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STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Supreme Court No.

Plaintiff-Appellant,

Court of Appeals No. 314375 4/24

v

Leelanau Cir. Ct. No. 12-1777-FH

William
JOSEPH MILLER,

Power, T

Defendant-Appellee.

THE PEOPLE'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF QUESTION PRESENTED

A jury convicted Defendant Joseph Miller of violating MCL 257.625(1) (operating a motor vehicle while intoxicated), and MCL 257.625(5) (operating a motor vehicle while intoxicated, or while visibly impaired, or while having any amount of a specified controlled substance in his or her body, and causing serious injury). The Court of Appeals reversed the conviction under subsection 1 on the basis of double jeopardy.

1. Whether the multiple punishments prong of the Double Jeopardy Clause forbids a defendant from being convicted under both subsection 1 and subsection 5 of MCL 257.625.

The People's answer: No.

Defendant's answer: Yes.

The trial court did not answer this question because it was not raised below.

Court of Appeals' answer: Yes.

Authority: *People v Ream*, 481 Mich 223; 750 NW2d 536 (2008).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution commands that no “person be subject for the same offence to be twice put in jeopardy of life or limb.”

US Const, Am V.

Article 1, § 15 of the Michigan Constitution states, “No person shall be subject for the same offense to be twice put in jeopardy.”

STATUTE INVOLVED

Subsection 1 of MCL 257.625 provides:

A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated. As used in this section, “operating while intoxicated” means any of the following:

- (a) The person is under the influence of alcoholic liquor, a controlled substance, or other intoxicating substance or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance.
- (b) The person has an alcohol content of 0.08 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or, beginning October 1, 2018, the person has an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.
- (c) The person has an alcohol content of 0.17 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine.

Subsection 3 of MCL 257.625 provides:

A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state when, due to the consumption of alcoholic liquor, a controlled substance, or other intoxicating substance, or a combination of alcoholic liquor, a controlled substance,

or other intoxicating substance, the person's ability to operate the vehicle is visibly impaired. If a person is charged with violating subsection (1), a finding of guilty under this subsection may be rendered.

Subsection 5 of MCL 257.625 provides:

A person, whether licensed or not, who operates a motor vehicle in violation of subsection (1), (3), or (8) and by the operation of that motor vehicle causes a serious impairment of a body function of another person is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not less than \$1,000.00 or more than \$5,000.00, or both. The judgment of sentence may impose the sanction permitted under section 625n. If the vehicle is not ordered forfeited under section 625n, the court shall order vehicle immobilization under section 904d in the judgment of sentence.

Subsection 8 of MCL 257.625 provides:

A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if the person has in his or her body any amount of a controlled substance listed in schedule 1 under section 7212 of the public health code, 1978 PA 368, MCL 333.7212, or a rule promulgated under that section, or of a controlled substance described in section 7214(a)(iv) of the public health code, 1978 PA 368, MCL 333.7214.

STATEMENT OF JUDGMENT APPEALED FROM AND RELIEF SOUGHT

The People seek leave to appeal the Court of Appeals' decision that vacated defendant Joseph Miller's conviction and sentence for operating a motor vehicle upon a highway while intoxicated contrary to MCL 257.625(1), third offense.¹ *People v Miller*, unpublished opinion per curiam of the Court of Appeals, issued March 11, 2014 (Docket No. 314375) (attached as Appendix A). The Court of Appeals also denied the People's motion for rehearing. *People v Miller*, unpublished order of the Court of Appeals, entered April 24, 2014 (Docket No. 314375) (attached as Appendix B).

This Court should grant leave to appeal, reverse the Court of Appeals and reinstate Miller's conviction under MCL 257.625(1) (operating a motor vehicle while intoxicated), because allowing this conviction stand along with his conviction for violating to MCL 257.625(5) (operating a motor vehicle while intoxicated, or while visibly impaired, or while having any amount of a specified controlled substance in his or her body, and causing serious injury) does not violate the multiple punishments prong of the Double Jeopardy Clause.

Alternatively, this Court should summarily reverse the Court of Appeals' erroneous decision and reinstate Miller's conviction under MCL 257.625(1) without merits briefing and oral argument.

