

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

EPHRIAM E. JASPER,

Defendant-Appellee.

UNPUBLISHED

June 3, 2004

No. 245429

Wayne Circuit Court

LC No. 97-008521

Before: Markey, P.J., and Wilder and Meter, JJ.

PER CURIAM.

The prosecution appeals as of right from an order dismissing a charge of possession with intent to deliver 50 or more but less than 225 grams of cocaine. See MCL 333.7401(2)(a)(iii).¹ We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The parties dispute whether, under MCL 333.7409,² defendant's prior federal conviction of conspiracy to deliver cocaine bars a state charge of possession with intent to deliver the same cocaine. This case is controlled by the Michigan Supreme Court's decision, subsequent to the filing of the parties' briefs on appeal, in *People v Zubke*, 469 Mich 80; 664 NW2d 751 (2003). In *Zubke*, the trial court dismissed a state charge of possession with intent to deliver a controlled substance under MCL 333.7409 based on the defendant's federal conviction of conspiracy to possess with intent to distribute a controlled substance, and this Court affirmed that decision. *Id.* at 81. However, our Supreme Court reversed and remanded for trial on the state charge. *Id.* at 86. In doing so, the Court concluded that the state charge "did not violate the 'same act' prohibition of [MCL 333.7409]" because the act giving rise to the federal conspiracy conviction was "entering into an agreement to possess cocaine" while the act giving rise to the state

¹ This statute has been amended and now proscribes the possession of 50 to 450 grams of cocaine.

² MCL 333.7409 provides:

If a violation of this article is a violation of 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.

possession charge was “defendant’s actual physical possession or control of the cocaine.” *Id.* at 84. This analysis squarely applies to the present case. Under *Zubke*, defendant’s prior federal conviction does not preclude the state cocaine possession charge at issue under MCL 333.7409 because the federal conspiracy charge was based on entering into a proscribed agreement while the possession charge was based on the separate act of actually possessing or controlling cocaine.

Defendant, in moving for dismissal of the charge at issue, and evidently the trial court in granting that motion, relied in substantial part on this Court’s pre-*Zubke* decision in *People v Avila (On Remand)*, 229 Mich App 247; 582 NW2d 838 (1998), overruled by *Zubke*, *supra*. In *Avila*, this Court held that under MCL 333.7409 the defendant’s prior guilty plea to a federal charge of conspiracy to distribute or possess with intent to distribute cocaine precluded a state charge of possession with intent to deliver cocaine. *Avila*, *supra* 229 Mich App at 251. However, *Zubke* expressly rejected the reasoning of *Avila*, stating that it erred in its analysis of the issue. *Zubke*, *supra*, 469 Mich at 85. While *Zubke* did not state in explicit terms that it was overruling *Avila*, that is the clear import of its decision given its express rejection of the reasoning of *Avila* and the lack of any plausible basis to materially distinguish the two cases. Thus, *Zubke* constituted the overruling of *Avila*, and we are required to apply *Zubke*, not *Avila*, to the present case.

We reverse the order dismissing the charge of possession with intent to deliver 50 or more but less than 225 grams of cocaine and remand this case to the circuit court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter