IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	*	
PLAINTIFF-APPELLANT,	*	**CASE NO. 06-1529**
VS.	*	**ON APPEAL FROM THE ROSS COUNTY COURT OF APPEALS, FOURTH APPELLATE DISTRICT**
PAUL FAIRBANKS,	*	
DEFENDANT-APPELLEE.	*	
	*	**C.A. CASE NO. 05 CA 2870**

****

MERIT BRIEF OF APPELLEE

****

Michael M. Ater (0063517)
Ross County Prosecuting Attorney
72 North Paint Street
Chillicothe, Ohio 45601
(740) 702-3115
(740) 702-3106
Judith Heimerl Brown(0043588) Asst.
Counsel for Appellant, State of Ohio

James T. Boulger (0033873)
Attorney for Appellee
2 West Fourth Street
Chillicothe, Ohio 45601
(740) 775-5312
(740) 775-6189-Fax

Counsel for Appellee, Jason Gibson

FILED
FEB 28 2007
MARCIA J MENGEL, CLERK
SUPREME COURT OF OHIO

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EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.

STATEMENT OF FACTS/STATEMENT OF CASE

On October 12, 2003 a deputy of the Ross County Sheriff's Department began a pursuit of a motor vehicle later determined to be operated by the Defendant-Appellant, Paul Fairbanks. The reason for the initial pursuit was a minor misdemeanor traffic violation (left of center, 4511.25 R.C.). The pursuit ended when Mr. Fairbanks lost control of his motor vehicle causing an accident which disabled his vehicle.

Mr. Fairbanks was issued a traffic citation on the date of offenses. The citations charged Mr. Fairbanks with the offenses of speeding, (4511.21 R.C.), OMVI, OMVS (4511.19(A)(1) and (A)(7) R.C.), Reckless Operation (4511.20 R.C.), and left of center (4511.25 R.C.). On or before the 25th day of November of 2003, Mr. Fairbanks paid the 'waiver' amounts for the speeding (4511.20 R.C.), reckless operation (4511.21 R.C.) and left of center (4511.25 R.C.) violations.

On December 5, 2003, Mr. Fairbanks was indicted on one count of Failure to Comply in violation of R.C. 2921.331(B) and (C)(5)(a)(ii) for his actions on October 12, 2003. After entering a not guilty plea to the Indictment, Mr. Fairbanks filed a Motion to Dismiss/Strike. In his motion, Mr. Fairbanks submitted that division(C)(5)(a)(ii) of R.C. 2921.331, and enhancing element in the indictment, placed him in double jeopardy as a successive prosecution to his reckless operation conviction.

On March 24th of 2005, the trial court overruled Mr. Fairbanks' motion. Mr. Fairbanks ultimately entered a no contest plea to the indictment, was found guilty by the trial court, and sentenced to community control sanctions.

Mr. Fairbanks timely appealed his conviction and the Court of Appeals of Ross County reversed the trial court, finding a double jeopardy bar.

The Court of Appeals found that reckless operation under Revised Code 4511.20 is a lesser included offense to failure to comply as charged under Revised Code 2921.33(B) and (C)(5)(a)(ii). The Court noted that the enhancing element under (C)(5)(a)(ii) of 2921.331(B) must be interpreted in light of the provisions of 2901.21(B) and found that recklessness is a required mental state for this enhancing element. That being the case, all three prongs of the Deem Test were met.

Since lesser-included offenses are clearly within the *Blockburger* standard, the Court concluded that the double jeopardy bar of multiple prosecutions had been violated. The Court of Appeals did not engage in an analysis under R.C. 2941.25

ARGUMENT IN SUPPORT OF THE PROPOSITIONSOF LAW

FIRST PROPOSITION OF LAW

Where the general assembly indicates a mental state in one part of the statute and does not indicate any mental state in another part of the statute, the exclusion of any mental state indicates intent to impose strict liability as to the other part.

Implicit in the State's Proposition of Law is the assumption that the double jeopardy to successive prosecutions only applies when one of the offenses sucesively prosecuted is a lesser-included offense to the other.

The State argues in support of the proposition without any reference to the *Blockburger* test, the touchstone of double jeopardy analysis of successive prosecutions on this question.

In *Blockburger v. United States,* (1932), 284 US 299 the Court stated the test in deceptively simple terms:

> "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 a fact which the other does not.**"
> *Blockburger v. United States,* 284 U.S. 299, 304 (U.S. 1932). (Emphasis added)

As Justice Byers observes in *Texas v. Cobb,* 532 U.S. 162:

> ". . .the simple-sounding Blockburger test has proved extraordinarily difficult to administer in practice. Judges, lawyers, and law professors often disagree about how to apply it. See, e.g., United States v. Woodward, 469 U.S. 105, 108, 83 L. Ed. 2d 518, 105 S. Ct. 611 (1985) (per curiam) (holding that lower court misapplied Blockburger test). Compare United States v. Dixon, 509 U.S. 688, 697-700, 125 L. Ed. 2d 556, 113 S. Ct. 2849 (1993) (opinion of SCALIA, J.) (applying Blockburger and concluding that contempt is same offense as underlying substantive crime), with 509 U.S. at 716-720 (REHNQUIST, C. J., concurring in part and dissenting in part) (applying Blockburger and deciding that the two are separate offenses). The test has emerged as a tool in an area of our jurisprudence that THE CHIEF JUSTICE has described as "a veritable Sargasso Sea which could not fail to challenge the most intrepid judicial navigator." Albernaz v. United States, 450 U.S. 333, 343, 67 L. Ed. 2d 275, 101 S. Ct. 1137 (1981)."
> *Tex. v. Cobb*, 532 U.S. 162, 185 (U.S. 2001).

The reckless operation statute, R. C. 4511.20, provides that:

> "[n]o person shall operate a vehicle, tractor, trolley, or street car on any street or highway in willful or wanton disregard of the safety of persons or property."

The Supreme Court of Ohio has previously considered the mens rea elements of this statute and concluded that:

> "Under the language of the statute, a person is prohibited from operating a vehicle in willful or wanton disregard of the safety of persons or property. Contrary to the holding of the court of appeals, we believe that **the statute simply provides two definite and clear bases upon which a finding of guilt may be premised**. n1 A person may be found guilty of violating R.C. 4511.20 **if he acts willfully. Such conduct implies an act done intentionally, designedly, knowingly, or purposely**, without justifiable excuse. Black's Law Dictionary (5 Ed. 1979) 1434. Or, conversely, R.C. 4511.20 is violated when a person acts wantonly in disregard of the safety of others. **A wanton act is an act done in reckless disregard of the rights of others which evinces a reckless indifference of the consequences to the life, limb, health, reputation, or property of others**. Id. at 1419. n2 Similarly, when the operator of a vehicle, with full knowledge of the surrounding circumstances, recklessly and inexcusably disregards the rights of other motorists, his conduct may be characterized as wanton. Hawkins v. Ivy, supra."
> *State v. Earlenbaugh,* 18 Ohio St. 3d 19, 21-22 (Ohio 1985).(emphasis added).

The "willful or wanton' language of R.C. 4511.20 establishes a set of alternative mens rea elements which include both purposeful and reckless conduct.

R.C. 2921.331(B) provides that:

> "no person shall operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop."

The grammatical structure of 2921.331(B) is such that the infinitive phrase ". . .to elude or flee a police officer. . . " functions as an adverb modifying the verb 'operate'. In turn the adverb 'willfully' modifies the infinitive/adverbial phrase. A violation of this section is a first degree misdemeanor unless one of the enhancing elements of 2921.371(C)(4) or (5) is added. In this case the indictment stated the following additional element:

> "The operation of the motor vehicle by the offender caused a substantial risk of serious physical harm to persons or property."
> 2921.331(C)(5)(a)(ii)

Recognizing that the 'operation of the motor vehicle' references the verb 'operated' as modified in 2921.331(B), the question becomes:

Can a person operate a motor vehicle so as willfully (purposefully) to elude or flee. . .{while} causing substantial risk of serious physical harm to person or property without also committing the offense of operating a motor vehicle in wanton (reckless) disregard of the safety of persons and property?

At least three Ohio Courts of Appeals have applied the *Blockburger* test and held that prosecutions under R.C. 2921.331(B) and (C)(5)(a)(ii) are in violation of double jeopardy prohibition when the accused has already been convicted of reckless operation based upon the same conduct. *State v. Morton,* 2005 Ohio 308, (Second District, discretionary appeal not allowed by *State v. Morton,* 2005 Ohio 3154). *State v. Moton* (Dec. 17, 1998), Richland App. No. 98 CA 60, (Fifth District); *State v. Knaff,* (1998), 128 Ohio App. 3d 90 (First District). See Also *State v. Morton,* (Apr. 30, 1999), Hamilton App. No. C-980391, 1. *BUT CF. State v. Jackson,* 2002 Ohio 5329, 2002 Ohio App. LEXIS 5343 (holding reckless operation is not a lesser included offense of failure to comply). In essence all three of these appellate courts have determined that:

> " The felony failure-to-comply offense required proof of several additional facts separate from the reckless-operation offense. However, the reckless-operation offense did not require proof of any fact beyond those required for felony failure to comply. Under the elements, it is impossible to commit the felony version of the failure-to-comply offense-operation of a motor vehicle causing substantial risk of serious physical harm to person or property- without also violating the [reckless operation statute]- operation of a vehicle without disregard for the safety of persons or property"
> *Morton,* 2005 Ohio at P. 20-21, App. Pgs. 1-4.

