IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JANUARY 2000 SESSION

FILED

March 22, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	*	No. E1999-01363-CCA-R3CD
Appellee,	*	SULLIVAN COUNTY
V.	*	Hon. R. Jerry Beck, Judge
STEVEN BRYAN MAXWELL,	*	(Possession of a Controlled Substance in a Penal Institution)
Appellant.	*	

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OPINION FILED:

REVERSED, JUDGMENT MODIFIED, AND REMANDED

NORMA MCGEE OGLE, JUDGE

OPINION

The appellant, Steven Bryan Mitchell, appeals his conviction in the Sullivan County Criminal Court of possession of a controlled substance in a penal institution in violation of Tenn. Code Ann. § 39-16-201(a)(2) (1997). Following a sentencing hearing on June 17, 1999, the trial court sentenced the appellant as a Range II multiple offender to seven years incarceration in the Tennessee Department of Correction. In this appeal as of right, the appellant alleges that the John R. Hay House, a residential facility established pursuant to the Tennessee Community Corrections Act of 1985, is not a penal institution within the meaning of Tenn. Code Ann. § 39-16-201. The appellant also challenges the length of his sentence and the trial court's denial of an alternative sentence. Following a review of the record and the parties' briefs, we hold that the appellant's conviction must be reduced to simple possession of a controlled substance, a class A misdemeanor, and remand this case to the trial court for the purpose of re-sentencing the appellant.

I.

On June 18, 1997, a Sullivan County Grand Jury returned a presentment charging the appellant with

> unlawfully, feloniously and knowingly possess[ing] contraband, to wit Marijuana, a Schedule VI Controlled Substance, while present in a penal institution where prisoners are quartered or under custodial supervision without the express written consent of the chief administrator of the institution, contrary to T.C.A., Section 39-16-201, a Class C felony . . .

On October 6, 1997, the appellant filed a motion to dismiss the presentment on the ground that the John R. Hay House, in which the appellant was quartered at the time of the present offense, is not a penal institution within the meaning of Tenn. Code Ann. § 39-16-201.

On November 10, 1997, the trial court conducted a hearing on the appellant's motion, at which hearing the appellant agreed with the State to a "Stipulation of Facts." Specifically, the parties stipulated that the Hay House is a private, non-profit agency funded pursuant to the Tennessee Community Corrections Act of 1985 and further stipulated concerning the operational details of the Hay House. The parties also stipulated that, on January 2, 1997, the appellant was serving a three year community corrections sentence in the Hay House for multiple felony offenses including burglary and theft and was found in possession of marijuana while inside the Hay House. Upon reviewing the "Stipulation of Facts" and the arguments of counsel, the trial court denied the appellant's motion to dismiss the presentment.

On December 17, 1998, the trial court conducted a bench trial in the appellant's case. At the trial, the parties adopted their prior "Stipulation of Facts." Moreover, Stewart Cannon, an employee of the Hay House, testified on behalf of the State that, on the evening of January 2, 1997, he encountered the appellant inside the Hay House. The appellant had just returned from work, and Mr. Cannon asked the appellant to submit to a search of his person. The appellant was reluctant to cooperate and especially attempted to avoid a search of a pack of cigarettes that he had been carrying in his pocket. A search of the cigarette pack revealed two hand-rolled cigarettes. As noted previously, the parties stipulated that the substance contained in the cigarettes was marijuana. The appellant's sole defense at trial, presented in the form of a motion for a judgment of acquittal, comprised his argument that the Hay House does not fall within the definition of a penal institution under Tenn. Code Ann. § 39-16-201. The trial court again rejected the appellant's argument and entered a judgment of conviction for the charged offense.

II.

On appeal, the State concedes and we agree that the Hay House does not qualify as a penal institution under Tenn. Code Ann. § 39-16-201. State v. Kendrick, No. 03C01-0810-CR-00374, 1999 WL 701337, at *5 (Tenn. Crim. App. at Knoxville, September 10, 1999). Accordingly, the evidence in this case is insufficient to support the judgment of the trial court finding the appellant guilty of possession of a controlled substance in a penal institution. That having been said, a question remains before this court concerning the appropriate remedy. The appellant asks that this court reverse the judgment of conviction and dismiss the presentment. In response, the State agues that the judgment should simply be modified to reflect a conviction of the "lesser-included offense" of simple possession of a controlled substance under Tenn. Code Ann. § 39-17-418(a) (1997).

