

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TIMOTHY P. ZUBKE,

Defendant-Appellee.

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UNPUBLISHED

July 30, 2002

No. 234130

Wayne Circuit Court

LC No. 00-010443

Before: Gage, P.J., and Cavanagh and Wilder, JJ.

PER CURIAM.

Defendant was charged in federal court with conspiracy to possess with intent to distribute more than one hundred kilograms of marijuana and more than five kilograms of cocaine, 21 USC 846, during the period between January 1, 1993, and August 10, 2000. Defendant was then charged in state court with possession with intent to deliver 225 grams or more but less than 650 grams of a mixture containing cocaine, MCL 333.7401(2)(a)(ii), and possession of a firearm during the commission of a felony, MCL 750.227b. After pleading guilty to the federal charge, defendant moved for dismissal of the state charge, arguing that the federal conviction and the state charge were based on the same act and state prosecution was barred by MCL 333.7409. The circuit court granted defendant's motion and dismissed the case without prejudice. The prosecutor appeals as of right. We affirm.

I

In this appeal, the prosecutor requests this Court to revisit its decision in *People v Avila (On Remand)*, 229 Mich App 247; 582 NW2d 838 (1998), and consider (1) whether the "same act" pursuant to MCL 333.7409 is the basis of both the federal conviction for conspiracy and the state charge of drug possession with intent to deliver, and (2) the applicability of MCL 333.7409 as an independent ground for dismissal.

We review a trial court's decision to grant or deny a motion to dismiss charges for an abuse of discretion. *People v Adams*, 232 Mich App 128, 132; 591 NW2d 44 (1998). This Court reviews de novo a double jeopardy challenge as a question of law. US Const, Am V; Const 1963, art 1, § 15; *People v Dillard*, 246 Mich App 163, 165; 631 NW2d 755 (2001). Questions of statutory construction are also reviewed de novo. *People v Morey*, 461 Mich 325, 329; 603 NW2d 250 (1999).

MCL 333.7409 provides:

If a violation of this article [Public Health Code] is a violation of a federal law or the law of another state, a conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state.

In this case, defendant was charged under MCL 333.7401, which is part of the Public Health Code. It provides in pertinent part:

(1) Except as authorized by this article, a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance . . . .

(2) A person who violates this section as to:

(a) A controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in section 7214(a)(iv) and:

\* \* \*

(ii) Which is in an amount of 225 grams or more, but less than 650 grams, of any mixture containing that substance is guilty of a felony and shall be imprisoned for not less than 20 years nor more than 30 years.

In *Avila (On Remand)*, a search of the defendant's residence revealed an amount of cocaine. *Id.* at 248. Following the search, the defendant was charged in federal court with conspiracy to distribute or to possess with intent to distribute cocaine pursuant to 21 USC 841(a)(1) and 21 USC 846. *Id.* The Wayne County Prosecutor's Office then charged the defendant with possession with intent to deliver more than 650 grams of cocaine pursuant to MCL 333.7401(2)(a)(i). *Id.* at 248-249. The defendant pleaded guilty to the federal charges and filed a motion to dismiss the state charge on double jeopardy grounds. *Id.* at 249. The trial court held that the double jeopardy clause of the Michigan Constitution, Const 1963, art 1, § 15, barred prosecution. *Id.* On appeal, this Court declined to address the constitutional double jeopardy issue and held that MCL 333.7409 operated to completely bar successive prosecutions based on the same act which formed the basis of a federal drug conspiracy conviction, even though the conspiracy charge did not constitute the same offense as the state possession charge. *Id.* at 250-251. Accordingly, this Court affirmed the trial court's decision to dismiss the case, holding that the state charge arose out of the "same acts" as those that formed the basis of the federal conviction. *Id.*

#### **A. "Same Act"**

We first address the question whether "the same act," pursuant to MCL 333.7409, was the basis for the federal conviction for conspiracy and the state charge of drug possession with intent to deliver. The prosecutor argues that it was not, but fails to factually support this assertion.

