STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0785

State of Minnesota,
Respondent,

vs.

Andrew Joseph Forcier,
Appellant.

Filed February 19, 2013
Reversed
Rodenberg, Judge

Sibley County District Court
File No. 72-CR-11-88

Lori Swanson, Attorney General, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Michael F. Cromett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Larkin, Judge; and Rodenberg, Judge.

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

RODENBERG, Judge

Appellant challenges his conviction of third-degree controlled substance crime (sale) following a stipulated-facts trial. Because the district court committed reversible error by convicting appellant of an uncharged offense that was not a lesser-included

offense of the crime charged, and because we cannot remand for a new trial without violating appellant's right against double jeopardy, we reverse.

FACTS

On March 29, 2011, a drug task force operating in Sibley County executed a search warrant on appellant Andrew Joseph Forcier's residence. The resulting search yielded more than 10 grams of methamphetamine, $3,702 in cash, multiple scales, plastic bags, methamphetamine pipes, surveillance equipment, and accounting records. Appellant was charged with one count of first-degree controlled substance crime (sale) in violation of Minn. Stat. § 152.021, subd. 1(1) (2010). The charge was based on an allegation that appellant possessed more than 10 grams of methamphetamine with the intent to sell it. Appellant moved to suppress the evidence obtained against him, arguing that the search warrant had been issued without probable cause. The district court denied appellant's motion to suppress.

Appellant and the state agreed to submit the matter to the district court for a stipulated-facts trial. The prosecutor outlined the agreement, stating:

> [T]his matter will be submitted to the Court on a stipulated facts trial. The statutes under which we will be submitting this for trial, it will be an amended charge of Possession of a Controlled Substance in the Third Degree. The charging provision of that statute is 152.023, Subd. 2(1).

For some reason not disclosed by the record, the district court subsequently returned a verdict finding appellant guilty of violating Minn. Stat. § 152.023, subd. 1(1) (2010) (third-degree sale). The district court made no finding under Minn. Stat. § 152.023, subd. 2(1) (2010) (third-degree possession), the statute to which the

prosecutor referred as the "amended charge." At sentencing, neither counsel informed the district court that it had convicted appellant of an offense different from that with which he had been charged. Appellant was sentenced to an executed term of 33 months in the custody of the commissioner of corrections by reason of the conviction under Minn. Stat. § 152.023, subd. 1(1).

Appellant filed an appeal, but the state did not respond. Accordingly, we decide this matter on the merits pursuant to Minn. R. Civ. App. P. 142.03.

D E C I S I O N

Appellant argues that the district court improperly convicted him of third-degree controlled substance crime (sale) under Minn. Stat. § 152.023, subd. 1(1), when appellant was charged with third-degree controlled substance crime (possession) under Minn. Stat. § 152.023, subd. 2(1).[1]

"It is elementary that one must be tried and convicted only of the accused charge or a lesser included offense." *State v. Voracek*, 353 N.W.2d 219, 220 (Minn. App. 1984). Under Minnesota law, a "lesser-included offense" is defined as

> (1) [a] lesser degree of the same crime; or
> (2) [a]n attempt to commit the crime charged; or
> (3) [a]n attempt to commit a lesser degree of the same crime; or
> (4) [a] crime necessarily proved if the crime charged were proved; or

[1] Appellant's argument presupposes that the complaint, which originally charged appellant with first-degree controlled substance crime (sale) under Minn. Stat. § 152.021, subd. 1(1), was orally amended prior to the stipulated-facts trial. Because the state has waived participation in this matter and because neither party has challenged the sufficiency of the procedures used to amend the complaint, for the purpose of this appeal we accept that the complaint was effectively amended.

> (5) a petty misdemeanor necessarily proved if the misdemeanor charge were proved.

Minn. Stat. § 609.04, subd. 1 (2010); *see also State v. Gisege*, 561 N.W.2d 152, 156 (Minn. 1997) (discussing Minn. Stat. § 609.04, subd. 1).

The state and appellant agreed to submit the matter to the district court as "an amended charge" of third-degree controlled substance crime (possession) in violation of Minn. Stat. § 152.023, subd. 2(1). In order to have found appellant guilty of this charge, the district court would have had to find beyond a reasonable doubt that (1) appellant possessed one or more mixtures containing cocaine, heroin, or methamphetamine, and (2) the total weight of the mixtures possessed over a 90-day period was three grams or more. Minn. Stat. § 152.023, subd. 2(1); *see also 10A Minnesota Practice*, CRIMJIG 20.20 (Supp. 2012).