If simple possession of a controlled substance is a lesser included offense of possession of a controlled substance in a penal institution, the State's argument possesses merit. See Bandy v. State, 575 S.W.2d 278, 281 (Tenn. 1979). See also, e.g., State v. Brown, 836 S.W.2d 530 (Tenn. 1992); State v. Barnes, 954 S.W.2d 760 (Tenn. Crim. App. 1997); State v. Neill, No. 02C01-9503-CC-00067, 1996 WL 102349 (Tenn. Crim. App. at Jackson, March 6, 1996); State v. Benson. No. 03C01-9307-CR-00241, 1994 WL 666892 (Tenn. Crim. App. at Knoxville, November 30, 1994). According to our supreme court's recent opinion in State v. Burns, 6 S.W.3d 453, 466-467 (Tenn. 1999),

> [a]n offense is a lesser included offense if:
>
> (a) all of its statutory elements are included within the statutory elements of the offense charged; or
>
> (b) it fails to meet the definition in part (a) only in the respect that it contains a statutory element or elements establishing
>
> (1) a different mental state indicating a lesser kind of culpability; and/or

> (2) a less serious risk of harm or risk of harm to the same person, property or public interest; or
>
> (c) it consists of [facilitation of, an attempt to commit, or a solicitation to commit the offense charged or a lesser included offense].

Part (a) of the above test is consistent with the approach adopted by our supreme court in Howard v. State, 578 S.W.2d 83, 85 (Tenn. 1979), and

> involve[s] a strict comparison between the statutory elements of the offense charged in the indictment with the elements of the lesser included offense at issue. Under this approach, an offense is not "necessarily included" in another unless the elements of the lesser offense are a subset of the elements of the charged offense. . . . In other words, the lesser offense may not require proof of any element not included in the greater offense as charged in the indictment.

Burns, 6 S.W.3d at 464. In short, one must be incapable of committing the offense as charged in the indictment without also committing the lesser offense. State v. Gamble, No. 03C01-9812-CR-00442, 2000 WL 45718, at *6 (Tenn. Crim. App. at Knoxville, January 21, 2000).

As charged in the indictment, the offense of possession of a controlled substance in a penal institution comprises the following essential elements:

(1) the defendant possessed a controlled substance found in Title 39, Chapter 17, Part 4 of the Tennessee Code, i.e., marijuana;

(2) the possession occurred while the defendant was present in any penal institution where prisoners are quartered or under custodial supervision;

(3) the defendant possessed the controlled substance without the express written consent of the chief administrator of the institution;

(4) the defendant acted knowingly.

Tenn. Code Ann. § 39-16-201(a)(2). In comparison, the offense of simple possession of a controlled substance comprises the following essential elements:

(1) the defendant possessed a controlled substance as defined in Title 39, Chapter 17, Part 4; and

(2) the defendant acted knowingly.

Tenn. Code Ann. § 39-17-418(a).[1] While not congruent with the essential elements of possession of a controlled substance in a penal institution, the essential elements of simple possession of a controlled substance appear to be a subset thereof. Accordingly, we conclude that the offense of simple possession of a controlled substance qualifies as a lesser included offense under part (a) of the Burns test.

III.

For the reasons set forth above, we reverse the appellant's conviction of possession of a controlled substance in a penal institution and modify the judgment of the trial court to reflect his conviction of simple possession of a controlled substance. Furthermore, we find it unnecessary to address the remaining issues regarding sentencing as they are rendered moot by our holding in this case. Accordingly, we remand this cause to the trial court for entry of a judgment of conviction in accordance with this opinion and for re-sentencing consistent with the principles of sentencing.

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[1]Tenn. Code Ann. § 39-17-418(a) provides that it is an offense to knowingly possess a controlled substance *"unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of professional practice."* See also Tenn. Code Ann. § 39-17-427 (1997). However, the absence of a valid prescription is not an additional essential element of the offense, but rather an exception which a defendant must prove by a preponderance of the evidence. Tenn. Code Ann. § 39-11-202 (1997). See also State v. Hinkle, No. 03C01-9902-CR-00061, 1999 WL 1133314, at *7 (Tenn. Crim. App. at Knoxville, December 10, 1999); State v. Cobb, No. 03C01-9811-CR-00420, 1999 WL 1080952, at *4 (Tenn. Crim. App. at Knoxville, December 2, 1999).

Norma McGee Ogle, Judge

CONCUR:

Gary R. Wade, Presiding Judge

Joseph M. Tipton, Judge