

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHULEY D. HEAD,

Defendant-Appellant.

UNPUBLISHED

April 21, 1998

No. 200972

Oakland Circuit Court

LC No. 89-091511-FH

Before: Doctoroff, P.J., and Reilly and Allen*, JJ.

PER CURIAM.

In 1989, defendant was convicted of possession with intent to deliver between 225 and 650 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii), and possession of marijuana, MCL 333.7403(2)(d); MSA 14.15(7403)(2)(d). On appeal, this Court reversed and remanded for a new trial. Following a jury trial, defendant was convicted of possession with intent to deliver 225 grams or more, but less than 650 grams of cocaine, and possession with intent to deliver marijuana, MCL 333.7401(2)(d); MSA 14.15(7401)(2)(d). Defendant pleaded guilty of habitual offender, third offense, MCL 769.11(1)(a); MSA 28.1083(1)(a), and was sentenced to ten to sixty years' imprisonment. On appeal, this Court vacated defendant's conviction for possession with intent to deliver marijuana, determining that prosecution of this charge was barred by double jeopardy, given that defendant was convicted of possession of marijuana at the first trial. *People v Head*, 211 Mich App 205, 212-213; 535 NW2d 563 (1995).¹ On remand, the trial court found that defendant was not prejudiced by trial on the jeopardy-barred offense (possession with intent to deliver marijuana) in conjunction with the nonjeopardy-barred offense (possession with intent to deliver cocaine) and entered a conviction for possession of marijuana. The trial court determined that resentencing was not necessary and sentenced defendant to time served on the marijuana count. Defendant appeals as of right from the trial court's finding of no prejudice. We affirm.

Defendant argues the trial court's finding is clearly erroneous because it failed to even attempt to question the jurors to determine whether the submission of the marijuana charge prejudiced defendant. We disagree. First, we note that this Court clearly placed the burden on defendant to demonstrate

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

prejudice. *Head, supra* at 213. Second, we conclude that vacating defendant's conviction for possession with intent to deliver marijuana and entering a conviction of possession of marijuana adequately cured the double jeopardy violation because defendant failed to demonstrate that but for the improper inclusion of the charge, the result of the proceeding would have been different.

Defendant's theory at trial was that the prosecution could not link him to the drugs. Thus, defendant disputed possession. In order for the jury to convict defendant of possession with intent to deliver marijuana, it had to find that the prosecution proved the element of possession. See *People v Wolfe*, 440 Mich 508, 516-517; 489 NW2d 748, modified 441 Mich 1201 (1992).² Therefore, to convict defendant of the greater offense of possession with intent to deliver, it was necessary for the jury to find defendant guilty of the lesser offense of possession. In *Morris v Mathews*, 475 US 237; 106 S Ct 1032; 89 L Ed 2d 187 (1986), the United States Supreme Court noted that "where it is clear that the jury necessarily found that the defendant's conduct satisfies the elements of the lesser included offense, it would be incongruous always to order yet another trial as a means of curing a violation of the Double Jeopardy Clause." *Id.* at 247. Unlike the defendant in *Morris*, defendant in the present case does not assert that evidence admissible to prove the greater crime was not admissible to prove the lesser crime. *Id.* at 247-248. See also *Jones v Thomas*, 491 US 376, 385 n 3; 109 S Ct 2522; 105 L Ed 2d 322 (1989). In fact, the same evidence would have been used to prove the crime of simple possession.

Defendant has also failed to demonstrate a reasonable probability that, but for trial on the possession with intent to deliver marijuana offense, he would not have been convicted of the cocaine offense. The trial court correctly noted on remand that the testimony at trial clearly distinguished between the marijuana and cocaine crimes. In addition, the jury was instructed that the marijuana and cocaine charges were distinct offenses that must be deliberated on separately. Therefore, we conclude the trial court did not err in finding that defendant failed to establish prejudice. *Head, supra* at 213.

Affirmed.

/s/ Martin M. Doctoroff

/s/ Maureen Pulte Reilly

/s/ Glenn S. Allen, Jr.

¹ This Court noted that conviction of a lesser charge constitutes an acquittal of higher charges. *Head, supra* at 212.

² Possession may be actual or constructive. "The essential question is whether the defendant had dominion or control over the controlled substance." *People v Konrad*, 449 Mich 263, 271-273; 536 NW2d 517 (1995).