IN THE COURT OF APPEALS OF IOWA

No. 2-132 / 11-0612
Filed April 25, 2012

STATE OF IOWA,
Plaintiff-Appellant,

vs.

CRISTINA RINCON,
a/k/a LAURIE OLANIYI,
Defendant-Appellee.

Appeal from the Iowa District Court for Jefferson County, Lucy J. Gamon, Judge.

The State appeals a district court ruling granting a defendant's motion to dismiss criminal charges on double jeopardy grounds. **REVERSED AND REMANDED.**

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, and Timothy W. Dille, County Attorney, for appellant.

Cristina Rincon, Battle Creek, Michigan, appellee pro se.

Heard by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

VAITHESWARAN, P.J.

The State appeals a district court ruling granting Cristina Rincon's motion to dismiss criminal charges on double jeopardy grounds.

I. Background Facts and Proceedings

Rincon, formerly Laurie Olaniyi, divorced Olabayo Olaniyi. Under the dissolution decree, Olaniyi received physical care of their two children subject to Rincon's visitation rights, which included six consecutive weeks of summer visitation.

One summer, Rincon, who lived in Michigan, chose not to return the children to their father's home in Iowa. She based her decision on concerns that the children were being subjected to abuse or neglect. The Michigan Department of Protective Services investigated those concerns but did not take action in light of the father's residence in another state. The matter was referred to the Iowa Department of Human Services, which declined to confirm Rincon's allegations.

Olaniyi filed an application to have Rincon held in contempt for failing to return the children. The district court ruled that Olaniyi did not carry his burden of proving contempt. The court reasoned that Rincon had a reasonable basis for her concerns about the children's welfare, precluding a finding that she acted with malice in violating the summer visitation provision of the decree. The court dismissed the contempt application.

Meanwhile, the State filed criminal charges against Rincon for violation of a custodial order. *See* Iowa Code § 710.6 (2009). Rincon moved to dismiss the criminal charges, citing the court's dismissal of the contempt application. She

alleged that the contempt proceeding was "an indirect criminal contempt prosecution" and her "acquittal" in that proceeding barred prosecution of the criminal counts "under the double jeopardy clauses of the United States Constitution and Iowa Constitution." The district court granted Rincon's motion and dismissed the criminal charges. The State appealed.

II. Analysis

The Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." The Iowa Constitution's version of the clause is more restrictive, providing only that "[n]o person shall after acquittal, be tried for the same offence." Iowa Const. art. I, § 12. The State does not argue that the analysis under the state constitution differs from the analysis under the federal constitution. Accordingly, we will restrict our analysis to the federal constitution. *See State v. Burgess*, 639 N.W.2d 564, 567–68 (Iowa 2001).

The question under the Fifth Amendment is whether the contempt action based on Rincon's violation of the decree's summer visitation provision barred Rincon's prosecution for violation of a custodial order. Our review of this constitutional issue is de novo. *See State v. Kramer*, 760 N.W.2d 190, 194 (Iowa 2009) (reviewing constitutional double jeopardy claim de novo); *State v. Finnel*, 515 N.W.2d 41, 43 (Iowa 1994) ("To the extent Finnel presents a constitutional double jeopardy claim, our review is de novo.").

The State concedes that the contempt proceeding implicates double jeopardy protections. *See State v. Sharkey*, 574 N.W.2d 6, 7 (Iowa 1997) (noting contempt proceedings are quasi-criminal). The State argues, however, that

those protections are not triggered where the initial proceeding is a contempt action under Iowa chapter 665. As authority for this proposition, the State cites Iowa Code section 665.12, which provides:

> The punishment for a contempt constitutes no bar to an indictment, but if the offender is indicted and convicted for the same offense, the court, in passing sentence, must take into consideration the punishment before inflicted.

See also Iowa R. Crim. P. 2.5(5) ("The term indictment embraces the trial information, and all provisions of law applying to prosecutions on indictment apply also to informations, except where otherwise provided for by statute or in these rules, or when the context requires otherwise."); *Flannagan v. Jepson*, 177 Iowa 393, 399, 158 N.W. 641, 643 (1916) ("Punishment for contempt is not a bar to indictment where the act of contempt is also an offense against the laws of the state."). The State contends we need go no further than this provision, which, in its view, plainly states "there is no limitation on the State's power to bring the prosecution."

