

STATE OF MINNESOTA

IN SUPREME COURT

A21-0220

Court of Appeals

Chutich, J.

State of Minnesota,

Respondent,

vs.

Filed: October 12, 2022  
Office of Appellate Courts

Kevin Herman Larson,

Appellant.

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Keith Ellison, Attorney General, Peter Magnuson, Assistant Attorney General, Saint Paul, Minnesota; and

Lauri A. Ketola, Carlton County Attorney, Carlton, Minnesota, for respondent.

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, Saint Paul, Minnesota, for appellant.

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S Y L L A B U S

1. When a person who is required to register as a predatory offender is assigned a corrections agent, the unit of prosecution for failing to register in violation of subdivision 3(a) of Minnesota Statutes section 243.166 (2020), for double jeopardy purposes, is the initial assignment of that corrections agent.

2. The district court did not err when it denied appellant's motion to dismiss the criminal charge of failing to register in August 2019 on double jeopardy grounds, because appellant's earlier convictions involved different assignments of a corrections agent.

3. The district court erred when it denied appellant's motion to dismiss an additional criminal charge of failing to register in September 2019 on double jeopardy grounds, because the August 2019 offense involved the same assignment of a corrections agent.

Affirmed in part, reversed in part, and remanded.

## OPINION

CHUTICH, Justice.

The issue raised in this case is whether double jeopardy principles limit the number of times that the State may charge a defendant with failing to register as a predatory offender under subdivision 3(a) of Minnesota Statutes section 243.166 (2020). Subdivision 3(a) requires a predatory offender to register "with the corrections agent as soon as the agent is assigned to the person." Appellant Kevin Herman Larson is required to register as a predatory offender. Between 2004 and 2018, Larson was convicted and sentenced on seven separate occasions for failing to register under subdivision 3(a). In August 2019, after he was assigned a new corrections agent, Larson refused to sign the required registration paperwork. The corrections agent asked a special agent of the Minnesota Bureau of Criminal Apprehension (the Bureau) for help in obtaining the necessary paperwork from Larson. When the special agent from the Bureau met with Larson in

August 2019, Larson refused to sign the required paperwork. In September 2019, the special agent asked Larson to sign the same paperwork, and Larson refused a second time.

The State then charged Larson with two counts of failing to register under subdivision 3(a), one for each month's refusal. Larson moved to dismiss the charges on double jeopardy grounds, arguing that his earlier convictions for failing to register bar prosecution of the 2019 offenses. In the alternative, Larson contended that the August 2019 offense bars prosecution of the September 2019 offense because no change in circumstances triggered a new duty to register. The district court issued an order denying Larson's motion, which the court of appeals affirmed.

We hold that for double jeopardy purposes, the unit of prosecution for a violation of subdivision 3(a) is the assignment of a corrections agent. As a result, Larson's earlier convictions did not bar prosecution of the August 2019 offense, which involved a different assignment of a corrections agent. Because the September 2019 offense involved the same assignment of a corrections agent as the August 2019 offense, however, prosecution of the September 2019 offense is barred. We therefore affirm in part, reverse in part, and remand to the district court to vacate the conviction entered for the September 2019 offense.

### **FACTS**

On January 4, 1993, Kevin Herman Larson was convicted of one count of second-degree criminal sexual conduct in violation of Minnesota Statutes section 609.343, subdivision 1(a) (2020). The court imposed a 36-month sentence. Larson's conviction required him to register as a predatory offender. Minn. Stat. § 243.166, subd. 1b(a)(1)(iii) (2020). During his initial incarceration, corrections agents repeatedly asked Larson to sign

the required registration paperwork.<sup>1</sup> Larson refused. Since initially refusing to sign his registration paperwork, Larson has persisted in his noncompliance. Accordingly, beginning in 2004, Larson has been prosecuted and convicted for violations of Minnesota’s registration law on seven separate occasions and has spent most of the last 30 years serving sentences for his persistent failure to register, primarily under subdivisions 3(a) and 3(b) of section 243.166.<sup>2</sup> Subdivision 3(a) requires a person to register “with the corrections agent as soon as the agent is assigned to the person”; subdivision 3(b) requires registration

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<sup>1</sup> The term “corrections agent” is defined as “a county or state probation agent or other corrections employee. The term also includes United States Probation and Pretrial Services System employees who work with a person subject to this section.” Minn. Stat. § 243.166, subd. 1a(c) (2020).

