

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

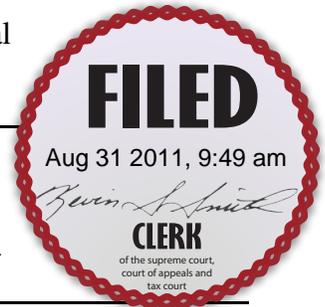
ATTORNEY FOR APPELLANT:

ELLEN M. O'CONNER
Marion Co. Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

ANDREW R. FALK
Deputy Attorney General
Indianapolis, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

EQWAN GARRETT,)
)
Appellant-Defendant,)
)
vs.)
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

No. 49A05-1101-CR-2

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven R. Eichholtz, Judge
Cause No. 49G20-0908-FA-74802

August 31, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Eqwan Garrett appeals his convictions for Possession of a Firearm as a Serious Violent Felon,¹ a class B felony, and for Pointing a Firearm,² a class D felony. Specifically, Garrett argues that, under the actual evidence test, his convictions violate Article I, section 14 of the Indiana Constitution, which prohibits double jeopardy. Concluding that there was no double jeopardy violation, we affirm the judgment of the trial court.

FACTS

In 2007, after a year-long surveillance operation of a residence on North Pershing Avenue in Marion County, the Indianapolis Metropolitan Police Department (IMPD) suspected that the residence was used as a facility for the manufacture of cocaine. IMPD observed Garrett, along with several other individuals, frequent the residence approximately eight to ten times over the course of the surveillance. While conducting surveillance on July 24, 2007, Detective Jake Hart observed Garrett and two others park near the residence and carry a large duffle bag full of rifles.

On August 14, 2007, officers with IMPD's narcotic division executed a "no-knock" search warrant on the residence. SWAT team members Detective Garry Riggs, Sergeant Robert Stradling, and Officer Baker breached the residence through the front door using a battering ram. During this time, police officers loudly announced, "[P]olice, search warrant. Everybody get down on the ground!" Tr. p. 123, 210.

¹ Ind. Code § 35-47-4-5.

² I.C. § 35-47-4-3.

Upon entering the house, Detective Riggs and Sergeant Stradling noticed Garrett repeatedly popping out of the second bedroom, approximately ten to twelve feet away from them. Garrett again and again pointed a semi-automatic handgun at Detective Riggs and Sergeant Stradling. Each time, he attempted to fire the handgun, but it misfired. A second SWAT team entered the residence from the rear and secured Garrett in the second bedroom. Three other individuals were also in the house and arrested during the execution of the search warrant.

The police then searched the residence for evidence. In the kitchen, police recovered cocaine, digital scales, over \$8,000, and an assault rifle. In the second bedroom, where police apprehended Garrett, they found a silver and black Smith & Wesson .40 caliber semi-automatic handgun within arm's length of Garrett. No other suspects were in the second bedroom. In the living room, police recovered an additional assault rifle, two handguns, and a magazine for the handgun found near Garrett. The weapons in the living room were within ten feet of where Garrett had stood in the second bedroom.

On August 22, 2009, the State charged Garrett, along with four other defendants, with: Count I, conspiracy to commit dealing in cocaine, a class A felony; Count II, dealing in cocaine, a class A felony; Count III, possession of cocaine, a class C felony; Count IV, possession of a firearm by a serious violent felon (possession of a firearm by a SVF), a class B felony; Count V, pointing a firearm, a class D felony; and Count VI, possession of cocaine and a firearm, a class C felony. After a two-day jury trial on

Counts I, II, III, V, and VI, the jury found Garrett guilty on Counts, I, V, and VI. The jury convicted Garrett on a lesser included offense on Count III and acquitted him on Count II.