We agree with the State that section 665.12 evinces an unambiguous legislative intent to permit a criminal prosecution following punishment for contempt. However, we discern two problems with the State's reliance on this provision. First, the State did not raise section 665.12 in the district court, and the court did not consider it in connection with Rincon's motion to dismiss. Arguably, therefore, error was not preserved as to the applicability of this provision. *See Garwick v. Iowa Dep't of Transp*., 611 N.W.2d 286, 288 (Iowa 2000) (noting allegation before district court was "far too unspecific to preserve double jeopardy challenge"). Second, even if we were to bypass this error

preservation concern, the State's argument that "intent may be gleaned from the face of the statutes," is premised on an Iowa Supreme Court opinion that involved application of the Double Jeopardy Clause to cumulative punishments rather than successive prosecutions. *See State v. Perez*, 563 N.W.2d 625, 627–28 (Iowa 1997) ("[W]here a double jeopardy violation is alleged to arise from a single prosecution, our analysis begins with an examination of legislative intent [which] may generally be gleaned from the face of the statute."). The purpose of applying the Double Jeopardy Clause to multiple punishments differs from the purpose underlying the prohibition against successive prosecutions. *State v. Franzen*, 495 N.W.2d 714, 716 (Iowa 1993) (noting double jeopardy protection against multiple punishments for same offense serves a different purpose than prohibition against successive prosecutions); *see also United States v. Dixon*, 509 U.S. 688, 744, 113 S. Ct. 2849, 2881, 125 L. Ed. 2d 556, 599 (1993) (Souter, J., concurring in part and dissenting in part) ("[T]he analysis applied to claims of successive prosecution differs from that employed to analyze claims of multiple punishment."); *State v. Gilley*, 522 S.E.2d 111, 116 (N.C. Ct. App. 1999) (stating "an analysis according deference to expressed legislative intent is applicable only to cases involving multiple punishments," because, unlike cases involving successive prosecutions, multiple punishment cases do not implicate the "core values of the Double Jeopardy Clause," the right to be free of vexatious proceedings (citation omitted)). While the question of multiple punishments is essentially a question of legislative intent, *see Franzen*, 495 N.W.2d at 716, the State cites no Iowa authority applying *Perez*'s "face of the statute" rule to double jeopardy cases involving successive prosecutions.

In successive-prosecution cases, the Iowa Supreme Court has applied the established *Blockburger* test to decide whether a criminal prosecution on the heels of a contempt proceeding violates double jeopardy protections. *See State v. Sharkey*, 574 N.W.2d 6, 8 (Iowa 1997) (citing *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932)); *State v. Kraklio*, 560 N.W.2d 16, 19 (Iowa 1997) (same). *Blockburger* held:

> The applicable rule is 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 an additional fact which the other does not.

284 U.S. at 304, 52 S. Ct. at 182, 76 L. Ed. at 309; *see also Dixon*, 509 U.S. at 695, 113 S. Ct. at 2855, 125 L. Ed. 2d at 567 (addressing issue "whether prosecution for criminal contempt based on violation of a criminal law incorporated into a court order bars a subsequent prosecution for the criminal offense," with a plurality of the Court applying the *Blockburger* test). The test compares the elements of each offense. "If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." *Sharkey*, 574 N.W.2d at 8 (quoting *Iannelli v. United States*, 420 U.S. 770, 785 n.17, 95 S. Ct. 1284, 1293 n.17, 43 L. Ed. 2d 616, 627 n.17 (1975)).

