

## IN THE MICHIGAN COURT OF APPEALS

### ORDER

Re: **People of MI v Keenan Clarence Nielbock**

Docket No. **298814**

L.C. No. **09-004763-FH**

Donald S. Owens, Judge, acting under MCR 7.211(E)(2), orders:

The prosecutor's confession of error is accepted and defendant's convictions and sentences for possession of less than 25 grams of cocaine and possession of less than 25 grams of heroin are REVERSED. The possession convictions combined with the convictions for possession with intent to deliver less than 50 grams of cocaine and possession with intent to deliver less than 50 grams of heroin involving the same drugs violate the double jeopardy clause of the federal and state constitutions. US Const, Am V; Const 1963, art 1, § 15. The test for determining whether multiple convictions violate the double jeopardy clause is whether each offense requires proof of an element that the other does not. *People v Smith*, 478 Mich 292, 305; 733 NW2d 351 (2007), quoting *Blockburger v United States*, 284 US 299 at 304; 52 S Ct 180; 76 L Ed 306 (1932). Because the elements of possession of less than 25 grams of cocaine and possession of less than 25 grams of heroin are subsumed by the elements of possession with intent to deliver less than 50 grams of cocaine and possession with intent to deliver less than 50 grams of heroin, the possession offenses do not require proof of an element that the delivery offenses do not and thus violate the double jeopardy clause. The convictions and sentences for possession of less than 25 grams of cocaine and possession of less than 25 grams of heroin are VACATED.

As the concurrent convictions for possession of less than 25 grams of cocaine and possession of less than 25 grams of heroin were used in scoring prior record variable 7 and were a factor in the calculation of defendant's remaining sentences, the remaining sentences are VACATED and the matter is REMANDED to the trial court for resentencing based on accurate information. *People v Jackson*, 487 Mich 783; 790 NW2d 340 (2010).



A true copy entered and certified by Larry S. Royster, Chief Clerk, on

JUN 02 2011

Date

  
Chief Clerk