NOT DESIGNATED FOR PUBLICATION

No. 124,607

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

MILES MARTIN,
Appellant.

MEMORANDUM OPINION

Appeal from Geary District Court; COURTNEY D. BOEHM and RYAN W. ROSAUER, judges. Opinion filed March 17, 2023. Affirmed.

Bryan W. Cox, of Kansas Appellate Defender Office, for appellant.

Tony Cruz, assistant county attorney, and *Derek Schmidt*, attorney general, for appellee.

Before HILL, P.J., BRUNS and WARNER, JJ.

PER CURIAM: Miles Martin appeals his drug convictions, claiming an illegal search by the police and then an improper admission of the fruits of that search into evidence at his trial. He also argues there is a violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution because of the identity of the two charges. Based on our review of the record, the district court did not err when it admitted into evidence the contraband found by the officer in the medicine bottle she first shook and then opened. Even though the two charges Martin was convicted of have similar elements, they are not identical and there was no constitutional violation. We affirm his convictions.

A defective tag light, an open whisky bottle, and a voluntarily surrendered pill bottle lead to this prosecution.

In September 2019, Detective Cayla Da Giau stopped Martin because his car's tag light did not work. Martin pulled over and Detective Da Giau approached Martin's car. She asked for his license and insurance. While Martin looked for his insurance, Detective Da Giau looked in the back seat and saw an open bottle of Crown Royal whisky.

While the detective waited for assistance, she asked Martin to step out so she could conduct a probable cause search of the car. When Martin stepped out, she noticed a large blade on his waist. She removed the knife and another officer did a pat-down search of Martin's person for the officers' safety.

Detective Da Giau instructed Martin to sit on the curb and then searched his car. Inside Martin's car she found a yellow straw with a white powdery residue, which she knew was used as drug paraphernalia. She also found a butane lighter and five open containers of alcohol. Detective Da Giau asked Martin to complete field sobriety tests and a preliminary breath test, which he did. The test showed his BAC was .000.

After searching the car, Da Giau heard Martin complain to the assisting deputy that he was hot. She told Martin that he and his dog could sit in her patrol vehicle to cool off. She told Martin she needed to check him before he could sit in her patrol car. Martin then began handing Da Giau items from his pockets. When Martin was done, Da Giau asked if he had anything else on his person. Martin grabbed a pill bottle from his pocket and handed it to the detective.

After she finished getting Martin comfortable, the detective opened the pill bottle. She saw a white crystalline substance she believed was methamphetamine. Da Giau later explained she opened the pill bottle because when it shifted in her hand, it did not feel

like the pills that were pictured on the bottle. Da Giau said the contents felt "more scratchy." Da Giau did not have a warrant to search the pill bottle, nor did she ask Martin for permission to do so. The pill bottle contained methamphetamine.

The State charged Martin with possession of methamphetamine with the intent to distribute within 1,000 feet of a school zone and no drug tax stamp. Before trial, Martin moved to suppress the evidence found inside the pill bottle. Martin argued the search of the pill bottle was unreasonable because Da Giau did not have a warrant to search the bottle and none of the exceptions to the warrant requirement applied. In response, the State argued that the evidence in the pill bottle should not be excluded because Martin voluntarily relinquished the bottle to Da Giau. In other words, he had consented to the search of the bottle.

The district court denied the motion to suppress the evidence from the pill bottle. The jury acquitted Martin of possession of methamphetamine with intent to distribute within 1,000 feet of a school zone but found him guilty of possession of methamphetamine and one count of no drug tax stamp.

The district court sentenced Martin to 20 months in prison for possession of methamphetamine and 6 months for no tax drug stamp, to be served concurrently.

In this appeal, Martin argues that the district court erred by denying his motion to suppress the evidence found in the pill bottle and that he cannot be convicted of both possession of methamphetamine and no drug tax stamp.

The rules that guide us are well established.

When dealing with a motion to suppress evidence, we review the district court's findings of fact to determine whether they are supported by substantial competent

evidence and reviews the district court's legal conclusions de novo. *State v. Cash*, 313 Kan. 121, 125-26, 483 P.3d 1047 (2021).

When we review factual findings, we do not reweigh the evidence or assess witness credibility. When the material facts supporting a district court's decision on a motion to suppress are not in dispute, the ultimate question of whether to suppress is a question of law over which an appellate court has unlimited review. *State v. Hanke*, 307 Kan. 823, 827, 415 P.3d 966 (2018).