The problem we face is defining the "offense" in the contempt proceeding. Was the offense "contempt" or was the offense the underlying act which precipitated the contempt action? In *Dixon*, 509 U.S. at 697, 113 S. Ct. at 2856, 125 L. Ed. 2d at 569, Justice Scalia, speaking for a plurality of the Court, stated that the contempt statute itself was not the "offense" to be compared to the

subsequent criminal charge, as it simply provided that "[a] person who has been conditionally released . . . and who has violated a condition of release shall be subject to . . . prosecution for contempt of court." (Citation omitted). Justice Scalia noted that "[t]he statute by itself imposes no legal obligation on anyone." *Id.* at 697, 113 S. Ct. at 2856–57, 125 L. Ed. 2d at 569. A judge first had to issue an order prohibiting the commission of certain offenses. *Id.* at 697–98, 113 S. Ct. at 2857, 125 L. Ed. 2d at 569. Once the order was issued, the underlying offense, in that case possession of cocaine, became the "offense" whose elements would be compared to the elements of the subsequently charged crime. *Id*. Justice Scalia concluded the substantive criminal offense underlying the contempt action was the same as one of the subsequently charged crimes. Therefore, the subsequent prosecution for that crime failed the *Blockburger* test and was barred. *Id.* at 700, 113 S. Ct. at 2858, 125 L. Ed. 2d at 570.

A concurring opinion by Chief Justice Rehnquist took a different approach. Justice Rehnquist began by setting out the facts as follows:

> Respondent Alvin Dixon possessed cocaine with intent to distribute it. For that he was held in contempt of court for violating a condition of his bail release. He was later criminally charged for the same conduct with possession with intent to distribute cocaine. Respondent Michael Foster assaulted and threatened his estranged wife. For that he was held in contempt of court for violating a civil protection order entered in a domestic relations proceeding. He was later criminally charged for the same conduct with assault, threatening to injure another, and assault with intent to kill.

Id. at 713, 113 S. Ct. at 2865, 125 L. Ed. 2d at 578–79 (Rehnquist, C.J., concurring in part and dissenting in part). Justice Rehnquist then stated:

> In my view, *Blockburger*'s same-elements test requires us to focus, not on the terms of the particular court orders involved, but

> on the elements of contempt of court in the ordinary sense. . . . Because the generic crime of contempt of court has different elements than the substantive criminal charges in this case, I believe that they are separate offenses under *Blockburger.*

Id. at 714, 113 S. Ct. at 2865, 125 L. Ed. 2d at 579–80. Justice Rehnquist continued:

> Applying this test to the offenses at bar, it is clear that the elements of the governing contempt *provision* are entirely different from the elements of the substantive crimes. Contempt of court comprises two elements: (i) a court order made known to the defendant, followed by (ii) willful violation of that order. Neither of those elements is necessarily satisfied by proof that a defendant has committed the substantive offenses of assault or drug distribution. Likewise, no element of either of those substantive offenses is necessarily satisfied by proof that a defendant has been found guilty of contempt of court.

Id. at 716, 113 S. Ct. at 2866, 125 L. Ed. 2d at 580–81 (citations omitted). He noted:

> Our double jeopardy cases applying *Blockburger* have focused on the statutory elements of the offenses charged, not on the facts that must be proved under the particular indictment at issue—an indictment being the closest analogue to the court orders in this case.

Id. at 716–17, 113 S. Ct. at 2867, 125 L. Ed. 2d at 581. Justice Rehnquist concluded,

> In sum, I think that the substantive criminal prosecutions in this case, which followed convictions for criminal contempt, did not violate the Double Jeopardy Clause.

Id. at 719–20, 113 S. Ct. at 2868, 125 L. Ed. 2d at 583 (citation omitted). Chief Justice Rehnquist would have applied the *Blockburger* test by focusing on the elements of contempt and by comparing those elements to the elements of the crime, while Justice Scalia and a plurality of the Court applied the *Blockburger*

test by focusing on the order underlying the contempt application and by comparing that order to the elements of the crime.

The Iowa Supreme Court has not explicitly endorsed any of *Dixon*'s several applications of the *Blockburger* test but, as will be discussed, the court's analysis in double jeopardy cases involving successive prosecutions appears more consistent with the Scalia approach than the Rehnquist approach.

