

**IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA**

**THE STATE OF NEBRASKA,**

Plaintiff,

vs.

**JAMES M. WINKLER,**

Defendant.

Case No. CR01-38

**ORDER DENYING  
PLEA IN BAR**

**DATE OF HEARING:** January 7, 2002.  
**DATE OF RENDITION:** February 1, 2002.  
**DATE OF ENTRY:** Date of filing by court clerk (§ 25-1301(3)).  
**APPEARANCES:**  
For plaintiff: Thomas P. Herzog, Holt County Attorney.  
For defendant: David A. Domina with defendant.  
**SUBJECT OF ORDER:** Defendant's plea in bar.  
**PROCEEDINGS:** See journal entry filed on January 8, 2002.  
**MEMORANDUM:**

1. The defendant is charged in this court with the crime of terroristic threats under § 28-311.01. The defendant previously tendered a plea of no contest in the Holt County Court to the charge of assault in the third degree under § 28-310(1)(a) (“intentionally, knowingly, or recklessly causes bodily injury to another person”). The defendant’s plea in bar asserts that the prior conviction for assault in the third degree bars the current prosecution for terroristic threats.

2. Although the defendant offered an affidavit of the defendant’s father, the defendant relies primarily on the county attorney’s statements of factual basis to the county court in the assault case. Briefly stated, the county attorney’s statements describe the following course of events. The defendant thrust the butt of a shotgun through the closed window on the driver’s side of a pickup truck, hit the driver in the face causing the driver to suffer pain and blackening the driver’s eye. During the course of the event, the defendant shouted, “Get out, I’m going to kill you” several times, during which four individuals were present in the cab of the pickup truck. At least one of the four persons in the cab was uncertain whether the threat

was directed to one, two, three, or all of the occupants, but was clear that the threat was directed to one or more occupants of the pickup truck. Both the county court complaint on the felony charge and the information in this court after the defendant waived preliminary hearing allege that the defendant “threaten[ed] to commit a crime of violence with the intent to terrorize another.” Upon inquiry in the preliminary county court proceeding, the county attorney responded that the “another” was “[the driver] and/or [another occupant] and/or [another occupant] and/or [another occupant].”

3. The State focuses on the specific elements of the county court charge of the “causes bodily injury” alternative version of assault in the third degree, which obviously does not share the same elements as terroristic threats. NEB. REV. STAT. § 28-310(1)(a) (Reissue 1995). The defendant urges application of *State v. White*, 254 Neb. 566, 577 N.W.2d 741 (1998), and claims the application of *White* requires a conclusion that the current prosecution is barred by double jeopardy. The defendant’s argument focuses on the § 28-310(1)(b) alternative method of committing assault in the third degree by “threaten[ing] another in a menacing manner.”

4. Under § 28-311.01(1)(a), a person commits terroristic threats “if he . . . threatens to commit any crime of violence . . . with the intent to terrorize another . . . .”

5. The Double Jeopardy Clause protects against three distinct abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense. *State v. Thomas*, 262 Neb. 138 629 N.W.2d 503 (2001). The protection provided by Nebraska’s double jeopardy clause is coextensive with that provided by the U.S. Constitution. *State v. Nelson*, 262 Neb. 896, \_\_\_ N.W.2d \_\_\_ (2001). The difficult portion of the analysis comes in determining what is the “same offense.”

6. In *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932), the Supreme Court explained that, when the same act violates two statutes, the test whether there are two offenses or one is whether each requires proof of a fact which the other does not. In *Brown v. United States*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), the Supreme Court held that a conviction for a lesser-included offense bars a subsequent trial for the greater offense if all of the facts for the greater have occurred or could have been discovered by due diligence. In *Whalen v. United States*, 445 U.S. 684, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980), the Supreme Court characterized the

*Blockburger* test as a rule of construction. The Supreme Court observed that the assumption underlying the rule is that Congress ordinarily does not intend to punish the same offense under two different statutes. Accordingly, where two statutory provisions proscribe the “same offense,” they are construed not to authorize cumulative punishments in the absence of contrary legislative intent. Cumulative sentences are not permitted in the same trial unless elsewhere specifically authorized by Congress.

7. In *Missouri v. Hunter*, 459 U.S. 359, 103 S.Ct. 673, 74 L.Ed.2d 535 (1983), the Supreme Court recognized the exception upon a clear indication of contrary legislative intent. The Court determined that where a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the “same” conduct under *Blockburger*, the prosecutor may seek cumulative punishment in a single trial.

