IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 65875-1-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
HECTOR FIGUEROA-OLGUIN,	)	UNPUBLISHED
	)	
Appellant.	)	FILED: March 12, 2012
	)	
	)	

Cox, J. — Hector Figueroa-Olguin appeals his convictions for possession of cocaine with intent to deliver and possession of hydrocodone with intent to deliver. Under the Blockburger same evidence test, these convictions do not violate double jeopardy because they are not the same either in fact or in law. Figueroa-Olguin does not claim any prejudice by the late entry of findings of fact and conclusions of law following the Criminal Rule (CrR) 3.6 hearing. We affirm.

A Washington State Patrol deputy stopped Figueroa-Olguin's truck after a detective observed what he believed to be an illegal drug transaction. Figueroa-Olguin consented to a search of the truck. Inside, the deputy found a prescription pill bottle containing 49 hydrocodone pills.

The deputy arrested Figueroa-Olguin and searched him. The search yielded 11.9 grams of cocaine.

The State charged Figueroa-Olguin with unlawful possession of a

controlled substance with intent to deliver, to wit: hydrocodone, in count I of the information. In count II of the information, the State also charged him with unlawful possession of a controlled substance with intent to deliver, to wit: cocaine. Both charges were based on violations of RCW 69.50.401.

Figueroa-Olguin appeals.

DOUBLE JEOPARDY

Figueroa-Olguin argues that his two convictions for possessing a controlled substance with intent to deliver violate the prohibitions against double jeopardy. We disagree.

Figueroa-Olguin did not raise the double jeopardy issue below. As the State properly concedes, this is a claim of manifest error affecting a constitutional right under RAP 2.5(a), which may be raised for the first time on appeal.[1]

The double jeopardy clauses of the Fifth Amendment and article I, section 9, of the Washington Constitution protect defendants against multiple punishments for the same offense.[2] This court applies the Blockburger "same evidence" test to determine if a defendant has been punished multiple times for violating two distinct statutory provisions.[3] Under that test, double jeopardy is

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[1] State v. Adel, 136 Wn.2d 629, 631-32, 965 P.2d 1072 (1998).

[2] State v. Bobic, 140 Wn.2d 250, 260, 996 P.2d 610 (2000).

[3] State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995) (citing Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 2d 306 (1932)).

violated if a defendant is convicted of offenses that are the same in law and in fact.[4] If each offense, as charged, includes elements not included in the other, or requires proof of a fact that the other does not, the offenses are different and multiple convictions can stand.[5]

Whether a criminal defendant is placed in double jeopardy in a particular circumstance is a question of law that we review de novo.[6]

Here, Figueroa-Olguin was charged with unlawful possession of a controlled substance with intent to deliver, to wit: hydrocodone, in count I of the information. The State also charged him in count II of the information with unlawful possession of a controlled substance with intent to deliver, to wit: cocaine. The charges were based on violations of RCW 69.50.401:

> (1) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.
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> (2) Any person who violates this section with respect to:
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> (a) A controlled substance classified in Schedule I or II which is a narcotic drug or flunitrazepam, including its salts, isomers, and salts of isomers, classified in Schedule IV, is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years.

Both cocaine and hydrocodone are schedule II narcotics, but are classified in

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[4] Id. at 777-78.

[5] Adel, 136 Wn.2d at 633.

[6] State v. Womac, 160 Wn.2d 643, 649, 160 P.3d 40 (2007); State v. Benn, 161 Wn.2d 256, 261-62, 165 P.3d 1232 (2007).

separate subsections of RCW 69.50.206.[7]

Figueroa-Olguin's convictions are not the same in fact or in law. To convict Figueroa-Olguin for possession of cocaine, the State was required to prove that he possessed cocaine. Similarly, to convict him of possession of hydrocodone, it was required to prove that he possessed hydrocodone. Each conviction required proof of a different fact—the specific type of narcotic drug.

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[7] RCW 69.50.206, which specifies what controlled substances are included in Schedule II, states, in relevant part:

> (b) Substances. (Vegetable origin or chemical synthesis.) Unless specifically excepted, any of the following substances, except those listed in other schedules, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by combination of extraction and chemical synthesis:
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> (1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate, excluding apomorphine, thebaine-derived butorphanol, dextrorphan, nalbuphine, nalmefene, naloxone, and naltrexone, and their respective salts, but including the following:
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> . . . .
>
> ***(xi) Hydrocodone;***
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> . . . .
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> (4) Coca leaves and any salt, compound, derivative, or preparation of coca leaves including ***cocaine*** and ecgonine, and their salts, isomers, derivatives, and salts of isomers and derivatives, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecgonine.

(Emphasis added.)

Thus, the convictions are not the same "in fact."

Nor are the convictions the same "in law." In State v. O'Neal,[8] Division II was faced with a similar issue. There, the defendant was charged under former RCW 69.50.401(a)(1)(ii) for unlawfully manufacturing methamphetamine and former RCW 69.50.401(a)(1)(iii) for unlawfully manufacturing marijuana.[9] The court rejected the double jeopardy challenge, applying the same evidence test.[10] In doing so, the court concluded that the charged crimes were neither identical in law or fact, as that test requires.[11]

Here, the State charged Figueroa-Olguin with separate violations of the criminal statute. One charge was for unlawful possession of hydrocodone with intent to deliver. The other charge was for unlawful possession of cocaine with intent to deliver. Each of these charges was based on a separate subsection of Schedule II controlled substances.[12] Thus, the offenses, as charged, are not the same in law.

There is no violation of double jeopardy.

Figueroa-Olguin argues that the "unit of prosecution" test, not the "same evidence" test, applies. He is wrong. In O'Neal, the court determined that the

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[8] 126 Wn. App. 395, 109 P.3d 429 (2005), aff'd, 159 Wn.2d 500 (2007).

[9] Id. at 417.

[10] Id.

[11] Id.

[12] RCW 69.50.206(b)(1)(xi), (b)(4).

unit of prosecution analysis is not applicable where the defendant is charged with violating two distinct statutory provisions.[13] The unit of prosecution test is only applied when a defendant is convicted of multiple counts of the same criminal statute.[14] Here, Figueroa-Olguin possessed two distinct controlled substances. Hydrocodone and cocaine are defined as controlled substances in two separate statutory provisions: RCW 69.50.206(b)(1)(xi) and (b)(4), respectively. Therefore, a unit of prosecution test is not necessary because Figueroa-Olguin was not convicted of violating a single statute multiple times.

Figueroa-Olguin also argues that the legislature's intended unit of prosecution in RCW 69.50.401(2)(a) is ambiguous. We again disagree.

This argument is based on the flawed assumption that the unit of prosecution is relevant to this case. As we explained previously in this opinion, it is not.

In any event, subsection 2(a) of the statute makes it a class B felony to possess with intent to deliver "[a] controlled substance." Figueroa-Olguin argues that the word "a" is ambiguous because, according to the dictionary, "a" can mean "any." Therefore, he argues that the rule of lenity requires that the statute be construed in his favor, such that possession of a specific drug is not the unit of prosecution.[15]

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[13] 126 Wn. App. at 416.

[14] Adel, 136 Wn.2d at 634.

[15] In re Pers. Restraint of Davis, 142 Wn.2d 165, 172, 12 P.3d 603 (2000).

Figueroa-Olguin is straining to create ambiguity where there is none. RCW 69.50.401 treats different controlled substances in different ways. Each controlled substance is listed under one of five different schedules, ranging from schedule I to schedule V.[16] The statute plainly penalizes possession of specific controlled substances according to their classification in the schedules. Therefore, the statute is not ambiguous.

Figueroa-Olguin argues that this court's inquiry should focus on whether he had a separate and distinct intent to distribute each of the controlled substances he possessed. This suggests that same a criminal conduct analysis is relevant to a double jeopardy analysis. He relies on In re Personal Restraint of Davis[17] and Adel's discussion of State v. Lopez.[18] His reliance is misplaced.

In Davis, the defendant pleaded guilty to two counts of possession with intent to manufacture or deliver marijuana for growing operations he managed in two separate locations.[19] The supreme court examined RCW 69.50.401 to determine the unit of prosecution.[20] It determined that the unit of prosecution for a charge of possession with intent to deliver or manufacture was "a 'separate

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[16] RCW 69.50.204 (Schedule I), .206 (Schedule II), .208 (Schedule III), .210 (Schedule IV), .212 (Schedule V).

