

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT LEE HARVEY,

Defendant-Appellant.

UNPUBLISHED

May 11, 1999

No. 208244

Washtenaw Circuit Court

LC No. 94-002415 FH

Before: Kelly, P.J., and Neff and Smolenski, JJ.

MEMORANDUM.

In 1995, defendant pleaded guilty to possession of 50 grams or more but less than 225 grams of cocaine, MCL 333.7403(2)(a)(iii); MSA 14.15(7403)(2)(a)(iii), and he was sentenced to seven to twenty years' imprisonment. This Court denied defendant's application for leave to appeal for lack of merit in the grounds presented but the Michigan Supreme Court has remanded the case to us for consideration as on leave granted. *People v Harvey*, 456 Mich 901 (1997). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's conviction is based upon his possession of 73 grams of cocaine. Defendant argues that according to the law in effect at the time of the offense in May of 1994, his conduct was prohibited by both MCL 333.7403(2)(b); MSA 14.15(7403)(2)(b) and MCL 333.7403(2)(a)(iii); MSA 14.15(7403)(2)(a)(iii), and that the "rule of lenity" requires that he be convicted and sentenced under the statute with the lesser penalty, i.e., MCL 333.7403(2)(b); MSA 14.15(7403)(2)(b). We disagree.

The "rule of lenity" does not apply to the controlled substances statutes of the Public Health Code. MCL 333.1111(2); MSA 14.15(1111)(2); *People v Denio*, 454 Mich 691, 699; 564 NW2d 13 (1997); *People v Morris*, 450 Mich 316, 326-327; 537 NW2d 842 (1995); *People v Poole*, 218 Mich App 702, 713-714; 555 NW2d 485 (1996). Moreover, even if the "rule of lenity" were applicable, the redundancy resulting from overlapping criminal provisions that provide two separate penalties for the same conduct does not constitute the kind of "ambiguity" necessary for application of the rule. *United States v Batchelder*, 442 US 114, 121-122; 99 S Ct 2198; 60 L Ed 2d 755 (1979). Defendant's reliance upon this Court's opinion in *People v Gridiron*, 185 Mich App 395; 460 NW2d

908 (1990), which was vacated in *People v Gridiron (On Rehearing)*, 190 Mich App 366; 475 NW2d 879 (1991), modified 439 Mich 880; 476 NW2d 411 (1991), is misplaced in this regard, as this Court specifically declined to reach the issue of whether a defendant may be charged and convicted under either statute, 185 Mich App at 404 n 4.

Affirmed.

/s/ Michael J. Kelly

/s/ Janet T. Neff

/s/ Michael R. Smolenski