

IN THE SUPREME COURT OF THE STATE OF NEVADA

LESTER DEMON HANDS, JR.,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 41802

FILED

DEC 10 2003

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of possession of a controlled substance and possession of a controlled substance for the purpose of sale. The district court sentenced appellant Lester Demon Hands, Jr. to serve two concurrent prison terms of 19 to 48 months.

Hands first contends that there was insufficient evidence adduced at trial in support of his conviction for possession of a controlled substance for the purpose of sale. In particular, Hands contends that there was no evidence presented that he intended or attempted to sell the cocaine at issue, and the small quantity of cocaine found, 2.46 grams, "lends itself only to a finding of personal use." Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.¹

In particular, Washoe County Sheriff's Officer Michael Yonker testified that, while performing searches of arrested persons at the Washoe County Jail, he observed Hands chewing something. Hands

¹See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Origel-Candido v. State, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998).

refused to open his mouth, and Officer Yonker and two other police officers unsuccessfully attempted to forcibly open Hands' mouth.² Hands told Yonker: "I'm not going to jail for a rock."

Eventually, Hands was transported to the hospital. Reno Police Officer Kenneth Harmon testified that he observed a hospital doctor take a pair of angled forceps and remove a small plastic bag from Hands' throat. The bag contained 2.46 grams of cocaine.³ Harmon also testified that he had previously observed another officer search Hands and that no contraband had been found.⁴ David Kinamon, a Reno City Police Officer, testified that the most common way for drug dealers to hide rock cocaine is to place it in their mouths in little plastic bags so if they are confronted by the police they can swallow the rock and avoid arrest.

Hands also testified at trial. Hands told the jury that, while being booked into the Washoe County Jail, he was physically assaulted by police officers, a nurse injected him with an unknown substance which rendered him unconscious for two days, and that the police officers were lying about the fact that Hands had cocaine.

²A videotape, recorded at the Washoe County Jail, was also admitted into evidence. The videotape depicted Hands chewing something and showed the police officers attempting to remove an object from Hands' mouth.

³There was also evidence presented that Hands had ingested some of the cocaine, namely, Hands admitted that he was unconscious for two days, and a medical report noted that cocaine had been found in the contents of Hands' stomach.

⁴In its closing argument, the State argued that Hands intended to sell the cocaine because, at the time of his arrest, he did not possess a pipe to use the cocaine.

Although Hands contends that there was no evidence that he intended to sell the rock cocaine, the jury could reasonably infer from the evidence presented that Hands possessed the cocaine with the intent to sell. It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict.⁵ Accordingly, we affirm Hands' conviction for possession of a controlled substance for the purpose of sale.

Hands next contends that his conviction for possession of a controlled substance must be reversed on double jeopardy grounds. The State concedes that Hands' conviction for simple possession must be reversed, and we agree.⁶

Under the facts of this case, the acts of possession of a controlled substance for the purpose of sale and possession of a controlled substance provide the predicate facts for only one crime. Therefore, because possession of a controlled substance is a lesser-included offense of possession for the purpose of sale, Hands' conviction for possession of a controlled substance must be reversed because it violates the Double Jeopardy Clauses of both the United States and Nevada Constitutions.⁷

⁵See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

⁶While conceding that the conviction should be reversed under existing law, the State invites this court to revisit the issue and adopt the concurrent sentence doctrine discussed in Hughes v. State, 112 Nev. 84, 910 P.2d 254 (1996). We decline the State's invitation.

⁷See U.S. Const. amend. V; Nev. Const. art. I, § 8, cl. 1; McIntosh v. State, 113 Nev. 224, 225-26, 932 P.2d 1072, 1073 (1997).

Accordingly, we reverse Hands' conviction for possession of a controlled substance.

Finally, Hands contends that the district court erred in refusing to grant him 99 days credit for time served in presentence confinement on the instant case. In its appellate brief, the State concedes that NRS 176.055(1) is mandatory and that Hands should be given credit for time spent in presentence confinement provided that confinement is not attributable to another offense.⁸ We agree.

At the sentencing hearing in this case, a representative from the Division of Parole and Probation informed the district court that Hands was entitled to 99 days credit for time served because he had been discharged from a diversion program ordered in another case and, therefore, was only incarcerated on the instant offense. The district court denied Hands' request for credit, finding that he should be required to serve his full sentence because he posed a severe risk of society. We conclude that the district court erred in rejecting Hands' request for credit without considering whether the time spent in custody was attributable solely to the instant offense.

In construing NRS 176.055(1), this court has held that time spent in presentence incarceration should generally be credited towards the defendant's ultimate sentence.⁹ By statute, however, a defendant is not entitled to presentence incarceration credit if: (1) he was in custody

⁸See Kuykendall v. State, 112 Nev. 1285, 1287, 926 P.2d 781, 783 (1996); Anglin v. State, 90 Nev. 287, 525 P.2d 34 (1974).

⁹Id.

pursuant to the judgment of conviction for another offense; or (2) on probation or parole from a Nevada conviction.¹⁰

In this case, it is unclear from the record on appeal whether the time spent in presentence confinement was solely for the instant offense or whether one of the statutory exceptions set forth in NRS 176.055 applies. Accordingly, we remand this matter to the district court for a determination of whether Hands is entitled to credit for presentence incarceration. If Hands was not on probation or parole from a Nevada conviction or serving time pursuant to a judgment of conviction for another offense, but instead was in custody solely on the instant offense, then he is entitled to credit for time served.

In sum, we affirm Hands' conviction for possession of a controlled substance for the purpose of sale and reverse Hands' conviction for possession of a controlled substance. Additionally, we remand this case to the district court for consideration of whether Hands is entitled to credit for time spent in presentence confinement.

Having considered Hands' contentions, we

¹⁰See NRS 176.055.

ORDER the judgment of conviction AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

Becker, J.
Becker

Shearing, J.
Shearing

Gibbons, J.
Gibbons

cc: Hon. James W. Hardesty, District Judge
Washoe County Public Defender
Attorney General Brian Sandoval/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk