

No. SC90444

In the
Missouri Supreme Court

STATE OF MISSOURI,

Appellant,

v.

GAIL L. DAWS,

Respondent.

Appeal from Platte County Circuit Court
Sixth Judicial Circuit
The Honorable Abe Shafer, Judge

APPELLANT'S SUBSTITUTE REPLY BRIEF

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ARGUMENT

The *Blockburger* test for a lesser-included offense requires an examination of the statutory elements – not the underlying evidence used to prove those elements, and a subsequent prosecution is barred only if the elements of the alleged lesser-included offense are the same as those required to prove the greater.

In arguing that double jeopardy barred the subsequent prosecution for resisting arrest, Respondent makes three arguments. First, she argues that the offenses need not be “absolutely identical” for one to constitute a lesser-included offense pursuant to *Blockburger*. Second, she argues that, even if the elements must be the same, the elements of both failure to yield and resisting arrest are the same because a statutory presumption in the resisting arrest statute is a de facto element of resisting arrest. Finally, Respondent argues that the plain language of § 556.046.1(1) requires the court to examine the evidence in the case to determine whether one offense is included within the other. But because Respondent’s arguments are in direct conflict with U.S. Supreme Court precedent regarding double jeopardy, this Court should reject them.

A. The statutory elements of the two offenses at issue must be the same for one to be considered a lesser-included offense under *Blockburger*.

Respondent contends that “[i]n analyzing the different elements of the statutes, Missouri law does not require that the elements of both offenses be absolutely

identical.” (Resp. Br. 11). She then relies on *State v. McLemore*, 782 S.W.2d 127 (Mo. App. E.D. 1989), which found a double jeopardy violation in a subsequent prosecution case because the language of the city ordinance and state statute at issue were “functionally equivalent.” *Id.* at 129. But *McLemore* is inconsistent with the current law of double jeopardy.

In reaching its holding, the *McLemore* Court acknowledged that its “functional equivalency analysis . . . may not square with the double jeopardy analysis, which typically requires a comparison of the elements of each offense.” *Id.* The court recognized that there were elements of the ordinance that were not required to prove a violation of the statute, and that there were elements of the statute not required to prove a violation of the ordinance. *Id.* at 130-131. Nevertheless, the court determined that there was no double jeopardy violation because “neither law nor logic warrants such a mechanical application of double jeopardy principles.” *Id.* at 131. But *McLemore* was not employing the correct standard in analyzing the double jeopardy claim. The court’s opinion stated that “[b]asically, the Double Jeopardy Clause bars double prosecution for the same conduct.” *Id.* at 130.

But “[t]he ‘same-conduct’ rule . . . is wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy.” *U.S. v. Dixon*, 509 U.S. 688, 704 (1993). “The question is whether the charges are identical and violate double jeopardy, or whether each offense necessitates proof of an

essential element not required by the other.” *State v. Hill*, 970 S.W.2d 868, 870 (Mo. App. W.D. 1998) (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

“In determining double jeopardy, Missouri follows the separate or several offense rule rather than the same transaction rule.” *State v. Treadway*, 558 S.W.2d 646, 651 (Mo. banc 1977).¹ “This means that a defendant can be charged with and convicted of several offenses which arise from the same transaction, incident or set of facts, without violation of double jeopardy.” *Id.* “Indeed, the very same act can support multiple convictions without infringement of double jeopardy so long as the convictions rest on separate offenses.” *Id.*

“The double jeopardy doctrine is directed to the identity of the offense, and not to the act.” *Id.* “In the determination of whether several charges from one act or transaction are identical, our courts look to whether each offense necessitates proof of an essential fact or element not required by the other; if so, there is no identity of offense.” *Id.*

The law regarding double jeopardy in both Missouri and the U.S. Supreme Court is that the elements of the two crimes must be the same, not just “functionally

¹ *Treadway* was subsequently disapproved of by *Sours v. State*, 593 S.W.2d 208 (Mo. banc 1980). But *Sours* was heavily criticized and essentially overturned by the U.S. Supreme Court in *Missouri v. Hunter*, 459 U.S. 359, 364-365 (1983).

equivalent.” To the extent *McLemore* holds differently, it has been effectively overruled by subsequent case law and should not be followed. *See e.g. State v. Burns*, 877 S.W.2d 111, 112 (Mo. banc 1994).

