STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1306

State of Minnesota,
Respondent,

vs.

Jason James Isaacson,
Appellant.

Filed August 3, 2010
Affirmed
Peterson, Judge

Polk County District Court
File No. 60-CR-08-2704

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

Greg Widseth, Polk County Attorney, Scott A. Buhler, Assistant County Attorney, Crookston, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Steven P. Russett, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Lansing, Judge; and Stauber, Judge.

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

PETERSON, Judge

In this appeal from a conviction of and sentence for being an ineligible person in possession of a firearm, appellant argues that (1) the district court erred by denying his

motion to dismiss the charge based on constitutional and statutory double-jeopardy grounds, and (2) he was denied effective assistance of counsel. We affirm.

FACTS

On March 28, 2007, appellant Jason James Isaacson telephoned W.J. Appellant, who suspected that his girlfriend, A.H., was with R.D., told W.J. that he was going to shoot and kill R.D. Appellant later arrived at W.J.'s house, pulled a black and silver handgun from a Hugo's grocery bag, and said that he intended to kill R.D. W.J. later told R.D. that appellant had a gun and was looking for him.

R.D. contacted the police. The police tried to find appellant that night, but could not locate him. The next day, the police found appellant at A.H.'s residence and arrested him. While executing a search warrant at A.H.'s residence, the police found a black and silver pistol, a Hugo's grocery bag, 16 grams of marijuana, and a digital scale.

After being advised of his rights, appellant was interviewed by police. Appellant admitted that he threatened R.D.'s life, but he denied possessing a gun when he made the threat. Appellant also stated that he put the gun where the police found it at A.H.'s residence and that his friend D.S. had loaned the gun to him about one month earlier.

D.S. testified that appellant was with him when he purchased the gun on December 26, 2006. D.S. testified that after shooting the gun in mid-January 2007, he put it in a gun case and put it in his room next to his bed. D.S. did not see the gun again until the beginning of April 2007, when he went to identify it at the Crookston Police Department. D.S. testified that appellant had been alone in D.S.'s bedroom, but D.S. did not say when appellant was in his bedroom, and D.S. did not have any information about

how the gun left his apartment. Appellant stipulated that, under Minnesota law, he had been ineligible to possess a firearm since October 6, 1999.

Appellant was charged by complaint with being an ineligible person in possession of a firearm in violation of Minn. Stat. § 624.713, subd. 1(b) (2006), for possessing a firearm from March 1 to March 28, 2007, and two counts of terroristic threats in violation of Minn. Stat. § 609.713, subd. 1 (2006). The complaint was amended to include one count of possession of stolen property in violation of Minn. Stat. § 609.53, subd. 1 (2006), and one count of fifth-degree controlled-substance crime in violation of Minn. Stat. § 152.025, subd. 1(1) (2006).

When the state prosecutor learned that federal authorities had indicted appellant, he dismissed the state charges against appellant. Appellant pleaded guilty to a federal felon-in-possession-of-a-firearm charge for knowingly possessing a firearm on March 29, 2007, and in May 2008, he was sentenced to a 180-month prison term.

In October 2008, the state prosecutor again charged appellant with the same offenses that had been charged in the earlier complaint and amended complaint. On December 8, appellant made his first appearance on these charges. On January 20, 2009, the case was continued pending trial in other cases, and in March 2009, in a separate proceeding stemming from separate charges, appellant was convicted of and sentenced for being an ineligible person in possession of a firearm for possessing a firearm on January 22, 2007.

On March 25, 2009, appellant moved to dismiss the ineligible-person-in-possession-of-a-firearm charge in this case, arguing that because he had already been

convicted for possessing the pistol, further prosecution would place him twice in jeopardy for the same offenses in violation of his constitutional and statutory rights.[1] Following a hearing, the district court denied appellant's motion as untimely and because there was no evidence presented that would support dismissing the charge. Appellant was convicted of ineligible person in possession of a firearm and sentenced to a 180-month prison term to be served concurrently with previous sentences. He was also convicted of terroristic threats, for which he received a 33-month sentence to be served concurrently, and fifth-degree controlled-substance crime, for which he received a 12-month-and-one-day sentence, to be served consecutively. This appeal followed.

