STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0095

State of Minnesota,
Respondent,

vs.

David Joseph Gottwalt,
Appellant.

Filed July 23, 2012
Affirmed
Stauber, Judge

Morrison County District Court
File No. 49CR1144

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Brian J. Middendorf, Morrison County Attorney, Little Falls, Minnesota (for respondent)

James R. Chatto, James R. Chatto, P.A., Faribault, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Worke, Judge; and Cleary, Judge.

U N P U B L I S H E D O P I N I O N

STAUBER, Judge

On appeal from his conviction of second-degree driving while impaired (DWI), appellant argues that his prior conviction for deer shining, which was based on a guilty plea, precludes the subsequent DWI prosecution under Minn. Stat. § 609.035 (2010),

because both offenses arose from the same behavioral incident. Because the DWI and deer-shining offenses constitute separate behavioral incidents, we affirm.

FACTS

In September 2010, appellant David Joseph Gottwalt was issued a citation for deer shining in violation of Minn. Stat. § 97B.081, subd. 2 (2010). Because the conservation officer also suspected appellant of DWI, he contacted the Morrison County Sherriff's Department. The responding deputy performed field sobriety tests on appellant, including two breath tests that indicated alcohol concentrations above .08. Appellant was then arrested for DWI.

Appellant paid the fine for deer shining by mail and signed the back of the citation indicating that he pleaded guilty to deer shining. Thereafter, he was charged with two counts of second-degree DWI, as well as one open-bottle offense. Appellant moved to dismiss the complaint, arguing that because he had pleaded guilty and paid the fine for deer shining, the subsequent charges were in violation of the serial prosecution prohibition contained in Minn. Stat. § 609.035. The district court denied the motion, concluding that because appellant "did not engage in deer shining either in furtherance of, or to avoid detection for, his impaired driving," the two offenses constituted separate behavioral incidents. Following a stipulated-facts trial, the district court found appellant guilty of the charged offenses. This appeal follows.

D E C I S I O N

Appellant argues that under Minn. Stat. § 609.035, he could not be convicted of both the DWI offense and the deer-shining offense because both offenses arose from the

same behavioral incident. When the facts are not in dispute, whether multiple offenses are part of a single behavioral incident is a question of law that we review de novo. *State v. Bauer*, 776 N.W.2d 462, 477 (Minn. App. 2009), *aff'd* 792 N.W.2d 825 (Minn. 2011).

Subject to limited exceptions, which do not apply here, "if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses and a conviction or acquittal of any one of them is a bar to prosecution for any other of them." Minn. Stat. § 609.035, subd. 1. Section 609.035, subdivision 1, is intended to "protect against exaggerating the criminality of a person's conduct and to make punishment and prosecution commensurate with culpability." *State v. Secrest*, 437 N.W.2d 683, 684 (Minn. App. 1989) (quotation omitted), *review denied* (Minn. May 24, 1989). Whether the offenses arose out of the same behavioral incident depends on the facts and circumstances of each particular case. *State v. Hawkins*, 511 N.W.2d 9, 13 (Minn. 1994).

Two tests for determining the singularity of behavior in a behavioral incident were set forth in *State v. Johnson*, 273 Minn. 394, 141 N.W.2d 517 (1966), and the test to be applied is dependent upon whether the implicated offenses are intentional or unintentional crimes. *Bauer*, 776 N.W.2d at 478. When conducting a single-behavioral-incident analysis for two intentional crimes, Minnesota courts consider (1) whether the conduct shares a unity of time and place and (2) whether the conduct was motivated by an effort to obtain a single criminal objective. *State v. Williams*, 608 N.W.2d 837, 841 (Minn. 2000); *State v. Soto*, 562 N.W.2d 299, 304 (Minn. 1997). But when the crimes include both intentional and unintentional crimes, the proper inquiry is whether the

offenses (1) occurred at substantially the same time and place and (2) "[arose] out of a continuing and uninterrupted course of conduct, manifesting an indivisible state of mind or coincident errors of judgment." *State v. Gibson*, 478 N.W.2d 496, 497 (Minn. 1991). The second test replaces the factor of "single criminal objective"—or intent—with the singleness of the conduct itself. *Johnson*, 273 Minn. at 404, 141 N.W.2d at 525. Whether the conduct is singular depends on the indivisibility of the defendant's state of mind, not the separability of the defendant's actions. *State v. Krech*, 312 Minn. 461, 465, 252 N.W.2d 269, 272-73 (1977).

Here, appellant was convicted of deer shining, which is a specific-intent crime. *See* Minn. Stat. § 97B.081; *State v. Hayes*, 431 N.W.2d 533, 534 (Minn. 1988) (reasoning that to support a conviction for deer shining, the state must prove that defendant intentionally shined artificial light "in order to spot a wild animal"). Conversely, driving while impaired is a general-intent traffic offense. *State v. Anderson*, 468 N.W.2d 345, 346 (Minn. App. 1991). Because one of appellant's convictions was for DWI, a nonintentional crime, the two-prong nonintentional test is applicable. *See Krech*, 312 Minn. at 466-67, 252 N.W.2d at 273 (applying nonintentional test when traffic offense was one of multiple offenses at issue). The parties agree that the offenses occurred at substantially the same time and place, thereby satisfying the first prong of the analysis. Consequently, the question before us is whether appellant's conduct meets the second prong of the analysis—whether appellant's conduct "[arose] out of a continuing and uninterrupted course of conduct, manifesting an indivisible state of mind or coincident errors of judgment." *See Gibson*, 478 N.W.2d at 497.

A person displays an indivisible state of mind if the behavior exhibited was motivated or caused by only one objective. *See, e.g.*, *Krech*, 312 Minn. at 467, 252 N.W.2d at 273 (holding that driving while impaired, obstructing legal process, and assaulting police officers were all committed while intoxicated with singular purpose of avoiding apprehension). In contrast, a person's state of mind is divisible when the conduct constituting each offense is dissimilar or unrelated. *State v. Reiland*, 274 Minn. 121, 124, 142 N.W.2d 635, 638 (1966).

In *State v. Sailor*, the Minnesota Supreme Court determined that the offenses of driving while impaired and unauthorized use of an automobile were not part of an indivisible state of mind because the motivations for committing the two offenses were sufficiently different. 257 N.W.2d 349, 353 (Minn. 1977). Similarly, in *State v. Butcher*, the defendant was charged with transporting an uncased firearm, taking a deer out of season, and driving after cancellation. 563 N.W.2d 776, 779 (Minn. App. 1997), *review denied* (Minn. Aug. 5, 1997). Although these offenses were committed at the same time, this court reasoned that "the charged offenses were distinct and separate. Each of [the defendant's] offenses were committed and proven independently of the others. One did not necessarily give rise to another. The charged offenses do not share an indivisible state of mind or coincidental errors in judgment." *Id.* at 784.

Here, as in *Sailor* and *Butcher*, appellant's offenses are separate, distinct, and unrelated. There is no evidence that appellant committed either offense in furtherance of the other. Moreover, the offenses are the result of two separate errors in judgment—one error in judgment was to drive while impaired, and the other was to shine deer.

Therefore, the offenses of deer shining and DWI constitute separate behavioral incidents. The district court did not err by concluding that appellant could be prosecuted for the DWI after pleading guilty to deer shining.

Affirmed.