IN THE COURT OF APPEALS OF IOWA

No. 0-382 / 09-0870
Filed June 30, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RUSSELL DAROLD PICK,
Defendant-Appellant.

Appeal from the Iowa District Court for Plymouth County, Jeffrey A. Neary, Judge.

The defendant appeals from his conviction for possession of a controlled substance (marijuana). **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and E. Frank Rivera, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber and Mary Tabor, Assistant Attorneys General, Eric McBurney, Student Legal Intern, Darin J. Raymond, County Attorney, and Amy Oetken, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ. Tabor, J., takes no part.

VOGEL, P.J.

Russell Pick was charged with possession of a controlled substance (marijuana) enhanced, a class D felony, while being a habitual felon in violation of Iowa Code sections 124.401(5), 902.8, and 902.9 (2007). According to the minutes of evidence, Pick had five prior convictions for possession of marijuana, one prior conviction for possession of a prescription drug (Mylan), and one prior conviction for second-degree burglary. Three of those convictions were felonies.

On May 5, 2009, following a trial on the minutes of evidence, the district court found Pick guilty as charged. The district court sentenced Pick to an indeterminate fifteen-year term in prison with a three-year mandatory minimum, suspended the prison term, and placed Pick on probation for a period of three years. Pick appeals and asserts he should have been found guilty of an aggravated misdemeanor and not a class D felony under Iowa Code section 124.401(5). Our review is for correction of errors at law. *State v. Cortez*, 617 N.W.2d 1, 3 (Iowa 2000).

Section 124.401(5) provides:

> It is unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of the practitioner's professional practice, or except as otherwise authorized by this chapter. Any person who violates this subsection is guilty of a serious misdemeanor for a first offense. A person who commits a violation of this subsection and who has previously been convicted of violating this chapter or chapter 124A, 124B, or 453B is guilty of an aggravated misdemeanor. *A person who commits a violation of this subsection and has previously been convicted two or more times of violating this chapter or chapter 124A, 124B, or 453B is guilty of a class "D" felony.*
>
> If the controlled substance is marijuana, the punishment shall be by imprisonment in the county jail for not more than six

> months or by a fine of not more than one thousand dollars, or by both such fine and imprisonment for a first offense. If the controlled substance is marijuana and the person has been previously convicted of a violation of this subsection in which the controlled substance was marijuana, the punishment shall be as provided in section 903.1, subsection 1, paragraph "b". *If the controlled substance is marijuana and the person has been previously convicted two or more times of a violation of this subsection in which the controlled substance was marijuana, the person is guilty of an aggravated misdemeanor.*

(Emphasis added.) In *Cortez*, our supreme court examined section 124.401(5) and found that this section only intended to grant leniency to those charged exclusively with marijuana related offenses. *Cortez*, 617 N.W.2d at 3. The court stated that "[o]nce a defendant is convicted of a single offense involving other illegal substances . . . all crimes committed prior or subsequent thereto could be used to enhance the offender's sentence under the stricter, felony track." *Id*. The court's interpretation of section 124.401(5) was based on the fact that "it would be absurd to treat a defendant as a first time marijuana offender, when that person is guilty of antecedent convictions for possession of hard drugs." *Id*.

Pick acknowledges that he has a prior conviction for an offense involving other illegal substances—the prescription medication Mylan. However, Pick essentially argues that under *Cortez* a prior drug conviction must be for a "hard drug," and he asserts Mylan is not a "hard drug" so he should have only been convicted of an aggravated misdemeanor. We find Pick's argument is without merit. The *Cortez* court stated that a prior conviction must be for a non-marijuana drug, which is all other illegal substances, as was urged by the State. *Id*. It did use, without defining, the term "hard drug" in explaining the rationale behind the statute and its decision, but did not find that a defendant must have a

prior conviction for a "hard drug." *Id*. The statute clearly provides that a non-marijuana offense can be used to enhance a charge to a Class D felony. Therefore, Pick was properly convicted of a class D felony. We affirm.

AFFIRMED.