

WISCONSIN SUPREME COURT

October 3, 2019

9:45 a.m.

No. 2018AP53-CR

State v. Dennis Brantner

This is a review of a decision of the Wisconsin Court of Appeals, District II (headquartered in Waukesha), that summarily affirmed a Fond du Lac County Circuit Court decision, Judge Peter L. Grimm, presiding, that found the defendant, Dennis Brantner, guilty of three felony counts of possession of narcotic drugs, one misdemeanor count of possession of a controlled substance, one misdemeanor count of possessing an illegally-obtained prescription drug, and five counts of felony bail jumping.

May the State charge someone twice for possessing different doses of the same drug at the same time, as opposed to charging a single count based on the aggregate amount? This is the question of double jeopardy law before the Supreme Court in this case. This case also presents the Supreme Court with an opportunity to clarify the analytical framework for applying the Wisconsin Constitution's requirement that criminal prosecutions take place in the county where they occurred.

On March 27, 2015, Brantner appeared in the Kenosha County circuit court. As he was leaving the courthouse, detectives from the Fond du Lac County Sheriff's Office executed an arrest warrant against him. The detectives handcuffed him, asked him if he had anything on his person about which they should know, and patted him down. Brantner did not disclose that he possessed an assortment of pills in a plastic bag that was inside his left boot. The detectives drove Brantner to the Fond du Lac County jail.

At the jail, deputies booked Brantner. As part of the booking process, Brantner was directed to remove his clothing. When Brantner removed his left boot, the booking officer discovered the pills, which included thirty-five 20mg oxycodone pills and two 5mg oxycodone pills. Brantner did not have a prescription for any of the pills. The State charged Brantner with the counts identified above. Of importance to this case is that the State charged Brantner with two separate counts relating to the oxycodone pills.

At trial, Brantner moved for a directed verdict on the ground that there was insufficient evidence to support venue in Fond du Lac County, arguing that the possession had occurred in Kenosha County prior to his arrest. Brantner also moved to dismiss one of the oxycodone possession counts on the ground that the two counts were multiplicitous (i.e., that the State was seeking to punish him twice—through two separate counts—for the same offense, in violation of the federal and state double jeopardy clauses). The circuit court denied both motions. The jury subsequently found Brantner guilty on all counts.

Brantner appealed. With respect to the venue issue, the Court of Appeals said Brantner knew at the time of his arrest that he had the pills in his boot and that the detectives were going to take him to Fond du Lac County to be booked based on the arrest warrant. The Court of Appeals reasoned that if Brantner had wanted to avoid being charged with possession in Fond du Lac County, he could have disclosed the pills to the detectives while still in Kenosha County. Since Brantner did not do so, he maintained possession of the illegal pills until they were discovered in the Fond du Lac County jail, therefore providing sufficient support to laying venue in that county.

As to Brantner's argument that the two oxycodone charges were multiplicitous, the Court of Appeals said that multiplicity occurs when a defendant is charged with more than one count for a single offense. A "single offense" must be identical in law and fact. If there are differences in law or fact between counts, then there is a presumption that the law intends separate punishments. Here, the Court of Appeals concluded that the two oxycodone counts were different in fact because the pills differed in dosage and were therefore different types of pills. The Court of Appeals presumed that Brantner would have had to obtain these different types of pills by different means, and so the offenses committed to obtain the pills were separate.

Brantner petitioned the Supreme Court for review, seeking clarification of the same issues argued on appeal: the venue issue—specifically where venue should lie where the police arrest a person in one county, transport the person to another county, and then discover concealed controlled substances; and the multiplicity issue—whether possession of two different dosages of the same illicitly-obtained drug are identical offenses or separate offenses under the law.

The Supreme Court is expected to resolve the following issues:

1. Do the United States and Wisconsin Constitutional protections against double jeopardy bar the State from punishing a criminal defendant twice for violations of Wis. Stat. § 961.41(3g)(am) for possessing pills containing different doses of the same substance at the same time?
2. When an individual is arrested in one county with controlled substances on his person and transported in police custody to a different county where the substances are removed from the individual's person during the booking process, does a trial for possession of the controlled substances in the destination county violate the individual's rights under Article I, Section VII of the Wisconsin Constitution and Wis. Stat. § 971.19?