

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 24, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP2339

Cir. Ct. No. 2007FO153

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

COUNTY OF PRICE,

PLAINTIFF-RESPONDENT,

V.

LORENZO D. THOMPSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Price County:
DOUGLAS T. FOX, Judge. *Affirmed.*

¶1 BRUNNER, J.¹ Lorenzo Thompson, pro se, appeals a judgment rendered against him for violating Price County's Shoreline Zoning Ordinance.

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

Thompson contends the court erroneously denied his motion to dismiss the case on double jeopardy grounds. We disagree and affirm the judgment.

BACKGROUND

¶2 On April 30, 2007, Thompson was cited for violating PRICE COUNTY, WIS., SHORELAND ZONING ORDINANCE § 7.21.² Section 7.21, in conjunction with § 7.2, requires a permit from the zoning committee to conduct “[a]ny filling or grading of any area which is within 300 feet landward of the ordinary highwater mark of navigable water and which has surface drainage toward the water and on which there is ... [f]illing or grading of more than 5000 square feet on slopes less than 12%.”

¶3 It appears Thompson was also cited for violating WIS. STAT. § 30.19(1g)(c), which was the subject of a separate action.³ Under that statute, “[u]nless an individual or a general permit has been issued under this section or authorization has been granted by the legislature, no person may ... [g]rade or remove topsoil from the bank of any navigable waterway where the area exposed by the grading or removal will exceed 10,000 square feet.”

¶4 Thompson moved to dismiss this case on double jeopardy grounds, contending the ordinance and statutory violations constituted multiple punishments for the same offense. The circuit court denied the motion because the

² We note that the background section of Thompson’s brief is devoid of citations to the record, contrary to the rules of appellate procedure. *See* WIS. STAT. RULE 809.19(1)(d). We further note that our ability to ascertain the underlying facts is limited because the jury trial transcript is not in the record. It is also unclear whether some of the background facts Thompson refers to are even in the record.

³ While the circuit court was familiar with the case regarding Thompson’s violation of WIS. STAT. § 30.19(1g)(c), we do not have the record for that case in this appeal.

offenses' elements are different. A trial was held, and a jury found Thompson violated the ordinance.

DISCUSSION

¶5 We review de novo whether a person's constitutional rights to be free from double jeopardy have been violated. *See State v. Anderson*, 219 Wis. 2d 739, 746, 580 N.W.2d 329 (1998). The double jeopardy clauses of the United States and Wisconsin Constitutions protect a person from, among other things, multiple punishments for the same offense. *State v. Rachel*, 2002 WI 81, ¶20, 254 Wis. 2d 215, 647 N.W.2d 762. While double jeopardy protections apply only to criminal prosecutions, a statute's label as criminal or civil is not determinative. *Id.*, ¶¶20, 34-43. Instead, a multi-factor, "intent-effects" test is used to determine whether statutes are punitive. *Id.*, ¶¶31-33, 38. If only one of two statutes is punitive, there is no double jeopardy violation. *Id.*, ¶20.

¶6 Even where both statutes are punitive, that does not end the double jeopardy inquiry, but instead leads to a second test. *See Anderson*, 219 Wis. 2d at 746. This second, two-part test addresses: (1) whether the charged offenses are identical in law and fact; and (2) if the charges are not identical in law and fact, whether the legislature intended them to be brought as a single count. *Id.* We analyze the second part of the test applying a presumption that the legislature intended multiple punishments. *See id.* at 751. This presumption may only be rebutted by a clear indication to the contrary. *See id.* If the presumption is rebutted and the legislature intended the violations to be brought as a single count, then prosecuting the violations as multiple counts is impermissible. *Id.* at 753.

¶7 We need not address the multi-factor, intent-effects test because, even assuming both violations were punitive, they are not identical in law and fact,

and Thompson does not address whether the legislature intended multiple punishments.⁴ The most obvious difference between the ordinance and statute are the permitting requirements. Under PRICE COUNTY, WIS., SHORELAND ZONING ORDINANCE §§ 7.2 and 7.21, Thompson was required to obtain a permit from the County's zoning committee. Under WIS. STAT. § 30.19, Thompson was required to obtain a general or individual permit from the Department of Natural Resources. See WIS. STAT. §§ 30.01(1j) and 30.19(1g)(c), (3r)-(4). Because the violations of the ordinance and statute are based on failures to obtain two distinct permits, they are not identical in law and fact.⁵

¶8 The violations not being identical in law and fact, Thompson must show that the legislature intended the violations to be brought as a single count. See *Anderson*, 219 Wis. 2d at 751-53. Thompson does not address this part of the test. As a result, Thompson does not overcome the presumption that multiple prosecutions were intended. See *id.*

⁴ We note, however, that even if we were to address whether the ordinance and statute were punitive using the intents-effects test, we would conclude they are not. See, e.g., *State v. Thierfelder*, 174 Wis. 2d 213, 220-21, 228-29, 495 N.W.2d 669 (1993) (violation of municipal operating while intoxicated ordinance not criminal).

⁵ While the different permits are one obvious difference between the ordinance and statute, the conduct for which the different permits are required is also different. For example, under the ordinance, a permit is required to grade 5,000 square feet, whereas under the statute it is 10,000 square feet. See PRICE COUNTY, WIS., SHORELAND ZONING ORDINANCE § 7.21; WIS. STAT. § 30.19(1g)(c). The ordinance also applies to all land within 300 feet of the ordinary high water mark, while the statute only applies to "the bank," which has its own definition under WIS. STAT. § 30.19(1b)(b).

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT RULE
809.23(1)(b)4.