B. The evidentiary presumption established in the resisting arrest statute does not constitute an element of the offense.

Respondent next argues, in accordance with the Western District’s decision in *State v. Clark*, 263 S.W.3d 666 (Mo. App. W.D. 2008), that the presumption outlined in § 575.150.3 “defines and incorporates a failure to yield as evidence of elements of resisting arrest.” (Resp. Br. 13). But this assertion is incorrect.

Under § 575.150.3, “[a] person is presumed to be fleeing a vehicle stop if that person continues to operate a motor vehicle after that person has seen or should have seen clearly visible emergency lights or has heard or should have heard an audible signal emanating from the law enforcement vehicle pursuing that person.” But this presumption is not an element of the offense of resisting arrest.

The purpose of the presumption laid out in § 575.150.3 appears to be for judicial review. *See State v. Taylor*, 778 S.W.2d 276, 279 (Mo. App. W.D. 1989) (finding that presumption in forgery cases that person in possession of forged instrument was the person that forged it was applicable only to judicial review of a claim of insufficient evidence of knowledge of the document’s falsity and not something considered by the jury); *see also State v. St. George*, 215 S.W.3d 341,

347 (Mo. App. S.D. 2007) (Southern District used presumption in § 575.150.3 to uphold resisting arrest conviction against challenge based upon insufficient evidence).

Consistent with this purpose, the presumption is not submitted to the jury as an element of the offense in the verdict-director at trial. MAI-CR3d 329.60. In fact, at no point is this presumption submitted to the jury in any form. *Cf.* MAI-CR3d 310.04 (submits presumption of intoxication pursuant to § 577.037.1 in a separate instruction if requested).

Because the evidentiary presumption in § 575.150.3 does not constitute an element of resisting arrest, Respondent, as well as the court in *Clark*, are incorrect to rely on it to support a double jeopardy claim.²

C. Section 556.046.1(1) is a codification of *Blockburger* and does not have a separate meaning.

Respondent argues that Appellant is seeking to reinterpret § 556.046.1(1) “to mean the exact opposite of what it plainly says.” (Resp. Br. 17). But Appellant does not seek to reinterpret the statute; rather, Appellant simply seeks to apply the statute in a manner that is consistent with this Court’s interpretation of the statutory language.

² It should be noted that, because the jury is not instructed as to this presumption, it cannot run afoul of the U.S. Supreme Court’s holding in *Francis v. Franklin*, 471 U.S. 307 (1985), precluding the State’s use of mandatory presumptions to establish elements of a charged offense.

As noted in Appellant’s opening brief, this Court has repeatedly held that § 556.046.1(1) is simply a codification of the *Blockburger* test. *State v. Burns*, 877 S.W.2d 111, 112 (Mo. banc 1994); *State v. Villa-Perez*, 835 S.W.2d 897, 903 (Mo. banc 1992); *State v. McTush*, 827 S.W.2d 184, 188 (Mo. banc 1992); *State v. McCrary*, 621 S.W.2d 266, 269 (Mo. banc 1981).

And, while *Blockburger* also spoke in terms of “facts,” the U.S. Supreme Court has repeatedly clarified that such “facts” are nothing more than the statutory elements of the offenses at issue. *Illinois v. Vitale*, 447 U.S. 410, 416 (1980) (“the *Blockburger* test focuses on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial. . . . if each *statute* requires proof of an additional fact which the other does not, the offenses are not the same under the *Blockburger* test.” (emphasis in original)); and *Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975) (“the Court’s application of the test focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes.”).

