IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
MAY SESSION, 1995

STATE OF TENNESSEE,	)	
	)	No. 02C01-9411-CR-00251
Appellee	)	
	)	SHELBY COUNTY
vs.	)	
	)	Hon. **WILLIAM H. WILLIAMS**, Judge
JOSE D. HOLMES,	)	
	)	(Possession of Cocaine with intent
Appellant	)	to sell, Class B felony; Sale of Cocaine,
	)	Class C felony)

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AT TRIAL:
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OPINION FILED: _____

AFFIRMED

David G. Hayes
Judge

OPINION

The appellant, Jose D. Holmes, appeals as of right from convictions entered by the Criminal Court for Shelby County for possession of cocaine in excess of .5 grams with intent to sell, a class B felony, and for the sale of less than .5 grams of cocaine, a class C felony. The trial court sentenced the appellant as a career offender to forty-five years for the offenses.[1] The appellant now raises two issues for our review. First, the appellant challenges the sufficiency of the evidence to sustain a conviction for possession with intent to sell. Second, the appellant contends that the principles of double jeopardy and due process bar convictions for both offenses.

After a review of the record, we affirm the judgment of the trial court.

I. Factual Background

On July 22, 1993, a drug unit of the Memphis Police Department was conducting a "buy/bust" operation in the city of Memphis. Testimony at trial revealed that in this particular type of "drug operation" an undercover officer in an unmarked car proceeds to an area known for drug activity and attempts to purchase narcotics from a street seller. The undercover car is accompanied by a "takedown squad" consisting of several marked police cars and a "write up van," where evidence is collected and maintained. The officer in the unmarked car is "wired" with a radio transmission device so that the other officers in the unit can monitor the drug transaction.

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[1]The appellant received a sentence of thirty years for the class B felony and fifteen years for the class C felony. The trial court ordered that the sentences be served consecutively.

In the instant case, under the direction of their superior, members of the drug unit proceeded to a car wash in South Memphis at approximately 6:30 p.m.. Detective Sharon Isabel and a second officer were in an unmarked car. As they entered the car wash lot, they were approached by the appellant. Detective Isabel, who was in the passenger seat, asked the appellant if he could get her a "twenty," slang for a rock of crack cocaine. The appellant told Isabel to "wait a minute," then proceeded to a car parked in one of the car wash stalls. The appellant opened the door of the car, got into or leaned inside the car, then exited the car and proceeded back to the unmarked police car. Upon returning to the undercover vehicle, he gave Isabel two rocks of crack cocaine, later determined to collectively weigh .4 grams, in exchange for a marked twenty-dollar bill. Immediately after receiving the drugs, Detective Isabel described the appellant over the radio transmitter, and a "takedown" signal was given. At this point, Officer Robert McIntyre and other members of the "takedown squad" converged onto the scene and apprehended the appellant after a short chase. Officer McIntyre observed the appellant discard the marked money, which was then retrieved by the officer and returned to Detective Isabel. Officer McIntyre also searched the car that the appellant had entered before delivering the drugs. He found a small bag containing several rocks of a substance appearing to be crack cocaine and some "crumbs of the same substance" under the armrest in the car. The evidence obtained from the car was taken to the "write up van" where it was tagged and weighed. The substance weighed .9 grams. This evidence and the rocks sold to Detective Isabel were later analyzed by a research toxicologist at the University of Tennessee toxicology lab. The tests revealed that the substances were crack cocaine.

II. Sufficiency of the Evidence

The appellant first challenges the sufficiency of the evidence to sustain a verdict for possession of cocaine in excess of .5 grams with intent to sell. Upon a challenge of insufficient evidence, this court must review the record to determine if the evidence adduced at trial is sufficient "to support the finding by any rational trier of fact that the essential elements of the offense have been shown beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 317, 99 S.Ct. 2781, 2789 (1979); State v. Cazes, 875 S.W.2d 253, 259 (Tenn. 1994); Tenn. R. App. P. 13(e). We do not reweigh or reevaluate the evidence, nor may we substitute our inferences for those drawn by the trier of fact. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978); State v. Hatchett, 560 S.W.2d 627, 630 (Tenn. 1978); Liakas v. State, 199 Tenn. 298, 286 S.W.2d 856, 859 (1956).

