2012 IL App (2d) 120176
No. 2-12-0176
Order filed December 27, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 11-CF-474
BRANDON RILEY,	)	Honorable Timothy Q. Sheldon,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Presiding Justice Burke and Justice McLaren concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court erred when it denied defendant's motion to dismiss based on compulsory joinder grounds because the offenses charged were known to the prosecuting officer at the commencing of the prior prosecution and that both prosecutions arose from the same act. Therefore, the subsequent offenses were subject to compulsory joinder with the original cannabis charge.

¶ 2 Defendant, Brandon Riley, appeals from the denial of his motion to dismiss two cannabis-related charges on compulsory joinder grounds. He asserts that the charges involved in the appeal—unlawful possession, with intent to deliver, of more than 500 grams, but not more than 2,000 grams, of cannabis (720 ILCS 550/5(e) (West 2010)) and unlawful possession of more than

500 grams, but not more than 2,000 grams, of cannabis (720 ILCS 550/4(e) (West 2010))—were based on the same act as a misdemeanor to which he previously pleaded guilty. Further, he asserts that the facts on which the current charges were based were known to the State's Attorney's office when the misdemeanor plea occurred. Defendant contends the trial court erred when it denied his motion because the current charges were subject to dismissal under the compulsory joinder provisions of sections 3-3(b) and 3-4(b)(1) of the Criminal Code of 1961 (the compulsory joinder statute) (720 ILCS 5/3-3(b), 3-4(b)(1) (West 2010)). We conclude that, because the offenses charged were known to the prosecuting officer at the commencement of the prior prosecution and that both prosecutions arose from the same offense, the State's Attorney's office should have known that defendant had control of the cannabis that formed the basis for the felony charges, and it should have known of those charges for purposes of joinder. We therefore reverse the trial court's denial of defendant's motion to dismiss and remand.

¶ 3 I. BACKGROUND

¶ 4 On March 14, 2011, defendant was charged by information with the two cannabis-possession counts at issue here, and on June 29, 2011, a grand jury indicted him on the same charges. Defendant moved to dismiss both as barred by the compulsory joinder provisions and by double jeopardy principles. He asserted that the charges arose out of a December 10, 2010, warrant-authorized search of his house. He further asserted that, based on what the police had found, they had immediately arrested him and charged him with misdemeanor possession of more than 2.5 grams, but not more than 10 grams of cannabis (720 ILCS 550/14(b) (West 2010)). On January 7, 2011, he pleaded guilty to that charge. Defendant argued that, because the police had gained all of

the evidence for both prosecutions in the December 10, 2010, search, sections 3-3(b) and 3-4(b)(1) of the Code barred the State from commencing a second prosecution.

¶ 5 Defendant included a copy of the warrant as an exhibit. That document showed that defendant was the sole person discussed as a suspect or a person of interest. The trial court issued the warrant for the search of both "the residence commonly known as **463 S. Liberty *** including detached garage**" and "[t]he person of **Brandon Riley**." According to the affidavit of the investigating officer, defendant had registered his car to the Liberty address. Moreover, a John Doe informant had participated in a controlled purchase of cannabis from defendant. The informant's affidavit for the warrant averred that he knew that defendant lived in the house that the police sought to search and that in the past 72 hours, he had, "while inside the residence," observed defendant in possession of approximately two pounds of cannabis.

¶ 6 At the hearing on defendant's motion, defendant argued that the controlling precedent required the trial court to find that instances of actual possession and constructive possession of contraband that occur at a single time constituted a single act for joinder purposes. Defendant agreed to stipulate that five other residents of the house were present at the time of the warrant's execution, as were two nonresidents. Further, the police found, in a cooler in the residence's detached garage, the larger quantity of cannabis that formed the basis for the later felony case. The smaller amount, which formed the basis for defendant's earlier misdemeanor conviction, the police found in a basement bedroom area that had indicia of being defendant's. The police also found one of the other residents, Justin Harper, to have cannabis on his person; he was also sitting on a scale. Also in personal possession of cannabis was Michael Page, who was sleeping in another basement bedroom area. Moreover, the search found cannabis in other parts of the house.

¶ 7 The police sent the cannabis and packaging from inside the cooler, along with fingerprint cards from defendant and Harper, to the State Police laboratory with the request that any fingerprints found be run through the automated fingerprint identification system. The laboratory identified prints of defendant's.

¶ 8 The State argued both that multiple acts of possession had occurred and that it did not, for purposes of making joinder compulsory, know of the felony offenses until it learned that defendant's fingerprints were associated with the cannabis from the cooler. It argued that it had no way to be certain to whom the cannabis in the garage belonged when the police found it. It further suggested that the felony and misdemeanor offenses required different evidence because the smaller amount had an obvious connection to defendant. The trial court denied the motion; defendant filed a timely motion to reconsider, which the court denied; and defendant timely appealed.

¶ 9 II. ANALYSIS

¶ 10 At issue is the proper application of the compulsory joinder provisions of the Code. The joinder provisions are in sections 3-3 and 3-4 of the Code (720 ILCS 5/3-3, 3-4 (West 2010)). The rule for joinder proper is in section 3-3:

> "(a) When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense.
>
> (b) *If the several offenses are known to the proper prosecuting officer at the time of commencing the prosecution* and are within the jurisdiction of a single court, *they must be prosecuted in a single prosecution*, except as provided in Subsection (c), *if they are based on the same act*.

(c) When 2 or more offenses are charged as required by Subsection (b), the court in the interest of justice may order that one or more of such charges shall be tried separately." (Emphases added.) 720 ILCS 5/3-3 (West 2010).

The rule barring further prosecutions is in section 3-4(b)(1).

"(b) *A prosecution is barred if the defendant was formerly prosecuted* for a different offense, or for the same offense based upon different facts, *if that former prosecution*:

(1) resulted in either a conviction or an acquittal, and the subsequent prosecution is for an offense of which the defendant could have been convicted on the former prosecution; or *was for an offense with which the defendant should have been charged on the former prosecution, as provided in Section 3-3 of this Code* (unless the court ordered a separate trial of that charge); or was for an offense that involves the same conduct, unless each prosecution requires proof of a fact not required on the other prosecution, or the offense was not consummated when the former trial began[.]" (Emphases added.) 720 ILCS 5/3-4(b)(1) (West 2010).

¶ 11 Summarizing the above, a prosecution is barred if three conditions are met: (1) the existence of a prior prosecution; (2) the offense charged in the current prosecution was known to the proper prosecuting officer at the time of commencing the prosecution for the prior offense; and (3) both prosecutions arise from the same act. Both parties agree that whether charges are subject to compulsory joinder is an issue of law and so subject to *de novo* review when, as here, none of the relevant facts is in dispute. See, *e.g.*, *People v. Hunter*, 2012 IL App (1st) 092681, ¶ 2 (using *de novo* review in similar circumstances).

¶ 12 With respect to the prosecuting officer's knowledge, defendant argues:

> "Fingerprints were lifted from the garage cooler containing the cannabis which is the subject of the present charges at the time of the raid on 12.10.10. They provided the nexus for the present charges. The State had them in their possession since the date of the raid, and of course, at the time Defendant's guilty plea to constructive misdemeanor possession was accepted on 01.07.11. *** They had the evidence from the day of the raid, sat on it for three months, and now complain of a lack of evidence to proceed."

In reply to the State, defendant argues that he was the State's investigational target from the outset and that it had sufficient knowledge from the informant's affidavit that the cannabis in the cooler was his.

¶ 13 In this case, we determine that the offenses charged were known to the prosecuting officer at the commencement of the prior prosecution and that both prosecutions arose from the same offense. We first address the knowledge requirement. In *People v. Hiatt*, 229 Ill. App. 3d 1094 (1992), the State executed a search warrant of defendant's residence on May 22, 1990, and seized numerous photographs, VHS tapes, a video camera, and a VCR. *Id.* at 1095. Approximately one week later, the defendant's wife informed investigators that the defendant took the pictures and that two of the minors were the defendant's children, who were between the ages of 11 and 14. *Id.* Thereafter, on June 19, 1990, the State charged the defendant in Peoria County with the offense of child pornography. The indictment alleged that the defendant knowingly videotaped T.T., a child he knew to be less than the age of 18, while she performed sexual acts. *Id.* The defendant was acquitted following a jury trial. *Id.* On July 26, 1990, the defendant was charged with the offense of child pornography in Tazewell County, with the indictment again alleging that the defendant possessed a pornographic video of T.T. The trial court subsequently dismissed the charge on double

jeopardy grounds. *Id.* Finally, the State charged the defendant in Tazewell County with 20 counts of child pornography, alleging that the defendant possessed 20 different photographs of his minor children, J.H. and T.H. *Id.* The defendant moved to dismiss the charges pursuant to the compulsory joinder statute, and the trial court denied the motion, finding that the State did not "know" of the charges at issue at the time the earlier possession of a pornographic video tape of T.T. charge was filed. *Id.* at 1095-96.

¶ 14 On appeal, the defendant argued that the charges were known to State at the time of the first Tazewell County charge. *Id.* at 1096. The reviewing court agreed, concluding that "the State's argument that the prosecutor did not know *of the possibility of charges* stemming from the photographs is not persuasive." (Emphasis added.) *Id.* at 1097. The reviewing court emphasized that the videotape and the photographs were discovered in the same search, it was clear that the children were under 18 years of age, and the defendant's ex-wife verified that fact six days after the search. *Id.*

¶ 15 We find the reasoning in *Hiatt* persuasive. Here, as in *Hiatt*, the larger amount of cannabis found in the residence's detached garage was found in the same search as the smaller amount which formed the basis of defendant's earlier misdemeanor conviction. Moreover, that defendant was in possession of the larger amount of cannabis at issue in this case was corroborated by the affidavit from John Doe, who averred that he observed defendant in possession of two pounds of cannabis while he was inside the defendant's residence. Based on the circumstances here, *i.e.*, that the John Doe affidavit specified that defendant was in possession of two pounds of cannabis and that the police discovered two pounds of cannabis executing the search, we conclude that the State knew of

the possibility of the charges stemming from the larger amount of cannabis when the State brought the misdemeanor charges against defendant. See *id.*

¶ 16 We are cognizant of the State's argument that the State was waiting for the analysis from the fingerprints taken from the cooler, so as to wait "until all facts surrounding the possession of the cannabis in the detached garage were known before charging the defendant." We also recognize that other people were present at defendant's residence when the police executed the search and that the larger quantity of cannabis could have belonged to someone else. That the larger quantity of cannabis could have belonged to another person at the house did undermine the possibility that the larger amount of cannabis could have belonged to defendant. However, we do not read the knowledge component of section 3-3(b) of the compulsory joinder statute as requiring knowledge to a precise degree of specificity. Rather, we believe that the proper reading of that provision, as described in *Hiatt*, is that so long as the State was aware of the possibility of charges stemming from the larger quantity of cannabis, the State had knowledge of the offense.

¶ 17 We caution, however, that whether the possibility of charges is sufficient to constitute knowledge under section 3-3(b) must be carefully examined under the specific circumstances of each case. Nonetheless, as discussed above, because the smaller and larger amounts of cannabis were found during the same search and the John Doe affidavit specified that defendant was in possession of two pounds of cannabis at his residence, the State had knowledge of the current charges when it prosecuted defendant for the lesser amount.

¶ 18 Turning to the element as to whether both prosecutions arose from the same conduct, the State argues that "possession of different amounts of drugs in different locations are related, but distinct, acts that do not implicate compulsory joinder." In *People v. Hunter*, 2012 IL App (1st)

092681, police officers observed the defendant conducting an apparent drug deal using a vestibule of a building in Chicago. *Id.* ¶ 4. The officers recovered 10.6 grams of cannabis and one loaded handgun in the vestibule near the defendant, and also recovered a second loaded handgun from a staircase approximately five feet from the vestibule. *Id.* The defendant was charged with cannabis possession only. *Id.* Thereafter, the State charged defendant with five additional offenses—four charges of unlawful use of a weapon by a felon and a single charge of being an armed habitual criminal. *Id.* ¶ 7. The defendant moved to dismiss the new charges against him, arguing that the compulsory joinder statute required the State to charge the new offenses with the original cannabis charge, and that his right to a speedy trial had been violated. *Id.* ¶ 8. The trial court granted the motion. *Id.* ¶ 10.

¶ 19 On appeal, the reviewing court considered the "narrow issue" of whether the defendant's alleged possession of cannabis and possession of the recovered handguns were based on the "same act" under the compulsory joinder statute. *Id.* ¶ 13. The reviewing court noted that "the State in effect argues that the defendant engaged in separate and distinct acts of constructive possession of the cannabis and the handguns that were effectively recovered simultaneously. To accept this contention would require that we create multiple acts of constructive possession at discrete moments in time." *Id.* ¶ 27. The court in *Hunter* rejected the State's argument, opining:

> "The criminal act of the defendant here constructively possessing both the cannabis and the handguns, as the State alleges, cannot be divided into multiple distinct and overt acts. The simultaneous, constructive possession of the cannabis and the handguns is analogous to both items being present in a single container that the defendant is to alleged to have

> possessed. It is the singular act of possessing that container that triggers compulsory joinder *** ." *Id.* ¶ 29.

The court in *Hunter* concluded:

> "[T]he simultaneous, constructive possession of the cannabis and the handguns recovered in the instant case gave rise to the offense that the State was required to prosecute 'in a single prosecution' as required by section 3-3(b) of the [compulsory joinder statute]. The State fails to persuade that constructive possession should be treated differently than had the cannabis and the guns been recovered simultaneously from a single container possessed by the defendant or from the defendant's person. [Citation.] We reject the State's hypertechnical interpretation of the 'same act' to create multiple acts based on discrete moments in time in which the defendant constructively possessed the cannabis separately from constructively possessing the handguns." *Id.* ¶ 34.

