

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002422-MR

KEVIN MOORE

APPELLANT

v.

APPEAL FROM ROWAN CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 01-CR-00058

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Kevin Moore ("Moore") appeals from a judgment and sentence of the Rowan Circuit Court on a conditional plea of guilty to the charge of first-degree possession of a controlled substance. We affirm.

On January 7, 2001, Moore was arrested during a traffic stop when he was found to be in possession of a syringe containing a small amount of liquid. The liquid was later determined to be oxycodone. Moore was charged with four offenses, and on April 9, 2001, he entered a plea of guilty on one count each of possession of drug paraphernalia, operating on

a suspended license, and giving false information to a police officer, with one charge being dismissed.

On May 18, 2001, a Rowan County grand jury indicted Moore, charging him with possession of a controlled substance, i.e., the oxycodone found in the syringe. Moore then moved to dismiss the indictment, arguing that the charge be dismissed on grounds of double jeopardy because possession of oxycodone necessarily was included in the previous charge of possession of drug paraphernalia. The motion was denied on June 5, 2001.

On November 2, 2001, Moore entered a conditional plea of guilty on the possession charge, reserving for appeal the issue of double jeopardy. The plea was accepted by the Rowan Circuit Court, and this appeal followed.

The sole issue for our consideration is Moore's assertion that the trial judge erred in failing to dismissing the possession charge on the grounds of double jeopardy. Specifically, Moore argues that the successive prosecution of the charges is barred because the paraphernalia charge and the possession charge require proof of the same fact, i.e., the presence of oxycodone in the syringe. He seeks to have the judgment reversed.

As the parties are well aware, the Unites States Supreme Court established the "same elements" test for double jeopardy claims in Blockburger v. Unites States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932). The Court stated therein that, "[T]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the

test applied to determine whether there were two offenses or only one, is whether each provision requires proof of an additional fact which the other does not." Id. at 304. See also, KRS 505.020; Bolen v. Commonwealth, Ky., 31 S.W.3d 907 (2000); Commonwealth v. Burge, Ky., 947 S.W.2d 805 (1996).

The dispositive question, then, is whether the paraphernalia charge and the possession charge each requires proof of an additional fact which the other does not. Clearly, they do. The paraphernalia statute, KRS 218A.500, requires in relevant part proof of possession of drug paraphernalia for the purpose of injecting a controlled substance into the human body. First-degree possession of a controlled substance requires proof of the knowing and unlawful possession of a schedule I or II controlled substance. KRS 281A.1415. The Commonwealth may prove possession of drug paraphernalia without proving the presence of a controlled substance, and, conversely, may prove the possession of a controlled substance without offering proof that drug paraphernalia was present.

Moore phrases the issue in terms of whether both charges required proof of the presence of a controlled substance. Blockburger and its progeny, however, examine not whether statutes require proof of a shared element, but whether each requires proof an a unique element. In the matter at bar, KRS 218A.500 requires proof of paraphernalia (and KRS 281A.1415 does not), whereas KRS 281A.1415 requires proof of the presence of a controlled substance (and 218A.500 does not). There are a number of factors under KRS 218A.510(1) which may be used in determining

whether an object is drug paraphernalia. While the presence of a controlled substance is one factor which may be considered, proof of the presence of a controlled substance is not required in order to obtain a conviction for possession of drug paraphernalia. Since the statutes at issue each require proof of a unique element, Blockburger and its progeny do not provide a basis for tampering with the judgment on appeal.

For the foregoing reasons, we affirm the judgment of the Rowan Circuit Court.

ALL CONCUR.

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