Similar to the defendant in *Avila*, defendant in this case was charged with conspiracy in violation of federal law. Subsequently, the state charged defendant with the substantive crime of possession with intent to distribute a controlled substance. Defendant pleaded guilty to the federal conspiracy charge, and filed a motion to dismiss the charges with the state court, claiming that the Michigan double jeopardy statute barred his state prosecution. Defendant argues that the two charges arise from the same criminal act. A defendant asserting the state statutory double jeopardy bar to drug prosecutions bears the burden of both production and persuasion. *People v Mezy*, 453 Mich 269, 282-283; 551 NW2d 389 (1996). Here, defendant explained that the July 6, 2000, incident occurred within the same time frame as the events forming the basis of the federal conspiracy charge, both charges were based on the acts of defendant in purchasing controlled substances in Texas and selling the controlled substances to drug dealers in the Detroit metropolitan area, and the federal government had planned on using the July 6, 2000, incident as part of its case-in-chief against defendant. Defendant submitted with his motion and his brief on appeal an affidavit by the Assistant United States Attorney prosecuting the federal charges, who stated that the government intended to offer, as part of its case-in-chief, evidence of the June-July 2000 criminal acts as overt acts in furtherance of the conspiracy.

The prosecutor, on the other hand, failed to rebut defendant's assertion that the two charges were based on the same act. Instead, the prosecution merely asserts that "the conspiracy involved different, albeit partially overlapping times, different people, and different overt acts, [and] appears to militate against a finding that they were substantially the "same act" for purposes of applying MCL 333.7409." Beyond this conclusory statement, the prosecutor provides no explanation, and the record does not support the statement. There is nothing in this appeal to show that the trial court erred in concluding that the criminal act upon which both charges were based was the same; therefore, the trial court correctly held that MCL 333.7409 barred the state prosecution in the instant case.

### **B. The Applicability of MCL 333.7409**

The prosecutor challenges the applicability of MCL 333.7409 with the same argument that this Court rejected in *Avila*. In particular, the prosecutor argues that, because the federal crime of conspiracy to possess and distribute drugs is a distinct and separate crime from the state crime of possession with intent to deliver drugs, MCL 333.7409 is inapplicable. The prosecutor correctly asserts that conspiracy is separate and distinct from the substantive crime that is its object. See *People v Mass*, 464 Mich 615, 632; 628 NW2d 540 (2001). However, the prosecutor fails to necessarily take the reasoning of his argument a step further. MCL 333.7409 provides that "[i]f a violation of this article [Public Health Code] is a violation of a federal law or the law of another state, a conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state." It is not disputed that the crime of possession with the intent to deliver a controlled substance, MCL 333.7401, is part of "this article" for purposes of MCL 333.7409. Therefore, the next questions are (1) whether violation of MCL 333.7401 constitutes a violation of the federal conspiracy statute, and (2) whether both charges are based on the same criminal act. As previously discussed, the prosecutor did not address whether the same criminal act was the basis for both charges, except in passing.

We conclude that a proper determination of the applicability of MCL 333.7409 to the facts in this case cannot be made on this appeal. The prosecutor fails to address the reasons why

MCL 333.7409 should not apply in the instant case, particularly in light of the general practice of federal prosecutors to prove conspiracies with evidence of overt acts of the underlying substantive crime, even in the absence of an overt act requirement. See *Mass*, *supra* at 650 (Markman J., concurring). This general practice effectively renders the state substantive crime a functional element of the federal conspiracy crime and, accordingly, MCL 333.7409 would apply. Furthermore, we conclude that another important issue not addressed by the prosecutor is the intent of the Legislature regarding the scope of punishment under MCL 333.7409. This Court's analysis of this issue requires consideration of "whether there is a clear indication of legislative intent to impose multiple punishment for the same offense." *People v Mitchell*, 456 Mich 693, 696; 575 NW2d 283 (1998). The prosecutor simply fails to recognize or address these two questions. As the Supreme Court has stated:

It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow. Failure to brief a question on appeal is tantamount to abandoning it. [*People v Kevorkian*, 248 Mich App 373, 388-389; 639 NW2d 291 (2001), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).]

In sum, we are not convinced that we should revisit this Court's decision in *Avila (On Remand)*. Both here and in *Avila*, the prosecutor failed to challenge the issue whether the "same act" was the basis of both the federal conviction and the state charge, and he failed to address the applicability of MCL 333.7409. Therefore, in light of our decision in *Avila (On Remand)*, *supra* at 251-252, we conclude that the trial court correctly dismissed the instant case because prosecution is barred by MCL 333.7409.

Affirmed.

/s/ Hilda R. Gage  
/s/ Mark J. Cavanagh  
/s/ Kurtis T. Wilder