

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYREE WASHINGTON,

Defendant-Appellant.

UNPUBLISHED

March 20, 1998

No. 201057

Genesee Circuit Court

LC No. 90-042914-FH

Before: Fitzgerald, P.J., and Hood and Sawyer, JJ.

PER CURIAM.

Defendant pleaded guilty to possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). He was sentenced to 41 to 240 months' imprisonment, and appeals as of right. We vacate his conviction and sentence.

On December 27, 1989, defendant, who was carrying 121 rocks of crack cocaine, was arrested at a house in Flint. On August 16, 1990, he pleaded guilty in the Genesee Circuit Court to charges stemming from that arrest, but he absconded prior to his subsequently scheduled sentencing. He was arrested in February 1992 on an unrelated narcotics offense and was placed in the Macomb County jail. In July 1993, the Genesee Circuit Court issued a writ of habeas corpus to the Macomb County Sheriff to obtain defendant for the purpose of sentencing him. Prior to the scheduled sentencing hearing, however, defendant was remanded to the custody of the U.S. Marshall after pleading not guilty to federal charges of conspiracy to possess with intent to distribute over five grams of cocaine base, 21 USC 846 and 21 USC 841(a)(1), and possession with intent to distribute over five grams of cocaine base, 21 USC 841(a)(1). The later federal charge arose out of the same December 27, 1989 incident in Flint, which led to the charges upon which defendant pleaded guilty in the Genesee Circuit Court¹. A federal jury convicted defendant on both federal counts and in February 1996, he was sentenced to concurrent terms of 120 months' imprisonment for each of the two convictions. He was incarcerated in a federal prison. Thereafter, in November 1996, defendant was finally sentenced in the Genesee Circuit Court. The judgment of sentence was entered on November 20, 1996.

Defendant argues that his state conviction and sentence arising out of the December 27, 1989 narcotics offense in Flint violates his federal and state rights to be free from double jeopardy. His claim is based on the fact that he was convicted and sentenced in federal court for the same illegal conduct that formed the basis of his state conviction. We agree that defendant's state conviction violates the Michigan State Constitution's double jeopardy provision, Const 1963, art 1, § 15. We disagree that defendant's state conviction violates his federal right to be free of double jeopardy, US Const, Am V.

As a preliminary matter, we note that the record is unclear as to whether defendant properly preserved this issue for appeal. Even if it was not properly preserved, however, defendant's double jeopardy challenge will be addressed on appeal because it presents a significant constitutional issue. *People v Pitts*, 222 Mich App 260, 272; 564 NW2d 93 (1997).

"The double jeopardy provisions of both the United States Constitution and the Michigan Constitution are intended to protect citizens from suffering multiple punishments and successive prosecutions for the same offense." Const 1963, art 1, § 15; US Const, Am V; *People v Duranseau*, 221 Mich App 204, 206; 561 NW2d 111 (1997). Federal precedent holds, however, that a defendant may be prosecuted in state court subsequent to a federal court prosecution arising out of the same illegal activity, and that such a subsequent prosecution does not constitute double jeopardy. *Heath v Alabama*, 474 US 82, 88-89; 106 S Ct 433; 88 L Ed 2d 387 (1985); *Bartkus v Illinois*, 359 US 121, 137; 79 S Ct 676; 3 L Ed 2d 684 (1959); *People v Gay*, 407 Mich 681, 693; 289 NW2d 651 (1980); *People v Cooper*, 398 Mich 450, 456; 247 NW2d 866 (1976). Therefore, we hold that defendant's subsequent state court conviction did not violate his federal right to be free from double jeopardy under US Const, Am V².

Michigan precedent holds opposite to federal precedent. The current state of the law under Const 1963, art 1, § 15 was delineated by the Court in *Cooper, supra*. In *Cooper, supra* at 460, the Court ruled that "[w]hen state and Federal interests do coincide, prosecution by one sovereign will satisfy the need of the other." It then held that "Const 1963, art 1 § 15 prohibits a second prosecution for an offense arising out of the same criminal act unless it appears from the record that the interests of the State of Michigan and the jurisdiction which initially prosecuted are substantially different." *Id.* at 461. In *Gay, supra* at 694-695, the Court clarified that only in rare instances will the social interests of the state not be addressed by the federal prosecution such that a second, state prosecution is permissible.

A recent panel of this Court confirmed that *Cooper* remains valid law in Michigan. *People v Childers*, 218 Mich App 431, 439; 554 NW2d 336 (1996), lv gtd 456 Mich 902 (1997). It must be noted, however, that three justices recently advocated overruling *Cooper* in *People v Mezy*, 453 Mich 269; 551 NW2d 389 (1996), and the fact that leave has been granted in *Childers, supra* indicates that the issue may again be revisited by the Supreme Court. Nevertheless, *Cooper* is binding on this Court and must be followed.

In *Cooper, supra* at 461 the Court set forth three factors that need to be analyzed when determining whether the federal prosecution satisfies the state's interests such that a subsequent state prosecution will violate the double jeopardy provision:

[W]hether the maximum penalties of the statutes involved are greatly disparate, whether some reason exists why one jurisdiction cannot be entrusted to vindicate fully another jurisdiction's interests in securing a conviction, and whether the differences in the statutes are merely jurisdictional or are more substantive.

Plaintiff does not contest that the factors weigh in favor of a determination that the federal prosecution satisfied this state's interest in this case.

Applying the *Cooper* factors, we are constrained to hold that defendant's state conviction constituted double jeopardy because he was previously convicted for this activity in federal court. It is clear that the federal prosecution satisfied this state's interest in exacting punishment for defendant's crime. The maximum penalties of the statutes involved are not greatly disparate although they are different. MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), the state statute under which defendant was prosecuted, carries a potential sentence of one to twenty years' imprisonment. The state guideline recommendation was 41 to 240 months' imprisonment. 21 USC 841(a)(1), the federal statute under which defendant was prosecuted, carries a sentence of five to forty years' imprisonment for the charges upon which he was convicted. See 21 USC 841(b)(1)(B). The federal guideline recommendation was 188 to 235 months' imprisonment. Although the federal penalty is more severe than the state penalty, nothing in the penalties suggest that the separate prosecutions advanced different interests. See *Childers*, *supra* at 443.

With regard to the second factor, the inquiry is whether there is a basis "to conclude that the Federal court could not adequately satisfy the state interest in obtaining a conviction." *Gay*, *supra* at 702. Stated another way, courts must determine whether "Michigan's interests in a conviction were vigorously, competently and swiftly pursued by Federal authorities." *Id.* at 703. Based on the record, we cannot render a conclusion that Michigan's interests in obtaining a conviction were not satisfied by the Federal prosecution.

Finally, with regard to the third factor, a determination must be made as to whether the statutes are substantively different. In order to make such a determination, a court must consider whether the "statutes differ as to the type of conduct prohibited, as to the interests sought to be protected, and as to the proofs required to establish the prohibited offense." *People v Formicola*, 407 Mich 293, 300; 284 NW2d 334 (1979). In this case, both statutes prohibit the same conduct; that being the manufacture or delivery of a controlled substance and the possession with intent to manufacture or distribute a controlled substance. 21 USC 841(a)(1); MCL 333.7401; MSA 14.15(7401). Both statutes seek to protect and promote public health and welfare. See *United States v Holmes*, 838 F2d 1175, 1177 (CA 11, 1988); *United States v Jeffers*, 524 F2d 253, 257 (CA 7, 1975); *People v Trupiano*, 97 Mich App 416, 419-420; 296 NW2d 49 (1980). Finally, similar proofs are required to establish the prohibited offenses. Because the statutes do not differ as to the type of conduct prohibited, the interests sought to be protected, and the proof required to establish the offenses, we find that the differences in the statutes are not substantive.

Because it appears from the record that the interests of the State and the Federal government were not substantially different, the subsequent state conviction violated defendant's right to be free from

double jeopardy under Const 1963, art 1, § 15. Moreover and more importantly, we find that defendant's conviction violated MCL 333.7409; MSA 14.15(7409). This statute applies only to controlled substance offenses and appears to be an absolute bar to state prosecution where a defendant has already been prosecuted under federal law. Accordingly, we vacate defendant's conviction and sentence.

The remaining issue on appeal is rendered moot by our determination.

Defendant's conviction for possession with intent to deliver less than 50 grams of cocaine is vacated.

/s/ E. Thomas Fitzgerald

/s/ Harold Hood

/s/ David H. Sawyer

¹ We reject plaintiff's argument that there is no basis for determining that the federal case actually arose out of the same criminal conduct or transaction as the state case. It is clear from the record that the federal conviction under 21 USC 841(a)(1) and the state conviction arose out of the same illegal conduct, which took place in December, 1989 in the city of Flint.

² Plaintiff argues that the state court conviction in this case occurred prior to the federal court conviction and that because the state court conviction was first, the double jeopardy argument should have been pursued in the federal court. We disagree. Simply because defendant pleaded guilty to the state charges prior to his federal trial, conviction and sentence does not mean that the state court conviction occurred first. In Michigan, jeopardy does not attach in a case where a plea bargain has been entered until sentencing. *People v Johnson*, 396 Mich 424, 431 n3; 240 NW2d 729 (1976); *People v Leonard*, 144 Mich App 492, 494-495; 375 NW2d 745 (1985). Defendant's sentencing on the state charges occurred after the federal trial, conviction, and sentence. Therefore, for jeopardy purposes, the state court conviction occurred subsequent to the federal court conviction.