The decisions in these cases consist of a straight forward application of the *Blockburger* test.

In contrast, the trial court in this case determined that the enhancing element under 2921.331(C)(5)(a)(ii) contains no mens rea, and further found a plain intent to impose strict liability. To reach this conclusion the court had to either distinguish, or ignore, holdings of the Supreme Court of Ohio in *State v. Moody*, 104 O.S. 3d 244 and *State v. Lozier*, 101 O.S. 3d 161.

A unanimous court in *Moody* quoted with approval the following language from *State v. Collins*, 89 O.S. 3d 524:

> "It is not enough that the General Assembly in fact intended imposition of liability without proof of mental culpability. Rather the General Assembly must plainly indicate that intention in the language of the statute."
> *Moody* at 247 quoting *Collins* at 530.

Several months earlier the Supreme Court in *Lozier* applied the provisions of R.C. 2901.21(B) to the enhancing element of committing drug trafficking (2925.03) in the vicinity of a school (2925.03 (C)(5)(6). The court in Moody summarized the *Lozier* holding thusly:

> "In accordance with this statute, we have held that "recklessness is the catchall culpable mental state for criminal statutes that fail to mention any degree of culpability, except for strict liability statutes, where the accused's mental state is irrelevant. However, for strict liability to be the mental standard, the statute must plainly indicate a purpose to impose it. "*State v. Lozier,* 101 Ohio St. 3d 161, 2004 Ohio 732, P21, 803 N.E. 2d 770. Thus, in constructing R.C. 2901.21(B), we have repeatedly held that in order to impose strict criminal liability, the statute must clearly show such legislative intent. See *State v. Maxwell,* 95 Ohio St. 3d 254, 2002 Ohio 2121, 767 N.E. 2d 242; *State v. Jordan,* (2000), 80 Ohio St. 3d 488, 493, 2000 Ohio 225, 733 N.E. 2d 601; *State v. McGee* (1997), 79 Ohio St. 3d 193, 195, 1997 Ohio 156, 680 N.E. 2d 975; *State v. Wac* (1981), 68 Ohio St. 2d 84, 86, 22 O.O. 3d 299, 428 N.E. 2d."
> *Moody* at 246.

Further, the plain language of both statutes and the 2921.331 subsection makes clear that the conduct the legislature intend to proscribe is reckless operation of a vehicle, whether

the reckless operation is committed with or without eluding the police. If an individual engages in such conduct without fleeing or eluding a police officer, the individual is charged with a minor misdemeanor. On the other hand, if the individual engages in such conduct while also fleeing and eluding a police officer, and in so doing creates a substantial risk of physical harm, the individual is charged with a felony. Three appellate courts have observed reckless operation can be committed without fleeing from law enforcement, but it is impossible to flee or elude a police officer while also causing substantial risk of serious physical harm to persons or property and not at the same time drive in a manner that is in wanton disregard of the safety of persons and property.

CONCLUSION

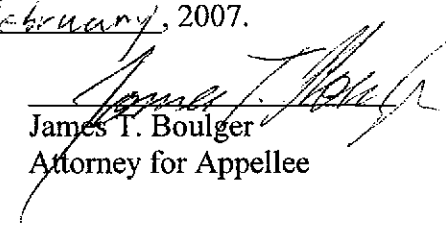
Consequently, the trial court erred when it overruled Mr. Fairbanks' motion to dismiss/strike. The Court of Appeals correctly determined that the successive prosecution was barred by double jeopardy clause.

Respectfully submitted,

James T. Boulger (0033873)
Attorney for Appellee
2 West Fourth Street
Chillicothe, Ohio 45601
(740) 775-5312

PROOF OF SERVICE

A copy of the foregoing was served upon Mr. Michael M. Ater and Judith Heimerl Brown, Ross County Prosecutor's Office, 72 North Paint Street, Chillicothe, Ohio 45601 by regular U.S. Mail this 28th day of February, 2007.



