

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

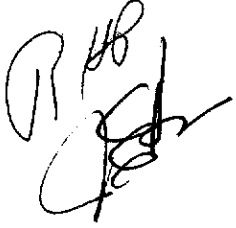
**FIRST CIRCUIT**

**2007 KA 2523**

**STATE OF LOUISIANA**

**VERSUS**

**GEORGIA BURNETT**



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**On Appeal from the 19th Judicial District Court  
Parish of East Baton Rouge, Louisiana  
Docket No. 08-07-0637, Section VII  
Honorable Todd Hernandez, Judge Presiding**

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**Doug Moreau  
District Attorney  
Dylan C. Alge  
Assistant District Attorney  
Baton Rouge, LA**

**Attorneys for Appellant  
State of Louisiana**

**Randall R. Robinson  
Snell & Robinson  
Bossier City, LA**

**Attorney for  
Defendant-Appellee  
Georgia Burnett**

**BEFORE: PARRO, KUHN, AND DOWNING, JJ.**

*Downing, J. dissents.*

**Judgment rendered May 2, 2008**

**PARRO, J.**

The defendant, Georgia Burnett, a former employee of Duplessis Cadillac (Duplessis) in Baton Rouge, was charged by bill of information with felony theft, over five hundred dollars, in violation of LSA-R.S. 14:67(B)(1). For the purpose of clarity, this bill of information will be referred to as "the second bill." The charge in the second bill stemmed from allegations that the defendant stole funds from Duplessis pursuant to an embezzlement scheme in which she misappropriated funds and offset bookkeeping entries to conceal the theft. This offense was originally alleged to have occurred from December 1, 2000, to February 28, 2005. The defendant pled not guilty and moved to quash the bill of information.

Noting that the defendant had previously pled guilty to theft from Duplessis under a separate bill of information (the first bill) for an embezzlement scheme allegedly occurring on or about June 28, 2001, to February 5, 2005, the motion to quash alleged that the second bill of information was untimely and in violation of the prohibition against double jeopardy. On October 1, 2007, a hearing was held on the motion to quash the second bill. During the hearing, the state noted that an audit conducted subsequent to the defendant's plea of guilty to the charge alleged in the first bill revealed that the defendant also embezzled funds from Duplessis outside the dates alleged in the first bill of information. According to the audit, the defendant's embezzlement scheme dated back to December 1, 2000. Later in the hearing, the state apparently realized the potential double jeopardy problem with the dates of the charge in the second bill. To cure the problem, the state voluntarily amended the bill of information to reflect the dates of December 1, 2000, to June 28, 2001, thereby excluding any date covered by the first bill. At the conclusion of the hearing, the district court, upon finding that the offenses charged in the first and second bills of information involved the same type of conduct, granted the motion to quash the second bill of information on the basis that it constituted a violation of the prohibition against double

jeopardy.<sup>1</sup>

The state appeals the ruling. Finding merit in the assigned error, we reverse the district court's ruling that granted the motion to quash and remand this matter for further proceedings.

### **DISCUSSION**

In its sole assignment of error, the state contends the district court erred in granting the defendant's motion to quash the second bill as a violation of the doctrine of double jeopardy. Specifically, the state argues that the theft offense alleged in this case and the theft to which the defendant previously pled guilty in the first bill were separate and distinct offenses occurring at separate and distinct times. In response, the defendant contends the trial court was correct in finding that the doctrine of double jeopardy prohibited the second prosecution for the same continuous course of conduct.

The federal and state constitutions provide that no person shall twice be put in jeopardy of life or liberty for the same offense. U.S. Const. amend. V; LSA-Const. art. I, § 15. The Double Jeopardy Clause protects the accused against multiple punishments for the same offense as well as subsequent prosecution for the same offense after acquittal or conviction. See LSA-C.Cr.P. arts. 591 through 598.

