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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. GENARO LOPEZ MADUENA, Appellant.	)	2 CA-CR 2009-0358 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200801005

Honorable Bradley M. Soos, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Alan L. Amann — Tucson
Attorneys for Appellee

Harriette P. Levitt — Tucson
Attorney for Appellant

B R A M M E R, Presiding Judge.

¶1 A jury found appellant Genaro Lopez Maduena guilty of three felonies: sale or transportation of methamphetamine, a dangerous drug; possession of methamphetamine for sale; and possession for sale of more than nine grams of cocaine, a

narcotic drug. The trial court sentenced Maduena to concurrent terms of imprisonment that will require him to serve ten years day-for-day, commencing upon his completion of other sentences imposed in a different case, CR200801452. In the single issue raised on appeal, Maduena contends his conviction for possessing methamphetamine for sale is "redundant" to his conviction for sale or transportation of methamphetamine and that the resulting double jeopardy violation constitutes fundamental error.

¶2 Because Maduena did not object on this ground below, he has forfeited review of the issue for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). A double jeopardy violation constitutes fundamental, prejudicial error, however, *State v. Ortega*, 220 Ariz. 320, ¶ 7, 206 P.3d 769, 772 (App. 2008), and we will review de novo an assertion that such a violation occurred, *State v. Musgrove*, 223 Ariz. 164, ¶ 10, 221 P.3d 43, 46 (App. 2009). We view the facts in the light most favorable to upholding the jury's verdicts. *Ortega*, 220 Ariz. 320, ¶ 2, 206 P.3d at 771.

¶3 The evidence established that Maduena drove to the parking lot of a fast-food restaurant to meet an undercover police detective after she had called him on the telephone and arranged to buy methamphetamine from him. The detective was wearing a "body bug"—a small, concealed transmitter—and other narcotics officers were stationed nearby in unmarked vehicles. When the detective approached Maduena's minivan, Maduena handed her "a little package . . . wrapped in a brown torn piece of napkin" that he had been holding in his hand as she approached. The contents of the "package" were later determined to be .63 gram of methamphetamine.

¶4 As soon as Maduena handed her the methamphetamine, the detective said, "Hold on, let me get my money," which was the prearranged signal for the other officers to move in and arrest Maduena. After he had been arrested and his six passengers removed from the vehicle, one of the other officers searched the minivan. In a grocery bag in the center of the van, he found a can that apparently was intended to look like a can of oil. Concealed inside the can were several bags of methamphetamine and cocaine, "all packaged individually, so they were ready for sale." Later analysis revealed that the bags found in the can contained a total of 23.1 grams of methamphetamine and 13.9 grams of cocaine, and testimony established those amounts were consistent with possession for sale rather than personal use.

¶5 Maduena's argument rests on this pivotal assertion: "[T]he two counts in question were based on the same corpus, the methamphetamine which was found in the can in the van." And, citing *State v. Price*, 218 Ariz. 311, 183 P.3d 1279 (App. 2008), he contends we should "determine whether the offenses are the same . . . [by] analyz[ing] the elements of the offenses, not the facts of the case."[1] Further, he contends he "could not have committed Transportation for Sale of a Dangerous Drug without also committing possession of the same dangerous drug."

¶6 As our recitation of the facts reveals, however, Maduena was not charged twice for the same act. His actual transfer and intended sale to the detective of the small,

[1]The issue in *Price* was whether the crime of aggravated assault is a lesser-included offense of armed robbery. 218 Ariz. 311, ¶ 3, 183 P.3d at 1281. We held that "for double jeopardy purposes, aggravated assault is not the same offense as armed robbery, and convictions for both offenses were constitutionally permissible." *Id.* ¶ 9.

brown packet containing .63 gram of methamphetamine was an entirely different transaction than his separate possession of the bags of cocaine and methamphetamine that were found concealed in the can inside his vehicle. Because he was not charged or convicted twice for the same act or transaction, and because the methamphetamine involved in the two counts was not the same, no violation of double jeopardy occurred.

¶7 Of the several cases Maduena has cited in support of his argument, *State v. Moroyoqui*, 125 Ariz. 562, 611 P.2d 566 (App. 1980), is the most nearly apposite.[2] There we set aside the defendant's conviction for possessing marijuana, which we found to be a lesser-included offense of both transporting marijuana and possessing marijuana for sale. *Id.* at 564, 611 P.2d at 568. But, in contrast to this case, the charges in *Moroyoqui* were all based on precisely the same acts by the defendant and involved exactly the same marijuana.

¶8 We reject Maduena's contention that his conviction for possessing for sale the 23.1 grams of methamphetamine found in his vehicle was "redundant" to his

[2]Maduena has also cited *Fitzgerald v. Superior Court*, 173 Ariz. 539, 845 P.2d 465 (App. 1992), and *Lemke v. Rayes*, 213 Ariz. 232, 141 P.3d 407 (App. 2007), in support of his contention. In *Fitzgerald*, a civil forfeiture defendant had been absolved of "any illegal activity regarding the seized items." 173 Ariz. at 542, 845 P.2d at 468. When subsequently he was charged criminally with related drug and weapons offenses, he moved to dismiss on grounds of double jeopardy and collateral estoppel, based on the earlier forfeiture action. The appellate court found no double jeopardy violation but ruled the state was collaterally estopped from bringing two of the four criminal charges. 173 Ariz. at 542, 845 P.2d at 468. In *Lemke*, the defendant unsuccessfully asserted that principles of double jeopardy and collateral estoppel barred the state from retrying him on a charge of felony murder after his first jury had failed to reach a verdict on the felony murder charge and had found him guilty only of theft, a lesser-included offense of the predicate felony offense of armed robbery. 213 Ariz. 232, ¶¶ 2, 6-7, 9, 141 P.3d 407, 410-11.

conviction for selling or transporting for sale the .63 gram of methamphetamine, separately packaged and wrapped in brown paper, that he actually transferred to the undercover detective immediately before his arrest. We find no violation of the prohibition against double jeopardy and further find no error, much less fundamental error.

¶9 Maduena's convictions and sentences are affirmed.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge