No. 29883-3-III

FILED

NOVEMBER 29, 2011

Court of Appeals
Division III
State of Washington

COURT OF APPEALS, DIVISION THREE
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent

vs.

KOUY GUY CHHONG
Appellant

BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant Kouy Chhong was found guilty by jury trial of Possession of Marijuana (over forty grams) and Possession of Marijuana with Intent to Deliver. At sentencing, over trial defense counsel's objection that the two offenses merged, the court refused to dismiss the conviction for felony marijuana possession and sentenced Chhong to six months confinement for the offense. Under the merger doctrine, the two offenses should have merged, and it was error for the sentencing court not to dismiss the conviction for felony marijuana possession.

II. ASSIGNMENTS OF ERROR

1. The sentencing court erred in finding that Count 4, Possession of Marijuana (over forty grams) did not merge with Count 2, Possession of Marijuana with Intent to Deliver. FTR RP 202.[1]

2. The sentencing court erred in failing to dismiss Count 4. CP 162.

3. The sentencing court erred in imposing six months confinement on Court 4. CP 162.

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[1] Because there are multiple volumes containing the Verbatim Reports of Proceedings with non-sequential numbering, I will refer to the FTR transcript of various hearings as "FTR RP" and the three volumes containing the trial as "Trial RP."

III. ISSUE PERTAINING TO ASSIGMENTS OF ERROR

1. Whether the sentencing court erred in failing to dismiss Count 4, Possession of Marijuana (over forty grams) when:

(a) The jury found Chhong guilty of both Count 2, Possession of Marijuana with Intent to Deliver, and Count 4, Possession of Marijuana (over forty grams), CP 136, 139;

(b) All evidence of marijuana related to Counts 2 and 4 was discovered by detectives in a single 2002 Ford Focus;

(c) The sentencing court found that Counts 2 and 4 encompassed the same criminal conduct, but also found that the counts did not merge;

(d) Defense counsel objected to the Court's finding that Counts 2 and 4 did not merge; and

(e) Ultimately, the sentencing court did not dismiss Count 4, but rather sentenced Chhong to six months confinement on Count 4.

(Assignments of Error 1, 2, and 3).

IV. STATEMENT OF THE CASE

Factual History

The Appellant, Kouy Guy Chhong, lived with his wife and five children in Issaquah, Washington. Trial RP 338, 356-57. He did not have any prior criminal history. By trade, he was a drywaller and carpenter with a four-year college degree. Trial RP 356.

In April 2010, Chhong, and three acquaintances, Brian Fabian, Taylor Hall, and Randy Madrid drove to Cody, Wyoming. Trial RP 344. Chhong testified that the purpose of the trip was to visit Hall's family ranch; however, investigating detectives claimed it was to sell drugs. Trial RP 344. On the return trip home, on or about April 19, 2010, Fabian drove his 2002 Ford Focus. Trial RP 86, 343. Chhong and the other occupants took turns sitting behind Fabian, because at over six feet tall, Fabian needed to have his seat pushed back such that the person behind him did not have a lot of leg room. Trial RP 343. Chhong testified that Fabian's yellow backpack was under or directly behind the driver's seat. Trial RP 342.

Chhong had just rotated into the seat behind Fabian when Fabian was pulled over for speeding by Washington State Patrol Trooper Tim Kron near George, Washington. Trial RP 86. Upon approaching the vehicle, Trooper Kron smelled the odor of marijuana coming from the car (the driver's window and rear left passenger window were both open). Trial RP 87. Trooper Kron subsequently removed Fabian from the vehicle and questioned him regarding the odor of marijuana. Trial RP 90-91. Fabian made various winking facial expressions, indicating that he wished to

speak with Trooper Kron privately. Trial RP 91-92. Trooper Kron placed Fabian in his patrol vehicle, and Fabian then indicated that there was marijuana in a yellow backpack that belonged to Chhong. Trial RP 24. Trooper Kron then removed the remaining three occupants from the vehicle. Trial RP 93-94. Trooper Kron ultimately impounded the vehicle for the purpose of obtaining a search warrant. Trial RP 96-97. All four men were permitted to return to the Seattle-area. Trial RP 97.

A search warrant for the vehicle was obtained. Trial RP 143. In searching the vehicle, detectives found a yellow backpack behind the driver's seat. Trial RP 143. Inside the yellow backpack Detective Chris Lloyd of the Washington State Patrol found, among other things, the following items: (1) marijuana, (2) psilocybin mushrooms, (3) plastic ziplock bags, (4) a semi-automatic handgun with live ammunition in the magazine, (5) $3,220.00 in cash, (6) pills, and (7) a digital scale that field-tested positive for marijuana. Trial RP 148-171. Detective Alan Barrowman of the Moses Lake Police Department located a black Gucci bag in the trunk. Trial RP 236. Inside the bag, Barrowman found green vegetable matter that appeared to be marijuana, a silver digital scale, and a marijuana grinder. Trial RP 237, 240-41.