In *Kraklio*, the defendant was the subject of an order enjoining him from engaging in deceptive practices amounting to consumer fraud in violation of Iowa Code section 714.16(2)(a). 560 N.W.2d at 17. He was later found in contempt for violating the injunction. *Id.*

The State filed a trial information charging Kraklio with securities fraud in violation of Iowa Code section 502.401. *Id.* Kraklio moved to dismiss the charges on the ground that his earlier punishment for contempt barred the prosecution. *Id.* The court cited the *Blockburger* test and *Dixon*'s "splintered views" of how *Blockburger* should be applied, but found it unnecessary to reconcile those views to resolve Kraklio's double jeopardy claim. *Id.* at 19–20. The court stated that, unlike *Dixon*, where "the orders that the defendants contemptuously violated were written broadly enough to incorporate the same crimes later prosecuted," Kraklio conceded that proof of his contempt rested on proof of acts that were not required to prove the subsequently charged crime. *Id.* at 20. The court concluded that a "comparison of elements yields differences that overcome a claim of double jeopardy under *Blockburger*." *Id.*

Notably, the court did not compare the statutory elements of the offense underlying the contempt citation (consumer fraud) with the statutory elements of

the charged crime (securities fraud). Instead, the court based its holding on the specific conduct that was restrained by the injunction and the fact that this specific conduct would not have to be proven in the subsequent prosecution for securities fraud. *Id.* As noted, the court's approach appears consistent with Justice Scalia's plurality opinion in *Dixon*.[1]

Following *Kraklio*, the court decided *Sharkey*, which again addressed the question of whether double jeopardy concerns were implicated in successive actions. *Sharkey*, 574 N.W.2d at 7. Sharkey was enjoined from certain activities involving his salvage operation. *Id.* He was later found in contempt of the injunction. *Id.* Meanwhile, the State filed criminal charges relating to his operation of a junkyard and other activities. *Id.* He was found guilty of these charges. *Id.*

On appeal, Sharkey argued that the prosecution subjected him to double jeopardy. *Id.* As in *Kraklio*, the court cited the *Blockburger* elements test in deciding whether the criminal prosecution was barred by the prior contempt citation, but focused on the specific conduct that was the subject of the contempt. *Id.* at 8–9. The court stated:

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[1] Justice Scalia's approach was criticized by some of his brethren for paying lip service to the *Blockburger* elements test but focusing instead on the underlying facts. *See Dixon*, 509 U.S. at 716–17, 113 S. Ct. at 2867, 125 L. Ed. 2d at 581 (Rehnquist, C.J., concurring in part and dissenting in part). Specifically, Justice Rehnquist stated:

> Our double jeopardy cases applying *Blockburger* have focused on the statutory elements of the offenses charged, not on the facts that must be proved under the particular indictment at issue—an indictment being the closest analogue to the court orders in this case. By focusing on the facts needed to show a violation of the specific court orders involved in this case, and not on the generic elements of the crime of contempt of court, Justice SCALIA's double jeopardy analysis bears a striking resemblance to that found in *Grady* [articulating a "same conduct rule"]—not what one would expect in an opinion that overrules *Grady.*

Id.

> The gravamen of the criminal prosecutions was the hazardous nature of the material stored and disposed of by Sharkey. On the other hand, the court's injunctions, and the contempt action based on them, merely prohibited Sharkey from landfilling with solid material; the hazardous nature of the waste was not a part of the injunction or the contempt action that followed.
>
> Therefore, the elements of the contempt and the criminal charges are so dissimilar that even the broadest application of the double jeopardy tests under *Blockburger* could not support Sharkey's argument. We therefore reject it.

Id. at 9. Again, the Iowa Supreme Court's approach appears consistent with Justice Scalia's application of the *Blockburger* test in *Dixon*.

We highlight these various applications of the *Blockburger* test in situations involving successive prosecutions to place in context the district court's application of that test in this case. We now turn to the court's ruling.

The district court correctly stated that "non-summary criminal contempt in Iowa [ ] is governed by Iowa Code Chapter 665." That chapter identifies several types of conduct that amount to contempt, including "[i]llegal resistance to any order or process made or issued by [the court]." Iowa Code § 665.2(3). The district court identified the elements of such a contempt action as (1) a duty to obey a court order, (2) failure to perform the duty, and (3) "evidence of conduct which is intentional and deliberate with a bad or evil purpose, or wanton and in disregard of the rights of others, or contrary to a known duty, or unauthorized, coupled with an unconcern whether the contemner had the right or not." *See In re Marriage of Ruden*, 509 N.W.2d 494, 496 (Iowa Ct. App. 1993). The court compared these elements to the elements of the crime of violating a custodial order set forth in Iowa Code section 710.6, articulating those elements as follows:

> [A] defendant who (1) is a relative of the child and who (2) acts in violation of a court order which fixes custody of the child in another,

> (3) by taking and concealing the child, within or outside the state, from the person having lawful custody.

By focusing on the statutory elements of chapter 665 contempt, as refined by case law, and comparing those elements to the statutory elements of section 710.6, the district court essentially applied Chief Justice Rehnquist's version of the *Blockburger* test as articulated in *Dixon*.

Although the State argues for reversal of the district court ruling, it also primarily espouses Chief Justice Rehnquist's approach in *Dixon*. While this approach is appealing in its simplicity, it was clearly a minority position and, as noted, the Iowa Supreme Court has not explicitly endorsed it. Accordingly, we decline to simply focus on the elements of contempt divorced from the underlying order claimed to have been violated. Instead, we apply the more fact-intensive approach used by the Iowa Supreme Court in *Sharkey* and *Kraklio* and by Justice Scalia and a plurality of the United States Supreme Court in *Dixon*. *See Dixon*, 509 U.S. at 697–98, 113 S. Ct. at 2857, 125 L. Ed. 2d at 569.

Following the approach of *Sharkey* and *Kraklio*, we begin with the decree provision Rincon was alleged to have violated. It stated:

> The Petitioner shall have visitation rights with the child . . . [f]or six consecutive weeks each summer, the six weeks to commence at 9:00 a.m. on the Saturday following the children's last day of school and ending at noon on Sunday six weeks thereafter.

This provision did not incorporate a criminal offense as did the order in *Dixon*. See *Dixon*, 509 U.S. at 697–98, 113 S. Ct. at 2857, 125 L. Ed. 2d at 569; *see also State v. Winningham*, 958 S.W.2d 740, 744 (Tenn. 1997) (characterizing Justice Scalia's opinion in *Dixon* as an "incorporation" approach that required inclusion of the underlying incorporated offense in the *Blockburger* analysis). It

simply set forth the amount of Rincon's summer visitation. Accordingly, we do not have to compare an underlying criminal offense with the subsequently charged criminal offense. To be held in contempt of this order, the district court had to find that Rincon had a duty to obey this order, she did not obey the order, and she did so "willfully," as defined above. *See Ruden*, 509 N.W.2d at 496; *see also Reis v. Iowa Dist. Ct.*, 787 N.W.2d 61, 68 (Iowa 2010).

In contrast, to establish a criminal violation of a custodial order under section 710.6, the State not only had to prove a violation of the decree, but also had to prove that Rincon was a "relative" of the "child" and "took and conceal[ed]" the child from the person who had custody. Iowa Code § 710.6. As the district court stated, the class of individuals subject to each offense differed, with the contempt action applying to those under a duty to obey a court order and the criminal action applying to relatives of a child. This statement alone should lead to a conclusion that the *Blockburger* test is not satisfied. In addition, the state of mind required of each offense differs. In the contempt proceeding, Olanayi had to show that Rincon acted "willfully." The criminal action, in contrast, is a general intent crime. *See Eggman v. Scurr*, 311 N.W.2d 77, 79 (Iowa 1981) ("[O]ffenses which have no express intent elements may be characterized as general intent crimes."). Under the *Blockburger* test, therefore, each offense required proof of an element that the other did not. Accordingly, double jeopardy did not attach and the criminal prosecution against Rincon could proceed.

We reverse the dismissal of the trial information and remand for further proceedings.

REVERSED AND REMANDED.