STATE OF MINNESOTA
IN COURT OF APPEALS
A06-0084

State of Minnesota,
Respondent,

vs.

Seta Samarea Hines,
Appellant.

Filed May 6, 2008
Affirmed
Lansing, Judge

Rice County District Court
File No. K7-04-1593

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

G. Paul Beaumaster, Rice County Attorney, Courthouse, 218 Third Street, Faribault, MN 55021 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Lansing, Presiding Judge; Worke, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

LANSING, Judge

Seta Hines was convicted of third-degree controlled substance crime for the sale of cocaine. In a petition for postconviction relief, Hines raised an equal-protection challenge that is based on her argument that the sale of cocaine is also proscribed by the fourth-degree controlled-substance-crime statute. We conclude that the statutes do not overlap. In addition, we conclude that, independent of our determination that the statutes do not overlap, Hines was not denied equal protection. Accordingly, we affirm.

F A C T S

As part of a prearranged buy-bust transaction, an informant purchased 0.8 grams of crack cocaine from Seta Hines in June 2004. Northfield police officers arrested Hines, and she was charged with third-degree controlled substance crime. After a jury trial, she was convicted and sentenced to ten years of probation.

In a petition for postconviction relief, Hines argued that her conviction violated equal protection because the sale of cocaine is prohibited by both the third- and fourth-degree controlled-substance-crime statutes. The district court relied on this court's decision in *State v. Richmond*, 730 N.W.2d 62 (Minn. App. 2007), *review denied* (Minn. June 19, 2007), and denied the petition. Hines appeals the district court's decision.

D E C I S I O N

Under the United States Constitution, no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Minnesota Constitution similarly incorporates equal-protection principles. Minn. Const.

art. I, § 2; *State v. Russell*, 477 N.W.2d 886, 889 n.3 (Minn. 1991). Equal protection generally requires that "all similarly situated individuals shall be treated alike." *Scott v. Minneapolis Police Relief Ass'n*, 615 N.W.2d 66, 74 (Minn. 2000).

The state charged Hines with third-degree controlled substance crime for the sale of cocaine. A person commits third-degree controlled substance crime by selling "one or more mixtures containing a narcotic drug." Minn. Stat. § 152.023, subd. 1(1) (2002). Cocaine is included within the statutory definition of "narcotic drug." Minn. Stat. § 152.01, subds. 3a, 10 (2002). Hines argues that the sale of cocaine also constitutes fourth-degree controlled substance crime, which occurs when a person "sells one or more mixtures containing a controlled substance classified in schedule I, II, or III." Minn. Stat. § 152.024, subd. 1(1) (2002). Cocaine is also defined as a schedule II substance. Minn. Stat. § 152.02, subd. 3(d) (2002). Because fourth-degree controlled substance crime is less severely punished and supposedly governs the same conduct, Hines argues that charging her with the third-degree offense violates equal protection because similarly situated individuals are not treated alike.

This court rejected the same argument in *State v. Richmond*, 730 N.W.2d 62 (Minn. App. 2007), *review denied* (Minn. June 19, 2007). We reject Hines's argument for the two reasons given in *Richmond*.

First, Hines's premise that the sale of cocaine violates both the third- and fourth-degree controlled-substance-crime statutes is incorrect. Under the statutory classification system, the sale of less than three grams of cocaine is exclusively governed by the more specific offense of third-degree controlled substance crime. *Richmond*, 730 N.W.2d at

67-70. Because a person cannot be charged with fourth-degree controlled substance crime for the sale of less than three grams of cocaine, no equal-protection issue exists.

Second, even if the statutes did overlap, Hines would be unable to establish an equal-protection violation. The existence of overlapping statutes does not violate the federal equal-protection clause. *Id.* at 72 (citing *United States v. Batchelder*, 442 U.S. 114, 124, 99 S. Ct. 2198, 2204 (1979)). And Hines has not provided any reason to adopt a more demanding standard under the Minnesota Constitution in this case. Hines's argument is rooted in a scholarly discussion of overlapping criminal statutes, which states:

> [I]t is useful to think about three types of situations in which a defendant's conduct may fall within two statutes. They are: (1) where one statute defines a lesser included offense of the other and they carry different penalties (e.g., whoever carries a concealed weapon is guilty of a misdemeanor; a convicted felon who carries a concealed weapon is guilty of a felony); (2) where the statutes overlap and carry different penalties (e.g., possession of a gun by a convicted felon, illegal alien or dishonorably discharged serviceman is a misdemeanor; possession of a gun by a convicted felon, fugitive from justice, or unlawful user of narcotics is a felony); (3) where the statutes are identical (e.g., possession of a gun by a convicted felon is a misdemeanor; possession of a gun by a convicted felon is a felony).

4 Wayne R. LaFave, et al., Criminal Procedure § 13.7(a) at 254-55 (3d ed. 2007). The first category—involving lesser-included offenses—is "certainly unobjectionable" because the statutes "afford guidance to the prosecutor, but . . . do not foreclose the prosecutor from deciding in a particular case that, notwithstanding the presence of one of the aggravating facts, the defendant will still be prosecuted for the lesser offense." *Id.* at 256.

Technically, because cocaine is statutorily defined as both a narcotic drug and a schedule II substance, third- and fourth-degree controlled substance crimes would not simply be lesser-included offenses. Instead, the statutes would fall into the second, more problematic, category of overlapping offenses. As a practical matter, however, no danger of unequal treatment exists. Third-degree controlled substance crime is quite obviously more serious than the fourth-degree offense. Thus, the statutory classification system provides the same guidance to prosecutors that exists in the case of lesser-included offenses. Because prosecutorial guidance is provided by the obvious difference in the degree of severity between the third-degree and fourth-degree classifications, there is little danger and no evidence of prosecutors using the overlapping statutes in a discriminatory way. *Richmond*, 730 N.W.2d at 72-73. Therefore, even if the statutes did overlap, Hines's argument would provide no basis for concluding that equal protection was violated. *Id.*

Affirmed.