James T. Boulger
Attorney for Appellee

 App 1

STATE OF OHIO, Plaintiff-Appellant -vs- RONALD E. MOTON, JR., Defendant-Appellee

Case No. 98CA60

COURT OF APPEALS OF OHIO, FIFTH APPELLATE DISTRICT, RICHLAND COUNTY

1998 Ohio App. LEXIS 6525

December 17, 1998, Date of Judgment Entry

PRIOR HISTORY: [*1] CHARACTER OF PROCEEDING: Appeal from the Richland County Court of Common Pleas. Case No. 98CR28H.

DISPOSITION: JUDGMENT: Affirmed.

CORE TERMS: reckless, failure to comply, double jeopardy, motor vehicle, police officer, suspension, motion to dismiss, signal, defendant-appellee, requires proof, first offense, traffic stop, convicted, prong, assignment of error, separately, memorandum, happened, sequence, pursuit, felony

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COUNSEL: For Plaintiff-Appellant: SHERYL M. GROFF, ASSISTANT PROSECUTOR, Mansfield, Ohio.

For Defendant-Appellee: MARK T. ZALLER, Mansfield, Ohio.

JUDGES: Hon. W. Scott Gwin, P.J., Hon. William B. Hoffman, J., Hon. W. Don Reader, J. Reader J., concurs and Hoffman, J., dissents.

OPINION BY: W. SCOTT GWIN

OPINION:

OPINION

Gwin, J.

Plaintiff-appellant the State of Ohio appeals the June 16, 1998 Judgment Entry of the Richland County Court of Common Pleas, which dismissed a felony charge against defendant-appellee Ronald E. **Moton,** Jr. on the basis of double jeopardy. The State assigns a single error to the trial court:

THE TRIAL COURT ERRONEOUSLY FOUND THAT THE CONVICTION OF DEFENDANT-APPELLEE IN MUNICIPAL COURT FOR **RECKLESS** OPERATION OF MOTOR VEHICLE BARRED SUBSEQUENT PROSECUTION FOR FELONY FAILURE TO COMPLY WITH ORDER OR SIGNAL OF POLICE OFFICER ON DOUBLE JEOPARDY GROUNDS.

On April 30, 1997, appellant was charged with numerous municipal violations, including **reckless** operation of a motor vehicle, in violation of R.C. 4511.20; speeding, in violation of R.C. **[*2]** 4511.21; and operating a motor vehicle under suspension, in violation of R.C. 4507.02, all arising from a traffic stop of the same date.

On July 15, 1997, appellee pled guilty to operating a motor vehicle under suspension and **reckless** operation. The trial court fined appellee $ 266.00 and $ 50.00 for each charge respectively. The court also sentenced appellee to ten (10) days in the Richland County Jail on the charge of operating a motor vehicle under suspension.

Thereafter, in January 1998, the Richland County Grand Jury indicted appellee on one count of failure to comply with order or signal of police officer, in violation of R.C. 2921.331, a felony of the fourth degree, arising out of the traffic stop on April 30, 1977.

App 1

On April 8, 1998, appellee filed a motion to dismiss based upon double jeopardy grounds. On May 4, 1998, appellant filed its memorandum in opposition to the motion to dismiss, asserting on the date in question, the

separately in time. Further, appellant argued double jeopardy had not attached in the instant case, because each of the offenses at issue **[*3]** contained an element not contained in the other.

In State v. Best (1975), 42 Ohio St. 2d 530, 330 N.E.2d 421, the Ohio Supreme Court set out four factors to consider when reviewing claims of double jeopardy: 1) whether there was a prior prosecution in the same state for the identical offense; 2) whether the same person was charged relative to the first prosecution; 3) whether the same parties were involved in both prosecutions; and 4) whether the first offense prosecuted was of such a nature as to constitute a bar to the successive prosecution. *Id.* at 533.

The *Best* Court quoted *Blockburger v. United States* (1932), 284 U.S. 299, 304, 76 L. Ed. 306, 52 S. Ct. 180.

. . . 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 a fact which the other does not. *Gavieres v. United States*, 220 U.S. 338, 342, 55 L. Ed. 489, 31 S. Ct. 421, and authorities cited. In that case [the] court quoted from and adopted the language of the Supreme Court of Massachusetts in *Morey v. Commonwealth*, **[*4]** 108 Mass. 433: 'A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.'

42 Ohio St. 2d at 534.

Appellant agrees the second and third prongs of the *Best* test are satisfied in the case *sub judice*. However, appellant contends the two offenses, reckless operation and failure to comply, are not the same [identical] offense under the first prong of the *Best* test; therefore, conviction on the first offense (reckless operation) should not bar prosecution of the second (failure to comply).

