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Kevin L. Smith
CLERK
of the supreme court,
court of appeals and
tax court

MATHIAS, Judge

Finnegan J. Coley (“Coley”) was convicted in Marion Superior Court of Class B felony possession of a firearm by a serious violent felon and Class C felony possession of cocaine and sentenced to concurrent terms totaling sixteen years. Coley appeals and claims that his convictions violate Indiana’s prohibition against double jeopardy. The State concedes the error.

We reverse and remand.

Facts and Procedural History

During a protective sweep of a house conducted during the execution of an arrest warrant for another individual, police found Coley in a bedroom, asleep in bed. On a table at the foot of the bed, the police found a handgun. During a pat-down search of Coley, police found cocaine. Coley admitted to the police that the handgun and cocaine were his.

The State charged Coley with Class B felony unlawful possession of a firearm by a serious violent felon, Class C felony possession of cocaine, and Class D felony possession of cocaine. Following a bench trial, the trial court found Coley guilty as charged. Concluding that the Class D felony conviction was a lesser-included offense of the Class C felony conviction, the trial court entered judgment of conviction only upon the Class C and Class B felony convictions. The trial court subsequently sentenced Coley to concurrent terms of sixteen years on the Class B felony conviction and eight years on the Class C felony conviction. Coley now appeals.

Discussion and Decision

Coley claims on appeal that his convictions violate Indiana's prohibition against double jeopardy. Pursuant to Indiana Code section 35-47-4-5, to convict Coley of possession of a firearm by a serious violent felon, the State was required to prove that he: (1) knowingly or intentionally possessed a firearm, and (2) that he had been convicted of a "serious violent felony," which includes Class C felony escape, a crime for which Coley has previously been convicted. To convict Coley of Class C felony possession of cocaine, the State had to prove that Coley: (1) knowingly or intentionally possessed cocaine, (2) while also in possession of a firearm. Ind. Code § 35-48-4-6(b)(1)(B).¹

Coley claims that the same evidence, i.e. his being found in possession of a handgun, was used to convict him for possession of a firearm by a serious violent felon and to enhance the cocaine conviction to a Class C felony. This, he claims, is in contravention of Indiana's prohibition against double jeopardy. The State concedes the error, and not without support. See Jarrell v. State, 818 N.E.2d 88, 93 (Ind. Ct. App. 2004) (holding that defendant's convictions for possession of a firearm by a serious violent felon and possession of a handgun without a license constituted double jeopardy because both were based on the evidentiary fact that the defendant was found to be in constructive possession of a single handgun), trans. denied; Hatchett v. State, 740 N.E.2d 920, 926-27 (Ind. Ct. App. 2000) (holding that defendant's convictions for possession of a firearm by a serious violent felon and carrying a handgun without a license constituted double jeopardy), trans. denied; see also Guyton v. State, 771 N.E.2d 1141, 1143 (Ind.

¹ The knowing or intentional possession of cocaine is generally a Class D felony. See I.C. § 35-48-4-6.

2002) (holding that prohibition against double jeopardy prevents “[c]onviction and punishment for an enhancement of a crime where the enhancement is imposed for the very same behavior or harm as another crime for which the defendant has been convicted and punished.”) (quoting Richardson v. State, 717 N.E.2d 32, 56 (1999) (Sullivan, J., concurring)).

Coley and the State also agree that the remedy for the double jeopardy violation should be the reduction of Coley’s Class C felony possession of cocaine conviction to a Class D felony. See Strong v. State, 870 N.E.2d 442, 443 (Ind. 2007) (noting that to remedy a double jeopardy violation, a court may reduce the sentencing classification on one of the offending convictions). We therefore reverse Coley’s conviction for Class C felony possession of cocaine and remand with instructions to vacate his conviction and sentence thereon and instead enter judgment of conviction for Class D felony possession of cocaine.

Furthermore, since the trial court ordered Coley’s sentences to be served concurrently, there is no reason for the trial court to hold another sentencing hearing. On remand, we further instruct the trial court to enter the advisory sentence of one and one-half years on the Class D felony conviction for possession of cocaine, to be served concurrent with Coley’s sixteen-year sentence on the Class B felony.

Reversed and remanded with instructions.

BAKER, C.J., and NAJAM, J., concur.