

MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Dwayne Loney,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 10, 2021

Court of Appeals Case No.
20A-CR-719

Appeal from the Clark Circuit
Court

The Honorable Bradley Jacobs,
Judge

Trial Court Cause Nos.
10C02-1602-F5-41, 10C02-1712-
F6-2338, 10C02-1607-F2-22

Altice, Judge.

Case Summary

[1] Dwayne Loney appeals his conviction for possession of a schedule III controlled substance, a Level 6 felony, and carrying a handgun without a license, a class A misdemeanor. Loney claims that the trial court's denial of his motion to dismiss the controlled substance charge improperly placed the burden on him to prove his innocence at trial. Loney also contends that double jeopardy principles were violated when he was convicted and sentenced for both the controlled substance charge as a Level 6 felony and the handgun charge because the enhancement of the controlled substance charge from a class A misdemeanor to a Level 6 felony was based solely on his possession of the same firearm.

[2] We affirm.

Facts and Procedural History

[3] During the evening of June 30, 2016, Clarksville Police Department Officer Levi James was patrolling the town's high crime area. At approximately 11:45 p.m., Officer James abruptly stopped his police vehicle to avoid colliding with the automobile in front of him. As that vehicle's license plate was not illuminated, Officer James activated his emergency lights, stopped the vehicle, and contacted dispatch to report his location. Officer Matthew Bauer was also radioed to the scene.

[4] As the officers approached the vehicle, Loney—the sole occupant—quickly opened the driver's side door in an aggressive manner with one hand concealed near the floorboard. Officer Bauer secured Loney as Officer James looked

inside the vehicle. The officers observed several items in plain view, including drug paraphernalia on the passenger seat and a handgun on the driver's side floorboard.

[5] Officer James determined through a computer check that Loney's driver's license was suspended and that Loney lacked a valid permit to carry a firearm. Loney was arrested and during the search of the vehicle, the officers seized 13.63 grams of methamphetamine from the center console. They also found a digital scale, baggies, a zipper pouch containing four grams of marijuana, and seven strips of Suboxone, a schedule III controlled substance. Loney admitted to Officer James that he used Suboxone and smoked marijuana. The officers also seized approximately \$550 in cash from Loney's pockets and two cell phones.

[6] On July 7, 2016, the State charged Loney with several offenses, including possession of a controlled substance, a Level 6 felony, and carrying a handgun without a license, a class A misdemeanor. Count II of the charging information stated as follows:

POSSESSION OF A CONTROLLED SUBSTANCE (LEVEL 6
FELONY) I.C. 35-48-4-7(a) and I.C. 35-48-4-7(b)

On or about June 30, 2016 in Clark County, State of Indiana, DWAYNE LONEY did knowingly or intentionally possess Buprenorphine (pure or adulterated) [Suboxone] listed in Schedule III, while . . . DWAYNE LONEY was in possession of a firearm, to-wit: Walther PPX 9mm.

Appellant's Appendix Vol. III at 72. Count VI alleged:

CARRYING A HANDGUN WITHOUT A LICENSE (CLASS
A MISDEMEANOR) I.C. 35-47-2-1.

On or about June 30, 2016 in Clark County, State of Indiana, DWAYNE LONEY did knowingly or intentionally carry a handgun, to-wit: Walther PPX 9mm . . . in or upon the defendant's vehicle or person without a license in the defendant's possession.

Id. at 73.

- [7] Prior to trial, Loney moved to dismiss the controlled substance charge because the Suboxone had not been chemically tested by the State's laboratory. The trial court denied the motion and following a two-day jury trial that concluded on September 24, 2019, Loney was found guilty as charged. Thereafter, Loney was sentenced on all offenses, including one year of incarceration for possession of the schedule III controlled substance and one year for possession of a handgun. Those sentences were ordered to run concurrently with each other.
- [8] Loney now appeals.

Discussion and Decision

A. Motion to Dismiss

- [9] Loney argues that the trial court abused its discretion in denying his pretrial motion to dismiss the controlled substance charge. Loney maintains that

because the State had not conducted a chemical test on the Suboxone, he was improperly required to prove his innocence at trial and show that the alleged Suboxone was not a controlled substance.

[10] We initially observe that due process requires the State to persuade the factfinder “beyond a reasonable doubt of every fact necessary to constitute the crime charged.” *Batchelor v. State*, 119 N.E.3d 550, 559 (Ind. 2019). The burden is on the State as part of the constitutional presumption that a defendant is innocent until proven guilty. *Austill v. State*, 745 N.E.2d 859, 861 (Ind. Ct. App. 2001), *trans. denied*.

[11] During the hearing on the pretrial motion to dismiss, the trial judge asked the prosecutor whether the substance labeled “Suboxone . . . could have been tested by the defense, if requested,” to which the prosecutor answered, “yes sir.” *Transcript Vol. II* at 136. The trial court denied the motion and Loney maintains that the exchange quoted above relieved the State of proving his guilt beyond a reasonable doubt at trial.

[12] During Loney’s jury trial, the preliminary and final instructions provided that Loney was presumed “innocent throughout each stage of the trial,” and that “when two interpretations of evidence existed, the jury was to choose the interpretation that was consistent with innocence.” *Appellant’s Appendix Vol. IV* at 12, 19, 38, 45, 51, 57. The instructions further provided that it was the State’s burden to prove Loney’s guilt beyond a reasonable doubt, that the State was required to prove all elements of the charged offenses, and that Loney was

“not required to present any evidence to prove his innocence or to prove or explain anything.” *Id.* These instructions clearly set forth the State’s burden of proof.

[13] Furthermore, we note that the State satisfied its burden of proof in this instance. The State may prove its case with or without laboratory testing of a suspected controlled substance, such as witness testimony and circumstantial evidence. *See Helton v. State*, 907 N.E.2d 1020, 1024 (Ind. 2009); *Halsema v. State*, 823 N.E.2d 668, 673 n.1 (Ind. 2005). Although chemical analysis is one way to prove the identity of a controlled substance, it is not the exclusive method of proof allowed at trial. *See Vasquez v. State*, 741 N.E.2d 1214, 1216 (Ind. 2001) (holding that the opinion of someone sufficiently experienced with a drug may establish its identity, as may other circumstantial evidence).

[14] Here, the strips that the officers seized from Loney’s vehicle were labeled “Suboxone,” and Loney admitted to the officers that he had been using that drug. *Transcript Vol. II* at 195-97, 230; *Exhibit 3*, 5. The State proved the identity of the substance by way of the labels on the substance and the admissions that Loney made to the police officers. And Loney did not object when the Suboxone strips were identified as such and admitted into evidence.

[15] In short, the record shows that the burden of proof remained with the State to establish Loney’s guilt beyond a reasonable doubt throughout the trial, and the burden did not shift to Loney to prove his innocence. Moreover, the State established the identity of the substance. Thus, we reject Loney’s contention

that the trial court abused its discretion in denying his motion to dismiss the controlled substance charge.

B. Double Jeopardy

[16] Loney argues that the conviction and sentence for both possession of a controlled substance as a Level 6 felony and carrying a handgun without a license violated double jeopardy concerns. Loney asserts that because his possession of the handgun was the sole basis for charging him with the elevated controlled substance offense, one of the convictions and sentences must be vacated.

[17] During the pendency of this appeal, our Supreme Court decided *Wadle v. State*, 151 N.E.3d 227 (Ind. 2020), which provides a new framework for analyzing alleged double jeopardy violations. The first step under the *Wadle* test is to determine whether “either statute clearly permits multiple punishment, whether expressly or by unmistakable implication.” *Id.* at 253; *see also Brown v. State*, No. 20A-CR-125, *slip op* at 14 (Ind. Ct. App. Nov. 19, 2020). If so, the “court’s inquiry comes to an end and there is no violation of substantive double jeopardy.” *Wadle*, 151 N.E.2d at 248.

[18] Loney was charged with violating Ind. Code § 35-48-4-7, which provides:

(a) A person who, without a valid prescription or order of a practitioner acting in the course of the practitioner’s professional practice, knowingly or intentionally possesses a:

(1) controlled substance or controlled substance analog . . . (2)

classified in schedule III . . . commits possession of a controlled substance, a Class A misdemeanor, except as provided in subsection (b).

(b) The offense is a Level 6 felony if the person commits the offense and an enhancing circumstance¹ applies.

[19] Loney was also charged with carrying a handgun without a license in violation of Ind. Code § 35-47-2-1, which states:

(a) [A] person shall not carry a handgun in any vehicle or on or about the person's body without being licensed under this chapter to carry a handgun.

...

(e) A person who knowingly or intentionally violates this section commits a Class A misdemeanor.

[20] Here, neither statute permits multiple punishments, whether “expressly or by unmistakable implication.” *See Wadle*, 151 N.E.3d at 253. Accordingly, we proceed to *Wadle*'s second step to determine whether a double jeopardy violation exists. *See Brown, slip op.* at 15. In this step, we determine whether either offense is included in the other—“either inherently or as charged”—under the included offense statutes. *Wadle*, 151 N.E.3d at 253, *Brown, slip op.* at 15. If an offense is not an included offense of another, there is no double

¹ Possession of a firearm when committing this offense is an “enhancing circumstance.” I.C. §35-48-1-16.5.

jeopardy violation. *See Wadle*, 151 N.E.3d at 253; *see also Barrozo v. State*, 156 N.E.3d 718, 723 (Ind. Ct. App. 2020).

[21] Ind. Code § 35-31.5-2-168 defines “included offense” as an offense that:

(1) is established by proof of the same material elements or less than all the material elements required to establish the commission of the offense charged;

(2) consists of an attempt to commit the offense charged or an offense otherwise included therein; or

(3) differs from the offense charged only in the respect that a less serious harm or risk of harm to the same person, property, or public interest, or a lesser kind of culpability, is required to establish its commission.

[22] Relevant to our discussion here is subsection (1) of the statute. The offenses each have at least one distinct element and, while they both require possession of a handgun, the handgun charge goes one step further and makes location of a handgun a material element. More specifically, Loney’s mere possession of the handgun supports the Level 6 felony drug charge, whereas Loney’s possession of the gun *in his vehicle or on his person* supports the Class A misdemeanor charge.²

² While it appears that the lack of a license is an element of the offense pursuant to I.C. § 35-47-2-1, it is not. Rather, this court has held that “proof of the presence of a license to carry a handgun is an exemption or exception to, and not an element of the crime of carrying a handgun without a license.” *Webster v. State*, 64 N.E.3d 919, 921 (Ind. Ct. App. 2016); *Armstrong v. State*, 742 N.E.2d 972, 977 (Ind. Ct. App. 2001). In other words, once the State establishes that a defendant carried a

[23] We observe that a defendant could be convicted of possession of a controlled substance based upon constructive possession of both in his residence. But a conviction for carrying a handgun without a license could not result from these same facts because the handgun was not on the defendant’s person or in his vehicle. Moreover, I.C. § 35-47-2-1 excludes possession of a handgun inside one’s dwelling from the offense. Because a defendant could commit the substance offense without committing the handgun offense, carrying a handgun without a license as a class A misdemeanor is not an inherently lesser-included offense of possession of a controlled substance while in possession of a firearm. *See Zachary v. State*, 469 N.E.2d 774, 749 (Ind. 1984) (observing that an offense is an inherently lesser-included offense if it is impossible to commit the greater offense without first having committed the lesser).

[24] Similarly, when considering the State’s charging informations, Count II—the elevated controlled substance offense—only alleges that Loney was in “possession” of a firearm, and there is no allegation as to where the possession occurred. On the other hand, Count II—the handgun offense—alleged that Loney carried the handgun “in or upon [his] vehicle or person,” which is a required element of the class A misdemeanor offense.

handgun on or about his person, away from his dwelling, property, or fixed place of business, the burden shifts to the defendant to demonstrate that he possessed a valid license. *Armstrong*, 742 N.E.2d at 977.

[25] In sum, neither offense is included in the other (either inherently or charged). Thus, there is no violation of double jeopardy. And according to *Wadle*, there is no need to further examine the specific facts of this case under the third step of the test—whether the defendant’s actions were “so compressed in terms of time, place, singleness of purpose, and continuity of action as to constitute a single transaction.” *Wadle*, 151 N.E.3d at 153; *see also Brown, slip op.* at 16.³

[26] Judgment affirmed.

Mathias, J. and Weissmann, J., concur.

³ Although we need not further explore the double jeopardy analysis in this instance, we acknowledge that the result reached here may very well have been different under a pre-*Wadle* analysis. *See, e.g., Cross v. State*, 15 N.E.3d 569, 773 (Ind. 2013) (concluding that the defendant’s conviction and sentence for carrying a handgun without a permit with an additional sentencing enhancement based on possession of the same handgun violated the prohibition against double jeopardy).