¹ Miller is a three-time drunk driver, and therefore, was sentenced as a felon under MCL 257.625(9)(c).

INTRODUCTION AND SUMMARY OF ARGUMENT

Defendant Joseph William Miller, a three-time drunk driver, should be held fully accountable for all of his crimes. Miller was a passenger in his girlfriend's car when—during an argument—he grabbed the wheel and caused the car to veer off the road, strike a large boulder, and become airborne. Miller was intoxicated at the time, and his decision to grab the wheel in anger caused the crash, which broke his girlfriend's collarbone and gave her a concussion.

A jury convicted Miller of operating a motor vehicle upon a highway while intoxicated contrary to MCL 257.625(1), and also of operating a motor vehicle while intoxicated and causing serious injury contrary to MCL 257.625(5).

On appeal the Michigan Court of Appeals vacated Miller's conviction under subsection 1 because it concluded that the conviction violated his double-jeopardy rights because he had also been convicted of violating subsection 5. The Court of Appeals looked to the same-elements test from *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932), and concluded the Double Jeopardy Clause was violated because MCL 257.625(1) does not require an element that is distinct from MCL 257.625(5).

The Court of Appeals clearly erred in its analysis. As this Court explained in *People v Ream*, 481 Mich 223; 750 NW2d 536 (2008), the correct test to apply is to look to the elements in the abstract and ask whether it is possible to commit the first crime without committing the second crime, and also possible to commit the second crime without committing the first crime. If the answer to both questions is yes, there is no violation of the Double Jeopardy Clause. 481 Mich at 241.

It is clear that a person may violate subsection 1 without violating subsection 5: the person could drive while intoxicated (thereby violating subsection 1) without causing "serious impairment of a body function" of another person (as subsection 5 requires). It is also true that one can violate subsection 5 without violating subsection 1. This can occur because a conviction under subsection 5 is allowed not just if there is a violation of subsection 1, but also for violations of subsection 3 or subsection 8. MCL 257.625(5) ("A person, whether licensed or not, who operates a motor vehicle in violation of subsection (1), (3), or (8) . . ."). For example, a person could seriously injure another by driving while having any amount of a specified controlled substance in his body (thereby violating subsection 5 via subsection 8) without having enough of the substance to be legally intoxicated (as subsection 1 requires). Applying the *Ream* test shows Miller's double-jeopardy rights were not violated. Leave should be granted because the Court of Appeals' decision conflicts with this Court's decision in *Ream*. MCR 7.302(B)(5).

Further, this case is jurisprudentially significant because it involves the Court of Appeals erroneously construing the multiple-punishments prong of the Double Jeopardy Clause to forbid imposition of two drunk-driving related convictions when the Double Jeopardy Clause does not prohibit imposition of the two convictions. MCR 7.302(B)(2).

Given that Miller's right to be free from double jeopardy was not violated, the Court of Appeals clearly erred. This Court should grant leave to appeal with a view to reverse, or alternatively it should peremptorily reverse the Court of Appeals.

STATEMENT OF FACTS

On June 28, 2012, Rosa Cuellar picked up her boyfriend, defendant Joseph William Miller, after work. (10/17/12 Trial Tr [TT], p 150.) That evening, the couple went to a concert, where both drank alcohol. (10/17/12 TT, p 153.) After the concert, they drove home in Cuellar's car. (10/17/12 TT, p 154.) After getting into an argument, Cuellar decided to drive Miller back to his own house. (10/17/12 TT, p 155.) But, at some point, she changed her mind and decided to drive home. (10/17/12 TT, p 158.) During the drive, they were arguing, and Cuellar testified that she remembered hitting Miller's arm in order to get his attention. (10/17/12 TT, p 159.)

Cuellar's car was traveling northbound on M-22 when it veered abruptly to the right, struck a very large boulder on the side of the road, and went airborne. (10/17/12 TT, p 104.) The top of the roof struck a tree, and Cuellar was trapped in the car. (10/17/12 TT, p 104.) Cuellar called 911 and told the operator that "I'm next to a tree because [Miller] moved my steering wheel." (10/17/12 TT, p 164; People's Ex 2 at 3:24-3:27.) Cuellar was in obvious distress during the call, repeatedly asking the operator to send help and complaining of pain in her head. (10/17/12 TT, p 164.) She later informed the operator that "I was going to drive [Miller] home, but he turned the steering wheel on me." (People's Ex 2 at 5:33-5:50.) She also confirmed that Miller had turned the wheel because he was mad about something. (*Id.*) But when Deputy Duane Wright questioned her at the scene, she told him she did not remember what happened. (10/17/12 TT, p 110.)

Sergeant Terrance Cadieux testified that the road was dry at the time of the crash. No dead animals or animal tracks provided a reason for Cuellar's car to suddenly veer off the road. (10/17/12 TT, pp 206-207.) No evidence suggested that Cuellar's car was trying to avoid another vehicle. (10/17/12 TT, pp 207-208.)

Cuellar was treated at the hospital for a broken collarbone and a concussion. (10/17/12 TT, p 160.) She told Larry Alexander, the physician's assistant who treated her at the Emergency Room, that the crash happened because Miller "grabbed the wheel." (10/17/12 TT, p 188.) She later testified at trial that she had no memory of the crash. (10/17/12 TT, pp 155-156.) Deputy Wright obtained a warrant to test both Cuellar's and Miller's blood-alcohol levels. Cuellar had a blood-alcohol level of .12, while Miller's blood-alcohol level was .17. (10/17/12 TT, pp 144-146.)

The jury deliberated for 31 minutes before finding Miller guilty of operating while intoxicated, MCL 257.625(1)(b), and operating while intoxicated causing serious injury, MCL 257.625(5). (10/17/12 TT, pp 267-269.) Miller was sentenced to five years of probation, with the first 9 months served in county jail. (11/26/12 Sentencing Tr, pp 7-8.)

PROCEEDINGS BELOW

Miller was convicted of violating MCL 257.625(1) and MCL 257.625(5). The trial court imposed concurrent sentences of five years of probation, with the first nine months served in the county jail. (11/26/12 Sentencing Tr, pp 7-8.)

On appeal Miller argued that allowing both of his convictions to stand violated the multiple-punishments prong of the Double Jeopardy Clause. The Michigan Court of Appeals agreed with Miller and vacated his conviction under MCL 257.625(1). *People v Miller*, unpublished opinion per curiam of the Court of Appeals, issued March 11, 2014 (Docket No. 314375).

The People filed a motion for reconsideration pointing out that the Court of Appeals' analysis was contrary to *People v Ream*. The Court of Appeals denied the People's motion in a summary order.

The People now seek leave to appeal the Court of Appeals' holding that allowing both convictions to stand violates Miller's rights under the Double Jeopardy Clause.

STANDARD OF REVIEW

A double-jeopardy challenge presents a question of constitutional law that this Court reviews de novo. *People v Nutt*, 469 Mich 565, 573; 677 NW2d 1 (2004). Because Miller did not raise this double jeopardy claim in the trial court, this unpreserved constitutional claim of error is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999).

ARGUMENT

- I. **Convicting and sentencing a defendant for violating both subsection 1 and subsection 5 of MCL 257.625 does not violate the multiple-punishments prong of the Double Jeopardy Clause because it is possible to violate each subsection without violating the other. This Court's double-jeopardy precedents require focusing on the abstract elements of the offenses.**

The United States and Michigan Constitutions command that no person be put in jeopardy twice for the same offense. US Const, Am V; Const 1963, art 1, § 15. The Fifth Amendment's Double Jeopardy Clause is applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Benton v Maryland*, 395 US 784, 794; 89 S Ct 2056; 23 L Ed 2d 707 (1969).

One of the basic protections afforded by the Double Jeopardy Clause is protection against multiple punishments for the same offense. *Brown v Ohio*, 432 US 161, 165; 97 S Ct 2221; 53 L Ed 2d 187 (1977). Double jeopardy protections in the federal and state constitutions prohibit multiple convictions and punishments for the same offense. *People v Ream*, 481 Mich 223, 227; 750 NW2d 536 (2008).

