RENDERED: June 12, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 97-CA-1316-MR

COMMONWEALTH OF KENTUCKY — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE GEOFFREY P. MORRIS, JUDGE
CRIMINAL ACTION NO. 97-CR-968

LINDA J. FENTON — APPELLEE

OPINION
REVERSING AND REMANDING

*** *** ***

BEFORE: GUDGEL, CHIEF JUDGE; EMBERTON AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE. The appellant, Commonwealth of Kentucky (Commonwealth), appeals the Jefferson Circuit Court order dismissing the indictment against appellee, Diane J. Fenton (Fenton), for trafficking in a controlled substance in the second degree, schedule II, methamphetamine, Kentucky Revised Statute (KRS) 218A.1412; and possession of drug paraphernalia, KRS 218A.500, on double jeopardy grounds. We reverse and remand.

In November, 1996, Jefferson County Police Detective Joseph Collins (Collins) arranged a meeting among an undercover detective, a confidential informant, and Fenton for a drug buy. No buy occurred at the time, as Fenton provided the detective and informant with methamphetamine at no cost. However, police

maintained an ongoing investigation of Fenton from November, 1996, to March, 1997, on suspicion of drug trafficking.

In March, 1997, Collins arranged another drug buy between the confidential informant and Fenton at a Jefferson County bar. When Fenton arrived at the bar, county police officers arrested and searched her on an unrelated fugitive warrant issued as the result of an outstanding charge in California. The officers seized approximately two ounces of methamphetamine.

Following her arrest, Fenton informed Collins that one pound of methamphetamine was located at a residence in southern Louisville. Collins contacted the Louisville City Police and gave the information to Detective Susan Williams (Williams). Williams obtained a search warrant for the residence. Upon execution of the warrant, Fenton's housemate admitted to the officers present that a safe in the house contained methamphetamine, but that Fenton was the only person with access to the safe. Police located the combination among Fenton's belongings, opened the safe, and seized approximately one pound of methamphetamine.

Fenton, was indicted for possession of methamphetamine from the incident at the bar, pled guilty and was sentenced to twelve months, conditionally discharged for two years. The next day, police charged Fenton with trafficking in methamphetamine based upon the drug seizure at her residence. The trial court

dismissed the indictments on double jeopardy grounds. This appeal followed.

Fenton persuaded the trial court that the indictment should be dismissed because the guilty plea on the possession charge (the bar seizure) precluded the indictment for trafficking (the residence seizure). The Commonwealth contends that the trial court erred in sustaining the motion to dismiss, arguing that the seizure of methamphetamine at the bar and at Fenton's residence constituted different crimes.

The double jeopardy clause of the Fifth Amendment of the United States Constitution and Section 13 of the Kentucky Constitution provide that an individual shall not twice be put in jeopardy for the same offense. In Brown v. Ohio, 432 U.S. 161, 165; 97 S.Ct. 2221, 2225; 53 L.Ed.2d 187 (1977), the United States Supreme Court interpreted the clause to protect criminal defendants from successive prosecutions for the same offense after an acquittal or conviction and multiple punishments for the same offense.

Traditionally, the courts have applied the analysis set forth in Blockburger v. United States, 284 U.S. 299, 304; 52 S.Ct. 180, 182; 76 L.Ed. 306 (1932), to determine whether an individuals rights against double jeopardy have been violated. See Commonwealth v. Burge, Ky., 947 S.W.2d 805 (1997). This prohibits closely connected conduct from resulting in multiple charges under separate statutes. However, in a case such as the one at bar, the Blockburger analysis is insufficient. In Jordan

v. Commonwealth of Virginia, 653 F.2d 870, 873 (4th Cir. 1980), the Fourth Circuit Court of Appeals enunciated why a different standard was required:

> Successive prosecutions implicate a component of double jeopardy protection not implicated in single prosecutions of joined charges such as those involved in Blockburger and Gore: the protection against retrial itself. In this component double jeopardy vindicates principles of finality and repose of former judgments and of fundamental fairness that simply are not involved in a joined charge prosecution. Basically, it insures that having once "run the gauntlet" of criminal trial to judgment either of conviction or acquittal, a person shall not be required to run essentially the same gauntlet again. It protects not only against multiple punishments but against multiple trials for the same offense. (Citations omitted).

The Court continued:

> It is also a test with more practical flexibility than the technically precise Blockburger test, directing a more pragmatic inquiry to the question whether "the evidence required to warrant a conviction upon one of the (prosecutions) would have been sufficient to support a conviction upon the other," and finding the second prosecution barred if the same evidence would so serve. (Citations omitted).