R.C. 4511.20, reckless operation of vehicles, provides:

No person shall operate a vehicle, trackless trolley, or streetcar on any street or highway in willful or wanton disregard for the safety of persons or property.

R.C. 2921.331, failure to comply with order or signal of police officer provides, in pertinent part:

(B) No person shall operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring his motor **[*5]** vehicle to a stop

. . . a violation of division (B) of this section is a felony of the fourth degree if the jury or judge as trier of fact finds any one of the following:

* * *

(3) The operation of the motor vehicle by the offender caused a substantial risk of serious physical harm to persons or property.

Appellant contends the two statutes require proof of an element the other does not. Appellee admits the two offenses are not the same offenses based on differences in their elements of proof. (Appellee's Brief at 1). However, appellee cites this Court to two United States Supreme Court cases modifying *Blockburger, supra,* to support his position the trial court appropriately dismissed the indictment.

In *Illinois v. Vitale* (1980), 447 U.S. 410, 65 L. Ed. 2d 228, 100 S. Ct. 2260, the Supreme Court held even if two successive prosecutions were not barred under the *Blockburger* test, a second prosecution would be barred if the State sought to establish an essential element of the second crime by proving the "conduct" for which the defendant was convicted in the first prosecution. If the conduct for which a defendant is convicted in the first prosecution is the same **[*6]** conduct necessary to establish the second prosection, double jeopardy bars the second prosecution. *See, Grady v. Corbin* (1990) 495 U.S. 508, 109 L. Ed. 2d 548, 110 S. Ct. 2084.

The State alleges appellee committed the offense of reckless operation prior to the offense of failure to comply with the police officer. Appellee asserts the reckless operation occurred after the officer gave chase. The trial court reviewed the arguments of the parties and determined the State had failed to demonstrate the two offenses were committed separately. This court will not substitute our judgment for that of the trial court nor will we give the State a second chance at establishing its case against appellee by remanding for further proceedings.

For the foregoing reasons, the judgment of the court of Common Pleas of Richland County, Ohio, is affirmed.

By: Gwin, P.J.,

Reader J., concurs and Hoffman, J., dissents

JUDGMENT ENTRY

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Richland County Court of Common Pleas is affirmed. Costs assessed to appellant.

DISSENT BY: William B. Hoffman

DISSENT:

Hoffman, **[*7]** *J., dissenting*

I respectfully dissent from the majority's opinion.

Appellee contends the conduct of reckless operation occurred while the officer was already in pursuit of appellee; therefore, the same conduct required to establish the failure to comply established the reckless operation. n1 Appellee concedes, "Had the officer attempted to stop the defendant-appellee for reckless operation, and the defendant-appellee failed to comply with the officer's order following that attempted stop, double jeopardy would not bar subsequent prosecution, because it would be separate and distinct conduct." (Appellee's Brief at 3).

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 If the record supported this claim, I would agree double jeopardy applies.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

In its Memorandum in Opposition to Motion to Dismiss, appellant specifically alleged the offense of reckless operation occurred prior to the offense charged in the common pleas court (failure to comply). In its judgment entry granting appellee's motion to dismiss, the trial court notes appellant pointed out **[*8]** the two offenses happened in sequence. As such, appellee's contention the reckless operation occurred while the officer was already in pursuit of appellee is not substantiated in the record before this Court. Given appellee's own concession quoted *supra,* if the two offenses happened in sequence, the conduct establishing the failure to comply occurred after the conduct establishing the reckless operation. The record before this Court does not affirmatively demonstrate the same conduct gave rise to both offenses. n2 Accordingly, I find the trial court erred in dismissing the failure to comply count on double jeopardy grounds at this stage of the proceedings.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n2 Had the trial court proceeded with an oral hearing on April 28, 1998, specific evidence might have been provided as to whether the conduct giving rise to the reckless operation charge was the same conduct appellant intended to use to establish the failure to comply charge.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

I would sustain appellant's sole assignment of error and reverse and remand this **[*9]** case to the trial court for further proceedings.

JUDGE WILLIAM B. HOFFMAN

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OPINION:

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appellant filed its memorandum in opposition to the motion to dismiss, asserting on the date in question, the offenses of reckless operation and failure to comply, although arising from the facts of the case herein, occurred separately in time. Further, appellant argued double jeopardy had not attached in the instant case, because each of the offenses at issue **[*3]** contained an element not contained in the other.