"[T]he question under the Double Jeopardy Clause whether punishments are 'multiple' is essentially one of legislative intent[.]" *Ohio v Johnson*, 467 US 493, 499; 104 S Ct 2536; 81 L Ed 2d (1984). If the Legislature expressed a clear intention to impose multiple punishments, the constitutional protections against double jeopardy are not offended. *People v Smith*, 478 Mich 292, 316; 733 NW2d 351 (2007).

But, when there is no clear legislative intent, to determine if the convicted offenses violated the multiple punishment strand of the Double Jeopardy Clause, it

is appropriate to apply the test of *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932); *Ream*, 481 Mich at 239–40; *Smith*, 478 Mich at 296, 316. The correct focus, and the proper method to ascertain whether the Legislature intended to impose multiple punishments, is an analysis driven by the abstract elements of each crime, as set forth in *Blockburger*. *Ream*, 481 Mich at 225–26, 228–29, 232. As this Court explained in *Ream*, “[b]ecause the statutory elements, not the particular facts of the case, are indicative of legislative intent, the focus must be on these statutory elements.” *Id.* at 238.

A. The two statutes Miller was convicted of violating have distinct elements.

MCL 257.625(1) forbids a person from operating a motor vehicle upon a highway if the person is operating while intoxicated (OWI). The statute further indicates that one can be intoxicated as the result of:

(i) being “under the influence of alcoholic liquor, a controlled substance, or other intoxicating substance or a combination of alcoholic liquor, a controlled substance, or other intoxicating substance,” MCL 257.625(1)(a),

or

(ii) having an unlawful bodily alcohol content (measured against the operator’s breath, blood or urine), MCL 257.625(1)(b) & (c).

In contrast, MCL 257.625(5) forbids a person from “operat[ing] a motor vehicle in violation of subsection (1), (3), or (8) and by the operation of that motor vehicle caus[ing] a serious impairment of a body function of another person.” The three subsection involve different predicate crimes:

Subsection (1): operating while under the influence of alcoholic liquor, or a controlled substance, or an other intoxicating substance or a combination of these substances,

or

Subsection (3): operating a motor vehicle upon a highway when the person is visibly impaired due to the consumption of alcoholic liquor, a controlled substance, or other intoxicating substance, or a combination of these substances,

or

Subsection (8): operating motor vehicle on a highway if the person has in his or her body any amount of a controlled substance listed in of the public health code.,

And subsection 5 also requires, in addition to the predicate violation, that the person by operation of the vehicle cause serious injury to another person.

B. Under *People v Ream*, if it is possible to commit the first crime without committing the second crime and to commit the second crime without committing the first crime, then there is no violation of the Double Jeopardy Clause.

In *Ream* the defendant was convicted of both first-degree felony murder and the predicate felony (first-degree criminal sexual conduct). 481 Mich at 225. The Court of Appeals vacated the defendant's first-degree criminal sexual conduct conviction and sentence on double-jeopardy grounds. The People appealed and this Court reversed.

The Court reasoned that "[f]irst-degree felony murder does not necessarily require proof of a sexual penetration because first-degree felony murder can be committed without also committing first-degree criminal sexual conduct." *Id.* at 241. Even though on the particular facts of *Ream's* case, the criminal sexual

conduct was the predicate felony for the felony-murder offense, this Court focused on the abstract elements of the offenses and the fact that it was possible for them to not overlap: “First-degree felony murder is the killing of a human being with malice while committing, attempting to commit, or assisting in the commission of *any* of the felonies specifically enumerated in MCL 750.316(1)(b).” *Id.* (emphasis in original). Because “it is possible to commit the greater offense [first-degree felony murder] without first committing the lesser offense [first-degree criminal sexual conduct]”—“each contains an element the other does not”—the Court concluded “that these offenses are not the ‘same offenses’ under either the Fifth Amendment or Const 1963, art 1, § 15, and, therefore, defendant may be punished separately for each offense.” *Id.* at 241–42.

The fact that it was possible in *Ream* to commit felony-murder by a different predicate felony is parallel to the fact here that the offense in MCL 257.625(5) can be committed without violating subsection 1 (by being “intoxicated”) because a person could violate subsection 8 (by having “any amount of a controlled substance” in one’s body).

