

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 BRIEF

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JURISDICTIONAL STATEMENT

This appeal is from the dismissal of a Platte County charge of the class D felony of resisting arrest, § 575.150, RSMo 2000. The dismissal constitutes a final judgment insofar as it “has the effect of foreclosing any further prosecution of the defendant on a particular charge[.]” *State v. Burns*, 994 S.W.2d 941, 942 (Mo. banc 1999). After a decision by the Western District Court of Appeals, this Court granted transfer pursuant to Rule 83.04. Therefore, this Court has jurisdiction.

STATEMENT OF FACTS

Respondent, Gail L. Daws, was charged in Platte County Circuit Court with one count of the class D felony of resisting arrest, § 575.150, RSMo 2000, and one count of driving while revoked, § 302.321, RSMo 2000. (L.F. 7-8).¹ On April 17, 2008, the trial court, with Judge Abe Shafer presiding, held a hearing on Respondent's Motion to Dismiss with Prejudice. (Tr. 3). On April 17, 2008, the trial court granted Respondent's motion and dismissed the State's charge of resisting arrest. (L.F. 5; Tr. 10). The same day, Respondent pleaded guilty to driving while revoked. (L.F. 5; Tr. 10).

On January 20, 2008, two law enforcement officers attempted to lawfully stop Respondent's vehicle, but Respondent fled from the officers on Interstate 435 while traveling at speeds in excess of 100 miles per hour and disregarding traffic signals.² (L.F. 7). On January 30, 2008, the State filed a criminal complaint against Respondent, charging her with felony resisting arrest and driving while revoked. (L.F. 1). On February 27, 2008, Respondent appeared in traffic court and was advised that she was charged with failure to yield to an emergency vehicle based on the events of

¹ The record on appeal consists of a pre-trial hearing transcript (Tr.), and a legal file (L.F.).

² These facts are taken from the information filed by the State on April 3, 2008. (L.F. 7).

January 20, 2008. (L.F. 12, 14). On March 5, 2008, Respondent pleaded guilty to the class A misdemeanor of failure to yield to an emergency vehicle, in violation of § 304.022, RSMo 2000. (L.F. 12-14). On April 3, 2008, the State filed an information against Respondent, charging her with felony resisting arrest and driving while revoked. (L.F. 7).

One week later, Respondent filed a Motion to Dismiss with Prejudice the charge of resisting arrest. (L.F. 9-14). The motion alleged that allowing the State to proceed with the resisting arrest charge violated her right to be free from double jeopardy based upon the fact that she previously pled guilty to failure to yield to an emergency vehicle, an offense that Respondent alleged constituted a lesser-included offense of resisting arrest. (L.F. 9-10). The trial court held a hearing on the motion wherein the State argued that each offense contained an element that the other did not; thus, failure to yield to an emergency vehicle could not be a lesser-included offense of resisting arrest. (Tr. 5). The trial court rejected the State's argument and dismissed the resisting arrest charge. (Tr. 10; L.F. 5).

On April 25, 2008, the State filed a motion to reconsider and set aside the dismissal. (L.F. 17-22). The court held a hearing on the State's motion on June 12, 2008. (Tr. 15; L.F. 6). The court overruled the State's motion, finding that "it's just not fair and it's not right" for the State to continue to prosecute Respondent for

resisting arrest following her guilty plea to failure to yield to an emergency vehicle.
(Tr. 16-17). The State appealed.

POINT RELIED ON

The trial court erred in dismissing Count 1 of the information, charging Respondent with felony resisting arrest, on the ground that the prosecution violated Respondent’s right to be free from double jeopardy because under the “same element” test pursuant to *Blockburger v. U.S.*, the class A misdemeanor of failure to yield to an emergency vehicle is not a lesser-included offense of the class D felony of resisting arrest, in that each offense contains at least one element not included in the other offense; thus, the State is not precluded from subsequently prosecuting Respondent for resisting arrest even though the charge arose from the same set of facts as the prior conviction for failure to yield.

Blockburger v. United States, 284 U.S. 299 (1932).