[17] 142 Wn.2d 165, 12 P.3d 603 (2000).

[18] 79 Wn. App. 755, 904 P.2d 1179 (1995).

[19] Davis, 142 Wn.2d at 168-69.

[20] Id. at 172-73.

and distinct' intent to manufacture drugs . . . ."[21] The court concluded that Davis's double jeopardy rights were not violated because "[b]y setting up two wholly self-contained grow operations, a 'separate and distinct' intent to manufacture marijuana at each location [was] evident."[22]

In Lopez, double jeopardy barred two convictions where the defendant purchased cocaine during a controlled buy.[23] The cocaine the defendant had just purchased was found on the floor of his car and additional cocaine, unrelated to the purchase, was found on his person.[24] The Lopez court applied a same evidence test and determined that the convictions violated double jeopardy.[25] In Adel, the court noted that Lopez's rights were also violated under the unit of prosecution test because the evidence failed to establish more than one intent to deliver the drugs in the future.[26]

Figueroa-Olguin's reliance on Lopez and Davis is not persuasive. Figueroa-Olguin admits that his case is distinguishable because he possessed two different controlled substances while Lopez and Davis only possessed one. But he argues, without citation to any authority, that "this is a distinction without

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[21] Id. at 175.

[22] Id. at 176.

[23] 79 Wn. App. at 757.

[24] Id. at 759.

[25] Id. at 761-63.

[26] Adel, 136 Wn.2d at 639.

a difference." It is not. As noted above, the fact that two separate controlled substances are at issue here requires use of the same evidence test, not the unit of prosecution test.

In any event, the supreme court has rejected same criminal conduct analysis as an analog for double jeopardy analysis.[27] So do we.

Finally, Figueroa-Olguin argues that State v. Rodriguez[28] and State v. Garza-Villarreal[29] support the conclusion that there can be only one conviction despite the presence of two different drugs. But both cases are distinguishable.

In Rodriguez, the defendant was convicted under RCW 69.50.401 of two counts of possession with intent to deliver, one for possession of cocaine and the other for possession of heroin.[30] The issue was whether his convictions constituted the same criminal conduct for determining his offender score during sentencing.[31] Division Two of this court affirmed, holding that for sentencing purposes the two counts involved the same intent and constituted the same criminal conduct within the meaning of RCW 9.94A.400(1)(a).[32]

In Garza-Villarreal, the defendant was also convicted of two counts of

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[27] State v. French, 157 Wn.2d 593, 611-12, 141 P.3d 54 (2006).

[28] 61 Wn. App. 812, 812 P.2d 868 (1991).

[29] 123 Wn.2d 42, 864 P.2d 1378 (1993).

[30] Rodriguez, 61 Wn. App. at 814.

[31] Id. at 815.

[32] Id. at 818.

possession with intent to deliver: one for heroin and one for cocaine.[33] The supreme court held that for the purposes of calculating the defendant's offender score, the two convictions arose from the same criminal conduct.[34]

Here, Figueroa-Olguin does not challenge the calculation of his offender score under RCW 9.94A.400(1)(a). Therefore, whether his convictions constitute the same criminal conduct for sentencing purposes is not relevant. Although neither defendant argued that his double jeopardy rights were violated, it is significant that in both Rodriguez and Garza-Villarreal the court upheld the defendants' original convictions.[35]

LATE ENTRY OF findings and conclusions

In his opening brief, Figueroa-Olguin argues that this case should be remanded for the entry of findings of fact and conclusions of law as required for CrR 3.6 hearings. Since then, the trial court entered findings of fact and conclusions of law. He neither objects to the late entry of the findings and conclusions nor does he claim any prejudice in their content. Accordingly, we deem his opening claim on appeal to be abandoned.[36]

We affirm the judgment and sentence.

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[33] Garza-Villarreal, 123 Wn.2d at 44.

[34] Id.

[35] Id. at 50; Rodriguez, 61 Wn. App. at 819.

[36] State v. Moore, 70 Wn. App. 667, 671-72, 855 P.2d 306 (1993).

Cox, J.

WE CONCUR:

Spearman, J.

Grosse, J.