The court in *Hunter* closed by noting that the State could have avoided the outcome had it filed the gun-related charges that it "unquestionably was aware of" within 160 days of the defendant's arrest. *Id.* ¶ 34.

¶ 20 We find the reasoning in *Hunter* persuasive to this case. The State charged defendant in the prior matter with possession of cannabis found in his residence, and later charged him with the larger amount found in his detached garage. The warrant authorized the State to search both defendant's residence and his "detached garage," and the John Doe affidavit specified that defendant was possession of two pounds of cannabis. We reject the State's "hypertechnical" interpretation of the "same act" provision to draw multiple acts based on the defendant being in possession of a smaller amount of cannabis in his residence while being in constructive possession of a larger amount of

cannabis in his unattached garage, both of which were within the purview of the search warrant and recovered simultaneously. *Id.* ¶ 33.

¶ 21 The State acknowledges *Hunter* in passing and purports to distinguish it by noting that the handguns in *Hunter* were "found within a few feet of the defendant." We are aware of no authority that distinguishes possession on the basis of the precise distance between the item in possession and the item in constructive possession. Thus, as in *Hunter*, the State has failed to persuade us that defendant's constructive possession of the larger quantity of cannabis should be treated differently than had both the smaller amount and the larger amount "been recovered simultaneously from a single container possessed by the defendant or from the defendant's person." *Id.*

¶ 22 Moreover, *People v. Brookhouse*, 289 Ill. App. 3d 1079 (1997), a case relied upon by the State, is distinguishable. In *Brookhouse*, the State obtained a search warrant to execute a search of the defendant and his residence in Cook County. *Id.* at 1080. The search revealed a quantity of marijuana and .2 gram of cocaine. *Id.* While the search was being executed, other police officers were standing by at a bowling alley in Will County. *Id.* After the defendant was placed under arrest at his apartment, he consented to a search of his locker at the bowling alley, which yielded 36.2 grams of cocaine. *Id.* On May 25, 1995, the State charged defendant in Cook County with possession of marijuana and cocaine stemming from the search of his residence. *Id.* On July 19, 1995, the State charged the defendant in Will County with the possession of cocaine found in the locker at the bowling alley. *Id.* Defendant pleaded guilty to the Cook County charges and moved to dismiss the Will County charges on the basis of double jeopardy, which the trial court denied. *Id.* at 1080-81.

¶ 23 The reviewing court affirmed. In doing so, the reviewing court focused on the nature of the offenses, and concluded that while the charges in both counties required proof of knowledge of the drugs, the charge based on constructive possession necessarily focused on the location of contraband. *Id.* at 1082. The reviewing court emphasized that constructive possession, by definition, existed without personal present control over the substance, so in effect, the location of where the drugs were found was a distinct element of any charge involving constructive possession. *Id.*

¶ 24 We are not persuaded by the State's reliance on *Brookhouse*. Initially, we note that *Brookhouse* involved two distinct searches that yielded different quantities and types of drugs located in two different counties and venues, and there is nothing in *Brookhouse* to suggest that the State was aware of either the drugs or the quantity found in the defendant's bowling locker before the search was executed. Conversely, here, the smaller amount and the larger amount of cannabis were the subject of the same search warrant and the larger amount was specified in the John Doe affidavit. Moreover, as the court in *Hunter* noted, a single criminal act might violate several different statutes (*Hunter*, 2012 IL App (1st) 092681, ¶ 30 (citing *People v. Quigley*, 183 Ill. 2d 1, 10 (1998)). Bringing multiple charges pursuant to various statutes necessarily requires proving distinct elements for each charge. Therefore, while requiring proof of location as a distinct element of constructive possession is a factor to consider in a "single act" analysis, that constructive possession contains a "distinct element" does not preclude possession and constructive possession being construed to be the same act with the meaning of the compulsory joinder statute.

¶ 25 Put more simply, we find the specific circumstances here more analogous to *Hunter* than to *Brookhouse*. Therefore, although proof of defendant's constructive possession of the larger quantity

of cannabis required a distinct element compared to his possession of the smaller quantity, we conclude the possession constituted a single act.

¶ 26 Finally, as did the court in *Hunter*, we note that nothing in our decision today would have precluded the State from waiting to charge defendant with possession of the smaller amount and the larger amount until the results of the fingerprint analysis were concluded. See *Hunter*, 2012 IL App (1st) 092681, ¶ 34.

¶ 27 III. CONCLUSION

¶ 28 For the foregoing reasons, we hold that the trial court erred when it denied defendant's motion to dismiss. Accordingly, we reverse the judgment of the circuit court of Kane County and remand the matter for further proceedings consistent with this order.

¶ 21 Reversed and remanded.