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PREVIEW: *City of Helena v. O’Connell*: Double Jeopardy and Strict Liability Offenses

Christine Hutchison*

Oral arguments are scheduled for Wednesday, January 23, 2019, at 9:30 a.m. in the Courtroom of the Montana Supreme Court, Joseph P. Mazurek Justice Building, in Helena, Montana.

I. INTRODUCTION

The sole issue before the Court is whether the Helena Municipal Court violated Petitioner Kristi Anne O’Connell’s (“O’Connell”) double jeopardy protections under Montana Code Annotated § 46–11–504(1).¹

Prior prosecution of an offense in any jurisdiction bars subsequent prosecution if the first prosecution resulted in an acquittal or a conviction and the subsequent prosecution arose “out of the same transaction.”² Two charges arise out of the same transaction if the conduct for both offenses is motivated by a purpose to accomplish a criminal objective, and the conduct is necessary or incidental to accomplishing that objective.³

O’Connell’s appeal provides the Court with an opportunity to reconsider whether strict liability offenses, such as driving under the influence (“DUI”), can ever arise out of the same transaction as other offenses.

II. FACTUAL AND PROCEDURAL BACKGROUND

On June 3, 2016, Helena police officers cited O’Connell with careless driving for causing a multiple-vehicle accident.⁴ O’Connell told the responding officer she missed a turn and was looping back when the accident occurred.⁵ O’Connell could not remember how the accident happened, but she accepted

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¹ Mont. Code Ann. § 46–11–504(1) (2017).

² *Id.*

³ Mont. Code Ann. § 46–2–101(23).

⁴ Appellee’s Response Brief at 2, *City of Helena v. O’Connell*, <https://perma.cc/NL2X-UCRJ> (Mont. Sept. 4, 2018) (No. DA 17-0440); Appellant’s Opening Brief at 1–2, *City of Helena v. O’Connell*, <https://perma.cc/68UT-Z6HK> (Mont. June 4, 2018) (No. DA 17-0440).

⁵ Appellee’s Response Brief, *supra* note 4, at 2.

responsibility.⁶ She also told the officer she took several prescribed medications and O'Connell agreed to provide a blood sample.⁷ The officer cited O'Connell with careless driving, and O'Connell pleaded guilty in Municipal Court within a week.⁸

The Helena City Attorney's Office received the toxicology report identifying four different medications in O'Connell's blood on August 22, 2016.⁹ In October of 2016, the Helena City Attorney's Office charged O'Connell with DUI.¹⁰ O'Connell moved to dismiss the DUI as arising under the same transaction as the careless driving charge, and thus violating Montana's double-jeopardy protections.¹¹ The court denied the motion.¹² O'Connell pleaded guilty to the amended charge of negligent endangerment, reserving her right to appeal the denial of her motion to dismiss.¹³

III. SUMMARY OF ARGUMENTS

O'Connell argues the City of Helena violated double-jeopardy protections under § 46–11–504(1).¹⁴ A subsequent prosecution violates the statute if: (1) the defendant's conduct constitutes an equivalent offense in both the jurisdiction where the first prosecution occurred and the jurisdiction where the subsequent prosecution is pursued; (2) the first prosecution resulted in an acquittal or a conviction; and (3) the subsequent prosecution was "based on an offense arising out of the same transaction."¹⁵ The parties agree the first two prongs are satisfied, and solely dispute whether the charges arose out of the same transaction.¹⁶

"Same transaction" means "conduct consisting of a series of acts or omissions that are motivated by . . . a purpose to accomplish a criminal objective and that are necessary or incidental to the accomplishment of that objective."¹⁷ The parties disagree on whether a person who drives while under the influence can be motivated by a criminal objective, and, if so, whether careless driving in this instance shares the same criminal objective.

⁶ *Id.* at 2–3.

⁷ Appellant's Opening Brief, *supra* note 4, at 2.

⁸ Appellee's Response Brief, *supra* note 4, at 3.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*; MONT CONST. art. II, § 25; Mont. Code Ann. § 46–11–504(1) (2017).

¹² Appellant's Opening Brief, *supra* note 4, at 4.

¹³ *Id.*

¹⁴ *Id.* at 3.

¹⁵ Mont. Code Ann. § 46–11–504(1); *see also* State v. Tadewaldt, 922 P.2d 463, 465 (Mont. 1996).

¹⁶ Appellant's Opening Brief, *supra* note 4, at 10.

¹⁷ Mont. Code Ann. § 46–1–202(23)(a).

A. Defendant-Appellant O'Connell's Argument

Petitioner O'Connell claims both charges shared the same criminal objective: continuing to drive after suddenly becoming dizzy. Therefore, the DUI charge should be barred as arising from the same transaction.¹⁸ O'Connell describes two divergent approaches for analyzing whether charges arise from the same transaction: the conduct approach and the elements approach.¹⁹ O'Connell asks the Court to adopt the conduct approach and overrule two cases O'Connell alleges utilize the elements approach.²⁰

Under the elements approach, the Court looks to the elements of the offenses—focusing specifically on the mental state—to determine whether the offenses shared the same “purpose, motivation, and criminal objective,” and thus arise from the “same transaction.”²¹ The Court has twice stated that because DUI does not have a mental state DUI cannot be motivated by a purpose to accomplish a criminal objective.²² Since DUI has no criminal objective, DUI cannot arise out of the same transaction as other offenses.²³ O'Connell implicitly concedes that the Municipal Court's denial of her motion to dismiss was correct under *State v. Condo*²⁴ and *State ex rel Booth v. Montana Twenty-First Judicial District*.²⁵ O'Connell asks the Court to overturn *Condo* and *Booth* as inconsistent with §§ 46–11–504(1) and 46–1–202(23)(a), and other case law utilizing the conduct approach.²⁶

O'Connell points to *State v. James*²⁷ and *State v. Cech*²⁸ as examples of the conduct approach.²⁹ In *James*, the defendant drove 100 miles per hour, passed other vehicles in no-passing zones, and eventually wrecked a vehicle while fleeing from officers.³⁰ The defendant was charged and convicted of fleeing a police officer in tribal court and subsequently charged with criminal endangerment in state court.³¹ The Court concluded both charges arose from the

¹⁸ Appellant's Opening Brief, *supra* note 4, at 7.

¹⁹ *Id.* at 6.

²⁰ *Id.* at 8.

²¹ *Id.* at 19 (quoting *State v. Condo*, 182 P.3d 57, 60–61 (Mont. 2008)).

²² *Id.* at 19–20 (citing *Condo*, 182 P.3d at 60–61; and *State ex rel Booth v. Montana Twenty-First Judicial District*, 972 P.2d 325, 330 (1998)).

²³ *Id.* at 19–20.

²⁴ 182 P.3d at 57.

²⁵ 972 P.2d at 325; Appellant's Opening Brief, *supra* note 4, at 1.

²⁶ Appellant's Opening Brief, *supra* note 4, at 8.

²⁷ 237 P.3d 672 (Mont. 2010).

²⁸ 167 P.3d 389 (Mont. 2007).

²⁹ Appellant's Opening Brief, *supra* note 4, at 12–14.

³⁰ *Id.* at 12; *James*, 237 P.3d at 674.

³¹ *James*, 237 P.3d at 674.

same conduct—driving dangerously and at a high rate of speed to avoid capture.³² The Court noted the charges contained different elements, but concluded the different elements did not mean the charges arose from different transactions.³³

In *Cech*, the defendant test drove a car and never returned it.³⁴ Police recovered the car in Washington, and Washington charged and convicted the defendant of possessing stolen property in the first degree.³⁵ Subsequently, a Montana court charged Cech with felony theft.³⁶ The Court held the underlying conduct for both charges “sought to accomplish the same criminal objective—control of the stolen vehicle.”³⁷ The Court held the felony theft charge violated Montana’s double jeopardy protections.

O’Connell asserts that under the conduct test she satisfies the same transaction prong because she engaged in a single course of conduct: choosing to continue to drive after a sudden onset of dizziness.³⁸ The crash was merely incidental to this decision.³⁹

B. Plaintiff-Appellee City of Helena’s Response

The City of Helena asserts *Booth*, *Cech*, *Condo*, and *James* are not incompatible and opposes O’Connell’s assertion that they create different tests.⁴⁰ The City of Helena maintains the Court analyzes a person’s conduct in conjunction with the crimes charged, and thus necessarily must sometimes look to the elements of the crimes to determine the criminal objective motivating the underlying conduct.⁴¹

In *Cech*, the Court focused on the elements of the two charges, finding “Cech’s asserted motivations, that of ‘knowingly . . . withhold[ing] or appropriate[ing]’ the Honda ‘to the use of any person other than the true owner or person entitled thereto,’ R.C.W. § 9A.56.140, or of ‘depriving the owner of the property’ under § 45–6–301(1)(a)” were the same.⁴²

The City notes the Court in *James* looked to the elements of the crimes in acknowledging the fleeing charge was based on “knowingly fleeing from an Officer . . . by traveling at a high rate of speed and/or making improper passes,” and the criminal

³² *Id.* at 675.