In determining whether or not the double jeopardy prohibition has been violated, the Louisiana Supreme Court has recognized two different tests, i.e., the test established in **Blockburger v. United States**, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932), and the "same evidence" test. The **Blockburger** test is as follows:

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**, 284 U.S. at 304. In addition to this "same elements" test, Louisiana courts

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<sup>1</sup> Based upon its finding that a fiduciary relationship existed between the defendant and her employer, Duplessis, the court declined to quash the bill of information as untimely. See LSA-C.Cr.P. art. 573(1).

also utilize the “same evidence” test when evaluating double jeopardy claims. The “same evidence” test focuses on the actual physical and testimonial evidence necessary to secure a conviction. Under this test, if the proof required to support a finding of guilt of one crime would also support conviction of another crime, the prohibition against double jeopardy bars a conviction for more than one crime. See State v. Leblanc, 618 So.2d 949, 957 (La. App. 1st Cir. 1993), writ denied, 95-2216 (La. 10/4/96), 679 So.2d 1372.

The record reflects that, in quashing the second bill of information, the district court reasoned:

All right. All right. The court took the matter under advisement, the defendant’s motion to quash, after having had the opportunity to receive testimonial evidence as what is documented evidence concerning the previous defendant’s plea of guilty on a previous bill of information and the amended bill of information of the State of Louisiana. The matter having been taken under advisement. [sic] After a short recess, the court has had the opportunity to review the evidence. The court will note that the [sic] double jeopardy prevents multiple prosecutions and multiple convictions for allegations of continuance [sic] conduct. The defendant was employed by the plaintiff [sic] for fourteen years. Previously plead [sic] guilty to the same conduct of embezzlement before this court. A later audit revealed further losses due to the defendant’s embezzlement which, for whatever reason, was not discovered after the first audit that originally identified the thefts by the defendant. A theft by fraud is a theft by a fraud. A theft is a theft by means of the – the first theft to which the defendant plead [sic] guilty to was her embezzlement and the means of a new charge was theft by means of embezzlement. Obviously, both occasions involved the same type of conduct that should have been discovered at the time that the original charges were initiated against the defendant. This is a violation of the prohibition against double jeopardy and the motion is granted.

Thus, in granting the defendant’s motion to quash, the district court found that the state improperly accused the defendant of having committed several distinct crimes of theft when the offense alleged in the second bill and the offense to which the defendant previously pled guilty resulted from the same course of conduct (i.e., the same embezzlement scheme). However, as the state correctly notes in its brief, Louisiana courts have expressly rejected the “same transaction” test which would prohibit multiple prosecutions for distinct crimes committed during one sequential, continuing course of conduct. See City of Baton Rouge v. Jackson, 310 So.2d 596

(La. 1975).

The instant case does not involve a situation where the same act or transaction constitutes a violation of two distinct statutory provisions. See **Blockburger**, 284 U.S. at 304. Therefore, the issue in this case is whether the state, by filing the second bill of information based on a particular scheme of criminal activity, occurring over an extended period of time, was seeking multiple prosecutions for the same offense in violation of the prohibition against double jeopardy. In determining whether an individual is being subjected to multiple punishments for the same offense, the applicable test is whether the pertinent statute intended to prohibit individual acts, in which case each act may be punished separately, or to prohibit the course of conduct. See **Blockburger**, 284 U.S. at 302. We resolve the issue in this case by referring to the statutory language of LSA-R.S. 14:67 and the jurisprudential interpretation of that language by the Louisiana Supreme Court in **State v. Joles**, 492 So.2d 490 (La. 1986), cert. denied, 479 U.S. 1056, 107 S.Ct. 933, 93 L.Ed.2d 984 (1987).

Louisiana Revised Statute 14:67 provides, in pertinent part, as follows:

A. Theft is the misappropriation or taking of anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct, practices, or representations. An intent to deprive the other permanently of whatever may be the subject of the misappropriation or taking is essential.