United States v. Dixon, 509 U.S. 688 (1993).

State v. White, 931 S.W.2d 825 (Mo. App. W.D. 1996).

State v. Clark, 263 S.W.3d 666 (Mo. App. W.D. 2008).

§ 304.022, RSMo 2000.

§ 575.150, RSMo 2000.

ARGUMENT

The trial court erred in dismissing Count 1 of the information, charging Respondent with felony resisting arrest, on the ground that the prosecution violated Respondent’s right to be free from double jeopardy because under the “same element” test pursuant to *Blockburger v. U.S.*, the class A misdemeanor of failure to yield to an emergency vehicle is not a lesser-included offense of the class D felony of resisting arrest, in that each offense contains at least one element not included in the other offense; thus, the State is not precluded from subsequently prosecuting Respondent for resisting arrest even though the charge arose from the same set of facts as the prior conviction for failure to yield.

The trial court dismissed the resisting arrest charge against Respondent pursuant to Respondent’s motion, which alleged that double jeopardy barred the prosecution based upon Respondent’s previous guilty plea to failure to yield to an emergency vehicle – an offense Respondent alleged constituted a lesser-included offense of resisting arrest. But because the trial court failed to apply the “same element” test outlined by the United States Supreme Court in *Blockburger*, its dismissal of the resisting arrest charge was erroneous. And because the “same element” test reveals that failure to yield to an emergency vehicle is not a lesser-included offense of resisting arrest, the dismissal should be reversed and the case remanded to allow the prosecution to proceed.

A. Standard of review.

Whether the Double Jeopardy Clause is implicated “is a question of law, which this court reviews *de novo*.” *State v. Glasgow*, 250 S.W.3d 812, 813 (Mo. App. W.D. 2008). When an appellate court engages in *de novo* review, “no deference [is] paid to the trial court’s determination of the law.” *State v. Williams*, 24 S.W.3d 101, 110 (Mo. App. W.D. 2000).

B. Under the “same element” test pursuant to *Blockburger*, the subsequent prosecution of resisting arrest was not barred by the double jeopardy clause.

“The Fifth Amendment to the United States Constitution establishes that no person shall ‘be subject for the same offense to be twice put in jeopardy of life or limb.’” *Peiffer v. State*, 88 S.W.3d 439, 442 (Mo. banc 2002). “The Fourteenth Amendment renders this protection against double jeopardy applicable to the states.” *Id.* “This constitutional safeguard protects defendants from successive prosecutions for the same offense after an acquittal or conviction and prohibits multiple punishments for the same offense.”³ *Id.*

³ Respondent’s motion to dismiss invoked not only the double jeopardy clause of the United States Constitution, but also Article I, section 19 of the Missouri Constitution. “Article I, Section 19 of the Missouri Constitution states, ‘nor shall any person be put again in jeopardy of life or liberty for the same offense, after being once *acquitted by a jury*.’” *State v. Dennis*, 153 S.W.3d 910, 917 (Mo. App. W.D. 2005) (emphasis

“[T]he proper method for addressing a claim that successive prosecutions constitute double jeopardy is determined by application of what is known as the ‘Blockburger test.’” *State v. White*, 931 S.W.2d 825, 828 (Mo. App. W.D. 1996). “That test, also called the ‘same element’ test, was first set forth in *Blockburger v. United States*, 284 U.S. 299, 304 (1932).” *Id.* “The pertinent inquiry in double jeopardy claims . . . is whether each offense contains an element not contained in the other; if not, the Double Jeopardy Clause bars a successive prosecution.” *Peiffer*, 88 S.W.3d at 444.

Here, the trial court did not apply the “same elements” test; rather, the court seemed to employ a “same conduct” analysis, which was rejected by the U.S. Supreme Court in *United States v. Dixon*, 509 U.S. 688 (1993).

