had been convicted of the factually related crime of arson.

¶11 In sum, ***Green*** supports our focus on whether jeopardy terminated with respect to Card's burglary charge and not on the fact that Card will face a second trial.

¶12 Card relies on a statement by the Wisconsin Supreme Court in ***State v. Henning***, 2004 WI 89, 273 Wis. 2d 352, 681 N.W.2d 871. There, referring to ***Dixon***, the court stated that the United States Supreme Court "has been willing to move beyond a strict 'elements only' interpretation of ***Blockburger*** in cases involving a second prosecution." ***Henning***, 273 Wis. 2d 352, ¶18. However, ***Henning*** does not analyze the ***Dixon*** opinions to show why this is an accurate statement. More importantly, the ***Henning*** paragraph in which this characterization appears begins with the following statement: "In the context of a second prosecution, this court has adopted the ***Blockburger*** test to demarcate the boundary between lawful successive prosecutions from constitutional violations." ***Henning***, 273 Wis. 2d 352, ¶18. The ***Henning*** opinion clearly regards this as the applicable test in a case of successive prosecution. ***Id.***, ¶¶34-35.

¶13 Card argues that common sense should prevail, and that we should recognize that he has already faced a trial on the burglary charge, the result being a jury decision that he did not commit the crime. Card argues there are only two

possibilities that explain the verdicts: first, the jury concluded that Card came into possession of the pills because he took them from the evidence room (i.e., he committed the burglary) or, second, the jury thought that Card took possession of the pills after the pills left the evidence room (i.e., he did not commit the burglary). Under the first scenario, according to Card, the jury effectively acquitted him of the burglary charge and, therefore, double jeopardy bars retrial. The problem with this argument is that we know the jury was split on the topic. A deadlock, even one based on a lopsided vote, is not the equivalent of an acquittal. There is nothing unusual about facing a second trial when a jury deadlocks on a charge in a first trial.

¶14 We conclude that the ***Blockburger*** elements-only test is the appropriate measure for whether jeopardy terminated and, therefore, whether Card may be retried on the burglary charge. Because Card has already conceded that application of the ***Blockburger*** test would permit retrial, we need not analyze in detail why that is so.

¶15 Card's second argument is that retrial on the burglary charge is barred on a theory of issue preclusion. Card bases this argument on the premise that the jury's view of the evidence was the second possibility described above, that the jury believed Card did *not* take the pills from the evidence room but instead that he found the pills outside the evidence room. He argues that, under this scenario, retrial is barred because the jury has already determined the factual issue of whether Card took the pills from the evidence room.

¶16 This argument fails for much the same reason as Card's double jeopardy argument. It is simply wrong to say that the jury reached an agreement. To reach a guilty verdict on the possession charge, the jury was not required to

reach any conclusion whatsoever on which way Card first came into possession of the pills. The jury might recognize that both possibilities are at least plausible on the evidence, but it was not required to choose between them. All the jury was required to find was that Card had possession of the pills.

¶17 Therefore, to suggest that the jury's finding of guilt on the possession charge necessarily implies a unanimous view of any fact related to the evidence on the burglary charge is incorrect. Indeed, in this case we know that is not true because the record shows that the jury deadlocked on this question. Accordingly, we reject Card's issue-preclusion argument.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5. (2007-08).