SUPREME COURT OF MISSOURI
en banc

STATE OF MISSOURI,	)	*Opinion issued March 15, 2022*
	)	
Appellant,	)	
	)	
v.	)	No. SC99063
	)	
GARY ANDREWS, JR.,	)	
	)	
Respondent.	)	

APPEAL FROM THE CIRCUIT COURT OF THE CITY OF ST. LOUIS
The Honorable David C. Mason, Judge

The State appeals the circuit court's decision to sustain defendant Gary Andrews Jr.'s motion to dismiss a count of possession of a controlled substance. The circuit court determined that, because Andrews had pleaded guilty to the offense of unlawful use of a weapon by possessing a firearm while in possession of a controlled substance, any further proceedings on the possession count would constitute a double jeopardy violation. Although the Double Jeopardy Clause prohibits multiple punishments for the same offense, it does not prohibit the State from prosecuting a criminal defendant for multiple offenses in a single prosecution. Accordingly, the circuit court's decision to dismiss the possession count on double jeopardy grounds was erroneous. The judgment is reversed, and the case is remanded.

Background

Andrews was charged in a single indictment with five counts, including one count of possession of a controlled substance under section 579.015[1] ("possession") and one count of unlawful use of a weapon by possessing a firearm while in possession of a controlled substance under section 571.030(11) ("UUW-possession"), stemming from the same incident. Prior to his scheduled plea hearing, Andrews filed a motion to dismiss, arguing possession was a lesser-included offense of UUW-possession and, therefore, constituted the "same offense" for purposes of double jeopardy. He contended the State was precluded from prosecuting him for both of those offenses and requested the circuit court either dismiss the possession count or require the State to elect to pursue either the possession count or the UUW-possession count.

At the plea hearing, the circuit court indicated its belief that pleading guilty to both the possession and UUW-possession counts would result in a double jeopardy violation and warned that Andrews could not be sentenced on both counts. The circuit court suggested the State proceed with just one of the offenses rather than allowing Andrews to decide to which count to plead. But the State maintained its position that the two counts constituted separate offenses and indicated its intent to proceed with all five counts as charged. Andrews pleaded guilty to UUW-possession but not possession. Andrews also pleaded guilty to the three other charged counts. The circuit court accepted Andrews's guilty pleas without objection from the State. The State asked the circuit court to

[1] All statutory references are to RSMo 2016.

sentence Andrews for possession, but the circuit court declined to do so because he had not pleaded guilty to that count. The State did not object to sentencing Andrews for the other four counts while the possession count remained pending. The circuit court sentenced Andrews to a total of four years' incarceration, suspended the execution of that sentence, and placed him on probation.

Andrews then refiled his motion to dismiss the possession count. He argued that, because he had been convicted of the greater offense of UUW-possession via his guilty plea, any subsequent prosecution or sentence for possession would be a double jeopardy violation. The State filed a memorandum in opposition, arguing the legislature intended possession and UUW-possession to constitute separate offenses subject to cumulative punishment. The circuit court sustained Andrews's motion and dismissed the possession count, finding any further proceedings on that count would violate the Double Jeopardy Clause's prohibition against multiple punishments for the same offense. The State now challenges that ruling.[2]

Standard of Review

When reviewing the circuit court's ruling on a motion to dismiss, this Court defers to the circuit court's factual findings but reviews questions of law, including questions regarding constitutional rights, *de novo*. *State v. Sisco*, 458 S.W.3d 304, 312 (Mo. banc 2015). Double jeopardy claims are questions of constitutional rights subject to *de novo* review. *State v. Daws*, 311 S.W.3d 806, 808 (Mo. banc 2010).

[2] After an opinion by the court of appeals, this Court granted transfer. Mo. Const. art. V, sec. 10.

Analysis

The issue before this Court is whether the Double Jeopardy Clause bars the State from trying Andrews for possession after he pleaded guilty to UUW-possession. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution guarantees no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The Double Jeopardy Clause affords a criminal defendant two basic protections: "it protects defendants from successive prosecutions for the same offense after acquittal or conviction and it protects defendants against multiple punishments for the same offense." *State v. Hardin*, 429 S.W.3d 417, 421 (Mo. banc 2014). "In contrast to the double jeopardy protection against multiple trials, the final component of double jeopardy—protection against cumulative punishments—is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature." *Ohio v. Johnson*, 467 U.S. 493, 499 (1984). Consequently, the analysis is limited to determining whether the legislature intended cumulative punishments. *State v. McTush*, 827 S.W.2d 184, 186 (Mo. banc 1992).

But whether a defendant can be *sentenced* separately for two different statutory offenses is entirely distinct from whether that defendant can be *prosecuted* for both of those offenses in a single proceeding. The United States Supreme Court addressed the latter question in *Ohio v. Johnson*. In that case, the defendant was charged in a single indictment with murder, aggravated robbery, involuntary manslaughter, and grand theft. *Johnson*, 467 U.S. at 494-95. The defendant had pleaded guilty to the lesser offenses of involuntary manslaughter and grand theft over the State's objection. *Id.* at 496. The

defendant then successfully moved to dismiss the remaining counts on the grounds that further prosecution for those offenses would violate the Double Jeopardy Clause. *Id.*

The Supreme Court determined the case did not concern double jeopardy protection against multiple punishments for the same offense. *Id.* at 497. As the Supreme Court explained, the trial court would have had to confront the question of cumulative punishments if the defendant was also found guilty of the more serious offenses, but that stage of the prosecution was never reached due to the dismissal of the remaining counts. *Id.* at 500. The Supreme Court clarified that, although the Double Jeopardy Clause protects defendants against cumulative punishments for the same offense, it "does not prohibit the State from prosecuting [defendants] for such multiple offenses in a single prosecution." *Id.* The Supreme Court concluded the State was not prohibited from continuing its prosecution of the defendant on the remaining counts, notwithstanding the trial court's acceptance of the defendant's guilty pleas. *Id.* at 502.

Like the defendant in *Johnson*, Andrews was charged with multiple counts in a single indictment; he had pleaded guilty to some, but not all of those counts; and he successfully moved to have the remaining count dismissed on double jeopardy grounds before he could be tried for it. But Andrews argues his case can be distinguished from *Johnson* for two reasons. First, Andrews claims he pleaded guilty to the allegedly greater offense of UUW-possession, while the defendant in *Johnson* had pleaded guilty to the lesser charged offenses.[3] But this distinction is immaterial, as *Johnson* specifically

[3] Because the question of whether possession is, in fact, a "lesser-included" offense of UUW-possession is inconsequential to the resolution of this case, this Court will not address it.

declined to hold that "determination of guilt and punishment on one count of a multicount indictment immediately raises a double jeopardy bar to continued prosecution on any remaining counts that are *greater or lesser included offenses* of the charge just concluded." *Id.* at 501 (emphasis added). Second, Andrews indicates the State failed to object to the separate resolutions of the charges against him at either the plea or sentencing stage, unlike in *Johnson*. Yet, while *Johnson* noted that the State objected when the defendant "offered only to resolve part of the charges against him," it did not hold that such an objection was required to prevent an improper application of double jeopardy protections. *Id.* at 501. This Court declines to impose such a requirement here.

As such, the present case cannot be meaningfully distinguished from *Johnson*. In accordance with that decision, the State should not have been precluded from continuing to prosecute Andrews for the charge of possession following his guilty plea, as doing so would not implicate double jeopardy protections.

Conclusion

While the Double Jeopardy Clause prohibits multiple punishments for the same offense, it does not prohibit the State from prosecuting a criminal defendant for multiple offenses in a single prosecution. Consequently, the circuit court's decision to dismiss the

possession count against Andrews was erroneous.[4] The judgment is reversed, and the case is remanded. [5]

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Mary R. Russell, Judge

All concur

[4] Because the circuit court's judgment is reversed on these grounds, the issue of whether the legislature intended for possession and UUW-possession to be subject to cumulative punishment need not be reached.

[5] Upon reversal of the circuit court's dismissal of the possession count, there is no final judgment on any of the counts against Andrews, including those to which he pleaded guilty and on which he was sentenced. *See State v. Waters*, 597 S.W.3d 185, 189 (Mo. banc 2020) ("A judgment of conviction is not final so long as any count in an indictment or information remains pending before the circuit court.").