<sup>2</sup> See *State v. Larson (Larson I)*, No. A05-40, 2006 WL 618857 (Minn. App. Mar. 14, 2006) (affirming Larson’s conviction for violating Minnesota Statutes section 243.166, subdivisions 3(a) and 3(b)), *rev. denied* (Minn. May 16, 2006); *State v. Larson (Larson II)*, No. A06-0623, 2007 WL 2993608 (Minn. App. Oct. 16, 2007) (affirming Larson’s conviction for violating Minnesota Statutes section 243.166, subdivision 3(b)), *rev. denied* (Minn. Dec. 19, 2007); *State v. Larson (Larson III)*, No. A07-2145, 2008 WL 5396820 (Minn. App. Dec. 30, 2008) (affirming Larson’s conviction for violating Minnesota Statutes section 243.166, subdivisions 1b(a)(1)(iii) and 3(a)), *rev. denied* (Minn. Mar. 17, 2009); *State v. Larson (Larson IV)*, No. A10-1562, 2011 WL 2672239 (Minn. App. July 11, 2011) (affirming Larson’s conviction for violating Minnesota Statutes section 243.166, subdivisions 3(b) and 3a(b)), *rev. denied* (Minn. Sept. 20, 2011); *State v. Larson (Larson V)*, No. A15-1085, 2016 WL 4596403 (Minn. App. Sept. 6, 2016) (affirming Larson’s conviction for violating Minnesota Statutes section 243.166, subdivision 3a(a)), *rev. denied* (Minn. Nov. 23, 2016); *State v. Larson (Larson VI)*, No. A17-1274, 2018 WL 4288994 (Minn. App. Sept. 10, 2018) (affirming Larson’s conviction for violating Minnesota Statutes section 243.166, subdivision 3(a)), *rev. denied* (Minn. Nov. 27, 2018); *State v. Larson (Larson VII)*, No. A18-1179, 2019 WL 3000749 (Minn. App. July 1, 2019) (affirming Larson’s conviction for violating Minnesota Statutes section 243.166, subdivision 3(a)), *rev. denied* (Minn. Sept. 25, 2019); *State v. Larson (Larson VIII)*, No. A21-0220, 2021 WL 6010122 (Minn. App. Dec. 20, 2021) (affirming Larson’s current convictions for violating Minnesota Statutes section 243.166, subdivision 3(a)).

upon moving to a new address. Larson's first conviction for violating subdivision 3(a) involved conduct that occurred in Morrison County. His seventh conviction for violating subdivision 3(a) occurred in Sherburne County and involved corrections agent Kenneth Kalla.

This appeal derives from Larson's eighth (and most recent) set of convictions for violating subdivision 3(a) of section 243.166, which involves conduct that occurred in Carlton County. In August 2019, Larson was serving his latest prison sentence for failing to register as a predatory offender. After corrections agent Amie Novak was assigned to Larson, he refused to sign the required registration paperwork. When Larson persisted in his refusal, Novak contacted the Minnesota Bureau of Criminal Apprehension—the governing agency for predatory offender registration in Minnesota. The Bureau dispatched Special Agent John Nordberg to assist with registration.

On August 28, 2019, Nordberg visited Larson at the Minnesota Correctional Facility at Moose Lake. During his visit, Nordberg informed Larson that his goal was to get Larson to sign the required registration paperwork. Larson did not acknowledge Nordberg's presence and refused to sign the registration paperwork. Nordberg informed Larson that he had no choice but to recommend that the prosecutor charge Larson with a felony offense of failing to register.<sup>3</sup> Twelve days later on September 9, 2019, Nordberg returned to the Minnesota Correctional Facility at Moose Lake and requested that Larson sign the required

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<sup>3</sup> As the representative of the state agency empowered to enforce offender registration laws, Nordberg testified that he was responsible for ensuring that offenders completed their registration paperwork. If Nordberg believed that a violation had occurred, it was his responsibility to recommend charges for that violation.

registration paperwork. During this second meeting, Nordberg again presented Larson with his registration paperwork, and Larson again refused to sign. Nordberg informed Larson that he had no choice but to recommend that the prosecutor charge Larson with an additional felony offense of failing to register.