D E C I S I O N

I.

Appellant argues that the district court erred by denying his motion to dismiss the possession-of-a-firearm charge on constitutional double-jeopardy grounds. The United States and Minnesota constitutions prohibit a person from being put twice in jeopardy for the same offense. U.S. Const. Amend. V; Minn. Const. art. I, § 7. "This prohibition protects a criminal defendant from 'three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense.'" *State v. Ehmke*, 752 N.W.2d 117, 121 (Minn. App. 2008) (quoting *State v. Humes*, 581 N.W.2d 317, 320 (Minn. 1998)). The

[1] The motion also sought dismissal of the possession-of-stolen-property charge, but the district court's denial of that portion of the motion is moot because appellant was acquitted of that charge.

district court's denial of a motion to dismiss on double-jeopardy grounds is reviewed de novo. *Id.*

"'Before [a] defendant may avail himself of the pleas of former jeopardy it is of course necessary that he show that the present prosecution is for the [i]dentical act and that the crime [b]oth in law and fact was settled by the first prosecution.'" *State ex. rel. Boswell v. Tahash*, 278 Minn. 408, 411-12, 154 N.W.2d 813, 816 (1967) (quoting *State v. Fredlund*, 200 Minn. 44, 48, 273 N.W. 353, 355 (1937)).

> Generally speaking in determining whether the offense charged in one criminal action is the same in law and fact as that charged in the second action it may be concluded that an identity of offenses exists when the evidentiary facts essential to support a conviction in one action would be both essential and sufficient, if proved, to sustain a conviction in the other, but, conversely, if the evidentiary facts essential to sustain a conviction in one action are not essential and sufficient to sustain a conviction in the other, no identity of offenses exists and a conviction or an acquittal in the first action will not be a bar to the second even though the offenses charged arise from a single act, transaction, or state of facts. Any substantial (as distinguished from a merely formal or technical) difference between the two offenses [a]s to the essential facts which must be proved to sustain a conviction make such offenses separate and free from the taint of double jeopardy. Evidentiary duplications or differences which do not relate to the essential facts are of no significance.

State v. Thompson, 241 Minn. 59, 62-63, 62 N.W.2d 512, 516-17 (1954) (citations omitted).

The Eighth Circuit Court of Appeals has stated:

> In order to support a claim of double jeopardy, a defendant must show that the two offenses charged are in law and fact the same offense. The defendant bears the initial burden of showing a non-frivolous claim of double jeopardy.

> Once the defendant has met this threshold requirement, the burden shifts to the government to show by a preponderance of the evidence that the two indictments at issue involve two separate offenses.

United States v. Bennett, 44 F.3d 1364, 1368 (8th Cir. 1995) (citations omitted).

Citing *Bennett*, appellant argues that he was required to make only a "non-frivolous claim of double jeopardy," after which the burden shifted to the state to prove that the two prosecutions involved two separate offenses. Appellant contends that because his possession of a firearm on January 22, 2007, for which he was convicted on March 23, was a continuing offense, he could not be prosecuted again for the offense based on his possession of the firearm from March 1 through March 28, 2007. Respondent acknowledges that in *State v. Banks*, 331 N.W.2d 491, 494 (Minn. 1983), the Minnesota Supreme Court implicitly reached the conclusion that a defendant's possession of a firearm on a single day was a continuing offense. But respondent argues that it is not a settled issue whether a defendant's use of a firearm during the course of discrete criminal acts committed on different dates is a continuing offense. We need not resolve this issue because, as the district court found, appellant did not present a factual basis to support his claim that the gun he possessed on January 22 was the same gun that he was charged with possessing from March 1 through March 28. Appellant's presentation to the district court included a motion, in which he claimed that the gun he possessed on January 22 was the same gun that he was charged with possessing in this case, and the argument of counsel. No evidence was presented to the district court. Consequently,

appellant failed to present even a nonfrivolous claim of double jeopardy, and the district court did not err in denying appellant's motion to dismiss the firearm-possession charge.

Because we affirm the district court's order denying appellant's motion for failing to present evidence to support the motion, we decline to address the timeliness of the motion.

II.