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(3) The operation of the motor vehicle by the offender caused a substantial risk of serious physical harm to persons or property.

Appellant contends the two statutes require proof of an element the other does not. Appellee admits the two offenses are not the same offenses based on differences in their elements of proof. (Appellee's Brief at 1). However, appellee cites this Court to two United States Supreme Court cases modifying *Blockburger, supra*, to support his position the trial court appropriately dismissed the indictment.

In *Illinois v. Vitale* (1980), 447 U.S. 410, 65 L. Ed. 2d 228, 100 S. Ct. 2260, the Supreme Court held even if two successive prosecutions were not barred under the *Blockburger* test, a second prosecution would be barred if the State sought to establish an essential element of the second crime by proving the "conduct" for which the defendant was convicted in the first prosecution. If the conduct for which a defendant is convicted in the first prosecution is the same **[*6]** conduct necessary to establish the second prosection, double jeopardy bars the second prosecution. *See, Grady v. Corbin* (1990) 495 U.S. 508, 109 L. Ed. 2d 548, 110 S. Ct. 2084.

The State alleges appellee committed the offense of reckless operation prior to the offense of failure to comply with the police officer. Appellee asserts the reckless operation occurred after the officer gave chase. The trial court reviewed the arguments of the parties and determined the State had failed to demonstrate the two offenses were committed separately. This court will not substitute our judgment for that of the trial court nor will we give the

The assignment of error is overruled.

For the foregoing reasons, the judgment of the court of Common Pleas of Richland County, Ohio, is affirmed.

By: Gwin, P.J.,

Reader J., concurs and Hoffman, J., dissents

JUDGMENT ENTRY

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Richland County Court of Common Pleas is affirmed. Costs assessed to appellant.

DISSENT BY: William B. Hoffman

DISSENT:

Hoffman, **[*7]** *J., dissenting*

I respectfully dissent from the majority's opinion.

Appellee contends the conduct of reckless operation occurred while the officer was already in pursuit of appellee; therefore, the same conduct required to establish the failure to comply established the reckless operation. n1 Appellee concedes, "Had the officer attempted to stop the defendant-appellee for reckless operation, and the defendant-appellee failed to comply with the officer's order following that attempted stop, double jeopardy would not bar subsequent prosecution, because it would be separate and distinct conduct." (Appellee's Brief at 3).

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n1 If the record supported this claim, I would agree double jeopardy applies.

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In its Memorandum in Opposition to Motion to Dismiss, appellant specifically alleged the offense of reckless operation occurred prior to the offense charged in the common pleas court (failure to comply). In its judgment entry granting appellee's motion to dismiss, the trial court notes appellant pointed out **[*8]** the two offenses happened in sequence. As such, appellee's contention the reckless operation occurred while the officer was already in pursuit of appellee is not substantiated in the record before this Court. Given appellee's own concession quoted *supra,* if the two offenses happened in sequence, the conduct establishing the failure to comply occurred after the conduct establishing the reckless operation. The record before this Court does not affirmatively demonstrate the same conduct gave rise to both offenses. n2 Accordingly, I find the trial court erred in dismissing the failure to comply count on double jeopardy grounds at this stage of the proceedings.

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n2 Had the trial court proceeded with an oral hearing on April 28, 1998, specific evidence might have been provided as to whether the conduct giving rise to the reckless operation charge was the same conduct appellant intended to use to establish the failure to comply charge.

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I would sustain appellant's sole assignment of error and reverse and remand this **[*9]** case to the trial court for further proceedings.

JUDGE WILLIAM B. HOFFMAN

APP 6

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STATE OF OHIO, Plaintiff-Appellee, v. KIM MORTON, aka MICHAEL LARKIN, Defendant-Appellant.

APPEAL No. C-980391

COURT OF APPEALS OF OHIO, FIRST APPELLATE DISTRICT, HAMILTON COUNTY

1999 Ohio App. LEXIS 1915

April 30, 1999, Date of Judgment Entry on Appeal

NOTICE: [*1] THESE ARE NOT OFFICIAL HEADNOTES OR SYLLABI AND ARE NEITHER APPROVED IN ADVANCE NOR ENDORSED BY THE COURT. PLEASE REVIEW THE CASE IN FULL.

PRIOR HISTORY: Criminal Appeal From: Hamilton County Court of Common Pleas. TRIAL NO. B-9800298.

DISPOSITION: Judgment Appealed From Is: Reversed and Cause Remanded with Instructions.