But the district court found appellant guilty of third-degree controlled substance crime (sale) in violation of Minn. Stat. § 152.023, subd. 1(1). Under this statute, the definition of "sell" includes "to possess with intent" to "sell, give away, barter, deliver, exchange, distribute or dispose of to another, or to manufacture." Minn. Stat. § 152.01, subd. 15a (2010); *see also 10A Minnesota Practice*, CRIMJIG 20.16 (Supp. 2012). This is the definition of "sell" used in the original complaint, which alleged that appellant possessed methamphetamine with intent to sell. Thus, in order to find appellant guilty of third-degree controlled substance crime (sale), the district court needed to find beyond a reasonable doubt that (1) appellant possessed one or more mixtures containing a narcotic

substance and (2) appellant possessed said mixtures with the intent to sell them. Minn. Stat. § 152.023, subd. 1(1); *see also* CRIMJIG 20.16.

Under the state's theory of the case, both third-degree sale or third-degree possession would have required the state to prove possession of illegal drugs. However, because a third-degree possession charge requires proof of the weight of the drugs possessed, which a third-degree sale charge does not, and because the sale charge requires proof of intent that the possession charge does not, the two charges are not lesser-included offenses with respect to each other. Therefore, appellant's conviction was not for the charged offense or for a lesser-included offense, and this court must reverse. *See Voracek*, 353 N.W.2d at 220.

The question then becomes whether the reversal should be outright or whether we should, or even can, remand to the district court for trial on the amended charge of third-degree possession. In *Voracek*, the defendant was charged only with driving while impaired (DWI) under Minn. Stat. § 169.121, subd. 1(a) (1984). *Id.* However, following a bench trial, the district court found the evidence insufficient to convict appellant of that charge, but convicted him instead of DWI under Minn. Stat. § 169.121, subd. 1(d) (1984). *Id.* Noting that the conviction was not for the charged offense or for a lesser-included offense, this court reversed the conviction without remand. *Id.*

The federal and state constitutions prohibit twice putting a criminal defendant in jeopardy of punishment for the same offense. U.S. Const. amends. V, XIV; Minn. Const. art. I, § 7; *Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 2062 (1969) (incorporating the Double Jeopardy Clause of the Fifth Amendment against the states

through the Due Process Clause of the Fourteenth Amendment). These provisions prohibit a second prosecution for the same offense after an acquittal or conviction. *State v. Jeffries*, 806 N.W.2d 56, 60–61 (Minn. 2011) (citing *Brown v. Ohio*, 432 U.S. 161, 165, 97 S. Ct. 2221, 2225 (1977)). For double-jeopardy purposes, whether an acquittal or a conviction has occurred is not determined by "the form of the judge's action" but by examining "whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." *Id.* at 571, 97 S. Ct. at 1354–55.

A trial on stipulated facts does not involve a concession of guilt, nor is it the functional equivalent of a guilty plea. *State v. Johnson*, 689 N.W.2d 247, 252–53 (Minn. App. 2004), *review denied* (Minn. Jan. 20, 2005). Instead, it is a bench trial. *See* Minn. R. Crim. P. 26.01, subd. 3(d) (stating that a stipulated-facts trial is conducted under the rules governing bench trials). In a bench trial, jeopardy attaches when the judge begins to receive evidence. *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569, 97 S. Ct. 1349, 1353 (1977).

In this case, because the district court accepted into evidence the stipulated facts offered by the parties, jeopardy attached. The district court then convicted appellant of third-degree controlled substance crime (sale) based on its determination that appellant had possessed 14.4 grams of methamphetamine with the intent to sell. In doing so, the district court resolved some of the factual elements of the charge of third-degree controlled substance crime (possession). Therefore, pursuant to *Martin Linen Supply Co.*, appellant's jeopardy had ended. *See id.*

The fact that the district court was silent on the possession charge in its verdict finding appellant guilty of the uncharged sale offense does not alter this conclusion. "[A] verdict of acquittal is final, ending a defendant's jeopardy, and even when 'not followed by any judgment, is a bar to a subsequent prosecution for the same offense.'" *Green v. United States*, 355 U.S. 184, 188, 78 S. Ct. 221, 223–24 (1957) (quoting *United States v. Ball*, 163 U.S. 662, 671, 16 S. Ct. 1192, 1195 (1896)).

In *Green*, appellant was charged with first-degree murder and the jury convicted him of the lesser offense of second-degree murder. *Id.* at 190, 78 S. Ct. at 225. Thereafter, the jury

> was dismissed without returning any express verdict on [the first-degree murder] charge and without Green's consent. Yet it was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so. Therefore it seems clear, under established principles of former jeopardy, that Green's jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for that offense.

Id. at 191, 78 S. Ct. at 225.

Similarly, in this case the district court had a full opportunity to return a verdict on the amended charge of third-degree controlled substance crime (possession). It did not do so despite resolving some of the factual elements of that offense. Appellant was subjected to jeopardy on that charge and that jeopardy ended with a conviction that must be reversed as discussed above. Because the district court's ruling was effectively an acquittal on the possession charge, appellant cannot be required to stand trial on the possession charge without violating the prohibition against double jeopardy.

We are constitutionally constrained to reverse and we are constitutionally prohibited from remanding for another trial. Therefore, we do not reach appellant's other assignments of error.

Reversed.