Appellant argues that "even if the district court properly rejected appellant's pretrial claim of serialized prosecution it erred by imposing an additional sentence for the current firearm possession conviction without first deciding whether that offense arose from the same behavioral incident as the January 22 offense." Minn. Stat. § 609.035, subd. 1 (2006), provides that "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."

Appellant correctly contends that in applying this statute, "[t]he state has the burden to establish by a preponderance of the evidence that the conduct underlying the offenses did not occur as part of a single behavioral incident." *State v. Williams*, 608 N.W.2d 837, 841 (Minn. 2000). But appellant fails to recognize that "[t]he purpose of the statute is to limit punishment to a single sentence when a single behavioral incident results in the violation of multiple criminal statutes." *State v. Skipintheday*, 704 N.W.2d 177, 180 (Minn. App. 2005), *aff'd*, 717 N.W.2d 423 (Minn. 2006). Appellant does not claim that his possession of the firearm resulted in the violation of multiple criminal

statutes and that he was sentenced for the multiple violations; appellant claims that the January 22 offense and the current offense were a single offense because he possessed the same firearm for an extended period of time. Appellant's argument that the state has the burden to show that the January 22 offense and the current offense did not occur as part of a single behavioral incident is simply an attempt to shift to the state appellant's burden of proving that the present prosecution is for the same act as the earlier prosecution.

III.

Appellant argues that he was denied effective assistance of counsel when his attorney failed to assert that following his federal felon-in-possession-of-a-firearm conviction, Minn. Stat. § 609.045 (2006) barred further prosecution for the same offense. In order to show ineffective assistance of counsel, "[t]he defendant must affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)).

An objective standard of reasonableness requires the exercise of "the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *State v. Gassler*, 505 N.W.2d 62, 70 (Minn. 1993) (quotation omitted). There is a strong presumption that counsel's performance fell within a range of acceptable professional assistance. *State v. Gustafson*, 610 N.W.2d 314, 320 (2000).

Minn. Stat. § 609.045 states:

> If an act or omission in this state constitutes a crime under both the laws of this state and the laws of another jurisdiction, a conviction or acquittal of the crime in the other jurisdiction shall not bar prosecution for the crime in this state unless the elements of both law and fact are identical.

The Minnesota Supreme Court has held that in determining whether two offenses are the same offense for purposes of barring prosecution under Minn. Stat. § 609.045, the *Blockburger* approach, named after *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180 (1932), should be used. *State v. Aune*, 363 N.W.2d 741, 745-46 (Minn. 1985). Under the *Blockburger* approach, a Minnesota prosecution based on the same conduct as an earlier prosecution is prohibited unless each prosecution requires proof of a fact that is not required in the other. *Id.* at 745.

The federal statute that appellant was accused of violating in the federal proceeding provides:

> It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(1) (2006). Thus, a conviction under this statute requires proof that the defendant's possession of a firearm was in or affected commerce and that the defendant had been convicted of any crime punishable by imprisonment for a term exceeding one year.

The state statute that appellant was accused of violating in this proceeding provides:

> The following persons shall not be entitled to possess a pistol or semiautomatic military-style assault weapon or . . . any other firearm:
>
> . . . a person who has been convicted of, or adjudicated delinquent or convicted as an extended jurisdiction juvenile for committing, in this state or elsewhere, a crime of violence. For purposes of this section, crime of violence includes crimes in other states or jurisdictions which would have been crimes of violence as herein defined if they had been committed in this state[.]

Minn. Stat. § 624.713, subd. 1(b). Thus, a conviction under this statute requires proof that the defendant had been convicted of a "crime of violence," which is defined to mean any one of a list of specific criminal offenses under Minnesota law. Minn. Stat. § 624.712, subd. 5 (2008). Because a successful prosecution of the federal offense requires proof of a fact that is not required to prove the state offense and a successful prosecution of the state offense requires proof of a fact that is not required to prove the federal offense, the two offenses are not the same offense for purposes of barring prosecution under Minn. Stat. § 609.045, and appellant's counsel's performance did not fall below an objective standard of reasonableness when counsel failed to assert that Minn. Stat. § 609.045 barred prosecution of an offense under Minn. Stat. § 624.713, subd. 1(b).

Affirmed.