In **Joles**, the defendant was convicted of twenty separate counts of theft from the same victim pursuant to a continuous scheme. The defendant argued that the state was required to aggregate the thefts into a single charge. In reviewing LSA-R.S. 14:67, the **Joles** court held that:

Section 67 generally prohibits the individual acts of theft, but further authorizes as part of the penalty provisions a greater penalty when the district attorney in his discretion determines that there was a sufficient number and degree of successive acts of theft to warrant aggregating the amounts of the thefts to punish the offender as one greater offense.

We therefore hold that under Section 67 the district attorney *may* charge a number of distinct thefts in one count in a single bill of information, in which case the aggregate amount of the takings *shall* determine the grade of the single offense, but that Section 67 does not

prohibit the district attorney from charging a number of distinct thefts in separate counts in either a single bill or multiple bills of information, in which case the amount of each taking determines the grade of the offense in each count.

**Joles**, 492 So.2d at 495.

Applying the language of the theft statute and the supreme court's holding in **Joles** to the instant case, we find error in the district court's ruling on the motion to quash. The thefts charged in the first and second bills of information actually involved separate and distinct misappropriations or takings, requiring separate and distinct evidence for conviction. Therefore, applying the "same evidence" test to the facts of this case, we do not find that the defendant's prosecution in the second bill violated the doctrine of double jeopardy.

The defendant committed a series of thefts in a given period from one victim, similar to the twenty thefts from one victim in **Joles**. Although she continued the criminal activity over an extended period of time, each time the defendant falsified a bookkeeping entry and pocketed funds belonging to Duplessis, she committed a separate and distinct act of theft. Under **Joles**, the district attorney has the discretion as to whether to prosecute these offenses separately or to aggregate them. See LSA-Cr.P. art. 61. In this case, the state was well within its discretion when it chose to bill the offenses occurring between December 1, 2000, and June 28, 2001, separately. This was no violation of the prohibition against double jeopardy since the offenses were clearly separate and the defendant had not been prosecuted for any theft from Duplessis during this time period. As the state conceded at the motion to quash hearing, only those offenses discovered to have occurred during the period to which the defendant had already pled guilty in the first bill were prohibited. Therefore, once the state amended the second bill of information to strike the period from June 28, 2001, to February 28, 2005 (the period covered by the first bill of information), it removed any potential double jeopardy violation.

Insofar as the defendant's reliance on **State v. Bryant**, 97-1878 (La. App. 4th Cir. 10/21/98), 729 So.2d 600, is concerned, we note that the facts in **Bryant** are easily distinguishable from the facts in this case. In **Bryant**, the defendant was charged in one case with theft of \$500 or more belonging to her employer, the Maiden Voyage Club, between October 1995, through the 6th of March 1996. In a second case the defendant was charged with theft of \$500 or more belonging to the Maiden Voyage Club between September 1995, and February 1996. The only difference in the two bills was the dates of the alleged offenses.

In finding that the doctrine of double jeopardy barred the prosecution in the second case, the court noted that because the bills of information gave almost the same time periods, theoretically the same evidence could be offered to support either theft in the overlapping months. The court noted that unlike the situation in **Joles**, "the poorly drawn" bills of information in **Bryant** did not indicate that the defendant was charged with two distinct thefts. **State v. Bryant**, 729 So.2d at 602-03. Therefore, since the defendant was charged in both cases with theft of more than \$500 from the Maiden Voyage Club between the dates of October 1995 and February 1996, the court found that the second prosecution was barred by the prohibition against double jeopardy.

As previously noted, in this case the state amended the second bill of information to strike the period from June 28, 2001, to February 28, 2005, thereby removing any potential double jeopardy violation. Furthermore, unlike the situation in **Bryant**, it is clear from the record that the defendant in this case was charged with two separate and distinct thefts.

Considering the foregoing, it is clear that the district court erred in finding that this matter concerned a single offense involving one course of criminal conduct rather than separate and distinct offenses. The state's assignment of error challenging the district court's ruling on the motion to quash has merit.

For the foregoing reasons, we reverse the district court's ruling that granted the defendant's motion to quash. The matter is remanded for further proceedings.

**RULING ON MOTION TO QUASH REVERSED; REMANDED FOR FURTHER PROCEEDINGS.**