Before granting Respondent’s motion to dismiss, the court questioned whether both the failure to yield and resisting arrest charges “occur[red] out of the same incident.” (Tr. 4). The court also asked the prosecutor “at what point did [Respondent] stop committing resisting and and [sic] start committing failure to

added). But because Respondent pled guilty, the double jeopardy clause of the Missouri Constitution has no application and could not operate to bar the subsequent prosecution. *Id.* Thus, to the extent the trial court’s decision to dismiss was based upon the Missouri Constitution, it is erroneous and should be reversed.

yield?” (Tr. 6). It does not appear from the record that the court ever compared the elements of the two crimes before granting Respondent’s motion to dismiss. (Tr. 10).

In overruling the State’s motion to reconsider and set aside the dismissal, the trial court indicated its belief “that it’s just ultimately fair that when a person pleads guilty and the prosecutors prosecute somebody for a crime . . . , [t]hat the person has the right to think they have taken care of the matter and they spent their time in jail.” (Tr. 16). The court stated that for the prosecutor to later charge the defendant with a different offense arising out of the same incident was “just not fair and it’s not right in my opinion.” (Tr. 16-17).

In *Grady v. Corbin*, 495 U.S. 508 (1990), the United States Supreme Court flirted with the idea of adopting a “same conduct” test. “The *Grady* test prohibited ‘a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted.’” *State v. Burns*, 877 S.W.2d 111, 112 (Mo. banc 1994) (quoting *Grady*, 495 U.S. at 510). But in *Dixon*, “[t]he Court rejected the ‘same-conduct’ analysis of *Grady*, and reaffirmed the ‘same-element’ analysis of *Blockburger*.” *Id.*; *Dixon*, 509 U.S. at 704.

Here, rather than examining the “fairness” of successive prosecutions arising out of the same conduct, the trial court should have compared the statutory elements of the two offenses (failure to yield to an emergency vehicle and resisting arrest) to

determine whether one offense was included within the other. Because the trial court failed to conduct the proper analysis, and because under the *Blockburger* test, the subsequent prosecution was not barred by the double jeopardy clause, the trial court's decision granting Respondent's motion to dismiss should be reversed.

Had the trial court conducted the proper analysis, it would have discovered that failure to yield to an emergency vehicle is *not* a lesser-included offense of resisting arrest.

In *Blockburger*, the Court recognized that “[a] single act may be an offense against two statutes[.]” *Blockburger*, 284 U.S. at 304. The Court held that “where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.” *Id.* “The *Blockburger* test asks whether each offense contains an element not contained in the other; if not, the Double Jeopardy Clause bars a successive prosecution.” *Burns*, 877 S.W.2d at 112. “Applying *Blockburger* requires a comparison of the elements of the offenses.” *Id.*

Section 304.022, RSMo 2000 (failure to yield) has three elements: (1) the immediate approach of an emergency vehicle upon the vehicle of another; (2) the emergency vehicle must be employing either audible sirens or flashing red or blue lights; and (3) the vehicle approached fails to yield the right-of-way to the emergency

vehicle by pulling as far over to the right as possible and then stopping and remaining until the emergency vehicle has passed unless otherwise directed by a police or traffic officer.

Section 575.150, RSMo 2000 (felony resisting arrest), as charged, has five elements: (1) a law enforcement officer must attempt to lawfully detain or stop an individual or vehicle; (2) the person being stopped or detained must know or reasonably should know that the officer is attempting a detention or stop; (3) the person then must resist the arrest by fleeing the officer; (4) the resistance must be for the purpose of preventing the detention or stop; and (5) the flight must create a substantial risk of serious physical injury.

Under the *Blockburger* test, failure to yield does not constitute a lesser-included offense of resisting arrest. Failure to yield requires the State to prove: (1) the presence of an emergency vehicle, (2) the presence of flashing lights or an audible siren, and (3) the presence of a defendant vehicle that failed to yield. None of these elements are required to prove resisting arrest. A person can easily commit the crime of resisting arrest without the involvement of any vehicles whatsoever. For example if an officer approaches a person on foot, intending to arrest that person for a crime, and that person, knowing of the officer's intent, resists the arrest by fleeing the officer, he

is guilty of resisting arrest.⁴ The State need not prove that the officer was in an emergency vehicle at the time or that the defendant was in a vehicle of his own.

