

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE
CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24.



DIVISION ONE
FILED: 08/09/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 10-0439
)
Appellee,) DEPARTMENT S
)
v.) **MEMORANDUM DECISION**
)
EDDIE JAMES MOORE II,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2007-121929-001 DT

The Honorable Glenn M. Davis, Judge

AFFIRMED IN PART, REVERSED IN PART

Thomas C. Horne, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Katia Mehu, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Joel M. Glynn, Deputy Public Defender
Attorneys for Appellant

T I M M E R, Judge

¶1 Eddie James Moore II appeals the trial court's
judgment after a jury found him guilty of multiple

offenses. He argues the court erred by convicting him on two counts of possession of marijuana as these convictions are based on the same act, and the convictions and resulting dispositions therefore violate his constitutional rights to be free from double jeopardy. Because Moore failed to raise this objection to the trial court, we review for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). We review the applicability of double jeopardy de novo. *State v. Brown*, 217 Ariz. 617, 621, ¶ 12, 177 P.3d 878, 882 (App. 2008). The State confesses error and, for the reasons that follow, we agree.

¶12 On April 4, 2007, Phoenix Police detectives stopped a car after observing the driver, later identified as Moore, commit a traffic violation. When Moore and his passenger rolled down windows to speak to the detectives, they smelled the odor of marijuana. After a detective spotted a gun and scale in an opened glove box, Moore and the passenger were removed from the car. In a subsequent search of the car, the detectives found, among other things, a digital scale with crack cocaine residue on it and a baggie containing 50 grams of marijuana. A search of Moore revealed four \$1,000 bundles of cash. After detectives placed Moore in a police car, he was found

attempting to hide a plastic bag containing crack cocaine beneath the seat.

¶13 The State indicted Moore on nine counts, including sale or transportation of marijuana (count five) and possession of marijuana for sale (count six). A jury later convicted Moore on two counts of possession of marijuana as lesser-included offenses of counts five and six in addition to finding him guilty on the remaining counts. The court subsequently imposed concurrent terms of incarceration for the convictions on counts one, two, eight, and nine. The court suspended imposition of sentence and placed Moore on concurrent two-year terms of probation as to counts three, four, five, six, and seven. The trial court also imposed a fine for each drug-related offense. This timely appeal followed.

¶14 Both the United States and Arizona Constitutions prohibit "multiple punishments for the same offense." *State v. Welch*, 198 Ariz. 554, 555, ¶ 6, 12 P.3d 229, 230 (App. 2000) (citations omitted). Double jeopardy is not invoked, however, if the charges stem from separate conduct by the defendant. See *Blockburger v. U.S.*, 284 U.S. 299, 302-03 (1932).

¶15 In the present case, Moore's convictions for possession of marijuana were both based on his single act

of possessing the baggie containing 50 grams of marijuana. Because the convictions on count five and count six were not based on Moore's separate conduct, the trial court violated the double jeopardy clauses of the United States Constitution and the Arizona Constitution by convicting Moore and entering dispositions for both offenses. This court may remedy the violation by vacating the conviction and disposition for one count of possession of marijuana. See *Welch*, 198 Ariz. at 557, ¶ 13, 12 P.3d at 232.

¶6 For the foregoing reasons, we vacate Moore's conviction and resulting disposition for count six. We affirm the remaining convictions, sentences, and dispositions.

/s/
Ann A. Scott Timmer, Judge

CONCURRING:

/s/
Lawrence F. Winthrop, Chief Judge

/s/
Daniel A. Barker, Judge