After the search of the car was completed, officers notified Fabian that he could come get his car. Trial RP 244. Fabian, Chhong, and a friend drove to the Ephrata Police Department. Trial RP 245, 347. Chhong and the friend dropped Fabian off at the station and then drove to nearby Oasis Park to wait in case Fabian needed a ride home. Trial RP 246-47, 348. Barrowman, Kron, and several other officers followed Chhong to Oasis Park and made contact with him. Trial RP 248-49. Kron escorted Chhong back to the police station for questioning. Trial RP 250.

Lloyd, Barrowman, and another detective, Jeff Wentworth of the Ephrata Police Department, were present for the interview with Chhong. Trial RP 251. All three detectives testified that Chhong confessed to the following: (1) that the yellow backpack and all of its contents belonged to him; (2) that he possessed the firearm and knew that the firearm was stolen; (3) that he was selling drugs in Wyoming to help make ends meet; and (4) that he was fronted the drugs from a dealer in the Seattle-area who he needed to pay back. Trial RP 252-54, 276-79, 306-09. Lloyd testified that Chhong named the contents of the yellow backpack, including the firearm. Trial RP 277. Chhong's interview was not tape recorded and he did not provide a written statement. Trial RP 267.

At trial, Chhong denied ever claiming ownership of the yellow backpack and denied making the statements attributed to him by Lloyd, Barrowman, and Wentworth. Trial RP 352, 354. In addition, Chhong testified that he was intimidated and threatened by the detectives during the interview. Trial RP 349-355.

Procedural History

On April 21, 2010, the Appellant was charged by Information in Grant County Superior Court with five separate counts: (1) Possession of a Stolen Firearm, RCW 9A.56.310; (2) Possession of Marijuana with intent to deliver, RCW 69.50.401.2C, with a firearm enhancement, RCW 9.94A.533.3C; (3) Possession of Psilocybin (Mushrooms) with intent to deliver, RCW 69.50.401.2C, with a firearm enhancement, RCW 9.94A.533.3C; (4) Possession of Marijuana over 40 grams, RCW 60.50.4013; and (5) Possession of a controlled substance, Psilocybin (Mushrooms), RCW 60.50.4013. CP 1-6.

A CrR 3.5 Hearing was held on September 15, 2010, for purposes of suppressing the statements made by Chhong on April 20, 2010, at the Ephrata Police Station. FTR RP 26. Ultimately,

the Court ruled that Chhong was properly notified of his *Miranda* rights and his statements were made voluntarily. FTR RP 98, 101.

A CrR 3.6 Hearing for the purpose of suppressing evidence obtained pursuant to the search of Fabian's vehicle was held the morning of trial, on March 31, 2011. Similarly, the trial court denied defense counsel's motion, finding that the impoundment and search of the vehicle was proper and pursuant to a search warrant supported by probable cause. Trial RP 42-44.

A three-day jury trial was held on March 23-25, 2010. Trial RP. Following deliberations, the jury returned verdicts of guilty as to all five counts, and returned deadly weapon special verdicts, finding that Chhong was armed with a firearm during the commission of Counts 2 and 3. Trial RP 472-485; CP 135-138.

At sentencing, on April 25, 2011, the Court dismissed Count 5 based on merger with Count 3. CP 150-175. The Court also found that Counts 2, 3, and 4 encompassed the same criminal conduct and counted as one crime in determining Chhong's offender score. CP 161. Although Count 2, Possession of Marijuana with Intent to Deliver normally has a seriousness level of 1, and Count 3, Possession of Psilocybin with Intent to Deliver, normally has a seriousness level of 2, each count was upgraded to

level 3 seriousness due to the deadly weapon special verdict. CP 161. Counts 2 and 3 each received a firearm enhancement of 18 months. CP 161. Chhong objected to the Court's finding that Count 4 did not merge with Count 2. FTR RP 209. Ultimately, Chhong was sentenced on Counts 1, 2, 3, and 4, as well as on two firearm enhancements, for total actual confinement of 54 months. CP 159-75. Chhong now timely appeals his sentence. CP 179-94.

V. ARGUMENT

A. THE TRIAL COURT ERRED IN FINDING THAT COUNT 2, POSSESSION OF MARIJUANA WITH INTENT TO DELIVER, DID NOT MERGE WITH COUNT 4, POSSESSION OF MARIJUANA (OVER FORTY GRAMS)

The Fifth Amendment to the United States Constitution protects individuals from multiple prosecutions for the same crime, and is applicable to the states through the Fourteenth Amendment. Article 1, Section 9 of the Washington State Constitution also protects against double jeopardy. The guarantee against double jeopardy protects persons from multiple punishments for the same offense. *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995) (*citing to Wahlen v. United States*, 445 U.S. 684, 688, 100 S.Ct.

1432, 1436, 63 L.Ed.2d 715 (1980)); *see also State v. Frohs*, 83 Wn. App. 803, 810, 924 P.2d 384 (1996).

Double jeopardy prevents cumulative punishment if offenses are legally identical and are based on the "same act or transaction." *State v. Gocken*, 127 Wn.2d 95, 101 896 P.2d 1267 (1995) (*quoting Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932)). Offenses are not legally identical if each offense contains an element not contained in the other. *Gocken,* 127 Wn.2d at 101. Because Possession of Marijuana with Intent to Deliver and felony Possession of Marijuana each contain an element not contained in the other, they are not legally identical. *See State v. Hutchins*, 73 Wn. App. 211, 868 P.2d 196 (1994).

Where offenses are not legally identical, as in the present case, the merger doctrine may apply. Merger is a doctrine of statutory interpretation "used to determine whether the Legislature intended to impose multiple punishments for a single act that violates several statutory provisions." *State v. Michielli,* 132 Wn.2d 229, 937 P.2d 587, 592 (1997) (*quoting State v. Vladovic,* 99 Wn.2d 413, 419 n. 2, 662 P.2d 853 (1983)). The court looks to the language and intent of the statutes proscribing the offenses to determine whether multiple offenses may be punished

cumulatively. *Calle*, 125 Wn.2d at 777. When the conduct of one offense elevates the degree of the second offense, the offenses merge to avoid double jeopardy. *Vladovic,* 99 Wn.2d at 419.

a. Conduct prohibited by the offense of Possession with Intent to Deliver Marijuana elevates the degree of the offense of Possession of Marijuana, and for this reason, the merger doctrine applies.

Black's Law Dictionary defines "degree" as a term that denotes division or classification of one specific crime into several grades of guilt. In examining the statutory provisions for the offenses of (1) Possession of Marijuana with Intent to Deliver and (2) felony Possession of Marijuana, clearly, the element of "intent to deliver" elevates the degree of the second offense to that of the first offense.

The relevant statutes declare that it is "unlawful for any person to possess a controlled substance" and, similarly, that it is unlawful for any person to possess with intent to deliver a controlled substance. RCW 69.50.4013(1); RCW 69.50.401(1). Marijuana (in all quantities) is a Schedule I controlled substance. RCW 69.50.204(c)(22). The prohibitions contained in each of these

statutes are nearly identical, save for the mens rea.[2] These statutes classify one specific crime, possession of marijuana, into two grades of guilt—simple possession without a specific mens rea and possession with the intent to deliver. Accordingly, at a minimum, one who possesses over forty grams of marijuana is guilty of felony possession; a further showing that the person intended to deliver the marijuana is also guilty of possession with intent to deliver.

The merger doctrine is appropriate in the present case. Chhong was found guilty of both Possession of Marijuana (over forty grams) and Possession of Marijuana with Intent to Deliver for the same criminal conduct. Although the offenses are not legally identical (*i.e.,* one is not a lesser included offense of the other), the conduct prohibited in one raises the degree of the other. *Vladovic,* 99 Wn.2d at 419, 662 P.2d 853. Under the merger doctrine, these offenses merged. The sentencing court ought to have dismissed Count 4, felony possession of marijuana.

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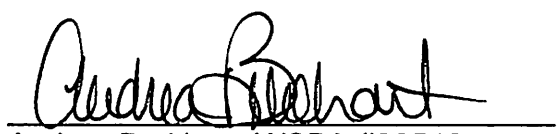
[2] Despite their similarity, felony possession of marijuana is not a lesser included offense of possession of marijuana with intent to deliver, because the first offense has the additional element of "over forty grams" which is sufficient but not necessary for a finding that the second offense has been committed. RCW 69.50.4014; *see State v. Hutchins*, 73 Wn. App. 211, 868 P.2d 196 (1994).

VI. CONCLUSION

An error at the sentencing level requires that Chhong's sentence with regard to Count 4 be reversed and dismissed. Contrary to the sentencing court's finding, Chhong's convictions for Possession of Marijuana (over forty grams) and Possession of Marijuana with Intent to Deliver merged and Count 4, felony possession, ought to have been dismissed. Over trial defense counsel's objection, the sentencing court refused to dismiss Count 4 and, instead, sentenced Chhong to six months of confinement. Chhong's sentence on Count 4 should be vacated and his conviction for felony possession of marijuana dismissed.

Respectfully submitted this 28th day of November, 2011.



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CERTIFICATE OF MAILING

I certify that on November 28th, 2011, I mailed a true and correct copy of the foregoing Brief of Appellant by depositing the same in the United States mail, postage prepaid, addressed as follows:

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