8. Here, of course, the prior conviction occurred in county court for the misdemeanor offense. Because the county court lacks jurisdiction in felony cases other than determination of probable cause, the felony offense charged in this case was not and could not have been adjudicated in a single trial in county court. The prosecutor might have elected to dismiss the misdemeanor charges in county court and prosecute both the felony and the misdemeanor in district court even if they involved the “same” conduct under *Blockburger*, so long as the Legislature specifically intended that punishment for violations of the statutes be cumulative. But the prosecutor may have had other practical reasons for the choice of prosecuting the misdemeanor offense in county court initially, even though the choice necessarily precluded prosecution in a single trial. Whatever the reason, the defendant was separately and previously prosecuted in the county court for the misdemeanor offense. That forecloses application of the *Missouri v. Hunter* exception.

9. In *Grady v. Corbin*, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), the Supreme Court held that in addition to passing the *Blockburger* test, a subsequent prosecution must satisfy a “same-conduct” test to avoid double jeopardy bar. The *Grady* test provided that if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted, a second prosecution may not be had. Three years later, in *U.S. v. Dixon*, 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), the Supreme Court overruled *Grady* because the “same-conduct” test contradicted an “unbroken” line

of decisions, contained “less than accurate” historical analysis, and produced confusion. In *Dixon*, the Supreme Court reinstated the *Blockburger* test.

10. The defendant’s argument focusing on the proximity in time and connection in events between the alleged terroristic threat and the conduct underlying the assault conviction invites this court to apply a “same-conduct” test. That test was rejected in *Dixon*. This court declines the defendant’s invitation to apply the incorrect analysis.

11. However, the issue remains whether the offense of which the defendant was previously convicted, assault in the third degree, is the same offense as that of which the defendant is presently charged in this subsequent prosecution. This brings us to the application of *State v. White*, 254 Neb. 566, 577 N.W.2d 741 (1998). The defendant claims that *White* applies to bar the present prosecution.

12. In *White*, the defendant was charged with first degree premeditated murder, use of a firearm to commit a felony, theft of automobile, and other offenses. He was tried. The jury was also instructed concerning the lesser-included offense of second degree murder. The jury found White guilty of second degree murder, use of a firearm to commit the murder, and automobile theft. Later, postconviction relief was granted because the jury was not instructed that malice is an element of second degree murder. The cause was remanded for a new trial. The State then charged White with felony murder, second degree murder, and other charges. White’s amended plea in bar claimed that because he was impliedly acquitted of first degree premeditated murder, the felony murder charge placed him again in jeopardy for the same offense. Adhering to previous cases determining that premeditated murder and felony murder are two different methods of committing a single offense, see *State v. Buckman*, 237 Neb. 936, 468 N.W.2d 589 (1991), the Supreme Court held that first degree murder where there is but one victim constitutes one offense even though there may be alternate theories by which criminal liability for first degree murder may be charged and prosecuted in Nebraska. The Court then concluded that double jeopardy prohibited prosecuting White for felony murder.

13. This court concludes that *White* compels a similar analysis here. In the former case relevant here, assault in the third degree constitutes one offense even though there may be alternate theories by which criminal liability for third degree assault may be charged and prosecuted.

14. This court rejects the plaintiff's contention that the court should only compare the elements of § 28-310(1)(a) (the "causes bodily injury" version) to the elements of § 28-311.01. Even though the State charged the "causes bodily injury" theory, under the rationale of *White* the court must also compare the elements of § 28-310(a)(b) (the "threatening in a menacing manner" version) to the elements of § 28-311.01.

15. Of course, to the extent that the State alleges a terroristic threat made by the defendant directed toward the other occupants of the pickup cab, clearly there has been no previous prosecution for the same offense. The county court complaint for third degree assault clearly alleged an assault committed against the driver, who was designated by proper name in the complaint. Of course, the Supreme Court has held that the Double Jeopardy Clause incorporates collateral estoppel as a constitutional requirement. *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). Had the defendant been *acquitted* of assaulting the driver, the doctrine of collateral estoppel incorporated in the double jeopardy analysis would have precluded later prosecution of the defendant regarding similar offenses concerning the other occupants of the vehicle. As the majority noted in *Dixon*, the

concern that prosecutors will bring separate prosecutions in order to perfect their case seems unjustified. They have little to gain and much to lose from such a strategy. Under *Ashe v. Swenson*, 397 U.S. 436 (1970), an acquittal in the first prosecution might well bar litigation of certain facts essential to the second one — though a conviction in the first prosecution would not excuse the Government from proving the same facts the second time. Surely, moreover, the Government must be deterred from abusive, repeated prosecutions of a single offender for similar offenses by the sheer press of other demands upon prosecutorial and judicial resources. Finally, even if [the concern] were well-founded, no double jeopardy bar short of a same-transaction analysis will eliminate this problem; but that interpretation of the Double Jeopardy Clause has been soundly rejected, [citation omitted] and would require overruling numerous precedents, the latest of which is barely a year old, *United States v. Felix*, 503 U.S. 378 (1992).

*U.S. v. Dixon*, *supra* at 710-11 n. 15 (citing *Ashe v. Swenson*, *supra*, and *U.S. v. Felix*, 503 U.S. 378, 112 S.Ct. 1377, 118 L.Ed.2d 25 (1992)). But as the defendant was convicted in the county court proceeding, the doctrine of collateral estoppel incorporated in the double jeopardy analysis does not apply.

16. As to the prosecution regarding an offense allegedly committed against the driver, there are essentially two elements of each crime to be compared. The first comparison is between the § 28-310(1)(b) element of "threatening another" to the § 28-311.01(1) element of threatening to commit a crime

of violence. Because every threat to commit a crime of violence at least implicitly threatens another, it is impossible to perform the § 28-311.01 “threatening” without also committing the § 28-310(1)(b) “threatening.”

17. However, the court must also compare the § 28-310(1)(b) requirement that the threat be made in a menacing manner with the § 28-311.01(1)(a) element that the threat be made with the intent to terrorize. The Nebraska Supreme Court has held that a violation of § 28-310(1)(b) requires an intentional act. *State v. Cebuhar*, 252 Neb. 796, 567 N.W.2d 129 (1997); *In re Interest of Siebert*, 223 Neb. 454, 390 N.W.2d 522 (1986). The intent required by § 28-310(1)(b) is a general intent, i.e., the intentional doing of an act which places another person in reasonable apprehension of receiving bodily injury. *Id.* On the other hand, the intent to terrorize required by § 28-311.01 constitutes a specific intent. In *State v. Schmidt*, 5 Neb. App. 653, 562 N.W.2d 859 (1997), the Nebraska Court of Appeals distinguished kidnapping, which requires proof of intent to terrorize or intent to commit a felony, from the “threatening” type of third degree assault, which the Court of Appeals concluded does not require either specific intent. The intent to terrorize constitutes a specific intent separate and different from the general intent of third degree assault.

18. The meaning of “menacing” commonly includes the showing of an intention to do harm. *In re Interest of Siebert*, 223 Neb. 454, 390 N.W.2d 522 (1986) (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, Unabridged 1409 (1981)). Terroristic threats does not require intention to do harm. As the Supreme Court stated in *State v. Saltzman*, 235 Neb. 964, 458 N.W.2d 239 (1990), the crime does not require an intent to execute the threats made. One can conceive of numerous instances where the words and acts of the actor establish an intent to terrorize without any menacing manner by the actor.

19. The *Blockburger* test compels the conclusion that the “threatening” form of third degree assault is not a lesser-included offense of terroristic threats. Double jeopardy does not apply to bar this prosecution for alleged terroristic threats. The defendant’s plea in bar should be denied.

20. A ruling denying a plea in bar on double jeopardy grounds is a final, appealable order because it is a special proceeding that affects a substantial right. *State v. Kula*, 254 Neb. 962, 579 N.W.2d 541 (1998). Consequently, the defendant will have the right to appeal from this order. However,

if the defendant chooses not to appeal, the State's statutory obligation to bring the defendant to trial will run from the date of entry of this order. For that reason, the court does not defer scheduling further proceedings until after the appeal time has run. If the court waited and no appeal was taken, much of that time would be essentially wasted. On the other hand, if the defendant timely perfects an appeal, the proceedings will be suspended until the appeal is determined.

**ORDER:** IT IS THEREFORE ORDERED that:

1. The defendant's plea in bar is denied.
2. The matter is scheduled for further arraignment on **Monday, February 25, 2002**, at **9:30 a.m.**, or as soon thereafter as the same may be heard.
3. In the event that an appeal is timely perfected prior to such date and time, the arraignment will be continued and the defendant's bond will be continued pending determination of the appeal.

Signed in chambers at **Ainsworth**, Nebraska, on **February 1, 2002**;  
DEEMED ENTERED upon file stamp date by court clerk.  
If checked, the court clerk shall:

- Mail a copy of this order to all counsel of record and any pro se parties.  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.
- Note the decision on the trial docket as: [date of filing] **Signed "Order Denying Plea in Bar" entered; arraignment scheduled for [date and time from order].**  
Done on \_\_\_\_\_, 20\_\_\_\_ by \_\_\_\_\_.

BY THE COURT:

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William B. Cassel  
District Judge

Mailed to: