

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 27677-5-III

Respondent,

)

)

) **Division Three**

v.

)

)

PALMER EUGENE HANSON,

) **UNPUBLISHED OPINION**

)

Appellant.

)

)

Kulik, A.C.J. — Palmer Hanson was convicted of possession of psilocybin mushrooms with intent to deliver, as well as possession of the same mushrooms. Mr. Hanson argues that the arresting officers lacked probable cause and that the drugs found in the search incident to arrest should have been suppressed.

Mr. Hanson directed undercover officers to a tent where they could buy marijuana at a campground near the Gorge Amphitheater. Probable cause exists when an officer has facts sufficient to believe that an offense has been committed. Here, it was reasonable for the officers to believe Mr. Hanson was an accomplice to an illegal drug transaction. The arrest and search incident to arrest were lawful.

Mr. Hanson argues, and the State concedes, that convictions for possession with intent to deliver and possession of the same illegal substance violate the rule against double jeopardy. We vacate the possession conviction and remand for resentencing for possession with intent to deliver.

FACTS

Detectives Eric Talbot and Dale Wagner were working for the Grant County Sheriff's Office in an undercover narcotics operation at a campground near the Gorge Amphitheater. A young man overheard the detectives talk about buying marijuana. The young man directed them to a tent with a green light and told them to ask for some "green." Report of Proceedings (Oct. 24, 2007) (RP) at 52. Detectives Talbot and Wagner went to the campsite indicated by the young man and told the two people present that they were looking for some green. The two people were later identified as Mark Heimbach and Palmer Hanson. Mr. Heimbach and Mr. Hanson directed the detectives to Michael Gerbin.

Detective Talbot entered a car with Mr. Gerbin and Mr. Heimbach and purchased marijuana from Mr. Gerbin. Detective Wagner stood outside the rear door on the passenger side. Detective Talbot stated that Mr. Hanson stood by the driver side door throughout the transaction. Detective Wagner testified he did not see Mr. Hanson around

the vehicle during the transaction, but Mr. Hanson may have been there.

Detectives Talbot and Wagner arrested Mr. Heimbach, Mr. Gerbin, and Mr. Hanson. The detectives explained that they were arresting Mr. Hanson because he “helped broker the deal.” RP at 90. During the search incident to arrest, the detectives recovered a large amount of individually-packaged bags of psilocybin mushrooms from a brown bag Mr. Hanson was carrying.

Following a bench trial, Mr. Hanson was convicted of possession of psilocybin mushrooms with intent to deliver and possession of the same mushrooms. This appeal followed.

ANALYSIS

Double Jeopardy. Both the United States Constitution and the Washington Constitution prohibit trying a person twice for the same offense. *See* U.S. Const. amend. V; Const. art. I, § 9. When the alleged criminal act violates more than one statute, the double jeopardy question is whether the legislature intended for punishment to be imposed under both statutes simultaneously. *State v. Baldwin*, 150 Wn.2d 448, 454, 78 P.3d 1005 (2003). If the statutes do not expressly allow convictions under both, then the court must look to the same evidence test or the *Blockburger*¹ test. *Id.* Under the

¹ *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

Blockburger test, two offenses are the same if they are identical in fact and in law. *Id.* (quoting *State v. Calle*, 125 Wn.2d 769, 776, 888 P.2d 155 (1995)). “If each offense includes an element not included in the other, and proof of one would not necessarily prove the other, the offenses are not constitutionally the same under this test.” *Id.*

Here, Mr. Hanson argues, and the State concedes, that his convictions for possession of psilocybin mushrooms with intent to deliver and simple possession of the same mushrooms violate double jeopardy. To prove a person violated the statute for possession with intent to deliver, one must prove: (1) possession and (2) the additional element of intent to deliver. RCW 69.50.401, .4013. Therefore, to prove possession with intent to deliver, one must necessarily prove possession.

Mr. Hanson was convicted of two offenses which are the same for double jeopardy purposes. The remedy is to vacate the lesser offense. The lesser offense is the offense which carries the shorter sentence. *State v. Weber*, 159 Wn.2d 252, 269, 149 P.3d 646 (2006). Possession with intent to deliver has a standard range of 12+ to 20 months and possession has a standard range of 0 to 6 months. Possession carries the lesser sentence. We vacate that conviction and remand for resentencing based solely on his conviction for possession with intent to deliver.

Probable Cause. The admissibility of evidence is reviewed for an abuse of discretion. *State v. Tan Le*, 103 Wn. App. 354, 358, 12 P.3d 653 (2000). Warrantless searches and seizures are prohibited under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution, unless they fall under one of the narrowly drawn exceptions. A search incident to a lawful arrest is one of the exceptions to the warrant requirement. *State v. Moore*, 161 Wn.2d 880, 885, 169 P.3d 469 (2007) (quoting *State v. O’Neill*, 148 Wn.2d 564, 584, 62 P.3d 489 (2003)). A lawful arrest requires probable cause. “Probable cause exists when the arresting officer has ‘knowledge of facts sufficient to cause a reasonable [officer] to believe that an offense has been committed’ at the time of the arrest.” *Id.* (quoting *State v. Potter*, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006)).

Mr. Hanson argues that the mere act of pointing out another individual who was selling drugs and then standing nearby while the transaction occurred was insufficient to establish probable cause. Mr. Hanson cites two cases in support of his position—*State v. Gladstone*² and *State v. Amezola*.³ In both cases, the court found insufficient evidence to convict the defendants of accomplice liability for drug transactions. These cases did not

² *State v. Gladstone*, 78 Wn.2d 306, 474 P.2d 274 (1970).

³ *State v. Amezola*, 49 Wn. App. 78, 741 P.2d 1024 (1987).

consider probable cause.

Mr. Hanson argues that *Gladstone* and *Amezola* are relevant because they are informative in determining what acts do not constitute a crime and, therefore, what acts should not constitute probable cause for committing that crime. While the cases are informative, the fact remains that to convict, a crime must be proven beyond a reasonable doubt but an arresting officer needs only probable cause to arrest.

Here, Mr. Hanson was at the campsite where marijuana was being sold. He, along with Mr. Heimbach, directed the detectives to where they could buy marijuana. While Mr. Hanson stood next to the car, Mr. Heimbach and Mr. Gerbin completed a drug sale in the car. While *Gladstone* and *Amezola* support the argument that, without anything more, Mr. Hanson could not be convicted of accomplice liability to this transaction, a reasonable officer could believe Mr. Hanson was acting as an accomplice to the drug transaction. That is all that is required for a lawful arrest.

Because the arrest was lawful, the search incident to arrest was lawful. The trial court did not err by admitting evidence found in the search incident to arrest.

We vacate the possession conviction, and we remand for resentencing on the

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possession with intent to deliver conviction.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kulik, A.C.J.

WE CONCUR:

Brown, J.

Korsmo, J.