C. It is possible to commit a violation of subsection 1 without violating subsection 5 and vice versa.

As the following chart shows, the differences between subsection 1 and subsection 5 make it possible to violate one without violating the other.

MCL 257.625	Elements of Subsection 1	Elements of Subsection 5
Intoxicated	X	
Operating vehicle	X	X
With any amount of a controlled substance in body (predicate offense under subsection 8)		X
Causing serious injury to another		X

There is no dispute, and the Court of Appeals recognized, that one can commit a violation of subsection 1 without violating subsection 5 because subsection 5 requires someone be seriously injured.²

Similarly, one can be convicted of violating subsection 5 by operating with any amount of a specified controlled substance in one's body (subsection 8), even if that amount does not lead to intoxication. Thus, subsection 1 is not a necessarily lesser included offense of subsection 5. Just as first-degree felony murder does not necessarily require proof of first-degree criminal sexual conduct because it can be

² This Court of Appeals used the shorthand "OUIL" to describe a violation of subsection 1 in its opinion. But, this shorthand is imprecise and can be misleading given that one need not be under the influence of alcoholic liquor to violate subsection 1. One can violate subsection 1 by operating while intoxicated by alcoholic liquor, or intoxicated by a controlled substance, a combination of the two, or while being under the influence of an other intoxicating substance.

Further, the Court of Appeals used the shorthand "OUIL causing serious injury" to describe a violation of subsection 5. Again, this shorthand is imprecise and can be misleading given that one can violate subsection 5 in three different ways. The first way is to be operating while intoxicated contrary to subsection 1. But, subsection 5 can also be violated if one is either visibly impaired causing serious injury, contrary to subsection 3, or by having any amount of a specified controlled substance in one's body causing serious injury, contrary to subsection 8.

committed by committing a different predicate offense, so a violation of subsection 5 does not require proof of subsection 1 because a violation of subsection 5 can be premised on a violation of subsection 8 (any amount of a specified controlled substance in one's body).

D. The Court of Appeals' analysis is contrary to the *Ream* test.

The Court of Appeals held:

[I]t cannot be said that MCL 257.625(1) requires an element that is not present in MCL 257.625(5). While one could be convicted of MCL 257.625(5) without having violated MCL 257.625(1), such as by violating MCL 257.625(3) or (8) while causing serious injury to another person, that is not the test. [Slip op at 4.]

Actually, under *Ream* (a case the court failed to address), that is the test.

The Court of Appeals' error becomes clear if one takes the above-quoted paragraph and plugs in the statutes in *Ream*, by substituting "first-degree felony murder" for "MCL 257.625(5)," and "first-degree criminal sexual conduct" for "MCL 257.625(1)." With these substitutions, and other appropriate changes, the Court of Appeals opinion would read as follows:

[I]t cannot be said that first-degree criminal sexual conduct requires an element that is not present in first-degree felony murder. While one could be convicted of first-degree felony murder without having committed first-degree criminal sexual conduct, such as by committing a different predicate felony, that is not the test.

Thus, the test the Court of Appeals used would find a violation of the Double Jeopardy Clause where this Court said in *Ream* that there was none.

Application of the *Ream* test shows it is not a violation of the Double Jeopardy Clause to convict someone of violating both subsection 1 and subsection 5.

This is because a subsection 5 conviction can be premised on a subsection 8 violation. In the absence of a double-jeopardy violation, Miller was not entitled to have his conviction for violating MCL 257.625(1) vacated.

CONCLUSION AND RELIEF REQUESTED

The multiple punishments prong of the Double Jeopardy Clause was not violated here. The Court of Appeals' decision vacating Miller's conviction and sentence for violating MCL 257.625(1) (operating a motor vehicle while intoxicated), as a third offense, should be reversed.

Accordingly, the People respectfully request this Honorable Court to grant leave to appeal, or in the alternative, to peremptorily reverse the decision of the Court of Appeals, reinstating Miller's MCL 257.625(1) conviction and sentence as a three-time drunk driver, MCL 257.625(9)(c).

Respectfully submitted,

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