State v. Chhong

Court of Appeals of Washington, Division Three

June 12, 2012, Filed

No. 29883-3-III

Reporter
2012 Wash. App. LEXIS 1408; 2012 WL 2109254

THE STATE OF WASHINGTON, *RESPONDENT*, v. KOUY GUY CHHONG, *APPELLANT*.

NOTICE: RULES OF THE WASHINGTON COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE WASHINGTON RULES OF COURT.

Subsequent History: Reported at *State v. Chhong, 2012 Wash. App. LEXIS 1480 (Wash. Ct. App., June 12, 2012)*

Prior History: [*1] Appeal from Grant Superior Court. Docket No: 10-1-00217-3. Judgment or order under review. Date filed: 04/25/2011. Judge signing: Honorable Evan E Sperline.

Counsel: *Andrea Burkhart*, Burkhart & Burkhart PLLC, Walla Walla, WA, for Appellant(s).

D. Angus Lee, Grant County Prosecuting Attorney, Ephrata, WA; *Edward Asa Owens*, *Steven Peter Johnson Jr.*, Grant County Prosecutor's Office, Ephrata, WA, for Respondent(s).

Judges: AUTHOR: Kevin M. Korsmo, C.J. WE CONCUR: Stephen M. Brown, J., Laurel H. Siddoway, J.

Opinion by: Kevin M. Korsmo

Opinion

¶1 Korsmo, C.J. — Kuoy Guy Chhong challenges the trial court's refusal to merge two of his five felony convictions and also presents several pro se contentions. There was no error. The convictions are affirmed.

FACTS

¶2 Mr. Chhong was a passenger in a car stopped for speeding. A backpack at his feet contained a stolen handgun, marijuana, psychedelic mushrooms, $3,200 cash, scales, and other paraphernalia associated with drug usage or distribution. He admitted ownership of the backpack.

¶3 A jury ultimately concluded that Mr. Chhong was guilty on five felony counts: (1) possession of a stolen firearm, (2) possession of marijuana with intent to deliver, (3) possession of psilocin with intent to deliver, [*2] (4) possession of more than 40 grams of marijuana, and (5) possession of psychedelic mushrooms. The jury also found that counts two and three were committed while armed with a firearm.

¶4 At sentencing, the trial court merged count five into count three. The court also declined to merge count four into count two. The court then imposed four concurrent terms of confinement, the two largest of which were for 54 months. Mr. Chhong then timely appealed to this court.

ANALYSIS

¶5 Counsel argues that the trial court erred in its merger decision concerning the two marijuana charges. Pro se, Mr. Chhong presents three claims in his Statement of Additional Grounds (SAG). We first will address the merger argument before turning to Mr. Chhong's pro se arguments.

¶6 *Merger.* Appellant argues that count four should merge with count two because it elevated the offense in count two. It did not.

¶7 Whether or not multiple punishments are permitted for the same criminal act is largely a question of legislative intent. *State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995)*. Courts apply the test of *Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932)*, to determine whether or not multiple punishments [*3] are authorized. That test determines whether two crimes are the same offense by seeing if each crime requires proof of elements not found in the other offense. *Blockburger, 284 U.S. at 304*. In effect, then, the *Blockburger* test prohibits multiple convictions when one crime is a lesser offense of the greater crime. In addition to comparing elements of the offenses, Washington courts also look at whether the evidence proving one crime also proved the second crime. *In re Pers. Restraint of Orange, 152 Wn.2d 795, 820-21, 100 P.3d 291 (2004)*.

¶8 In the context of overlapping criminal behavior that violates more than one statute, this state also recognizes that offenses will merge when one crime elevates the degree of another and there is no independent criminal purpose to the multiple offenses. *State v. Freeman, 153 Wn.2d 765, 772-73, 108 P.3d 753 (2005)*.

¶9 Appellant properly recognizes that the two offenses have different elements. Count two required proof of possession of some amount of marijuana and proof of intent to distribute the substance. *RCW 69.50.401(1)*. Count four required proof of possession of marijuana in excess of 40 grams. *RCW 69.50.4013*. In light of these differences, the two [*4] crimes are not the same under the *Blockburger* analysis. Accordingly, appellant's sole argument is that the felony marijuana possession offense elevated the delivery offense. It did not.

¶10 Initially, we note that the crime of delivery of a controlled substance does not have multiple degrees. There is only one crime of delivery of a controlled substance. On this basis alone, appellant's "elevation" argument fails. It also fails on the behavioral level. A person commits the crime of delivery of a controlled substance when she or he delivers *any* amount of a controlled substance. *RCW 69.50.401(1)*; *State v. Jones, 25 Wn. App. 746, 749, 610 P.2d 934 (1980)*. A person commits felony level possession of marijuana by possessing more than 40 grams of the substance. *RCW 69.40.401*; *Jones, 25 Wn. App. at 749*. The quantity of marijuana does not elevate or in any other manner change the delivery offense.

¶11 Merger does apply when one crime is a constituent element of a greater offense. An example is found in the robbery and assault statutes, the subject of the analysis in *Freeman*. There, one of the defendants had been convicted of both first degree robbery and second degree assault after an incident where [*5] he injured a woman with a punch prior to taking property from her. *153 Wn.2d at 770*. Since the infliction of injuries was necessary to constitute a first degree robbery instead of a second degree robbery, the assaultive conduct elevated the crime. Therefore the crimes merged. *Id. at 778*.

¶12 Other divisions of this court previously have rejected arguments similar to what appellant raises here. *State v. Moore, 54 Wn. App. 211, 219-20, 773 P.2d 96 (1989)*; *Jones, 25 Wn. App. at 749-50*. [1] *Jones* involved delivery of marijuana and possession of marijuana in excess of 40 grams. *25 Wn. App. at 748*. The court concluded, solely on the basis of the same evidence test that the two offenses were not the same. *Id. at 749-50*. In *Moore*, the appellant argued that felony possession merged into his conviction for manufacturing marijuana. Relying upon *Jones*, the *Moore* court rejected the argument on the basis that no specific quantity was necessary to support a manufacturing conviction. *54 Wn. App. at 219-20*.

¶13 Similar to *Moore*, there is no [*6] merger here because the felony possession charge simply did not elevate or otherwise alter the delivery count in any manner. The possession offense was unnecessary to prove any aspect of the delivery count. The trial court correctly determined that the two offenses do not merge.

¶14 *SAG Issues*. Mr. Chhong raises three claims, which we will summarily address. His first claim is that the evidence was insufficient to prove his possession of the backpack. We are required to view the evidence in a light

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[1] However, misdemeanor possession of less than 40 grams of marijuana does merge into a delivery of marijuana conviction. *State v. Rhodes*, 18 Wn. App. 191, 567 P.2d 249 (1977).

most favorable to the State and determine whether there was evidence from which the jury could find each element of the offense was proved. *State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980)*. In light of Mr. Chhong's admission to ownership of the backpack seated at his feet, the evidence was sufficient.

¶15 Mr. Chhong next argues that the jury instructions concerning the firearm enhancements improperly required unanimity. This court has already determined that this issue cannot be raised initially on appeal. *State v. Nunez, 160 Wn. App. 150, 165, 248 P.3d 103*, *review granted*, *172 Wn.2d 1004 (2011)*. Mr. Chhong does not demonstrate that the defense objected to this instruction at trial. The issue [*7] therefore is without merit.

¶16 Finally, the SAG contends that trial counsel performed ineffectively by not interviewing a witness. To prevail on this claim, Mr. Chhong must demonstrate that his counsel failed to perform to the standards of the profession and that the error rendered the verdicts unreliable. In addition, he must overcome a presumption of effectiveness; trial tactics and strategy cannot be the basis for establishing error. *Strickland v. Washington, 466 U.S. 668, 689-92, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)*.

¶17 The decision to interview a witness is a classic strategy decision. *State v. Piche, 71 Wn.2d 583, 590, 430 P.2d 522 (1967)*. Thus, Mr. Chhong cannot show that counsel erred. In addition, there is nothing in the record that explains what the witness would have testified about. Accordingly, there is no way of assessing whether the failure to call the witness was harmful or not.

¶18 The SAG does not provide any basis for relief.

¶19 Affirmed.

¶20 A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to *RCW 2.06.040*.

Brown and Siddoway, JJ., concur.