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DISTRICT II

February 24, 2021

To:

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You are hereby notified that the Court has entered the following opinion and order:

2019AP2007

State of Wisconsin v. Rodolfo Rebollar (L.C. #2015CF738)

Before Neubauer, C.J., Gundrum and Davis, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Rodolfo Rebollar appeals from an order denying his postconviction motion. He contends that his convictions for possession with intent to deliver cocaine are multiplicitous. Based upon

our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).¹ We affirm.

In 2015, Rebollar was stopped by police, who were acting on information provided by an informant. Police found approximately 258.2 grams of cocaine on Rebollar's person. Shortly thereafter, they searched his home and found approximately 872 grams of cocaine along with two men who said that they lived there.

Rebollar pled guilty to (1) possession with intent to deliver cocaine (>40 grams); and (2) possession with intent to deliver cocaine (>40 grams) as a party to a crime. He was sentenced to five years of initial confinement and three years of extended supervision on each count, to be served consecutively. This court affirmed his convictions. *State v. Rebollar*, No. 2018AP398-CRNM, unpublished op. and order (WI App Nov. 28, 2018).

Rebollar subsequently filed a postconviction motion pursuant to WIS. STAT. § 974.06. In it, he argued that his convictions are multiplicitous. Accordingly, he asked the circuit court to vacate the sentence on his second count. After a hearing, the court denied the motion. This appeal follows.

On appeal, Rebollar renews his claim that his convictions are multiplicitous.² The issue of multiplicity arises when a defendant is charged in more than one count for a single offense. *State v. Ziegler*, 2012 WI 73, ¶59, 342 Wis. 2d 256, 816 N.W.2d 238. The test to determine

¹ All references to the Wisconsin Statutes are to the 2017-18 version.

² The State does not argue that Rebollar is procedurally barred from making his claim. It does note, however, that this court's review is restricted to the record as it existed at the time Rebollar entered his pleas. *See State v. Kelty*, 2006 WI 101, 294 Wis. 2d 62, ¶38, 716 N.W.2d 886. We agree.

whether multiple counts are permissible is, first, whether the charges are identical in law and fact, and, second, whether the legislature intended to allow more than one unit of prosecution. See *State v. Anderson*, 219 Wis. 2d 739, 746, 580 N.W.2d 329 (1998). If the offenses are different in law or fact, then there is a presumption that the legislature intended multiple punishments. *Id.* at 751. The presumption may be rebutted only by showing clear intent to the contrary. *Id.* Questions of multiplicity and legislative intent are questions of law that we review de novo. See *State v. Davison*, 2003 WI 89, ¶15, 263 Wis. 2d 145, 666 N.W.2d 1.

Here, we are satisfied that Rebollar's convictions are sufficiently different in fact to show that he committed separate possession offenses. As noted, police found cocaine in two distinct locations. Moreover, Rebollar had actual possession of the cocaine found on his person and constructive possession of the cocaine found in his home that he shared with two other men. Thus, for each count, the facts as to location, quantity, and manner of possession differed. Given these differences, we presume that the legislature intended multiple punishments for the conduct in question. See *Anderson*, 219 Wis. 2d at 751. Because Rebollar has not met his burden of overcoming this presumption, we reject his multiplicity challenge.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals