IN THE COURT OF APPEALS OF IOWA

No. 9-269 (1999-82) / 98-1193
Filed May 26, 1999

STATE OF IOWA,
Appellee,

vs.

STEVEN EARL MOORE,
Appellant.

Appeal from the Iowa District Court for Des Moines County, John C. Miller, Judge.

On appeal from his convictions for going armed with intent and assault while participating in a felony, Steven Moore claims his sentences should have been merged under Iowa Code section 701.9 (1997). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and John P. Messina, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor, Assistant Attorney General, Patrick C. Jackson, County Attorney, and Michael D. Clark and Michael L. Bennett, Assistant County Attorneys, for appellee.

Considered by Huitink, P.J., and Streit and Mahan, JJ. Sackett, C.J., takes no part.

STREIT, J.

Steven Moore appeals his convictions and sentences for going armed with intent and assault while participating in the felony of going armed with intent alleging the trial court erred in not merging the offenses under Iowa Code section 701.9. Because we find the legislature intended cumulative punishments for the two offenses, section 701.9 is not applicable and merger was not required. We affirm.

I. Background Facts & Proceedings.

Moore attacked Lisa Cameron with a ketchup bottle and steak knife on January 28, 1998. Moore pled guilty to going armed with intent and assault while participating in the felony of going armed with intent. Prior to sentencing, Moore argued the two offenses should be merged under Iowa Code section 701.9. The sentencing court rejected the argument and imposed consecutive, indeterminate, five-year terms of imprisonment. Moore appeals.

II. Merger.

Moore argues his convictions under sections 708.8 and 708.3 of the Iowa Code should have been merged for sentencing purposes because a person cannot commit the offense of assault while participating in the felony of going armed with intent without committing the offense of going armed with intent. Our review of the issue of an illegal sentence because of merger is for correction of errors at law. Iowa R. App. P. 4; *State v. Anderson*, 565 N.W.2d 340, 342 (Iowa 1997).

The double jeopardy clause commands that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Of the three guarantees given by the double jeporady clause, the one pertinent to Moore's appeal is the protection against multiple punishments for the same offense. *See State v. Perez*, 563 N.W.2d 625, 627 (Iowa 1997).

In analyzing whether punishments are multiple for the same offense in violation of the double jeopardy clause, our courts engage a two-step process. *See id.*

First, we examine legislative intent. *See id.* That intent may generally be gleaned from the face of the statute. *Id.* "If the statutory language is plain and the meaning is clear, we do not search for the legislative intent beyond the express terms of the statute." *Horsman v. Wahl*, 551 N.W.2d 619, 620-21 (Iowa 1996). "[T]he question of what punishments are constitutionally permissible is no different from the question of what punishments the legislature intended to be imposed." *State v. McKettrick*, 480 N.W.2d 52, 57 (Iowa 1992). "Where . . . a legislature specifically authorizes cumulative punishment under two statutes . . . the prosecutor may seek and the trial court or jury may impose cumulative punishment under such statutes in a single trial." *Hunter*, 459 U.S. at 368-69, 103 S.Ct. at 679, 74 L.Ed.2d at 544.

Second, if legislative intent is not clear we turn to the rule of statutory construction articulated in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). *Blockburger* sets forth the "same-elements" test as a means of determining legislative intent. The test is applied by juxtaposing the two crimes to

determine from their elements whether each offense "requires proof of an additional fact the other does not." *Blockburger*, 284 U.S. at 304, 52 S.Ct. at 182, 76 L.Ed. at 309; *State v. Aguiar-Corona*, 508 N.W.2d 698, 701 (Iowa 1993).

With these principles in mind, we turn to the question of whether Moore can be cumulatively sentenced for his convictions of going armed with intent and assault while participating in the felony of going armed with intent. *See* Iowa Code §§ 708.8, 708.3 (1997).

We first determine whether the legislature intended for cumulative punishment under section 708.8[1] and 708.3[2] when the predicate felony for 708.3 is going armed with intent.

Moore has focused his appellate arguments on application of the *Blockburger* same-elements test. We find, however, under the rule set out by our supreme court in *Perez*, the issue is determined by the plain language of section 708.3 and resort to statutory interpretation is unnecessary. *Perez*, 563 N.W.2d at 629. In *Perez*, our supreme court found:

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[1] That statute states:
A person who goes armed with any dangerous weapon with the intent to use without justification such weapon against the person of another commits a class "D" felony.
Iowa Code § 708.8 (1997).

[2] That statute states:
Any person who commits an assault as defined in section 708.1 while participating in a felony other than a sexual abuse is guilty of a class "C" felony if the person thereby causes serious injury to any person; if no serious injury results, the person is guilty of a class "D" felony.
Iowa Code § 708.3 (1997).

> Iowa Code section 708.3 manifests the intent of the legislature to punish as a class "C" felony an assault committed while the assailant participates in a felony causing serious injury to another. *On its face, the provision contemplates punishment for two offenses--the assault resulting in injury as well as the predicate felony.*

Perez, 563 N.W.2d at 628 (emphasis added). Moore argues application of *Perez* should be limited to situations where the actor committed the crimes of willful injury and assault while participating in the felony of willful injury. The holding of *Perez* is not so limited. We find the only reasonable interpretation of section 708.3 is that it intended punishment for two offenses—the assault and the predicate felony. If merger is required in this case, this express legislative intention is not fulfilled. *See id.*

For these reasons sentencing Moore to cumulative punishments under section 708.8 and 708.3 did not violate the double jeopardy clause. Section 701.9 is not applicable to Moore's case and merger was not required. The trial court's sentences are affirmed.

AFFIRMED.

No. 98-1193. [9-269 (1999-82)] STATE v. MOORE

Appeal from the Iowa District Court for Des Moins County, John C. Miller, Judge. **AFFIRMED.** Considered by Huitink, P.J., and Streit and Mahan, JJ. Opinion by Streit, J. Sackett, C.J., takes no part. (5 pages $2.00)

Steven Moore argues his convictions under sections 708.8 and 708.3 of the Iowa Code should have been merged for sentencing purposes because a person cannot commit the offense of assault while participating in the felony of going armed with intent without committing the offense of going armed with intent. In analyzing whether punishments are multiple for the same offense in violation of the double jeopardy clause, our courts engage a two-step process. First, we examine legislative intent. Second, if legislative intent is not clear we turn to the rule of statutory construction articulated in *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). Moore has focused his appellate arguments on application of the *Blockburger* same-elements test. We find, however, under the rule set out by our supreme court in *State v. Perez*, 563 N.W.2d 625 (Iowa 1997), the issue is determined by the plain language of section 708.3 and resort to statutory interpretation is unnecessary. In *Perez*, our supreme court found: Iowa Code section 708.3 manifests the intent of the legislature to punish as a class "C" felony an assault committed while the assailant participates in a felony causing serious injury to another. *On its face, the provision contemplates punishment for two offenses--the assault resulting in injury as well as the predicate felony.* We find the only reasonable interpretation of section 708.3 is that it intended punishment for two offenses—the assault and the predicate felony. If merger is required in this case, this express legislative intention is not fulfilled. For these reasons sentencing Moore to cumulative punishments under section 708.8 and 708.3 did not violate the double jeopardy clause. Section 701.9 is not applicable to Moore's case and merger was not required.