

No. 38,327-KA

ON REHEARING

COURT OF APPEAL  
SECOND CIRCUIT  
STATE OF LOUISIANA

\* \* \* \* \*

STATE OF LOUISIANA

Appellee

versus

CHRISTOPHER SHRADER

Appellant

\* \* \* \* \*

On Rehearing  
Originally Appealed from the  
Twenty-Sixth Judicial District Court for the  
Parish of Bossier, Louisiana  
Trial Court No. 103,361

Honorable Bruce M. Bolin, Judge

\* \* \* \* \*

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Appellant

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\* \* \* \* \*

Before WILLIAMS, CARAWAY, DREW,  
MOORE and LOLLEY, JJ.

CARAWAY, J., dissents with written reasons.

WILLIAMS, J., dissents for the reasons assigned by J. Caraway.

**DREW, J.:**

In our court's otherwise excellent previous opinion, *State v. Shrader*, 2004 WL 1837893 (La. App. 2d Cir. 8/18/04), a 2 - 1 majority made a finding of error patent, holding that the dual prosecutions here implicated a violation of the Fifth Amendment's protections against double jeopardy. I dissented to that finding, otherwise joining in the well-crafted decision.

At rehearing, a 3 - 2 majority concluded that both prosecutions are valid, each crime requiring proof of a separate element not necessary for the conviction of the other offense.

This is a difficult, confusing, and complex area, and one in which reasonable minds often differ.

The defendant here was prosecuted and convicted of two crimes:

- Possession *with intent to distribute* certain drugs; and
- *Illegal carrying of firearms* while in possession of the same drugs.

While these crimes have an obvious common element (possession of the drugs), each crime requires an element which the other does not; therefore, no double jeopardy violations are implicated.

This is a different situation from a prosecution of felony murder predicated upon the commission of a certain felony, along with a prosecution for that same underlying felony. *State v. Thomas*, 99-2219 (La. App. 4<sup>th</sup> Cir. 5/17/00), 764 So. 2d 1104.

This instant case is also distinguishable from our very recent opinion by which we properly found double jeopardy strictures were violated when the defendant was prosecuted for both **possession** of a drug, and

possession of a firearm while in **possession** of the same drug. *State v. Barakat*, 38,419 (La. App. 2d Cir. 6/23/04), 877 So. 2d 223.

Accordingly, we adopt all but the last three paragraphs of our previous opinion. *Shrader, supra*. Finding no violation of Shrader's protection against double jeopardy, however, we now affirm the defendant's conviction and sentence in all respects.

AFFIRMED.

CARAWAY, J., dissents from the rehearing with written reasons.

In this case, Shrader was convicted of both possession of Diazepam with intent to distribute and possession of Diazepam while in the possession of a firearm. The same Diazepam formed the basis for the convictions of both offenses which occurred as one event. The majority on rehearing indicates that the added element of intent to distribute the CDS made the one drug crime in this case different from the other for purposes of double jeopardy. In agreeing with this court's recent ruling in *State v. Barakat*, 38,419 (La. App. 2d Cir. 6/23/04), 877 So. 2d 223, the majority does not single out the element of gun possession as the lynchpin for its ruling because such possession is not criminal in and of itself and is meaningless until associated with the underlying possessory drug crime. Thus, the majority tacitly acknowledges that we are dealing only with the possessory drug crime and the crime of distribution of that same drug. The question of double jeopardy in such context has long been decided.

In *State v. Dubaz*, 468 So. 2d 554 (La. 1985), the Louisiana Supreme Court concluded that convictions for both possession of cocaine with intent to distribute and simple possession of the same substance violated double jeopardy. *See also, State v. Cormier*, 97-2882 (La. 4/3/98), 717 So. 2d 227. Of course, this court's ruling in *Barakat*, relying partially on *State v. Sandifer*, 95-2226 (La. 9/5/96), 679 So. 2d 1324, held that convictions for possession of a firearm while in the possession of a controlled dangerous substance and possession of that same substance violated double jeopardy as well. Again, *Barakat* recognized that the firearm factual element which

was not an element of proof for one of the two crimes could not serve to defeat double jeopardy. *Sandifer* implied that under double jeopardy principles, a defendant could not be prosecuted for a firearms enhancement of the possession of a controlled dangerous substance and the possession of that same substance. Finally, in *State v. Thomas*, 99-2219 (La. App. 4th Cir. 5/17/00), 764 So. 2d 1104, *writ denied*, 00-1734 (La. 6/22/01), 794 So. 2d 780, the court concluded that convictions for both possession of cocaine with intent to distribute and possession of a firearm while in the possession of the same cocaine violated principles of double jeopardy.

The majority ruling therefore would reverse these cases, including the *Dubaz* decision by our highest court which is directly on point, without making any new distinction between the two drug crimes in question. Distribution of a CDS (which necessarily entails possession), and possession of the same CDS (whether with a firearm or not), when occurring together in the same criminal transaction, cannot be prosecuted as two separate crimes because of the double jeopardy principle as interpreted by the jurisprudence of this state. I respectfully dissent.