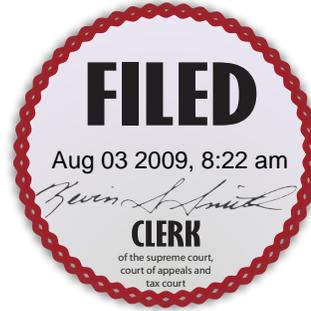


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JOSHUA CLARK,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 55A04-0812-CR-692

APPEAL FROM THE MORGAN SUPERIOR COURT
The Honorable Jane Spencer Craney, Judge
Cause No. 55D03-0512-FD-293

August 3, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Joshua Clark appeals his conviction for Class A misdemeanor criminal conversion in Morgan County. He contends that this conviction violates federal and state double jeopardy principles because he was already convicted of this offense when he was convicted of Class D felony theft in Monroe County. According to Indiana Code § 35-41-4-3(a)(1), a prosecution is barred if there was a former prosecution of the defendant based on the same facts and for commission of the same offense and if the former prosecution resulted in a conviction. Because Clark's former prosecution in Monroe County for theft was based on the same facts and resulted in a conviction, his subsequent prosecution for theft in Morgan County (for which the trial court entered judgment of conviction for a lesser-included offense of criminal conversion) was barred. We therefore vacate his conviction.

Facts and Procedural History

In early November 2005, Clark worked at the Center for Behavioral Health ("the Center") in Bloomington, Indiana, which is in Monroe County, through a temporary employment agency. On approximately November 5, the Center terminated his employment. On the morning of November 14, Clark purchased items at Bender Lumber Company in Bloomington and charged them to the Center. On the afternoon of the same day, Clark purchased items from Bender Lumber Company in Martinsville, Morgan County, Indiana, and charged them to the Center. On the next day, November 15, Clark purchased items at Bender Lumber Company in Bedford, Lawrence County, Indiana, and

charged them to the Center. Clark did not have the authority to charge these purchases to the Center.

On August 22, 2006, the Monroe County Prosecutor charged Clark with Class D felony theft. Ind. Code § 35-43-4-2. The charging information provides:

On or about November 10 through November 15, 2005 in Monroe County, Indiana, the defendant knowingly exerted unauthorized control over property of the *Center of Behavioral Health*, with intent to deprive the owner of any part of its value or use.

Appellant's App. p. 10 (emphasis added). It is important to note that the victim identified in the charging information is the Center, whose credit was unlawfully used, *not the Monroe County Bender Lumber*. The probable cause affidavit detailed the three separate Bender Lumbers that Clark used the Center's credit to purchase from and the amount of the purchases as follows:

11/14/2005 at 611 W. 11th Street, Bloomington, Indiana for \$945.21 at Bender Lumber Co.

11/14/2005 at 550 W. Mitchell Avenue, Martinsville, Indiana for \$863.72 at Bender Lumber Co.

11/15/2005 at 3120 Brock Lane, Bedford, Indiana for \$806.84 at Bender Lumber Co.

Id. at 11 (capitalization omitted) (formatting altered).¹ The affidavit further details that Clark used unauthorized control over accounts belonging to the Center for these purchases. *Id.*

On April 4, 2007, Clark pled guilty as charged,² and the trial court sentenced him to twenty-four months with twenty-one months suspended and ordered him to pay "\$5493.31 restitution to businesses."³ *Id.* at 13.

¹ There was a fourth business listed, Kleindorfer's Hardware, in Bloomington, Indiana, for \$839.96.

On December 2, 2005, before the Monroe County charges were filed, the Morgan County Prosecutor charged Clark with Class D felony theft with regard to the Morgan County Bender Lumber. The charging information for the Morgan County case provides:

[O]n or about November 14, 2005 in Morgan County, State of Indiana, Joshua M. Clark did knowingly exert unauthorized control over the property of *Bender Lumber* Martinsville, Indiana with the intent to deprive Bender Lumber of any part of the use or value of the property.

Id. at 14 (emphasis added). On April 10, 2007, approximately one week after pleading guilty to theft in the Monroe County case, Clark moved to dismiss the theft charge in Morgan County on grounds that the Monroe County theft conviction and sentence was based, in part, upon “acts that occurred in Morgan County”; as such, subjecting him to conviction and sentence in Morgan County “would violate [his] right against double jeopardy under the Fifth Amendment and Art. [1], § 14 of the Indiana Constitution.” Appellant’s App. p. 18. The Morgan Superior Court denied Clark’s motion to dismiss on May 1, 2007. Clark asked for and received permission from the trial court to seek an

² We do not have the transcript from the Monroe County guilty plea hearing, which would have set forth the factual basis for Clark’s guilty plea in that case. However, given that the charging information for that theft lists the Center (and not the Monroe County Bender Lumber) as the victim and sets forth a range of dates (implying that there was more than one act comprising the theft), the probable cause affidavit details the three Bender Lumbers, and the restitution order covers the amount of the purchases from the three Bender Lumbers, we conclude that the unauthorized use of the Center’s credit in fact covers the items purchased from the three Bender Lumbers.

³ Indiana Code § 35-50-5-3 provides:

(a) Except as provided in subsection (i) or (j), in addition to any sentence imposed under this article for a felony or misdemeanor, the court may, as a condition of probation or without placing the person on probation, order the person to make restitution to the victim of the crime, the victim’s estate, or the family of a victim who is deceased. The court shall base its restitution order upon a consideration of:

(1) property damages of the victim incurred as a result of the crime, based on the actual cost of repair (or replacement if repair is inappropriate)

interlocutory appeal, *id.* at 25, which this Court then denied. *Clark v. State*, No. 55A01-0705-CR-222 (Ind. Ct. App. June 18, 2007).

A bench trial was held in the Morgan County case in September 2007. The trial court found Clark guilty of Class D felony theft but entered judgment of conviction for the lesser-included offense of Class A misdemeanor criminal conversion. Ind. Code § 35-43-4-3(a). The court sentenced Clark to one year in the Morgan County Jail, with sixty days executed and the remainder suspended to probation. Restitution was not an issue in the Morgan County case since Clark was already ordered to pay restitution to the Morgan County Bender Lumber in the Monroe County case. Appellant's App. p. 39. The trial court stayed Clark's sentence pending appeal. This belated appeal now ensues.

Discussion and Decision

Clark contends that his Morgan County conviction for Class A misdemeanor criminal conversion, which is based on exerting unauthorized control over property of the Morgan County Bender Lumber, violates double jeopardy principles because he was already convicted and punished for those acts when he was convicted for the Monroe County theft, which is based on exerting unauthorized control over property of the Center with intent to deprive the Center of any part of its value or use. Clark cites both the United States and Indiana Constitutions in support.

However, we need not address this issue on constitutional grounds in order to afford Clark relief on appeal. Indiana Code § 35-41-4-3 provides:

(a) A prosecution is barred if there was a former prosecution of the defendant *based on the same facts and for commission of the same offense* and if:

(1) *the former prosecution resulted in an acquittal or a conviction of the defendant (A conviction of an included offense constitutes an acquittal of the greater offense, even if the conviction is subsequently set aside.)*

(Emphases added). Here, Clark filed a motion to dismiss the theft of the Morgan County Bender Lumber in the Morgan County case on grounds that he was already convicted and punished for that act in the Monroe County theft case, but the trial court denied his motion. *See* Ind. Code § 35-34-1-4(a)(7) (“The court may, upon motion of the defendant, dismiss the indictment or information upon any of the following grounds: . . . (7) The prosecution is barred by reason of a previous prosecution.”). We agree with Clark that the Morgan County prosecution was barred and therefore should have been dismissed. The Monroe County prosecution was based on the theft of the Center’s credit. *See* Appellant’s App. p. 10 (“the defendant knowingly exerted unauthorized control over property of the *Center of Behavioral Health*, with intent to deprive the owner of any part of its value or use”) (emphasis added). The Center’s credit was used to purchase items from the three Bender Lumbers. *See id.* at 11 (probable cause affidavit listing the three Bender Lumbers, including the Morgan County location, at which the Center’s credit was used and the amount of the purchases). Clark was then ordered to pay restitution to each Bender Lumber, including the Morgan County Bender Lumber. *See id.* at 13. Following his conviction for the theft of the Center in the Monroe County case (which included using the Center’s credit to purchase items from the Morgan County Bender Lumber), Clark cannot be prosecuted *again* in Morgan County for the theft from the Morgan County Bender Lumber. If the Monroe County prosecutor had only charged Clark with the theft of the Monroe County Bender Lumber, *then* the Morgan County prosecutor

could have charged Clark with the theft of the Morgan County Bender Lumber. However, that is not what happened in this case. As such, Clark's conviction for Class A misdemeanor criminal conversion cannot stand. We therefore vacate it.

Reversed.

NAJAM, J., and FRIEDLANDER, J., concur.