CORE TERMS: felony, failure to comply, reckless, police officer, motor vehicle, double jeopardy, same offense, signal, serious physical harm, recidivism, city ordinance, failure-to-comply, double-jeopardy, sentencing, misdemeanor offense, constitutional protection, subsequent prosecution, substantial risk, require proof, municipal, reckless-operation, accelerated, carjacking, successive, activated, jeopardy, offender, pull

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HEADNOTES: CRIMINAL MISCELLANEOUS

SYLLABUS:

For the purposes of double-jeopardy analysis, felony failure to comply with the order or signal of a police officer under subsection (C)(2) of R.C. 2921.331 is the same offense as reckless operation in violation Cincinnati Municipal Code 506-6.

Where a defendant who had previously been found guilty of reckless operation, in violation of Cincinnati Municipal Code section 506-6, was subsequently tried for felony failure to comply with the order or signal of a police officer, in violation of R.C. 2921.331(B) and (C)(2), the state's successive prosecutions of him violated the Double Jeopardy Clause.

COUNSEL: Michael K. Allen, Hamilton County Prosecuting Attorney, and Paula E. Adams, Assistant Prosecutor, for Plaintiff-Appellee.

A. Norman Aubin, for Defendant-Appellant.

JUDGES: DOAN, P.J., GORMAN and SUNDERMANN, JJ.

OPINION:

DECISION.

Please Note: We have *sua sponte* **[*2]** removed this case from the accelerated docket.

Per Curiam.

App 8

Defendant-appellant Kim Morton appeals his conviction for failure to comply with the order or signal of a police

FACTS

While on patrol on January 10, 1998, at approximately 7:30 p.m., Officer Paul Broxterman observed a vehicle, driven by **Morton,** traveling northbound on Reading Road. He noticed that the vehicle's rear license plate was not lit and appeared loose. As a result, Broxterman activated his rotary lights, signaling **Morton** to pull over. Although **Morton** began to pull over, he then accelerated and sped away. Broxterman activated his siren and began pursuing **Morton.** During the high-speed chase that ensued, **Morton** traveled at speeds in excess of seventy miles per hour, ran a red light and several stop signs, crossed the double-yellow dividing line, and ultimately collided with another vehicle. Although **Morton** fled on foot from the scene of the accident, Broxterman eventually apprehended him. **Morton** was charged with several offenses, only two of which, failure to comply with an order or signal of a police officer and **reckless** operation of a vehicle, are involved in this **[*3]** appeal.

MUNICIPAL COURT: MISDEMEANOR OFFENSE

On January 20, 1998, in municipal court, **Morton** pleaded no contest to the misdemeanor offense of **reckless** operation of a vehicle, in violation of Cincinnati Municipal Code 506-6. This section provides:

No person shall operate a vehicle on any street or highway without due regard for the safety of persons or property.

The trial court accepted **Morton's** plea and found him guilty.

COMMON PLEAS COURT: FELONY CHARGE

Morton was also indicted for the felony offense of failure to comply with the order or signal of a police officer, in violation of R.C. 2921.331(B) and (C)(2). This statute provides in relevant part:

(B) No person shall operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring his motor vehicle to a stop.

(C) *** A violation of division (B) of this section is a misdemeanor of the first degree, except that a violation of division (f) of this section is a felony of the fourth degree if the jury or judge as trier of fact finds any one of the following by proof beyond a reasonable doubt:

***

(2) The operation **[*4]** of the motor vehicle by the offender was a proximate cause of serious physical harm to persons or property.

Morton moved to dismiss the common pleas indictment based on an alleged double-jeopardy violation. The motion was denied and the case proceeded to trial before a jury. **Morton** was found guilty and sentenced to serve eighteen months of incarceration. He timely appeals the trial court's judgment and brings one assignment of error. In this assignment, **Morton** actually makes four distinct arguments, one of which being that his double-jeopardy rights were violated by the state's successive prosecutions of him.

ANALYSIS

Morton contends that his constitutional protection against double jeopardy was violated when he was prosecuted for felony failure to comply with the order or signal of a police officer in the Hamilton County Court of Common Pleas after previously having been found guilty of **reckless** operation in the Hamilton County Municipal Court. We agree.

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." This constitutional protection bars successive prosecutions for **[*5]** the same offense. n1 Accordingly, the state's subsequent prosecution of **Morton** for the felony failure to comply violated double jeopardy only if that offense constitutes the same offense as **reckless** operation.

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n1 See *U.S. v. Dixon* (1993), 509 U.S. 688, 113 S. Ct. 2849, 125 L. Ed. 2d 556.

