

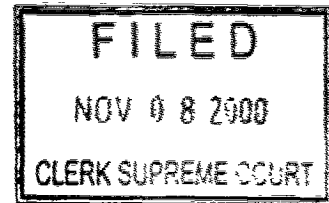
IN THE COURT OF APPEALS OF IOWA

No. 0-610 / 99-1778
Filed November 8, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BARRY E. STEWART,
Defendant-Appellant.



Appeal from the Iowa District Court for Polk County, Artis Reis, Judge.

On appeal from his convictions for two counts of possession of a controlled substance in violation of Iowa Code section 124.401(5) (1999), the defendant argues the district court erred in allowing the State to amend Count II of the trial information. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Robert P. Ranschau, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, John P. Sarcone, County Attorney, and Gary W. Kendell, Assistant County Attorney, for appellee.

Considered by Streit, P.J., and Vogel and Miller, JJ.

MILLER, J.

Barry Stewart appeals the judgment entered upon his convictions for two counts of possession of a controlled substance in violation of Iowa Code section 124.401(5) (1999). He contends the trial court erred in allowing the State to amend count II of the trial information. We affirm.

I. BACKGROUND FACTS AND PRIOR PROCEEDINGS

Stewart was charged by trial information with possession of methamphetamine, a class "D" felony (Count I), and possession of marijuana, an aggravated misdemeanor (Count II), both in violation of Iowa Code section 124.401(5) (1999). The trial information alleged the defendant had two prior possession of controlled substance convictions, one for methamphetamine and one for marijuana.

Prior to trial the State moved to amend Count II of the trial information. Based on Stewart's two previous convictions for possession of a controlled substance the State sought to charge him with possession of a controlled substance, third offense, thereby amending Count II to a class "D" felony.¹ Stewart resisted the State's motion, however the district court allowed the amendment. Stewart waived jury trial, a bench trial was held, and the court found Stewart guilty on both counts. He was sentenced to two concurrent five-year terms which the court suspended. He was placed on probation for two years and fined \$500 plus surcharge on each count. Notice of appeal was timely filed.

¹ The record indicates Stewart was previously convicted of possession of methamphetamine on December 19, 1996 and for possession of marijuana March 5, 1998. He received suspended sentences on both of these convictions. In addition, on September 27, 1996 Stewart received a deferred judgment for possession of marijuana.

On appeal Stewart contends the district court erred in granting the State's motion to amend. He asserts the charge and sentence under Count II should have been under the second paragraph of section 124.401(5) (the marijuana misdemeanor track) rather than under the first paragraph of that section (the felony track). He concludes that under Count II he should only have been charged with and sentenced for a serious misdemeanor as this was only his second marijuana conviction. We disagree.

II. MERITS

We review the district court's interpretation of section 124.401(5) for correction of errors of law and are not bound by the trial court's legal determinations. Iowa R. App. P. 4; *State v. Francois*, 577 N.W.2d 417, 417 (Iowa 1998). Section 124.401(5) provides in part:

It is unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by this chapter. Any person who violates this subsection is guilty of a serious misdemeanor for a first offense. A person who commits a violation of this subsection and who has previously been convicted of violating this subsection is guilty of an aggravated misdemeanor. A person who commits a violation of this subsection and has previously been convicted two or more times is guilty of a class "D" felony.

If the controlled substance is marijuana, the punishment shall be imprisonment in the county jail for not more than six months or by a fine of not more than one thousand dollars, or by both such fine and imprisonment for a first offense. If the controlled substance is marijuana and the person has been previously convicted of a violation of this subsection in which the controlled substance was marijuana, the punishment shall be as provided in section 903.1, subsection 1, paragraph "b". If the controlled substance is marijuana and the person has previously been convicted two or more times of a violation of this subsection in which the controlled substance was marijuana, the person is guilty of an aggravated misdemeanor.

Iowa Code section 903.1(1)(b) is the general sentencing statute for serious misdemeanors for which a specific penalty is not otherwise provided. It provides for a fine of \$250 to \$1,500 (which shall not be suspended) and further provides for possible imprisonment not to exceed one year.

The issue here is whether, on Count II, Stewart should have been charged and sentenced under the first or second paragraph of section 124.401(5) based on his prior convictions, one for possession of marijuana and one for possession of methamphetamine. Stewart argues that because he only had one prior *marijuana* conviction, the current marijuana charge should only be considered his second marijuana offense and thus under Count II he should have only been charged with a serious misdemeanor under the second paragraph of section 124.401(5) and should have been sentenced under the general serious misdemeanor sentencing statute, section 903.1(1)(b). The trial court granted the State's request to amend the trial information to charge Count II as a third offense, apparently considering both the prior marijuana and prior methamphetamine convictions as previous offenses for both counts of the trial information.

The Iowa Supreme Court recently interpreted section 124.401(5) in *State v. Cortez*, No. 99-507, 2000 WL 1273693 (Iowa Sept. 7, 2000). We believe *Cortez* to be controlling of the issue in this case. In *Cortez* the supreme court held that a prior conviction for a controlled substance other than marijuana serves as a predicate offense for a sentencing enhancement under the felony track of section 124.401(5) even though the defendant is currently charged only with possession of marijuana. *Cortez*, 2000 WL 1273693, at *2. The supreme

court's holding was based on the reasoning that "it would be absurd to treat the defendant as a first time marijuana offender, when that person is guilty of antecedent convictions for possession of hard drugs." *Id.* We conclude it would be equally absurd to treat Mr. Stewart as only a *second* time marijuana offender when he is guilty of an additional antecedent conviction for possession of hard drugs. Stewart's prior conviction for possession of methamphetamine "precludes the dispensation of leniency" found under the misdemeanor track of section 124.401(5), thereby requiring Count II of the trial information to be charged as a class "D" felony. *See id.*

III. CONCLUSION

We conclude the trial court did not err in granting the State's motion to amend the trial information. This was the proper interpretation of section 124.401(5) and Stewart was not prejudiced by allowing the amendment as he was fully aware of his previous convictions. Count II of the trial information was properly charged as a third offense, class "D" felony under section 124.401(5). Therefore, Stewart's conviction and sentence is affirmed.

AFFIRMED.