Likewise, resisting arrest requires proof of elements not required to prove failure to yield, such as: (1) the presence of a law enforcement officer, (2) knowledge by the defendant that the officer is attempting a stop or detention, (3) flight from the officer, and (4) the creation of a risk of serious physical injury. One can commit the crime of failure to yield to an emergency vehicle where no law enforcement is involved at all, such as where an ambulance is rushing towards the scene of a medical emergency or rushing a patient to the hospital. Additionally, there is a difference between not pulling over to allow an emergency vehicle to pass and active flight from a law enforcement officer with the intent to evade the officer. Failure to yield does not require the State to prove the defendant's intent in failing to yield; whereas resisting arrest requires the State to demonstrate that the defendant's flight was for the purpose of evading law enforcement.

⁴ For the crime to be considered a felony, resistance by flight must occur in a manner that creates a substantial risk of serious physical injury. Section 575.150.5, RSMo Cum. Supp. 2006. While this generally involves vehicular flight, it could also involve pedestrian flight into a dangerous situation, such as a construction zone or high traffic area.

Because the two offenses require proof of different elements, neither constitutes a lesser-included offense of the other. Therefore, the State's subsequent prosecution of Respondent for resisting arrest following her guilty plea to failure to yield is not barred by the double jeopardy clause. The trial court's dismissal was in error and should be reversed.

In *State v. Clark*, 263 S.W.3d 666 (Mo. App. W.D. 2008), the Western District Court of Appeals held that a subsequent prosecution of the defendant for resisting arrest following the defendant's guilty plea to a municipal ordinance of failure to yield violated the double jeopardy clause. *Id.* at 673-674. But in reaching that decision, the court committed two errors: first, it failed to properly identify the elements of the two offenses, and second, it examined the specific evidence in the case instead of just the elements in determining that failure to yield was a lesser-included offense of resisting arrest. Thus, *Clark* should be overturned.

In conducting its analysis, *Clark* erred in its identification of the elements of resisting arrest. First, *Clark* indicated that resisting arrest has the following three elements:

(1) the defendant, having knowledge that a law enforcement officer is making an arrest or a stop of a person or vehicle, (2) resists or interferes with the arrest by threatening to use violence or physical force or by fleeing from the officer, which is presumed if the defendant continues to operate a motor vehicle after

seeing the police officer's lights or signal, and (3) defendant did so with the purpose of preventing the officer from completing the arrest.

Clark, 263 S.W.3d at 673. But under § 575.150, resisting arrest (depending upon the manner in which it is charged) has anywhere from four to seven elements. See § 575.150, RSMo 2000.

In identifying the elements, *Clark* further erred by using a presumption found in the resisting arrest statute as part of one of the elements of the crime of resisting arrest that the State had to prove. *Clark*, 263 S.W.3d at 673. The presumption cited by the court in the second element (presuming flight if a person continues to operate a vehicle after seeing the police officer's lights) is not an element of the crime itself; rather, it is merely an evidentiary presumption established by proof of certain facts to support the element of the defendant's flight. Section 575.150.3, RSMo 2000 ("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."). In the resisting arrest context, the existence of a law enforcement officer's emergency lights and/or audible signal serves simply as part of an evidentiary presumption that can be relied on to support the elements of resisting arrest. The fact that a person is presumed to be fleeing a law enforcement officer under the resisting arrest statute if the officer is in a law

enforcement vehicle operating “visible emergency lights or . . . an audible signal,” does not make the presence of emergency lights and an audible signal an element of resisting arrest. The presumption is simply an evidentiary rule to assist the State in proving the elements of the defendant’s knowledge that a law enforcement officer is attempting to stop the individual and the defendant’s intent to evade that law enforcement officer. And because § 575.150.3 is simply an evidentiary presumption, *Clark* erred in considering it as part of the elements of resisting arrest.