In order to determine whether **reckless** operation and felony failure-to-comply constitute that same offense for purposes of double jeopardy, we must apply the *Blockburger* test, which provides:

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. n2

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n2

Blockburger v. U.S. (1932), 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306.

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[*6]

In *State v. Knaff*, n3 a case of nearly identical facts, this court recognized that reckless operation and felony failure to comply under subsection (C)(3) of R.C. 2921.331 constitute the same offense for purposes of double jeopardy, stating:

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n3 128 Ohio App. 3d 90, 713 N.E.2d 1112, 1998 Ohio App. LEXIS 2320 (1998).

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When we apply the *Blockburger* test to the case before us, it is clear that the felony failure-to-comply offense required proof of several additional facts separate from the reckless-operation offense. However, the reckless-operation offense did not require proof of any fact beyond those required for felony failure to comply. Under the elements, it is impossible to commit the felony version of the failure-to-comply offense--operation of a motor vehicle causing substantial risk of serious physical harm to persons or property--without also violating the city ordinance--operation of a vehicle without due regard for the safety of persons or property.

This court's opinion in *Knaff* did not **[*7]** take into account the analysis identified in two prior decisions in which the United States Supreme Court noted that, historically, double jeopardy protections were inapplicable to sentencing matters because those determinations do not place offenders in jeopardy for an "offense." Over the strong and ultimately persuasive dissent by Justices Scalia and Stevens, in *Monge v. California*, n4 the Court upheld California's "three-strikes" law. Likewise, in *Almendarez-Torres v. United States*, *n5* the Court upheld a congressional determination that recidivism findings are not elements of offenses even if they increase the accused's maximum punishment. But, last month, in *Jones v. United States*, n6 with Justices Scalia and Stevens carrying a now-majority position, the Supreme Court limited the application of *Almendarez-Torres* and *Monge* to the context of recidivism when it determined that sentence-enhancing provisions in the federal carjacking statute, which were triggered by proof of either serious bodily harm or death, were better read as elements making up separate offenses than as sentencing factors. In doing so, the Court distinguished the factors at issue (serious **[*8]** bodily injury and death) from recidivism. The Court noted that, unlike recidivism, these factors had not been traditionally regarded as sentencing factors as opposed to elements. The Court also found relevant that the statutory provisions in the carjacking statute conditioned imposition of the greater penalties on proof of further facts (injury or death) that seemed as important as the elements in the principal paragraph of the section.

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n4 (1998), 524 U.S. 721, 118 S. Ct. 2246, 141 L. Ed. 2d 615.

n6 (1999), 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311.

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Because the Supreme Court's analysis in *Jones* is squarely applicable to this case, we are confident that *Knaff's* silent treatment of subsection (C)(3) of R.C. 2921.331 as a separate element, and not merely as sentencing factor, is in step with the Court's double-jeopardy jurisprudence. And, although we recognize that **Morton** was charged under a different subsection of R.C. 2921.331 than Knaff, we **[*9]** do not believe that the rationale of *Knaff* is inapposite to this case. The only distinction between subsections (C)(2) and (C)(3) of R.C. 2921.331 is that, under subsection (C)(2), a defendant is charged with *proximately causing* serious physical harm to persons or property while operating a motor vehicle, whereas, under subsection (C)(3), the defendant is charged with *causing a substantial risk* of serious physical harm to persons or property while operating a motor vehicle. We believe that this is a distinction without a difference because, just as it was impossible to have committed a violation of R.C. 2921.331(C)(3) without also having violated the city ordinance, so too is it impossible to have committed a violation of R.C. 2921.331(C)(2) without also having violated the city ordinance. In other words, proof of **reckless** operation does not require proof of any fact beyond those required to prove felony failure to comply under *either* R.C. 2921.331(C)(2) or (C)(3). Therefore, we conclude that **reckless** operation, in violation of Cincinnati Municipal Code 506-6, constitutes the same offense as felony failure to comply under both R.C. 2921.331(C)(2) and (C)(3).

CONCLUSION

Because **[*10]** we conclude that **reckless** operation and felony failure to comply constitute the same offense, we sustain **Morton's** argument that the state's subsequent prosecution of him was in violation of the Double Jeopardy Clause. We do not reach the remaining issues raised by **Morton** in his appeal because this decision renders them moot. The judgment of the trial court is reversed, and the matter is remanded to the trial court with instructions to enter judgment for a misdemeanor violation of R.C. 2921.331(B).

Judgment reversed and cause remanded with instructions.

DOAN, P.J., GORMAN and **SUNDERMANN, JJ.**

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APP 11