A jury conviction, as in the present case, removes the presumption of innocence with which a defendant is initially cloaked, and replaces it with one of guilt, so that on appeal a convicted defendant has the burden of demonstrating that the evidence is insufficient. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). Thus, on appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. State v. Harris, 839 S.W.2d 54, 75 (Tenn. 1992).

The appellant contends that there is insufficient evidence to establish that he possessed the cocaine found in the vehicle at the car wash and that he intended to sell the cocaine. Specifically, the appellant alleges that "[t]here is no direct proof that he even had any of the cocaine in the vehicle under his control, and circumstantially there is no proof that he owned or had a key to the vehicle from which the cocaine was seized."

The essential elements of the offense of possession with intent to sell are (1) the defendant knowingly possessed cocaine and (2) the defendant intended to sell cocaine. Tenn. Code Ann. § 39-17-417(a)(4) (1994 Supp.). The term "possession" embraces both actual and constructive possession. State v. Cooper, 736 S.W.2d 125, 129 (Tenn. Crim. App. 1987). In order for a person to "constructively possess" a drug, that person must have "the power and intention at a given time to exercise dominion and control over . . . [the drugs] either directly or through others. Id. (quoting State v. WIlliams, 623 S.W.2d 121, 125 (Tenn. Crim. App. 1981)).[2] Thus, the mere presence of a person in an area where drugs are discovered will not show "possession," nor will association with one who is in control of drugs. Cooper, 736 S.W.2d at 129. With respect to the appellant's intent to sell the cocaine, Tenn. Code Ann. § 39-11-106 (a)(18) (1991) provides that intent requires a "conscious objective or desire to engage in the conduct."

The appellant, in the present case, when asked if he had a "twenty," went to a parked car only a short distance away, entered the car, and returned with crack cocaine. A subsequent search of the car produced .9 grams of crack cocaine. These facts constitute sufficient proof for a jury to determine that the appellant possessed cocaine in excess of .5 grams and that the appellant acted with a conscious objective to engage in the sale of cocaine. This issue is without merit.

III. Double Jeopardy and Due Process

The appellant next contends that his convictions for both possession with

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[2] We note that the trial court properly instructed the jury as to the definition of possession.

intent and sale of crack cocaine violate the double jeopardy and due process clauses of the 5th and 14th Amendments of the United States Constitution and Article I, Sections 8 and 10 of the Tennessee Constitution.[3] With respect to the appellant's due process challenge, the Supreme Court of Tennessee in State v. Anthony, 817 S.W.2d 299, 306 (Tenn. 1991), held, under the specific facts of that case, that the conviction for aggravated kidnapping and armed robbery within a single criminal episode was "essentially incidental" to one another. Thus, convictions for both offenses violated the defendant's due process rights. The appellant argues that the two offenses at issue in this case are "inherently interwoven" for due process purposes. We disagree. The appellant's possession of .9 grams of crack cocaine with intent to sell is in no way "essentially incidental" to or "inherently interwoven" with the appellant's sale of an entirely separate quantity of cocaine. Therefore, we must base our decision on principles of double jeopardy.

The appellant argues his possession of cocaine with intent to sell and his sale of cocaine were "part of the same criminal episode or single continuing transaction involving the same substance, requiring the same intent and occurring about at the same time and place." However, our courts have long since abandoned the "same transaction" or "same evidence" test for determining double jeopardy violations. State v. Black, 524 S.W.2d 913, 919 (Tenn. 1975). Instead, a determination of whether two offenses are the same for double jeopardy purposes requires consideration of (1) whether the event is a violation of two distinct statutory provisions, (2) whether either offense is necessarily included in the other, (3) whether the offenses require proof of different elements, (4) whether each offense requires proof of additional facts not required

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[3]The double jeopardy provisions of the federal and state constitutions protect a defendant from reprosecution for the same offense after acquittal or conviction and from multiple punishments for the same offense. State v. Todd, 654 S.W.2d 279, 281 (Tenn. 1983).

by the other, and (5) whether the legislative intent suggests that one or several offenses were intended. State v. Black, 524 S.W.2d 913, 919-920 (Tenn. 1975). See also Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182 (1932).