³³ *Id.*

³⁴ 167 P.3d at 390.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 394.

³⁸ Appellant’s Opening Brief, *supra* note 4, at 34.

³⁹ *Id.*

⁴⁰ Appellee’s Response Brief, *supra* note 4, at 10.

⁴¹ *Id.*

⁴² *Id.* at 11–12 (quoting *Cech*, 167 P.3d at 394) (alterations in original).

endangerment charge was based on “passing in no passing zones and driving his vehicle at speeds up to 100 mph.”⁴³

The City of Helena also points to the Court’s express decision in *Condo* not to overrule *Booth*’s assertion that a criminal objective cannot motivate DUI.⁴⁴ Because the Court’s cases can be read as consistent with each other, the City of Helena asserts that *stare decisis* provides the “preferred course.”⁴⁵

Even if the Court overturns *Booth* and *Condo*, the City of Helena maintains the careless driving and DUI charges did not arise from the same transaction.⁴⁶ A person is guilty of careless driving if she fails to drive in a “careful and prudent manner that does not unduly or unreasonably endanger . . . life, limb, [or] property.”⁴⁷ By contrast, DUI requires a person under the influence of any drug “to drive or be in actual physical control of a vehicle.”⁴⁸ O’Connell committed the alleged offense of DUI as soon as she drove or was in actual physical control of the vehicle while under the influence.⁴⁹ By contrast, officers cited O’Connell with careless driving for colliding with several vehicles.⁵⁰ The City contends these were two separate transactions: the first transaction occurred once O’Connell got behind the wheel under the influence of drugs, and the second occurred when she crashed into the other vehicles.⁵¹

C. Defendant-Appellant O’Connell’s Reply

O’Connell maintains that just because DUI does not require the prosecutor to prove a mental state element does not mean there is no criminal objective.⁵² O’Connell cites to the Court’s assertion in *State v. Glass*⁵³ that even though simple possession does not require the State to prove what a defendant intends to do with a dangerous drug he possesses, this does not mean the defendant has no criminal objective in possessing the dangerous drug.⁵⁴ O’Connell highlights the discrepancy between *State v. Couture*⁵⁵

⁴³ *Id.* at 12 (quoting *James*, 237 P.3d at 674).

⁴⁴ *Id.* at 16–17; *Condo*, 182 P.3d at 59.

⁴⁵ Appellee’s Response Brief, *supra* note 4, at 18 (quoting *State v. Kirkbride* 185 P.3d 340, 343 (Mont. 2008)).

⁴⁶ *Id.* at 19.

⁴⁷ *Id.* (quoting Mont. Code Ann. § 61–8–302(1) (2017)).

⁴⁸ *Id.* (quoting Mont. Code Ann. § 61–8–401(1)(c) (2017)).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Appellant’s Reply Brief at 3, *City of Helena v. O’Connell*, <https://perma.cc/39MK-6FTC> (Mont. Oct. 15, 2018) (No. DA 17-0061).

⁵³ 359 P.3d 469 (Mont. 2017).

⁵⁴ *Id.* at 472.

⁵⁵ 959 P.2d 948 (Mont. 1998).

and *State v. Tadewaldt*,⁵⁶ which identify a criminal objective for DUI, and *Booth* and *Condo*, which conversely state that strict liability offenses such as DUI cannot be motivated by a criminal objective.⁵⁷

Additionally, O'Connell asserts *stare decisis* serves to protect stability and predictability, but the Court's application of the "same transaction" is neither predictable nor stable. Therefore, the Court should overturn *Booth* and *Condo*.⁵⁸

Finally, O'Connell maintains the singular conduct of continuing to drive after a sudden onset of dizziness underlies both offenses.⁵⁹ O'Connell concedes separate criminal objectives might conceivably motivate defendants who drive under the influence for a significant period of time before causing an accident, but asserts both DUI and careless charges share the same criminal objective when impairment and an accident occur contemporaneously.⁶⁰ O'Connell also forcefully opposes the characterization that she "got behind the wheel under the influence of drugs" because the parties never stipulated to that fact.⁶¹

IV. ANALYSIS

The Court previously concluded strict liability offenses can be motivated by a criminal objective, but more recently stated that if there is no mental state, there is no criminal objective.⁶² The Court should reconsider this assertion. If the Court upholds that strict liability offenses cannot be motivated by a criminal objective and, therefore, are not subject to double-jeopardy prohibitions, the Court will effectively condone jurisdictions subsequently prosecuting any strict liability offense regardless of the underlying

⁵⁶ 922 P.2d 463 (Mont. 1996).

