STATE OF MINNESOTA
IN COURT OF APPEALS
A10-180

State of Minnesota,
Respondent,

vs.

Gregory Allen McKenna,
Appellant.

Filed January 11, 2011
Affirmed
Minge, Judge

Hennepin County District Court
File No. 27-CR-09-852

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

William M. Ward, Hennepin County Chief Public Defender, Peter W. Gorman, Assistant Public Defender, Minneapolis, Minnesota (for appellant)

Considered and decided by Lansing, Presiding Judge; Minge, Judge; and Crippen, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving 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

MINGE, Judge

Appellant challenges his conviction for possession of a controlled substance under the serialized-prosecution and multiple-punishment provision of Minn. Stat. § 609.035, subd. 1 (2008). Because we find that the offenses were not part of a single behavioral incident, we affirm.

FACTS

In October 2008, appellant Gregory McKenna was pulled over by airport police for speeding.[1] During the traffic stop, McKenna admitted to having a canceled driver's license and having cocaine in his system. The officers also found a knife in the vehicle, a knife on McKenna's person, and two baggies of powder on the floor in front of the passenger seat. One of the baggies was determined to contain methamphetamine. The other contained residue and was never tested. McKenna was arrested and agreed to provide a urine sample. The urinalysis confirmed the presence of amphetamine/methamphetamine. He was booked for felony fifth-degree controlled-substance possession, gross-misdemeanor second-degree driving while impaired, driving after cancellation, and possession of a dangerous weapon.

Two days after the arrest, a detective for the Metropolitan Airport Commission Police Department filed a misdemeanor/gross-misdemeanor complaint charging McKenna with driving under the influence of a hazardous substance, driving after cancellation, and possession of a dangerous weapon. McKenna posted bail, retained

[1] The facts of the case were stipulated to under Minn. R. Crim. P. 26.01, subd. 3.

private counsel, and made his first appearance on those charges on November 14, 2008. On February 27, 2009, he pleaded guilty to third-degree driving under the influence of a hazardous substance, and the other two charges in that complaint were dismissed.

The same detective who filed the misdemeanor complaint referred the possession offense to the Hennepin County Attorney's Office under a different case number. The Hennepin County attorney then charged McKenna with felony fifth-degree controlled-substance possession. McKenna appeared in court on that felony charge on February 24, 2009 and was assigned a public defender.

In April 2009, McKenna filed a motion to dismiss for serialized prosecution and double punishment, which was denied. The district court also denied his motion to reconsider. In November 2009, the district court heard the felony matter as a stipulated-facts proceeding under Minn. R. Crim. P. 26.01, subd. 3, and found McKenna guilty of fifth-degree possession of methamphetamine. He was sentenced, and this appeal followed.

D E C I S I O N

The basic issue on appeal is whether the felony-possession prosecution violates either the serialized-prosecution or the multiple-punishment prohibitions in Minn. Stat. § 609.035, subd. 1. When the facts are not in dispute, whether multiple offenses are part of a single behavioral incident is a question of law that we review de novo. *State v. Marchbanks*, 632 N.W.2d 725, 731 (Minn. App. 2001). The burden is on the state to establish that multiple offenses are not a single behavioral incident. *State v. Barnes*, 618 N.W.2d 805, 813 (Minn. App. 2000), *review denied* (Minn. Jan. 16, 2001).

Minn. Stat. § 609.035, subd. 1, states, in relevant part:

> [I]f a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses and a conviction or acquittal of any one of them is a bar to prosecution for any other of them. All the offenses, if prosecuted, shall be included in one prosecution which shall be stated in separate counts.

When multiple offenses arise from the same behavioral incident, the statute protects criminal defendants from serialized prosecutions and multiple sentences. *State v. Schmidt*, 612 N.W.2d 871, 876 (Minn. 2000). The statute was intended "to broaden the protection afforded by our constitutional provisions against double jeopardy." *State v. Johnson*, 273 Minn. 394, 400, 141 N.W.2d 517, 522 (1966). It protects a defendant from being "unduly harassed by repeated prosecutions for the same conduct." *Id.* It also protects against exaggerating the criminality of conduct by making punishment and prosecution commensurate with the defendant's culpability. *State v. Williams*, 608 N.W.2d 837, 841 (Minn. 2000); *see also* Minn. Stat. Ann. § 609.035 Pirsig cmt. (West 2009). Serialized prosecution and double punishment both depend on the same analysis. *State v. Krech*, 312 Minn. 461, 465, 252 N.W.2d 269, 272 (1977).

The court has two tests to determine whether crimes arise from a single behavioral incident. *State v. Bauer*, __ N.W.2d __, __, 2011 WL 13757, at *2 (Minn. Jan 5, 2011). Which test is used depends on whether the crimes contain an intent element. *Id.* Here, because the possession charge is intentional and it is difficult to conclude that the driving-under-the-influence charge is not intentional, we use the two-intentional-offenses test. Under this test we examine whether the offenses can be explained without reference

to each other. *State v. Banks*, 331 N.W.2d 491, 494 (Minn. 1983) (holding unlawful possession of a firearm and fleeing the police to be separate incidents).

In this case, the decision to acquire a controlled substance and the decision to use one while driving are two separate decisions that occurred at different times and manifest two distinct errors in judgment. Possession of a controlled substance does not become illegal when the person is caught or when the drugs are used, but is a crime at the moment the drugs are acquired.[2] Acquiring the drugs is a separate, distinct decision from the driving-centered offense. A driving-under-the-influence offense does not depend on whether the ingested substance is legal. These two offenses are separate criminal acts that can be explained without reference to each other and therefore do not fit the criteria of the test.

Because we conclude that the two offenses were not part of a single behavioral incident, we affirm.

Affirmed.

Dated:

[2] Possession of a controlled substance is the key factual distinction from the DWI cases cited by appellant. *See, e.g.*, *City of Moorhead v. Miller*, 295 N.W.2d 548 (Minn. 1980) (finding a single behavioral incident for driving while intoxicated and an open-bottle violation).