After reviewing Nordberg's report, the State charged Larson with two counts of violating subdivision 5(a)(1) of Minnesota Statutes section 243.166 (2020). This subdivision prohibits a person who is required to register as a predatory offender from knowingly committing an act, or failing to fulfill a requirement, that violates any provision of section 243.166. Minn. Stat. § 243.166, subd. 5(a)(1). The first count stemmed from Larson's August 28, 2019 refusal to register, and the second count stemmed from his September 9, 2019 refusal. Before trial, Larson moved to dismiss each count on double jeopardy grounds or, alternatively, to dismiss count two only.<sup>4</sup> Relying on court of appeals precedent holding that separate prosecutions are not barred when the offense is continuous and the defendant commits the same violation multiple times, the district court denied Larson's motion.

The case proceeded to a jury trial. After the defense observed that the State had not specifically identified the provision of section 243.166 that Larson allegedly violated, the district court permitted the prosecution to amend the complaint to allege violations of subdivision 3(a). The district court's jury instructions quoted verbatim the language of

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<sup>4</sup> Larson has also asserted double jeopardy in numerous previous appeals, including *Larson II*, 2007 WL 2993608, at \*3-6; *Larson III*, 2008 WL 5396820, at \*3-5; and *Larson V*, 2016 WL 4596403, at \*7.

subdivision 3(a). The jury found Larson guilty as charged. Relying on the career-offender statute, Minnesota Statutes section 609.1095, subd. 4 (2020), the State asked the court to sentence Larson to the statutory maximum of 60 months. Larson requested downward durational and dispositional departures. The court imposed two concurrent 60-month sentences.

Larson appealed his convictions to the court of appeals. On appeal, he again contended that his dual 2019 convictions for failing to register violated his constitutional protection against double jeopardy. Similar to the district court, the court of appeals relied on its own precedent to conclude that the two convictions for failing to register in August and September 2019 did not contravene Larson’s constitutional protection against double jeopardy.

Larson petitioned for review on numerous grounds. We granted review on one issue: “Did the district court err by not dismissing both or at least one of the two [2019] charges on double jeopardy grounds?”

### ANALYSIS

We review a district court’s application of the Double Jeopardy Clause de novo. *State v. Chavarria-Cruz*, 839 N.W.2d 515, 520 (Minn. 2013). Applying the Double Jeopardy Clause here involves a question of statutory interpretation, which we also review de novo. *State v. Pakhnyuk*, 926 N.W.2d 914, 920 (Minn. 2019).

The Double Jeopardy Clause in the Fifth Amendment to the United States Constitution provides that no person may “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. amend. V. Similarly, the Double Jeopardy Clause

of the Minnesota Constitution states that “no person shall be put twice in jeopardy of punishment for the same offense.” Minn. Const. art. 1, § 7. We have long held that these provisions “protect a criminal defendant from three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and *multiple punishments for the same offense*.” *State v. Humes*, 581 N.W.2d 317, 320 (Minn. 1998) (emphasis added); *see also Monge v. California*, 524 U.S. 721, 727–28 (1998) (same).

The protection afforded by the Double Jeopardy Clause, however, is not absolute. Specifically, it cannot nullify legislatively imposed penalties because the Legislature is free “to define crimes and fix punishments.” *Brown v. Ohio*, 432 U.S. 161, 165 (1977). Accordingly, the Double Jeopardy Clause “serves principally as a restraint on courts and prosecutors.” *Id.* In fact, “[f]ew, if any, limitations are imposed by the Double Jeopardy Clause on the legislative power to define offenses.” *Sanabria v. United States*, 437 U.S. 54, 69 (1978) (emphasis added). Once the Legislature has defined an offense, however, that statutory definition will determine the extent of double jeopardy protection. *See Brown*, 432 U.S. at 169.