⁵⁷ Appellant's Reply Brief, *supra* note 52, at 5.

⁵⁸ *Id.* at 9.

⁵⁹ *Id.* at 7.

⁶⁰ *Id.*

⁶¹ *Id.* at 13.

⁶² *Condo*, 182 P.3d at 60 (Because DUI is a strict liability offense that does not require proof of mental state and negligent vehicular assault requires proof of a negligent mental state the two offenses cannot be motivated by a purpose to accomplish the same criminal objective.); *Couture*, 959 P.2d at 950 ("Couture's driving without a license and without proof of insurance was unrelated to his criminal objective of DUI—ingesting alcohol and driving a vehicle while under the influence of alcohol."); *Booth*, 972 P.2d at 330 ("Booth's conduct of drinking alcohol and then driving his vehicle was 'not motivated by a purpose to accomplish a criminal objective.'"); *Tadewaldt*, 922 P.2d at 466 (95) ("Tadewaldt's conduct in possessing the dangerous drugs was not motivated by a purpose to accomplish the 'criminal objective' of DUI, nor was it necessary or incidental to that 'objective.'").

conduct. However, the Court already considered a nearly identical argument in *Condo* and chose not to overrule *Booth*.⁶³

Even if the Court overturns *Booth* and *Condo*, O'Connell cannot prevail unless the Court agrees the careless driving charge and the DUI charge share conduct motivated by the sole criminal objective of continuing to drive after a sudden onset of dizziness. The Court will likely find O'Connell's decision to drive while under the influence of prescription medication was separate from her driving decisions immediately before the accident.

O'Connell asserts a person who drives under the influence and also causes an accident may be motivated by two different criminal objectives, but only if a significant amount of time passes between the two incidents.⁶⁴ At its core, O'Connell's hypothetical describes separate conduct—that of driving under the influence and improper driving decisions—separated by an expanse of time. O'Connell asserts that because she suddenly became impaired immediately before the crash, both the DUI and the careless driving were motivated by the purpose to accomplish the same criminal objective of continuing to drive after a sudden onset of dizziness.⁶⁵

O'Connell's assertion that a person must drive a significant distance prior to causing an accident in order for the two offenses to arise from different transactions frames the question of how much time must pass. A person commits the offense of DUI as soon as she drives or is in actual physical control of a vehicle while her ability to safely operate a vehicle has been diminished by drugs or alcohol.⁶⁶ The Court will likely view O'Connell's decision to drive while impaired by prescription medication as separate from the driving decisions that caused the accident. O'Connell missed a turn and while attempting to find a place to turn around, she crashed into several other vehicles.⁶⁷ O'Connell's conduct underlying the DUI was operating a vehicle while under the influence of prescription drugs—conduct occurring prior to the crash.

If the Court chooses to overturn *Booth* and *Condo* and find strict liability offenses may be motivated by a purpose to accomplish a criminal objective, the Court will have to identify the specific conduct underlying both offenses to determine if both were motivated by the same criminal objective. Ultimately, O'Connell is unlikely to prevail on her double-jeopardy claim. The more consequential question left for the Court is whether O'Connell's claim fails because DUI is a strict liability offense or

⁶³ *Condo*, 182 P.3d at 59.

⁶⁴ Appellant's Reply Brief, *supra* note 52, at 15.

⁶⁵ *Id.*

⁶⁶ Mont. Code Ann. § 61-8-401(1), (3)(a) (2017).

⁶⁷ Appellee's Response Brief, *supra* note 4, at 2.

because different conduct with different criminal objectives underlies the two offenses.

V. CONCLUSION

O'Connell's case provides the Court the opportunity to clarify whether strict liability offenses such as DUI are motivated by a purpose to accomplish a criminal objective, and thus may trigger double-jeopardy protections. If the Court upholds *Booth's* and *Condo's* assertion that because there is no mental state, there is no criminal objective, then all strict liability crimes may be brought subsequent to conviction or acquittal without violating Montana's double-jeopardy statute. Such a holding would significantly limit double-jeopardy protections by removing any offense without a mental state from the scope of the statutory protections. If the Court determines strict liability offenses can have a criminal objective, the Court must identify O'Connell's conduct underlying both charges and determine if both offenses were motivated by the purpose to continue driving after a sudden onset of dizziness.