The legal foundation of our review is the United States Constitution. The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. Warrantless searches are per se unreasonable unless they fall within one of the exceptions to the warrant requirement. *State v. Heim*, 312 Kan. 420, 422-23, 475 P.3d 1248 (2020). The exceptions to the warrant requirement are:

(1) consent;

(2) search incident to lawful arrest;

(3) stop and frisk;

(4) probable cause plus exigent circumstances;

(5) the emergency doctrine;

(6) inventory searches;

(7) plain view or feel; and

(8) administrative searches of closely regulated businesses.

State v. Doelz, 309 Kan. 133, 140, 432 P.3d 669 (2019).

The State bears the burden to prove the lawfulness of a warrantless search. *Cash*, 313 Kan. at 126.

Neither the district court nor the State have said what exception to the warrant requirement applies.

It is uncontroverted that there was no warrant to search the pill bottle. But it is unclear what, if any, exception to the warrant requirement the district court relied on in denying the motion to suppress. In its response to the motion to suppress, the State did not argue that any of the exceptions apply. Instead, the State focused on Martin's lack of an expectation of privacy in the pill bottle since he voluntarily handed it over to Da Giau. At the motion hearing, the State did not specify which exception it believed applied. Instead, it argued that the evidence should not be excluded because Martin was already going to be arrested before Da Giau opened the pill bottle so it would have been found eventually.

In its order denying the motion to suppress, the district court did not specify which exception to the warrant requirement applied. The court made several findings of fact and explained its decision by describing what happened:

> "Due to the temperature outside, Detective DaGiau inquired if the Defendant would like to sit in her vehicle. He said he would. She then asked the Defendant if he had any other items on his person. After the Defendant handed her a cell phone and U.S. currency, Detective DaGiau again asked if the Defendant had anything else. The Defendant then handed Detective DaGiau a white opaque pill bottle. The Defendant indicated that the pills were for heartburn, and the bottle's label reflected that as well. Detective DaGiau testified that the actual size of the pill was noted on the bottle label. While holding the bottle, Detective DaGiau testified that she did not feel like the contents of the bottle felt as it should for that type of pill. Detective DaGiau looked in the bottle and found a substance that would be identified as methamphetamine.
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> "Prior to the Defendant handing the pill bottle to Detective DaGiau, law enforcement had already seen and collected multiple open containers of alcohol in the Defendant's vehicle. Transportation of an open container is a misdemeanor and arrestable offense in Kansas. Further, law enforcement had also already discovered the butane

> lighter and yellow straw with white powdery residue in the Defendant's vehicle. Detective DaGiau testified regarding her training and experience in controlled substances and investigations. Further, Detective DaGiau testified that before she opened and looked inside the pill bottle, she already knew that she was going to place the Defendant under arrest. Therefore, the Court denies the Defendant's Motion to Suppress Evidence."

The district court did not identify any exception to the warrant requirement in its order. Martin argues that the analysis should end there, and this court should reverse his conviction and suppress the evidence in the pill bottle. But Martin cites no authority—and we, too, can find none—that holds we must reverse a district court's ruling refusing to suppress evidence just because it failed to identify which exception to the warrant requirement it applied. The State argues that the warrantless search was valid under either the consent exception or search incident to arrest exception.

It appears to us that Martin was not under arrest when the detective opened the pill bottle and discovered the translucent substances within. But his arrest soon followed the examination and can be considered a search incident to arrest. Several courts support our holding.

In considering the application of the Fourth Amendment to the United States Constitution, it has been said that "[a] warrantless search preceding an arrest is a legitimate 'search incident to arrest' as long as (1) a legitimate basis for the arrest existed before the search, and (2) the arrest followed shortly after the search." *United States v. Anchondo*, 156 F.3d 1043, 1045 (10th Cir. 1998). It is uncontested here that there was a legitimate basis for the detective to arrest Martin before the search of the pill bottle based on the open alcohol containers and drug paraphernalia in Martin's car. The issue is whether Martin's arrest followed shortly after the search of the pill bottle.

In *Rawlings v. Kentucky*, 448 U.S. 98, 111, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980), the United States Supreme Court upheld the warrantless search of a woman's

purse containing the defendant's contraband before defendant was arrested. "Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa." 448 U.S. at 111.

In a similar ruling, the Kansas Supreme Court held in *State v. Barnes*, 220 Kan. 25, 29, 551 P.2d 815 (1976), that after recognizing the defendant based on the detailed description of the suspect in a string of robberies, the police could confront Barnes and then frisk him. After finding money in Barnes' pocket, officers then arrested the defendant and did a more thorough search.