In particular, whether the Double Jeopardy Clause permits the State to simultaneously charge a defendant with numerous violations of the same statutory provision depends on the statute’s “unit of prosecution.” *Sanabria*, 437 U.S. at 69–70 (quoting *United States v. Universal C. I. T. Credit Corp.*, 344 U.S. 218, 221 (1952) (citation omitted); *see also State v. Bakken*, 883 N.W.2d 264, 267 (Minn. 2016) (same). Although the United States Supreme Court has long held that the State cannot repeatedly charge a



defendant for the same crime, *see Brown*, 432 U.S. at 165–66, violations of the same statutory provision *may* be charged more than once in a single prosecution if the Legislature “intended the facts underlying each count to make up a separate unit of prosecution.” *Bakken*, 883 N.W.2d at 267 (quoting *United States v. Chipps*, 410 F.3d 438, 447 (8th Cir. 2005)). Multiple prosecutions are permitted for continuing offenses like possession of child pornography, *see Bakken*, 883 N.W.2d at 267–70 (defining the unit of prosecution as a single pornographic work), and joyriding, *see Brown*, 432 U.S. at 169 (defining the unit of prosecution as a single car). But prosecutors cannot avoid double jeopardy by dividing up a unit of prosecution “ ‘into a series of temporal or spatial units’ ” or “ ‘discrete bases of liability’ not defined as such by the legislature.” *Sanabria*, 437 U.S. at 72 (quoting *Brown*, 432 U.S. at 169).

Determining the available units of prosecution requires us to interpret the statute as written by the Legislature. *Bakken*, 883 N.W.2d at 267. Accordingly, we examine the language of subdivision 3(a) of section 243.166 to determine the unit of prosecution authorized by the Legislature; we then consider whether the State violated the Double Jeopardy Clause when it charged and prosecuted the offenses alleged in this case.

Subdivision 3(a) of Minnesota Statutes section 243.166 states:

Except as provided in subdivision 3a, a person required to register under this section shall register with the corrections agent as soon as the agent is assigned to the person. If the person does not have an assigned corrections agent or is unable to locate the assigned corrections agent, the person shall register with the law enforcement authority that has jurisdiction in the area of the person’s primary address.

Minn. Stat. § 243.166, subd. 3(a). Larson contends that subdivision 3(a) sets forth an “initial obligation to register” that arises one time: “as soon as the [corrections] agent is assigned” following conviction for a qualifying offense. Accordingly, Larson maintains that the State may only prosecute him for violating subdivision 3(a) *one time*, and therefore, each of his 2019 convictions contravene double jeopardy principles. The State counters that subdivision 5(c) of Minnesota Statutes section 243.166, which provides an enhanced penalty for a repeat offender, demonstrates that the Legislature believed a person could be convicted of failing to register *more than once*. See Minn. Stat. § 243.166, subd. 5(c) (2020).

Having examined the language of subdivision 3(a) of section 243.166, we conclude that the Legislature authorized one “unit of prosecution” for each assignment of a corrections officer. In reaching our conclusion, we rely on the statutory language that plainly states that “a person required to register under this section shall register with the corrections agent *as soon as the agent is assigned* to the person.” *Id.* (emphasis added). Accordingly, under our double jeopardy jurisprudence, the State can charge defendants *one time* for each failure to register following the “assignment” of a corrections agent.<sup>5</sup> Here, Larson’s earlier convictions did not bar prosecution of the August 2019 offense because

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<sup>5</sup> Minnesota’s administrative rules ensure compliance with section 243.166 by requiring correctional facilities to enact “policies and procedures to ensure that appropriate [registration] paperwork has been completed and the appropriate people are notified before [an offender] is released.” Minn. R. 2920.4900 (2021). Accordingly, the Minnesota Department of Corrections “assigns” a corrections agent to predatory offenders when they are about to be released, thereby creating a unit of prosecution under subdivision 3(a) of section 243.166.

they involved a different assignment of a corrections agent. But the August 2019 offense bars prosecution of the September 2019 offense because it involves the same assignment of a corrections agent. Consequently, the court of appeals did not err when it affirmed the denial of Larson's motion to dismiss the August 2019 offense, but it did err when it affirmed the denial of Larson's motion to dismiss the September 2019 offense.

### **CONCLUSION**

For the foregoing reasons, we affirm in part, reverse in part, and remand to the district court to vacate the conviction entered for the September 2019 offense.

Affirmed in part, reversed in part, and remanded.