Affirmed and Opinion filed May 3, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-98-00424-CR

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PAUL B. BRADY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 183rd District Court
Harris County, Texas
Trial Court Cause No. 700841

O P I N I O N

A jury found the Appellant guilty of possessing more than four grams and less than two hundred grams of black tar heroin. Raising two grounds, he attacks only the penalty phase of trial.

Appellant's first point contends the trial court erred in admitting judgments showing Appellant had two previous convictions for theft and unauthorized use of the same motor vehicle on the same date. He asserts that the identical date, property, and owner shows both convictions arose from the same conduct. Therefore, he reasons, the unauthorized use was the "same" offense as the theft for double jeopardy purposes, and one of those convictions must

be void as a second punishment for the same offense. Since his punishment enhancement is based in part upon a void conviction, he concludes, we should reverse his punishment and remand for resentencing.

In his second point, Appellant maintains that the trial court erred in admitting pen packets for several crimes with only one fingerprint card. This, he asserts, was insufficient to identify him to all of the crimes. We find no merit in either of Appellant's points.

Courts have sentenced the Appellant to a total of at least seventy-five years for past offenses. Nevertheless, within a few years after a court pronounced concurrent thirty-year sentences, he was arrested while driving down the street with dealer quantities of black tar heroin and over eight thousand dollars in cash,. Since he does not challenge his guilt, the substantive facts of the instant offense are peripheral to his complaints on appeal.

I. Double Jeopardy

A. Jurisdiction and Article 11.07 of the Texas Code of Criminal Procedure

Appellant's double jeopardy point challenges admission into evidence of two final judgments. They concern a theft and unauthorized use, occurring on the same day, of a truck owned by Edwin Brady, Jr. It is doubtful we have jurisdiction to rule upon whether these final judgments are void. In 1999, after this appeal was filed, the legislature amended Article 11.07 of the Texas Code of Criminal Procedure, which provides *habeas corpus* relief. **TEX. CODE CRIM. PROC. ANN.** Art. 11.07 (Vernon Supp. 1999). Article 11.07(3)(c) clearly states that the "confinement" for which Article 11.07 provides a remedy includes the collateral consequences of convictions. Article 11.07(5) states that 11.07 provides the sole procedure to discharge the prisoner from a final conviction. Thus, it appears the legislature deprived this court of authority to declare his earlier conviction void. This did not affect his substantive right to relief. It merely made *habeas corpus*, the procedure he would have needed anyway in this case to develop a sufficient record, the sole means to discharge Appellant from the collateral consequences of the earlier judgments.

There was no Article 11.07, section 2 pretrial habeas attack on the enhancement allegations in connection with this case. Nor was there a section 3 attack on the final judgments used for enhancement. Appellant did not request an evidentiary hearing before or during trial to support his double jeopardy attack upon the admissibility of evidence showing both convictions.

B. Lack of Support in the Record

Assuming without deciding that we do have jurisdiction over the double jeopardy claim, the record does not support exclusion of the judgments. The Appellant claims a double jeopardy violation is apparent on the face of the record from comparison of the judgments and indictments, under ***Blockberger v. United States***, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932). He also claims it is "well settled" that unauthorized use of a vehicle is the "same" as theft for double jeopardy purposes, citing ***Johnson v. State***, 903 S.W.2d 496 (Tex. App.—Fort Worth 1995, no pet.) and ***Pierson v. State***, 689 S.W.2d 481 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd).

1. Unauthorized Use Generally a Lesser Included Offense of Theft as a Factual Matter

a. The *Neely* Opinion in Response to Developments in Applying *Blockberger*, and Purported Statutory Change

The cases upon which Appellant relies rest upon ***Neely v. State***, 571 S.W.2d 926 (Tex. Crim. App. 1978) (unauthorized use was a lesser included offense of theft under Texas law). From at least 1932 until 1978, this state's jurisprudence held that unauthorized use was not a lesser included offense of theft. ***See Hutchins v. State***, 167 Tex. Cr. Rep. 595, 321 S.W.2d 880 (1959) (unauthorized use not a lesser included offense); ***Ex parte Rhoder***, 120 Tex.Cr.R. 78, 47 S.W.2d 827 (1932) (same). In 1977, the Supreme Court decided ***Brown v. Ohio.*** In ***Brown,*** the petitioner had been convicted both of "joyriding," and automobile theft. The statute

providing the theft offense defined automobile theft as "joyriding with intent to deprive." The year after ***Brown***, the Texas Court of Criminal Appeals decided unauthorized use was a lesser included offense of theft, apparently because the Supreme Court had held similarly regarding the Ohio statutes. ***See Brown v. Ohio***, 432 U.S. 161, 169, 97 S.Ct. 2221, 2227, 53 L.Ed.2d 187 (1977). The Court of Criminal Appeals stated that Texas law had changed. However, the unauthorized use offense declared not to be a lesser included offense of theft for half a century had actually been codified without substantive change. Thus, it appears the Court of Criminal Appeals assumed theft of an automobile required unauthorized use.

b. <u>Continued Changes Shed New Light on *Neely*</u>

In the twenty-three years since ***Neely***, the courts have refined the ***Blockberger*** analysis. ***United States v. Woodward***, explained that an offense is not a lesser included offense of another offense unless violation of the greater offense "necessarily entails" violation of the lesser. ***United States v. Woodward***, 469 U.S. 105, 107, 105 S.Ct. 611, 612, 83 L.Ed.2d 518 (1985) (per curiam) (failing to file a currency disclosure under 31 U.S.C. § 1058 did not "necessarily" require a "trick, scheme, or device," while Section 1001 nondisclosure of a material fact did require one). ***Woodward*** reduces the precedential value of ***Neely*** to a generalization that depends upon the proof necessary for each offense.

The Texas Court of Criminal Appeals now appears to read ***Neely*** as involving comparison of the factual allegations:

> In Texas, an offense is considered to be included within another if, among other things, "it is established by proof of the same or less than all the facts required to establish the commission of the offense charged[.]" **TEX. CODE CRIM. PROC. ANN.** art. 37.09(1) (West 1981). Our statute law [sic] thus describes includedness in much the same way ***Blockberger*** describes sameness. Yet we have long considered more than merely statutory elements to be relevant in this connection. ***See, e.g., Goodin v. State***, 750 S.W.2d 789 (Tex. Crim. App. 1988); ***Cunningham v. State***, 726 S.W.2d 151 (Tex. Crim. App. 1987); ***Broussard v. State***, 642 S.W.2d 171, 173 (Tex. Crim. App. 1982); ***Day v. State***, 532 S.W.2d 302 (Tex. Crim. App.1976). We acknowledge, for example, that other critical elements of an accusatory pleading, such as time, place, identity, manner and

> means, although not statutory, are germane to whether one offense includes another under Texas law and to whether several offenses are the same for jeopardy purposes. See ***Ex parte Jefferson***, 681 S.W.2d 33 (Tex. Crim. App. 1984); ***Neely v. State,*** 571 S.W.2d 926(Tex. Crim. App. 1978). We likewise think it reasonably clear from the various opinions in ***Dixon*** that the essential elements relevant to a jeopardy inquiry are those of the charging instrument, not of the penal statute itself. Statutory elements will, of course, always make up a part of the accusatory pleading, but additional nonstatutory allegations are necessary in every case to specify the unique offense with which the defendant is charged.

Parrish v. State, 869 S.W.2d 352, 354 (Tex. Crim. App. 1994); ***see also State v. Perez***, 947 S.W.2d 268, 271 (Tex. Crim. App. 1997) (comparing allegations in the indictments).[1]

Neely should not be read to prevent the application of ***Blockberger*** analysis as it has developed since 1978. Unauthorized use of a vehicle requires "operating" the vehicle. **TEX. PEN. CODE ANN.** § 31.07. While operating the vehicle might satisfy the "control" element of theft, a person may be convicted of stealing a vehicle without operating it. For example, planes, cars, trucks, boats, and motorcycles can all be stolen by loading them onto trailers and towing them away. Thus, unauthorized use requires "operating," an element that theft does not require. Similarly, theft requires "intent to deprive," an element that unauthorized use does not require. **TEX. PEN. CODE ANN.** § 31.03. The gravamen of unauthorized use is *operating*

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[1] The Texas Court of Criminal Appeals has stated in *dicta*, "While ***Parrish***, *supra*, does not make this distinction, it is logical to compare statutory elements in the multiple punishments context where ***Blockberger*** is a rule of statutory construction to be used in determining legislative intent, but compare charging instrument elements in the successive prosecutions context where there are two charging instruments to examine and where the underlying policy is to prevent retrying a defendant for something he has already been tried for." ***Perez***, 947 S.W.2d at 270.

The Supreme Court plurality clearly negated this assertion in ***Dixon***, stating,"[T]here is no authority, except ***Grady*** [which ***Dixon*** was expressly abandoning], for the proposition that it has different meanings in the two contexts. That is perhaps because it is embarrassing to assert that the single term 'same offence' (the words of the Fifth Amendment at issue here) has two different meanings – that what is the same offense is yet not the same offense." ***United States v. Dixon,*** 509 U.S. 688, 704, 113 S.Ct. 2849, 2860, 125 L.Ed.2d 556 (1993). The plurality in ***Dixon*** noted the continuing relevance of facts for "same offense" analysis, and three concurring judges objected to the plurality getting into the actual facts while generally abandoning the ***Grady*** "conduct" analysis. Thus, the holdings in ***Perez*** and ***Parrish*** are in accord with what guidance ***Dixon*** provides, but the *dicta* suggesting a different meaning for "same" offense in double punishment claims is contrary to ***Dixon.***

someone else's vehicle without consent, regardless of intent to deprive. In contrast, the gravamen of theft is *intent to deprive*, regardless of whether the vehicle is operated.

This is not to say that unauthorized use cannot be a lesser included offense of theft. It simply requires examination of the facts to determine whether the "control" element of theft occurred by the same act of operating the truck that supports unauthorized use. Merely seeking legislative intent by comparing statutory elements under ***Blockberger*** does not entirely resolve either multiple punishment or multiple prosecution claims of double jeopardy. Nor does incorporation of collateral estoppel into analysis of successive prosecutions provide the only factual input for double jeopardy. ***See Ashe v. Swenson***, 397 U.S. 436, 445, 90 S.Ct. 1189, 1195, 25 L.Ed.2d 469 (1970) (addressing collateral estoppel violation of double jeopardy).[2] After a trial has occurred, courts must examine the factual claims actually tried, not all factual theories that would satisfy an indictment, in order to determine whether the same conduct is at issue. ***Ex parte Goodbread***, 967 S.W.2d 859, 860-61 (Tex. Crim. App. 1998).

2. <u>No Record Support</u>

The record does not reveal what Appellant did to incur the enhancement convictions.[3] We recognize that the Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by simply dividing a single crime into a series of temporal or spatial units. ***Brown v. Ohio***, 432 U.S. at 169, 97 S.Ct. at 2227 (finding where theft was defined as

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[2] Even under the ***Grady*** conduct analysis, the court did not need to discern what facts the jury actually considered. ***See State v. Comerford***, 812 S.W.2d 668, 669-70 (Tex. App.—Amarillo 1991, no pet.) (stating this while ***Grady*** was in effect).

