IN THE COURT OF APPEALS OF IOWA

No. 2-140 / 11-1087
Filed February 29, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ELLIS LARD SR.,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Nancy S. Tabor (plea hearing) and Mark J. Smith (sentencing), Judges.

Ellis Lard appeals from the judgment and sentences entered following his guilty pleas to the charges of possession of a controlled substance with intent to deliver and delivery of a controlled substance. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephen J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Michael J. Walton, County Attorney, and Joseph E. Grubisch, Assistant County Attorney, for appellee State.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ. Tabor, J., takes no part.

DANILSON, J.

Ellis Lard appeals from the judgment and sentences entered following his guilty pleas to the charges of possession of a controlled substance (crack cocaine) with intent to deliver, and delivery of a controlled substance (crack cocaine), both in violation of Iowa Code section 124.401(1) (2009). Lard contends the district court's failure to merge his sentences violated section 701.9 and his right against double jeopardy. Considering the fact Lard's convictions were based upon different quantities of crack cocaine—being used for different acts, transactions, or purposes, which were discovered by law enforcement at different times—we conclude section 701.9 and double jeopardy principles do not bar multiple punishments for Lard's separate convictions. Accordingly, we affirm.

At approximately 8:00 p.m. on September 15, 2010, two Davenport special agents executed a controlled buy of five rocks of crack cocaine from Lard, weighing approximately 1.2 grams and valued at $150, at 314 South Gaines Street, Apartment 9. Later that evening, at approximately 9:40 p.m., several Davenport police officers returned to Apartment 9 with a search warrant. Lard was present at the apartment and was immediately handcuffed. Officer Craig Burkle detained Lard in the backseat of his patrol car to be taken to the Davenport Police Department. Officer Burkle noticed Lard moving around continuously and became suspicious. Lard stated that his handcuffs were uncomfortable. As Officer Burkle adjusted Lard's left wrist in his handcuff, he discovered a cigarette box wedged in the seat behind Lard. The cigarette box contained 17 rocks of crack cocaine, weighing approximately 4.8 grams.

The State charged Lard by trial information with delivery of a controlled substance, in violation of section 124.401(1)(c) (Count I); possession with intent to deliver a controlled substance, in violation of section 124.401(1)(c) (Count II); failure to affix a drug tax stamp, in violation of sections 453B.3 and 453B.12 (Count III); conspiracy to commit a non-forcible felony, in violation of section 706.1(1)(a) (Count IV); and possession of drug paraphernalia, in violation of section 124.414 (Count V). Lard entered a plea agreement with the State in which he agreed to plead to Counts I and II in exchange for the dismissal of Counts III, IV, and V. The district court accepted Lard's plea and sentenced Lard to up to ten years on each count and ordered the sentences to run concurrently. Lard appeals.

Lard argues the district court erred in failing to merge Counts I and II for which he was sentenced because the convictions were "alternative means of violating Iowa Code section 124.401."[1] He argues the court's failure to merge his sentences violated the Double Jeopardy Clause of the United States Constitution and Iowa Code section 701.9. *See* U.S. Const. amend V (protecting a defendant from being punished twice for the same offense); Iowa Code § 701.9 (codifying the double jeopardy principle against cumulative punishment by requiring that lesser included offenses be merged with the greater offense).

The State contends Lard committed separate offenses because "the two counts related to entirely separate acts." We agree. Double jeopardy principles

[1] Lard alternatively argues his trial counsel was ineffective for failing to raise this claim. Because we find the former issue properly raised and preserved for our review, *see* Iowa R. Crim. P. 2.24(5) (court may correct an illegal sentence at any time), we need not address Lard's argument in regard to counsel's ineffectiveness.

protect defendants against multiple punishments for the same offense. "However, multiple punishments can be assessed after a defendant is convicted of two offenses that are not the same." *State v. Smith*, 573 N.W.2d 14, 19 (Iowa 1997); *see also* 4A B. John Burns, *Iowa Practice Series, Criminal Procedure*, § 38:3 (2011 ed.) ("To constitute the same offense for the purpose of invoking the Double Jeopardy Clause, the offenses must be the same act. Separate acts, even charged under the same statute, are not subject to Fifth Amendment analysis.").

In this case, the special agents' controlled buy of five rocks of crack cocaine from Lard at approximately 8:00 p.m. on September 15, 2010, supported Lard's conviction for delivery of a controlled substance under section 124.401(1). And, approximately two hours later, Officer Burkle's discovery of a cigarette box containing seventeen rocks of crack cocaine in the patrol car from Lard's person after being detained following the execution of a search warrant supported Lard's conviction for possession of a controlled substance with intent to deliver under section 124.401(1).

Lard's convictions were based upon different quantities of crack cocaine—being used for different acts, transactions, or purposes, which were discovered by law enforcement at different times. *See State v. Bundy*, 508 N.W.2d 643 (Iowa 1993) (finding that multiple convictions of do not merge where the convictions are based upon different marijuana in different states of drying); *State v. Truesdell*, 511 N.W.2d 429, 432 (Iowa Ct. App. 1993) (concluding trial court properly refused to merge charges of possession with intent to deliver and manufacturing where the State "filed the two charges as separate offenses and

proved defendant committed them both based on the quantity, packaging and location of the drugs in the house and garage"); *see also United States v. Johnson*, 977 F.2d 1360, 1374 (10th Cir. 1992) (observing that various stashes of a defendant's drug supply "are considered separate where the evidence indicates that they were intended for different purposes or transactions"); *Potts v. State*, 479 A.2d 1335, 1343-44 (Md. Ct. App. 1984) (finding two convictions proper where they "were based on the seizure of two completely separate quantities of marihuana" from the defendant's home to be used for distinct purposes); *Com. v. Rabb*, 725 N.E.2d 1036, 1043-44 (Mass. 2000) (concluding defendant's possession of two separate quantities of cocaine were "sufficiently differentiated by time, location, or intended purpose" so as not to violate the defendant's double jeopardy rights); *Peake v. Com.*, 614 S.E.2d 672, 675-76 (Va. App. 2005) (concluding defendant's conviction for possession of marijuana in lockbox with the intent to distribute was not for the same act or transaction as his possession of the marijuana in his pocket).

Accordingly, Lard's convictions and sentences are affirmed.

AFFIRMED.