Within the context of our due process analysis, we concluded that neither offense at issue in this case is necessarily included in the other. We base this conclusion, in part, upon the use of different evidence to establish the commission of each crime. Two separate offenses occurred, involving two distinct quantities of cocaine. The appellant sold .4 grams of cocaine to Isabel. Then, pursuant to the search of the vehicle within the appellant's control, Officer McIntyre discovered .9 grams of cocaine. The cocaine found in the car is separate and distinct from the cocaine exchanged in the sale.

Additionally, the two offenses require proof of different statutory elements. As previously mentioned, the elements of the offense of possession of cocaine with intent to sell are (1) the defendant knowingly possessed cocaine and (2) the defendant intended to sell cocaine. Tenn. Code Ann. § 39-17-417(a)(4) (1994 Supp.). In contrast, the elements of the offense of sale of cocaine are (1) that the defendant actually sold cocaine and (2) the defendant acted knowingly. Tenn. Code Ann. § 39-17-417 (a)(3) (1994 Supp.).

Finally, this court notes that the offenses violated different paragraphs of Tenn.Code Ann. § 39-17-417 (1994 Supp.).[4] The separate provisions indicate a clear legislative intent to allow separate convictions for these separate acts. State v. Jones, No. 02C01-9307-CR-00155 (Tenn. Crim. App. at Jackson, Aug. 24, 1994), perm. to appeal denied, (Tenn. Jan. 3, 1995). Moreover, the

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[4]As noted above, Tenn. Code Ann. § 39-17-417 (a)(3) makes the sale of a controlled substance an offense. Tenn. Code Ann. § 39-17-417 (a)(4) makes the possession of a controlled substance with intent to sell an offense.

Sentencing Commission Comments to section 39-17-417 state that "[t]he commission wished to make it clear that each of these acts is a separate offense and therefore listed the manufacture, delivery, sale, or possession with intent to manufacture, deliver or sell each as a separate subsection."

In Jones, No. 02C01-9307-CR-00155, this court addressed the issue of double jeopardy under almost identical facts. The defendant, in Jones, was convicted of the sale of cocaine and possession of cocaine with intent to sell as a result of an undercover operation by the Memphis Police Department. Id. The defendant sold an amount of cocaine to an undercover officer; then during a subsequent search, officers discovered a separate amount of cocaine under a board from which the defendant had obtained the cocaine he had sold. Id. This court held that "[t]he cocaine which remained hidden after the sale was complete" was distinguishable from the sale itself for double jeopardy purposes. Id.; see also State v. Chitwood, 735 S.W.2d 471 (Tenn. Crim. App.), perm. to appeal denied, (Tenn. 1987) (convictions for sale of cocaine and for possession of cocaine stored in defendant's house do not constitute double jeopardy).

The appellant sold .4 grams of cocaine and received money for it. Additionally, the appellant had a supply of crack cocaine from which he clearly intended to make future sales of cocaine. We find that the facts support convictions for both offenses. The trial court properly allowed the convictions for both the sale of cocaine and possession of cocaine with intent to sell. Accordingly, we find no double jeopardy nor due process violations.

Having concluded that the evidence was sufficient to sustain the appellant's convictions and that the convictions did not violate double jeopardy and due process principles, we affirm the judgment of the trial court.

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DAVID G. HAYES, Judge

CONCUR:

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JOHN H. PEAY, Judge

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WILLIAM M. BARKER, Judge