STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF ANTRIM

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff/Appellant,

-v-

File No. 94-2914-AR
HON. PHILIP E. RODGERS, JR.

ROBERT GLEN PUROLL,

Defendant/Appellee.
_____/

Kevin A. Elsenheimer (P49293)
Attorney for Plaintiff

Robert Glen Puroll
In Pro Per

DECISION AND ORDER
RELATING TO THE PEOPLE'S APPEAL

The People filed a Claim of Appeal and Brief on Appeal seeking this Court's reversal of the trial court's denial of its Motion to Amend Complaint. The People presented oral argument on April 17, 1995, Defendant was present in the courtroom without counsel during the hearing. Pursuant to MCR 2.119(E)(3), this Court dispenses with oral argument. This Court has reviewed the claim of appeal, the People's brief and the Court file.

The following uncontested facts are provided in the People's brief on page 2:

> On June 27, 1994, a complaint and warrant was issued by the Antrim County Prosecutor's Office, herein Appellant, charging Robert Glen Puroll, herein Appellee, with Selling or Furnishing Alcohol to a Minor in violation of MCL 436.33(1); MSA 18.1004. The complaint alleged that Appellee provided alcohol to three (3) minors: Sarah Jane McDonald, aged [sic] 16 years; Bethany Amanda Craig, aged [sic] 17 years; and Nicole Katheryn Smith, age 17 years.
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> On October 28, 1994, Appellant filed a Motion for Leave to Amend Complaint to add a count of Contributing to Delinquency of Minor, contrary to MCL 750.145; MSA 28.340. For its motion, Appellant averred that Appellee simultaneously violated MCL 750.145 in that by providing alcohol to Sarah Jane McDonald, aged [sic] 16 years, he

tended to cause Ms. McDonald to come under the jurisdiction of the juvenile division of Probate Court.

The charged offense, selling or furnishing alcohol to a minor, MCL 436.33(1) provides, in pertinent part, as follows:

> Alcoholic liquor shall not be sold or furnished to a person unless the person has attained 21 years of age. A person who knowingly sells or furnishes alcoholic liquor to a person who is less than 21 years of age, or who fails to make diligent inquiry as to whether the person is less than 21 years of age, is guilty of a misdemeanor.

The proposed additional offense, contributing to neglect or delinquency of a minor, MCL 750.145; MSA 28.340, reads, in pertinent part, as follows:

> Any person who shall by any act, or by any word, encourage, contribute toward, cause or tend to cause any minor child under the age of 17 years to become neglected or delinquent so as to come or tend to come under the jurisdiction of the juvenile division of the probate court, ... whether or not such child shall in fact be adjudicated a ward of the probate court, shall be guilty of a misdemeanor.

At the trial court hearing on the motion to amend the complaint, Defendant was present with his counsel, Janet Mistele. Ms. Mistele argued, inter alia, that charging Defendant with the second offense would violate his constitutional right to be protected from double jeopardy. The transcript of the trial court hearing includes the following exchange:

> MS. MISTELE: ...[B]oth statutes require the same act. The prosecutor has conceded that in the motion and I simply do not believe my client can be convicted of both of these offenses for the exact same act. So, I would ask the court to please deny the prosecutor's request.
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> THE COURT: All right. Mr. Elsenheimer, were there any other facts that would be adduced at trial other than the furnishing of alcohol to the minor?
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> MR. ELSENHEIMER: Your Honor, that is the substance of both charges. And Ms. Mistele has correctly pointed out that that is indeed the act that is involved and that both charges do in fact stem from that single act. There -- that is something that is beyond argument. It's just simply a truism in this case. I would point

out, however, that as in chambers we discussed, there are several circumstances in which one act can be charged under different and completely separate -- completely separate pieces of code and statute. For example, here we're talking about one act which is not only a crime in the juvenile section, but also a motor vehicle crime -- or not a -- excuse me, also a violation of the criminal laws of this state. One can imagine a situation where somebody is drunk driving in which they could commit any -- during the course of that act, in which they could commit any number of separate yet chargeable misdemeanors or even civil infractions, or even felonies. One act can indeed supply the basis for more than one charge, and we would ask the court to consider that.

THE COURT: Well, I agree with your basic proposition, however -- and I would like the opportunity to research this. The trial is tomorrow and I'm going to make a decision. It is my view that the legislature can prohibit conduct, the same conduct, if there are different evils that it is trying to address. In this case, I see the same difficulty in both of the allegations, that is the furnishing of alcohol to a minor. Without more, I believe that this defendant cannot be convicted of both offenses, and therefore, I'm going to deny your motion to amend.

Motion hearing transcript, December 21, 1994, pp 8-9.

This Court finds the following remarks from People v Dickens, 144 Mich App 49, 54-55; 373 NW2d 241 (1985) to be helpful and instructive:

> The Michigan standard for double jeopardy has been stated by the Supreme Court in People v Carter[1] as follows:
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> " 'For purposes of the double jeopardy analysis, as a matter of state constitutional law, the question is not whether the challenged lesser offense is by definition necessarily included within the greater offense also charged, but whether, on the facts of the case at issue it is.' People v Jankowski, supra, 408 Mich 91.
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> "Of course, in focusing upon the facts, a court must nevertheless still take account of the elements of the offense. People v Wilder,411 Mich 328, 348-349, nf 10; 308 NW2d 112 (1981).

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[1] 415 Mich 558, 583-584; 330 NW2d 314 (1982), reh den 417 Mich 1105 (1983).

"In addition, Michigan has an expansive definition of necessarily included offenses for double jeopardy and other purposes:

"'The common-law definition of lesser included offenses is that the lesser must be such that it is impossible to commit the greater without first having committed the lesser. * * * This definition includes only necessarily included lesser offenses. This definition, however, is generally conceded to be unduly restrictive, and thus most jurisdictions, including Michigan, have statutes that are broadly construed to permit conviction of "cognate" or allied offenses of the same nature, under a sufficient charge. These lesser offenses are related and hence "cognate" in the sense that they share several elements, and are of the same class or category, but may contain some elements not found in the higher offense.' (Citation omitted.) People v Ora Jones, 395 Mich 379, 387; 236 NW2d 461 (1975). [Emphasis supplied.]

"'The fact that a lesser offense contains an element not also contained in the greater does not necessarily preclude the lesser from being included within the greater. The major factor is notice to the defendant; if the relation between the lesser offense and that originally charged is close enough to fairly inform the defendant that he will be required to defend against it, the lesser offense may be included within the greater. Further, cognate offenses include common statutory purposes as well as common elements; and, the shared elements must be related to those purposes, i.e., 'coincide in the harm to the societal interest to be protected'. Ora Jones, p 390.

"'Thus, in contrast to the test used in the federal system, the Michigan test for double jeopardy focuses on the facts of the particular case and proscribes multiple convictions of cognate as well as necessarily included offenses." (Footnote omitted.) [Emphasis added.]

The People rely on People v Robideau 419 Mich 458; 355 NW2d 592 (1984) to support its motion to amend the complaint. Inter alia, the People contend as follows:

To prove the charged crime, the People must show that the Appellee provided alcohol to people he knew to be less than twenty-one (21) years of age. To prove the proposed crime, the People must establish that the Appellee provided alcohol to a person under the age of seventeen (17) and that said act tends to cause the minor to "violat[e] any municipal ordinance or law of the state or of the United States." MCL 712 A.2(a)(1). [sic]

> [Possessing or transporting alcoholic liquor in a motor vehicle by a minor is a misdemeanor. MCL 436.33(a)(1.] Both the charged and the proposed crimes are ninety-day misdemeanors. The fact that the proposed crime is predicated on the actus reus of the charged crime and that both crimes have the same penalties "strongly suggests that the Legislature intended that the compound crime of (contributing [to] the delinquency of a minor) and the predicate crime of (furnishing to a minor) be separately punished." Robideau, at 489.
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> ... Under Robideau, the fact that the apparent intents of the charged and proposed statutes are unique and that the charges have like penalties and common elements strongly suggests that the punishments are not multiple. If the punishments are not multiple, Appellee's constitutional rights are not violated. As such, to deny the Appellant's Motion to Amend on double jeopardy grounds is clear error and an abuse of the trial court's discretion.

People's brief, p 5.

The Robideau opinion, authored by Justice Brickley, provides Michigan's highest Court's review of three related cases which embodied issues of compound and predicate crimes. Justice Brickley set forth the issue in the combined cases as follows:

> These cases require us to decide whether the prohibition in either the United States or Michigan Constitution against placing a person twice in jeopardy prohibits, in a single trial, convictions of both first-degree criminal sexual conduct under MCL 750.520b(1)(c); MSA 28.788(2)(1)(c) (penetration under circumstances involving any "other felony") and the underlying "other felony" of either armed robbery or kidnapping used to prove the charge of first-degree criminal sexual conduct. (Footnote omitted.)
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> The Double Jeopardy Clause prohibits a court from imposing more punishment than that intended by the Legislature. "[T]he question whether punishments imposed by a court after a defendant's conviction upon criminal charges are unconstitutionally multiple cannot be resolved without determining what punishments the Legislative Branch has authorized". Whalen v United States, 445 US 684, 688; 100 S Ct 1432; 63 L Ed 2d 715 (1980.

Robideau, supra at p 466 and 469. More recently, the Supreme Court in People v Harding, 443 Mich 693, 710; 506 NW2d 482 (1993) provided the following pertinent discussion:

> While discussing the severity of the punishments for the crimes at issue in Robideau, we noted that both first-degree criminal sexual conduct and the predicate felonies carry a maximum penalty of life imprisonment. Unlike traditional lesser included offenses, which subsume into the greater like robbery and armed robbery, the compound and predicate crimes in Robideau had the same penalties. We surmised that the Legislature would not have intended to have the predicate felony subsume into the compound felony because such a construction would provide no reason for having the compound felony apply in that instance. Accordingly, we held that it was not a violation of double jeopardy to convict and punish the defendants in Robideau for the compound crime of first-degree criminal sexual conduct and the underlying predicate felony used to sustain the compound crime.

The Robideau Court, then, considered a narrow issue related to double jeopardy, i.e. whether charging a defendant with two particular crimes, one a compound crime and the other a predicate crime, would expose that defendant to more punishment than that which the Legislature intended. The furnishing of alcohol to a minor is not a predicate crime to the crime of contributing to the delinquency of a minor and contributing to the delinquency of a minor is not a compound crime. Indeed, there are uncountable ways that an offender might contribute to the delinquency of a minor. Both offenses are of the same class, address similar social concerns and have identical penalties. On the facts of this case, they are cognate offenses.

In the opinion of this Court, Robideau does not aid the People's arguments. Contributing to the delinquency of a minor is not a compound crime and furnishing alcohol to a minor is not a predicate crime. There is no evidence before this Court that the Legislature intended that these crimes, on these facts, be separately punished. Harding, supra. To the contrary, without independent behavior to support the People's proposed amendment, Michigan law proscribes charging the cognate offense of contributing to the delinquency of a minor as a separate offense where prosecution for furnishing alcohol to a minor is already proceeding. People v Dickens, supra.

There is nothing on the record which persuades this Court that

the trial court abused its discretion in denying the People's motion to amend the complaint. For the foregoing reasons, this Court affirms the trial court's decision to deny the People's motion to amend the information and remands the case to the 87th District Court for further proceedings.

IT IS SO ORDERED.

HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 6/29/95