According to *Vitale*, it is irrelevant whether the State intends to use the same evidentiary facts to prove the offenses at both the prior and subsequent prosecution. In *Vitale*, the defendant, while driving a vehicle, struck two small children, killing both. *Vitale*, 447 U.S. at 411. An officer at the scene of the accident issued a traffic

citation charging the defendant with failing to reduce speed to avoid an accident. *Id.* The defendant was subsequently charged with two counts of involuntary manslaughter for “recklessly driving a motor vehicle” and causing the death of the two children. *Id.* at 412-413. The defendant moved to dismiss the manslaughter charges on the basis of the Double Jeopardy Clause, arguing that the State would prove the reckless element by proving the defendant’s failure to reduce speed. *Id.* at 413.

The U.S. Supreme Court held that “if manslaughter by automobile does not always entail proof of a failure to slow, then the two offenses are not the ‘same’ under the *Blockburger* test.” *Id.* at 419. “The mere possibility that the State will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution.” *Id.*

Here, while the State may rely on the same evidentiary facts that would have been used to prove Respondent’s failure to yield charge at trial, that alone does not render failure to yield a lesser-included offense of resisting arrest because resisting arrest does not always entail proof of a failure to yield.

Respondent asserts that “[t]here is no reasonable scenario in which a person can commit the offense of resisting a lawful traffic stop without committing the elements of failure to yield to an emergency vehicle.” (Resp. Br. 18). But Respondent is incorrect. In fact, an extremely common scenario exists wherein a person commits the

offense of resisting a lawful traffic stop through flight without simultaneously committing the elements of failure to yield to an emergency vehicle. Offenders frequently flee an attempted traffic stop by pulling over, stopping their own vehicles, and then exiting the car and continuing to flee the law enforcement officer on foot. In this scenario, the person has certainly committed the crime of resisting arrest, but has not violated the statute proscribing failure to yield because the person, in fact, pulled the vehicle over and stopped it in accordance with § 304.022.

But this scenario, while perhaps the most common, is not the only way in which a person can commit resisting arrest without simultaneously committing failure to yield. Failure to yield to an emergency vehicle requires the presence of an emergency vehicle. This is simply not required to establish that a person resisted a lawful traffic stop. While generally law enforcement is present in a vehicle when stopping another vehicle, this is not always the case. Law enforcement can stop a vehicle while on foot, or even horseback. Nothing in the resisting arrest statute requires the presence of an emergency vehicle.

Additionally, nothing in the resisting arrest statute requires that an officer operate his lights and/or siren when attempting the vehicle stop. Again, while this is the typical scenario, a stop can be accomplished by other means, including, for example, verbal commands and simple hand gestures. Because there are multiple

scenarios wherein a person can commit resisting arrest without also committing failure to yield, failure to yield is not a lesser-included offense of resisting arrest.

This Court's opinion in *Peiffer v. State*, 88 S.W.3d 439 (Mo. banc 2002), does not change this result. What *Peiffer* stands for is that a court, in employing the "same elements" test, is to examine the two crimes, *as charged*, which is not the same as examining the underlying facts used to prove the charged crimes. This is because many crimes can be committed in a variety of different ways, which renders the elements slightly different, depending upon the method of commission the State has charged. But the bottom line is that a reviewing court is still to analyze the elements of the offenses and not the evidentiary facts the State uses to prove the existence of those elements. *Accord, Vitale*, 447 U.S. at 421 (holding that, if the State relied on a prior conviction as proof of one of the elements in the subsequent prosecution arising out of the same facts, where the subsequent charge could be committed in a variety of manners, the Double Jeopardy Clause would be violated).

Here, if the manner in which the State charged Respondent with resisting arrest could not be committed without Respondent also committing the crime of failure to yield – independent of the evidence used to support the charges, then Respondent's right to be free from double jeopardy would be violated. But because the crime of failure to yield is not necessarily established through the elements of resisting arrest with which Respondent was charged, she suffered no violation of her right to be free

from double jeopardy, and the trial court's judgment dismissing the resisting arrest charge should be reversed.

CONCLUSION

The trial court erred in dismissing the State's charge of resisting arrest against Respondent. The trial court's ruling should be reversed and the case remanded to allow the State to proceed against Respondent on the resisting arrest charge.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 2,579 words, excluding the cover, certification and appendix, as determined by Microsoft Word 2003 software; and
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed this _____ day of March, 2010, to:

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