MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

James Anthony Miller,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

October 26, 2021

Court of Appeals Case No. 21A-CR-937

Appeal from the Marshall Superior Court

The Honorable Robert O. Bowen, Judge

Trial Court Cause No. 50D01-1901-F2-1

Weissmann, Judge.

[1] Law enforcement officers have a saying when it comes to confidential informants: "today's informants, tomorrow's target." Tr. Vol. II, p. 122. That turned out to be true for James Miller. Months after a stint as a confidential informant, a jury convicted Miller of dealing in and possession of methamphetamine. He challenges the sufficiency of the evidence underpinning these convictions, arguing that he was acting as a police agent. We find his argument unavailing and affirm his conviction for dealing in methamphetamine. However, we *sua sponte* reverse Miller's conviction for possession of methamphetamine because it violates double jeopardy.

Facts

[2] Officer Trent Stouder stopped a vehicle for speeding in Marshall County. Miller was in the passenger seat. During the stop, Miller admitted he had drugs in the vehicle and was making a delivery. He handed over more than 3 pounds of methamphetamine. Miller justified his actions by saying he was a confidential informant with the Indiana State Police.

[3] In fact, Miller *had* been a confidential informant—eight months prior on two controlled buys with the Marshall County Drug Task Force. Miller had also recently met with Indiana State Police Officer Richard Hudson to discuss becoming a confidential informant again, but nothing had been finalized. Officer Stouder called Officer Hudson, who explained that Miller was not working under his direction at the time of the stop.

[4] Miller was arrested and charged with one count of dealing in methamphetamine, a Level 2 felony, and one count of possession of methamphetamine, a Level 3 felony. After a jury convicted him on both counts, Miller admitted to being a habitual offender and was sentenced to an aggregate term of 40 years in the Indiana Department of Correction. Miller now appeals, arguing that the evidence was insufficient to support his convictions.

Discussion and Decision

I. The Evidence is Sufficient

[5] Miller argues that the evidence was insufficient to prove both charges beyond a reasonable doubt because he believed he was operating under the color of law. When reviewing the sufficiency of evidence to support a conviction, we must consider "only the probative evidence and reasonable inferences *supporting* the verdict." *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007) (emphasis in original) (quoting *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005)). We will not reweigh evidence or adjudge witness credibility. *Id.* We will only reverse where "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Id.* (quoting *Jenkins v. State*, 726 N.E.2d 268, 270 (Ind. 2000)).

[6] Miller relies heavily on evidence suggesting that he believed he was authorized to carry more than 3 pounds of methamphetamine as a confidential informant. To the extent his argument is a mistake-of-fact defense dressed as a sufficiency appeal, it is waived. A defendant may not raise an argument for the first time

on appeal, and Miller has failed to argue the defense cogently. *Treadway v. State*, 924 N.E.2d 621, 631 (Ind. 2010); Ind. App. R. 46(8)(a). Further, Miller's possible belief that he misunderstood his confidential informant agreement amounts to a request to reweigh evidence, which we will not entertain. *Drane*, 867 N.E.2d at 146.

[7] Regardless, the facts are more than sufficient to support Miller's convictions. Miller admitted that he possessed the methamphetamine and that he was en route to deliver it. Appellant's Br., p. 6. And two police officers testified that Miller was not engaged with either of their departments as a confidential informant. Tr. Vol. II, pp. 95, 125. A reasonable factfinder certainly could find the elements of both crimes proven beyond a reasonable doubt. But our analysis does not end here.

II. Miller's Convictions Violate Double Jeopardy

[8] Because questions of double jeopardy implicate Miller's fundamental rights, we raise the issue *sua sponte*. *See, e.g.*, *Morales v. State*, 165 N.E.3d 1002, 1009 (Ind. Ct. App. 2021); *Phillips v. State*, No. 20A-CR-1962, slip op. at 6 (Ind. Ct. App. August 12, 2021). Pursuant to the substantive double jeopardy test that our Supreme Court laid out in *Wadle v. State*, Miller's conviction for possession of methamphetamine must be vacated. 151 N.E.3d 227, 235 (Ind. 2020).

[9] *Wadle* requires a multi-step analysis to evaluate substantive double jeopardy claims that arise when a single criminal act implicates multiple statutes. *Id*. First, we look to the statutes. *Id.* If the statutes explicitly allow for multiple

punishments, there is no double jeopardy violation, and our inquiry ends. *Id.* at 248. If the statutes are unclear, we apply our included-offense statutes. *Id.* (citing Ind. Code § 35-31.5-2-168). If either offense is included in the other, we proceed to the second step and inquire whether the defendant's actions are "so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction." *Wadle*, 151 N.E.3d at 249. If the facts show only a single crime, judgment may not be entered on the included offense. *Id.* at 256.

[10] This Court performed the first step of the *Wadle* analysis for these charges in *Phillips*. We found that neither the possession of methamphetamine nor the dealing in methamphetamine statutes clearly permitted multiple punishments, either expressly or by unmistakable implication. *Phillips*, slip op. at 6. We also determined that possession of methamphetamine is a lesser-included offense of dealing in methamphetamine. *Id.* We therefore move onto the second step of *Wadle*.

[11] The record indicates that Miller's possession and dealing were simultaneous. Both the possession and dealing charges are based on the methamphetamine Miller handed over during the traffic stop. The charging information does nothing to distinguish the two acts, and in closing arguments, the State used the same methamphetamine as evidence to support both convictions. Appellant's App. Vol. III, p. 15; Tr. Vol. II, pp. 142-43 ("You would need . . . 10 grams [of methamphetamine] . . . to have a Level 2 dealing charge. The defendant had 3.6 pounds. . . . Possession is 28 grams . . . . He had 3.6 pounds."). Given this

evidence, we conclude Miller's actions constituted a single transaction. *See Wadle*, 151 N.E.3d at 249.

[12] Accordingly, we affirm Miller's conviction for Level 2 felony dealing in methamphetamine, but we reverse his conviction for Level 3 felony possession of methamphetamine. We remand with instructions to vacate that conviction[1].

Mathias, J., and Tavitas, J., concur.

[1] Because Miller's sentence for possession of methamphetamine ran concurrently to the other offense, his aggregate sentence remains unchanged.