Garrett waived his right to a jury trial on Count IV, possession of a firearm by a SVF and, on November 24, 2010, the trial court found Garrett guilty. At the sentencing hearing, the court entered convictions on conspiracy, possession of a firearm by a SVF, and pointing a firearm. Because of double jeopardy, the court found that the lesser included offense for possession of cocaine merged with the conspiracy conviction, and that possession of cocaine and a firearm merged with conspiracy and possession of a firearm by a SVF. The trial court sentenced Garrett to forty years for conspiracy and twelve years for possession of a firearm by a SVF, both to run concurrently. For pointing a firearm, the court sentenced Garrett to three years to run consecutively to the sentences for conspiracy and possession of a firearm by a SVF, for a total executed term of forty-three years in the Department of Corrections. Garrett now appeals.

DISCUSSION AND DECISION

Garrett contends that his convictions for possession of a firearm by a SVF and pointing a firearm violate Indiana's Double Jeopardy laws under the actual evidence test articulated in Richardson v. State, 717 N.E.2d 32, 49-53 (Ind. 1999). More to the point, he argues that both convictions arise from the same factual evidence, namely, his pointing of the handgun, and thus violate double jeopardy.

Article I, section 14 of the Indiana Constitution provides that “[n]o person shall be put in jeopardy twice for the same offense.” Two or more offenses are the same offense, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense. Richardson, 717 N.E.2d at 49. The first aspect of this analysis is the statutory elements test, which identifies and compares the essential statutory elements of the challenged crimes to determine if each offense contains at least one element that is separate and distinct from the other. Id. at 50.

Under the actual evidence test, the defendant must show a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense. Id. at 53. However, Indiana's Double Jeopardy Clause “is not violated when the evidentiary facts establishing the essential elements of one offense also establish only one or even several, but not all, of the essential elements of a second offense.” Spivey v. State, 761 N.E.2d 831, 833 (Ind. 2002).

Garrett was convicted of possession of a firearm by a SVF and pointing a firearm. To prove possession of a firearm by a SVF, the State had to show that Garrett knowingly or intentionally possessed a firearm as a serious violent felon. Ind. Code § 35-47-4-5. To prove pointing a firearm, the State had to show that Garrett knowingly or intentionally pointed a firearm at another person. Ind. Code §35-47-4-3. Both crimes have elements distinct from the other; the former charge requires a showing that Garrett is a felon who

possessed a firearm, and the latter requires a showing that Garrett pointed a firearm. Thus, the two crimes do not violate double jeopardy under the statutory elements test.

Continuing to the actual evidence test, the thrust of Garrett's appeal, the evidence presented at trial demonstrates that Garrett possessed a firearm that he used to point at the members of the SWAT team as they entered the house. Tr. p. 129, 130-31, 160, 162, 167, 211. He was arrested with the handgun in arms reach. Tr. p. 315. However, Garrett challenges the use of the same firearm and act to convict on both charges.

In Newman v. State, we held that Newman's convictions for aggravated battery and carrying a handgun without a license did not violate double jeopardy. 751 N.E.2d 265, 275 (Ind. Ct. App 2001). Newman challenged the conviction on the basis that the evidence from the battery was the same evidence used to convict for carrying a handgun without a license. Id. at 271. We found that Newman was clearly carrying the gun prior to the battery and thus, the crime of carrying a handgun without a license was completed before the battery was committed. Id. The aggravated battery revealed the crime of carrying the handgun without a license, and, therefore, there was different evidence to support both convictions. Id.

Garrett undoubtedly was in possession of the firearm before he initiated the crime of pointing a firearm. He therefore completed the crime of possessing the firearm as a serious violent felon before he initiated the crime of pointing a firearm at a person. Similar to Newman, the pointing of the firearm brought to light the prior offense of possession of a firearm by a serious violent felon. Different evidence supports each

conviction and, thus, Garrett's convictions for possession of a firearm by a SVF and pointing a firearm do not violate Indiana's constitutional prohibition against double jeopardy. Therefore, we affirm the decision of the trial court.

The judgment of the trial court is affirmed.

KIRSCH, J., and BROWN, J., concur.