In considering the underlying facts of the case in conjunction with the evidentiary presumption in the resisting arrest statute, *Clark* reached the erroneous conclusion that the offense set out in the municipal ordinance “is *essentially* the first two proof elements of the State’s resisting arrest statute.” *Clark*, 263 S.W.3d at 673 (emphasis added). But this conclusion is flawed because *Blockburger* requires that the elements *must* be the same for one offense to constitute a lesser-included offense of another. It is not enough for the elements to be “essentially” the same. “[T]he text of [the Double Jeopardy Clause] looks to whether the *offenses* are the same, not the interests that the offenses violate.” *Dixon*, 509 U.S. at 699 (emphasis in original). “This functional equivalency analysis, . . . may not square with the double jeopardy analysis, which typically requires a comparison of the elements of each offense.” *State v. McLemore*, 782 S.W.2d 127, 129 (Mo. App. E.D. 1989). In determining that the elements of resisting arrest and failure to yield were “essentially” the same, the

Western District acknowledged that the elements were not, in fact, the same. And because *Blockburger* requires that the elements be *the same* before double jeopardy bars a subsequent prosecution, *Clark* should be overturned.

It would seem that some confusion has arisen from the *Blockburger* Court's use of the term "fact," which also appears in § 556.046.1(1), RSMo 2000,⁵ defining a lesser-included offense as one that "is established by proof of the same or less than all the facts required to establish the commission of the offense charged." While both the Court and the statute speak in terms of "facts," it is widely recognized that the test involves an examination of only the *elements* of the offenses, not the underlying facts used to prove those elements. *See Dixon*, 509 U.S. at 704-705 ("The same-elements test, sometimes referred to as the '*Blockburger*' test, inquires whether each offense contains an element not contained in the other; if not, they are the 'same offence' and double jeopardy bars additional punishment and successive prosecution."); *Peiffer*, 88 S.W.3d at 444 ("The pertinent inquiry in double jeopardy claims . . . is whether each offense contains an element not contained in the other; if not, the Double Jeopardy Clause bars a successive prosecution."); *Burns*, 877 S.W.2d at 112 ("Applying

⁵ This Court has repeatedly recognized that the statute is simply a codification of the *Blockburger* test. *Burns*, 877 S.W.2d at 112; *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).

Blockburger requires a comparison of the elements of the offenses.”); *Villa-Perez*, 835 S.W.2d at 903-904 (“If each of the offenses for which the defendant was convicted requires proof of an element which the other does not, the offenses are not included offenses within the meanings of § 556.046.1(1).”); *State v. Kamaka*, 277 S.W.3d 807, 813 (Mo. App. W.D. 2009) (“this test requires that the court focus on the statutory elements, rather than on the evidence adduced at trial.”); *Tilley v. State*, 202 S.W.3d 726, 736 (Mo. App. S.D. 2006) (“The analysis focuses upon the statutory elements of each offense, rather than upon the evidence actually adduced at trial.”); *State v. White*, 931 S.W.2d 825, 828 (Mo. App. W.D. 1996) (“*Blockburger* held that the double jeopardy inquiry requires a determination whether each offense contains an element not contained in the other.”).

Interpreting *Blockburger* and § 556.046.1(1) to mean that a reviewing court is to look to the underlying facts, as opposed to simply the elements of the two crimes, would result in a revival of the long-rejected “same conduct” test. Such an interpretation would require trial courts to find a double jeopardy violation *anytime* the State charges multiple crimes arising out of the same set of facts because, in such circumstances, the State will – by necessity – present the same facts to support the elements of all crimes. And if the court is to examine the facts needed to support the elements to prove the charged offenses, rather than simply the statutory elements of the various crimes, a trial court will have no option but to find a double jeopardy

violation in every case where a defendant's single act results in the violation of multiple statutes.

But this Court has consistently held that both *Blockburger* and § 556.046.1(1) require an examination of the elements only. And because the elements of failure to yield wholly differ from those required to prove resisting arrest, it does not constitute a lesser-included offense of resisting arrest. Thus, the trial court's dismissal was in error and should be reversed and remanded to allow the State to proceed against Respondent on the resisting arrest charge.

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 4,200 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 February, 2010, to:

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APPENDIX

JudgmentA1