We note, though, that the rule allowing searches to precede arrest has limitations. In *State v. Conn*, 278 Kan. 387, 393-94, 99 P.3d 1108 (2004), the Kansas Supreme Court held that an arrest did not follow shortly after a search when the defendant was not booked into jail until three hours later. Another panel of this court has since held that an arrest two and a half hours after a search was not "'shortly after the search.'" *State v. Taylor*, No. 94,382, 2006 WL 538623, at *4 (Kan. App. 2006) (unpublished opinion).

We see no long delay here. The record shows that Martin was arrested shortly after the pill bottle was searched. At trial during cross-examination, Da Giau testified that to the best of her recollection she arrested Martin after searching the pill bottle and before finishing her search of his car.

"Q. And after you observed [the contents of the pill bottle], that's when you placed Mr. Martin under arrest?

"A. Yes, that's when we go ahead and put him under arrest and placed him into Deputy Garcia's vehicle.

"Q. Okay. Did you then go back and further search Mr. Martin's vehicle?

"A. Technically, I went back and I collected the items that I had in Mr. Martin's vehicle, yes.

"Q. Okay. So when you went back—after he was under arrest, you went back to his vehicle and simply removed the items that you'd already found from his vehicle.

"A. If I can recall. It's been a couple years, so . . .

"Q. Okay. But . . . that's what you recall doing . . . .

"A. That is what I remember."

We are satisfied that this record supports our holding. Martin's arrest came very quickly after the detective opened the pill bottle and discovered the contents. We move now to question the scope of the search. Four United States Supreme Court cases guide us.

First, in *Chimel v. California*, 395 U.S. 752, 762-63, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969), the United States Supreme Court held that a search incident to arrest must be limited to the area within the arrestee's immediate control, where it is justified by the interest in officer safety and preventing the destruction of evidence. Then, in *United States v. Robinson*, 414 U.S. 218, 235-36, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973), the Court applied the *Chimel* analysis to the search of a cigarette pack found on the arrestee's person. It held that the risks identified in *Chimel* are present in all custodial arrests. The Court found that if an arrest was reasonable, a search incident to arrest was no more of an intrusion and therefore also reasonable. 414 U.S. at 235.

Next, in *Arizona v. Gant*, 556 U.S. 332, 343, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), the Court permitted searches of a car where either (1) the arrestee is unsecured and within reaching distance of the passenger compartment; or (2) where it is reasonable to believe that evidence of the crime of arrest might be found in the vehicle. Finally, in *Riley v. California*, 573 U.S. 373, 374, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014), the Court declined to allow the search incident to arrest of data stored on cell phones, reasoning that it does not further the government interest identified in *Chimel* and implicates substantially greater individual privacy interests than a brief physical search.

Martin argues that the State should have sought a warrant to search the pill bottle. He argues that the key aspect of the search incident to arrest exception is that it is an *exception*, which should require exceptional justifications. He notes that with modern technology officers can obtain a warrant in mere minutes. Martin argues that modern technology undermines the rationale for an unlimited physical search incident to arrest of the arrestee's person.

Martin argues that this case is more like *Riley*, which involved the search of a cell phone found on the defendant's person, than *Robinson*, in which an officer could tell that a crumpled cigarette package contained something other than cigarettes by manipulating it with his hands. The officer opened the package and found capsules of heroin.

We do not agree with Martin. Martin tries to distinguish his case by arguing that he had a greater privacy interest in the pill bottle because it was harder to open. But in both this case and in *Robinson*, the officers took a package off the defendant's person, they could tell that their contents were unusual by the way they felt, and they proceeded to open the package and find contraband. Martin did not have a greater interest in the pill bottle than the defendant in *Robinson* if anyone could feel its contents were unusual just by holding it.

Even though Da Giau searched Martin's pill bottle before arresting him, the search incident to arrest exception still applies because Martin's arrest followed shortly after the search. Martin's case is like *Robinson*, in which the Court held that the search was a valid search incident to arrest. Thus, we affirm the district court's decision to deny the motion to suppress the evidence found in the pill bottle.

We find no double jeopardy problems in this prosecution.

Martin argues that possession of methamphetamine is an included offense of possession of methamphetamine with no tax stamp. He argues that his convictions are multiplicitous and prohibited by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and K.S.A. 2022 Supp. 21-5109(b). He asks this court to reverse his conviction for possession of methamphetamine. The State argues to the contrary but also contends that Martin did not preserve this issue for appeal.

Martin admits that he did not bring this issue up to the district court but contends that we should still consider the argument under an exception to the rule against considering arguments for the first time on appeal.

We will consider Martin's argument as it involves only a question of law arising under proved facts. *State v. Dukes*, 290 Kan. 485, 488, 231 P.3d 558 (2010).

We look to several cases for authority. "[T]he Double Jeopardy Clause of the Fifth Amendment 'protects against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense." *State v. Dale*, 312 Kan. 174, 178, 474 P.3d 291 (2020).

Section 10 of the Kansas Constitution Bill of Rights also prohibits a criminal defendant from being "twice put in jeopardy," and the Kansas Supreme Court has interpreted the clauses as providing a criminal defendant with the same protections. "In part, these clauses prohibit a court from imposing multiple punishments under different statutes for the same conduct in the same proceeding when the legislature did not intend multiple punishments." *State v. Hensley*, 298 Kan. 422, 435, 313 P.3d 814 (2013).

In Kansas, multiplicity is prohibited by statute as well. K.S.A. 2022 Supp. 21-5109(b) explains that a defendant may not be convicted of both a crime and a lesser included crime. A lesser included crime is (1) a lesser degree of the same crime; (2) a crime where all elements of the lesser crime are identical to some elements of the crime charged; (3) an attempt to commit the crime charged; or (4) an attempt to commit a crime defined in paragraph (1) or (2). K.S.A. 2022 Supp. 21-5109(b).

When a court determines whether a crime is a lesser included offense of another offense under K.S.A. 2022 Supp. 21-5109(b)(2), it "'applies a strict elements test and is limited to a comparison of the abstract elements of the offense charged.' It does not consider 'the factual nuances of a specific case as they may bear on the satisfaction of the statutory elements of both crimes under examination.'" *State v. Frierson*, 298 Kan. 1005, 1018, 319 P.3d 515 (2014) (quoting *State v. Alderete*, 285 Kan. 359, Syl. ¶ 2, 172 P.3d 27 [2007]).

The Kansas Supreme Court has outlined a two-step double jeopardy analysis. First, the appellate court determines whether the convictions arose from the same conduct. Second, the court considers whether by statutory definition there are two crimes or only one. The second question is answered by using an elements test. If each statute contains an element not found in the other statute, presumably the Legislature intended punishments for both crimes. *Hensley*, 298 Kan. at 435.

K.S.A. 2022 Supp. 21-5109(b) is essentially the inverse of the elements test, as it prohibits a defendant from being convicted of both a greater and lesser crime, e.g., "'a crime where all elements of the lesser crime are identical to some elements of the crime charged.'" *Hensley*, 298 Kan. at 436. Both K.S.A. 2022 Supp. 21-5109(b) and the Double Jeopardy Clause require reversal of both the conviction and sentence if the Legislature did not intend multiple punishments. *Hensley*, 298 Kan. at 436.

Martin accurately argues that for the first question, his convictions for possession of methamphetamine and no drug tax stamp arose from the same conduct—possessing the methamphetamine in the pill bottle.

For the second question, Martin analogizes his case to *Hensley*, in which the Kansas Supreme Court held that possession of marijuana is a lesser included offense of possession of marijuana with no tax stamp. 298 Kan. at 438. Martin asserts that even though the substances involved are different, the same logic applies.

In *Hensley*, the court found that all the elements of the simple possession charge were found in the possession of marijuana with no tax stamp charge. The simple possession statute provided: "'[I]t shall be unlawful for any person to possess or have under such person's control . . . [a] hallucinogenic drug,' including marijuana." 298 Kan. at 437. The possession with no tax stamp charge provided: "'[A] dealer distributing or possessing marijuana or controlled substances without affixing the appropriate stamps, labels or other indicia is guilty of a severity level 10 felony.'" 298 Kan. at 437.

We take this argument to mean that Martin is arguing that possession of methamphetamine is a *lesser* crime of no drug tax stamp. Possession of methamphetamine is a severity level 5 felony. Martin faced a sentence range of 22-18 months in prison for that crime. No drug tax stamp is a severity level 10 felony. Martin only faced a sentence range of 5-7 months for that offense. Thus, possession of methamphetamine is not a lesser crime of no drug tax stamp. And Martin cannot argue the inverse because the crime of no drug tax stamp has elements not present in the crime of possession of methamphetamine.

We affirm Martin's convictions and sentences for both crimes.

Affirmed.