

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

John W. Keller,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff

September 1, 2023

Court of Appeals Case No.
23A-CR-557

Appeal from the Daviess Superior
Court

The Honorable Brian M. Johnson,
Special Judge

Trial Court Cause No.
14D01-2108-F2-1007

Memorandum Decision by Judge Mathias
Judges Vaidik and Pyle concur.

Mathias, Judge.

[1] John W. Keller appeals his convictions for Level 2 felony dealing in methamphetamine and Level 2 felony conspiracy to commit dealing in methamphetamine. Keller also appeals his sentence. Keller raises three issues for our review, but we need only address the following two issues:

1. Whether Keller’s two convictions violate Indiana’s substantive protections against double jeopardy.

2. Whether the trial court erred when it entered an aggregate total sentence in excess of the statutory maximum allowed under [Indiana Code section 35-50-1-2\(d\)](#).

[2] We affirm Keller’s two convictions. As for his sentence, the State concedes that the trial court erred when it imposed an aggregate maximum sentence in excess of that allowed under Indiana law. We accept the State’s concession, reverse Keller’s sentence, and remand for resentencing.

Facts and Procedural History

[3] In 2021, Keller was both a dealer in and a user of methamphetamine. He would purchase methamphetamine from his own suppliers in Ohio and Indiana. He would then “front” some of that methamphetamine to Lanny House in Washington. Tr. Vol. 4, p. 26. In exchange, Keller and House agreed that House would sell the methamphetamine to third parties and pay Keller back out of the profits. Tr. Vol. 4, p. 26.

[4] On August 20, Keller and a female friend were at House’s residence using methamphetamine. At the time, Daviess County Sheriff’s Department officers

had House's residence under surveillance. When Keller and his female friend left the residence, officers initiated a traffic stop of their vehicle. As a result of that stop, officers discovered a "large lump" of methamphetamine in Keller's pocket. Tr. Vol. 3, p. 174. That methamphetamine later measured at more than thirty grams. Officers also seized a scale and baggies from the vehicle.

- [5] The State charged Keller with Level 2 felony dealing in methamphetamine and Level 2 felony conspiracy to commit dealing in methamphetamine. A jury found Keller guilty as charged and the court entered its judgment of conviction on both counts accordingly. After a sentencing hearing, the trial court ordered Keller to serve an aggregate term of forty years with twelve years suspended to probation. This appeal ensued.

1. There is no double jeopardy violation.

- [6] On appeal, Keller first asserts that his two convictions violated Indiana's substantive protections against double jeopardy. We review whether two convictions violate Indiana's substantive protections against double jeopardy de novo. *Carranza v. State*, 184 N.E.3d 712, 715 (Ind. Ct. App. 2022).
- [7] Keller's argument invokes the test announced by our Supreme Court in *Wadle v. State*, 151 N.E.3d 227 (Ind. 2020). As we have explained:

Wadle set forth a multi-step analysis to evaluate substantive double jeopardy claims that arise when, as here, a single criminal act implicates multiple statutes with common elements. The first step is to determine whether the statutes, *either explicitly or by unmistakable implication*, allow for multiple punishments. If the

statutes allow for multiple punishments, there is no double jeopardy violation, and our inquiry ends. If the statutes are unclear, we apply our included-offense statutes. If either offense is included in the other, either inherently or as charged, we then consider whether the defendant’s actions are “so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction.” If the facts show only a single crime, judgment may not be entered on the included offense.

Garth v. State, 182 N.E.3d 905, 920 (Ind. Ct. App. 2022) (emphasis added; citations omitted), *trans. denied*.

[8] Keller’s conviction for dealing and his conviction for conspiracy to commit dealing do not implicate Indiana’s substantive protections against double jeopardy. As another panel of our Court explained in *Garth*:

The State asserts that the “conspiracy statute permits by ‘unmistakable implication’ multiple punishments: one for agreeing to commit the crime and another for actually committing the crime. Although the conspiracy offense is defined by reference to the offense itself, it contemplates a separate punishment for planning to commit the offense and actually committing the offense.” We agree. In addition to the statutes themselves, we find support for the proposition that the legislature intended multiple punishments in [Indiana Code Section 35-41-5-3](#), the statute immediately following the attempt and conspiracy statutes. [Section 35-41-5-3](#) explicitly prohibits convictions for both a conspiracy and an attempt with respect to the same underlying crime. It also prohibits convictions for both a crime and an attempt to commit the same crime. Notably, however, it does not prohibit convictions for both a crime and a conspiracy to commit the same crime. If the legislature wanted to prohibit convictions for both a crime and a conspiracy to commit

that same crime, it surely would have included such language in [Section 35-41-5-3](#). See *N.D.F. v. State*, 775 N.E.2d 1085, 1088 (Ind. 2002) (“[I]t is just as important to recognize what the statute does not say as it is to recognize what it does say.”). . . .

Id. (some citations omitted).

[9] We agree with our colleagues’ analysis in *Garth* that the statutes regarding conspiracy to commit a crime and committing the crime are, by unmistakable implication, intended to allow for multiple punishments. As the *Garth* panel suggested, where the underlying offense remains inchoate, our statutes make clear that the conspiracy and the attempt to commit the underlying offense merge into one offense. But there is no analogous statutory merger once the underlying offense is completed. The unmistakable implication of those statutes is that a completed offense is intended to be punished along with a conspiracy to commit that offense. We therefore reject Keller’s double-jeopardy argument.

2. The parties agree that the trial court erred in sentencing Keller and that remanding for resentencing is appropriate.

[10] Keller also contends that the trial court erred as a matter of law when it sentenced him to an aggregate term of forty years. The parties agree that this issue is controlled by [Indiana Code section 35-50-1-2\(d\)\(5\) \(2022\)](#), which states in relevant part that “the total of the consecutive terms of imprisonment to which the defendant is sentenced for felony convictions arising out of an episode of criminal conduct may not exceed . . . thirty-two . . . years” where the most serious crime for which the defendant is sentenced is a Level 2 felony. The

State agrees that Keller's forty-year aggregate term is in excess of that requirement, and we accept the State's concession. We therefore reverse Keller's sentence and remand for resentencing.

Conclusion

- [11] For all of these reasons, we affirm Keller's convictions for Level 2 felony dealing in methamphetamine and Level 2 felony conspiracy to commit dealing in methamphetamine. However, we reverse Keller's sentence, and we remand for resentencing.
- [12] Affirmed in part, reversed in part, and remanded for resentencing.

Vaidik, J., and Pyle, J., concur.