Thus, the inquiry in this case becomes whether the same evidence would be utilized in prosecuting Fenton on both the possession charge and the trafficking charge. This Court finds that the circuit court erred in holding that the possession charge from the bar and the trafficking charge from the residence constitute one offense.

In reaching our decision, we have relied on Rashad v. Burt, 108 F.3d 677 (6th Cir. 1997), cert. denied, ___ U.S. ___, 118 S.Ct. 850, ___ L.Ed.2d ___ (1998). In this case, the defendant (Rashad) was convicted in two separate prosecutions based upon the execution of a single search warrant on a private residence. A drug dog alerted officers to the presence of cocaine in both Rashad's residence and his automobile. The automobile was impounded. Approximately one week later, an informant notified police that a secret compartment in the vehicle contained cocaine. Upon searching the vehicle again, police located the cocaine.

Although Rashad was indicted for possession with intent to deliver, a jury convicted him of possession of a controlled substance based upon the drug seizure at his residence. In a later bench trial, he was convicted of possession with intent to deliver based upon the drugs seized from his automobile while it was impounded.

The Sixth Circuit held that the above prosecutions were successive and violated the double jeopardy clause because the only distinguishing fact in the second prosecution was the location of the drugs. The Court found that this was not a significant fact which would warrant separate prosecution of the charged offenses since the search and seizure were a result of the same confrontation with officers in both prosecutions. The Court disagreed with the prosecutor's contention that the drugs, though two separate caches, were intended for distribution at two

separate times and locations and would amount to two separate transactions when, "[a]t the time of the police action of September 7, 1988, there was no evidence to support the inference that the full supply of cocaine could not, and would not, be employed in a single distribution." Id. at 681. The Court emphasized that all of the cocaine was possessed at a single location with the intent to distribute all or part of it in the future in amounts as requested by buyers. The Court stated, "Absent evidence of separate and distinct dedications of the two caches, his possession was a single, undivided offense."

The general consensus among courts is that separate convictions for possession will not violate double jeopardy principles if the possessions are sufficiently differentiated by time, location, or intended purpose. See United States v. Johnson, 977 F.2d 1360, 1374 (10th Cir. 1992), cert. denied sub nom. Behrens v. United States, 506 U.S. 1070, 113 S.Ct. 1024, 122 L.Ed.2d 170 (1993);United States v. Maldonado, 849 F.2d 522, 524 (11th Cir. 1988); United States v. Blakeney, 753 F.2d 152, 154-155 (D.C.Cir. 1985); United States v. Palacios, 835 F.2d 230, 233-34 (9th Cir. 1987). This Court holds that separate prosecutions may proceed without violating the double jeopardy clause in the current case because the possessions are sufficiently differentiated by time, place, and intended purpose.

In the case at bar, the drug seizures occurred at different times and different locations. The first drug seizure

took place at a Louisville bar. Later that evening, the second drug seizure took place at Fenton's residence.

The underlying circumstances surrounding each seizure also differed significantly from one another. Jefferson County Police arrested Fenton at the Louisville bar on the basis of a fugitive warrant executed in California. Though the arresting officers were aware that Fenton likely had methamphetamine in her possession, since an undercover buy had been previously arranged at that time, Fenton was not arrested on drug charges. The seizure at Fenton's residence was a result of her statements to county police officers that more methamphetamine was located at her residence. The arresting officers at the bar turned the information to over Louisville City Police, a separate law enforcement entity. It was the Louisville City Police that executed the search warrant on Fenton's residence and discovered the drugs, not the county police who had arrested her earlier that evening.

Finally, there were different intended purposes for the separate drug caches. Fenton had previously arranged to sell two ounces of methamphetamine to a confidential informant. She had that particular amount on her when she was arrested. Due to the prior arrangements to sell this amount, the drugs seized from Fenton at the bar were specifically intended for distribution in an already arranged drug transaction at a particular time to a known individual. However, the methamphetamine located at Fenton's residence was not intended for distribution at the

present time, but rather for future distribution. Fenton was the only person with access to the methamphetamine located at her residence, therefore, the fact that she was present in a location where a drug transaction had previously been arranged without possession of the methamphetamine located at her residence shows that there was no intent to distribute that amount at that time.

The Commonwealth did not violate the double jeopardy clause when it separately tried Fenton for possession and trafficking. Therefore, we find that the circuit court erred in dismissing the indictment against Fenton on the charge of trafficking in a controlled substance in the second degree, schedule II, KRS 218A.1412 for double jeopardy purposes. For the foregoing reason, we reverse and remand for proceedings consistent with this opinion.

ALL CONCUR.

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