[3] The trial court sustained an objection to Appellant's attempt to testify about the underlying facts. Since the validity of the convictions could not be attacked here, this was correct. It is only fair to allow the State notice for either a full and fair hearing of evidence on both sides, or to set the predicate for any State claim of laches due to the Appellant's delay prejudicing the State's ability to marshal evidence in opposition to the claim. Allowing a collateral attack barred by statute would unfairly surprise the State. Conversely, if such an attack was permissible, the trial court would have discretion to disbelieve the Appellant's testimony about past offenses, and the Appellant would be better served to present his contentions with evidence corroborating his testimony.

joyriding with intent to deprive, prosecution for both joyriding and theft by dividing the time a car was driven into discrete units under Ohio statutes constituted impermissible double jeopardy for "same" offense). Nor does double jeopardy bar the prosecution of multiple offenses arising from the same transaction. ***Garrett v. United States***, 471 U.S. 773, 790, 105 S.Ct. 2407, 2417, 85 L.Ed.2d 764 (1985). Still, before we decide punishment under two statutes violated double jeopardy, the record must affirmatively reflect whether both statutes were applied to the same transaction. For all the record tells us, perhaps Appellant went for an unauthorized drive in Edwin Brady's pickup in the morning, and then decided that afternoon to go back and steal it that night. ***See U.S. v. Register***, 931 F.2d 308, 312 (5th Cir. 1991)(burden is on the defendant to establish the commonality of two offenses in the indictment to show conviction of both violated double jeopardy). Moreover, information about the proof at trial of the enhancement convictions is necessary to determine whether conduct in one transaction could violate both statutes without constituting the "same" offense. ***Vineyard v. State***, 958 S.W.2d 834, 837 (Tex. Crim. App. 1998). For example, the Appellant could have stolen the truck by having it towed, and then could have committed the additional offense of operating it without consent, without any break in continuity. Even two violations of the same statute, each requiring one factual element that the other does not, can constitute separate offenses. ***See Vineyard***, 958 S.W.2d at 836.

3. No Evidence Admissible To Show Double Jeopardy when Appellant Offered It

The Appellant attempted to present his evidence regarding the enhancement convictions during his case-in-chief on punishment, after evidence of the judgments had been admitted during the State's case-in-chief. His challenge to admission of the judgments was no longer a live issue. Thus, even if a double jeopardy claim was cognizable, the evidence he attempted to offer could not assist in its resolution.

C. Conclusion Regarding Double Jeopardy Point

To conclude the record showed a double jeopardy violation, we would have to assume facts not in the record. Contrary to the Appellant's contention, the indictment and judgments

for two offenses involving the same property and owner on the same date do not conclusively show a double jeopardy violation on the face of the record. To the extent we have jurisdiction, the first point is overruled.

II. <u>The Fingerprint Card</u>

The second point, that the fingerprint card is insufficient to identify the Appellant convicted as the perpetrator of other offenses showing his criminal background, is mistaken. The fingerprint card links the Appellant to revocation of probation because of an offense in another county under the same name, on the same date, and with the same lawyer representing him. Unlike the theft convictions discussed above, the issue is identity of the perpetrator, and there was a factual determination in the trial court. The probability of two persons (1) with the same name, (2) with the same lawyer, (3) being accused of the same offense, (4) committed on the same date, (5) in the same alleged county is remote. A finder of fact could reasonably conclude the Appellant, identified to one case, was the defendant in the other case.

Moreover, the Appellant stipulated to the jury in closing argument that he had spent much of his adult life in jail as a result of the convictions for which he now challenges the identification. ***See Garner v. State***, 858 S.W.2d 656, 659 (Tex. App.—Fort Worth 1993, pet. ref'd) (stipulation at time offenses offered corroborated pen packet and tied it to the defendant). On the witness stand, Appellant had denied any memory of the enhancing convictions. Not only was his stipulation sufficient to complete his connection to the offenses, but his denials, followed by his admission during an argument for sympathy, probably caused any prejudice from the jury considering them. The second point is overruled.

The judgment of the trial court is affirmed.

/s/ Maurice Amidei
Justice

Judgment rendered and Opinion filed May 3, 2001.

Panel consists of Senior Justices Sears, Lee, and Amidei.[*]

Do Not Publish — TEX. R. APP. P. 47.3(b).

[*] Senior Justices Ross Sears, Norman Lee, and Former Justice Amidei sitting by assignment.