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ARKANSAS COURT OF APPEALS

DIVISION III
No. CACR09-646

	Opinion Delivered March 10, 2010
JASON LEE APPELLANT	APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT [NO. CR 08-3166]
V.	HONORABLE WILLARD PROCTOR, JR., JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

LARRY D. VAUGHT, Chief Judge

Jason Lee was convicted by a Pulaski County jury of simultaneous possession of drugs and firearms and possession of a controlled substance with the intent to deliver. He was sentenced to two concurrent seventeen-year terms in the Department of Correction. Lee appeals the latter conviction, arguing that it is a lesser-included offense of the simultaneous-possession charge and that his double-jeopardy rights have been violated because he has been convicted twice of the same crime. We affirm.

In the early morning of June 25, 2008, as part of a traffic stop, Officer Aaron Oncken of the Little Rock Police Department ran the license-plate number of a vehicle driven by Lee. Also present was Little Rock Police Officer Chance Ketzscher, who observed a firearm located under the driver's seat of Lee's vehicle. When Officer Oncken learned that two arrest warrants

had been issued for Lee, the officers arrested him. While conducting a search incident to the arrest, Officer Oncken discovered two baggies of what appeared to be a controlled substance in a pouch attached to the driver's seat, which was located directly above where the firearm was found. The substance in the baggies was later confirmed, by the Arkansas State Crime Lab, to be 22.3763 grams of crack cocaine. Based on this evidence, Lee was convicted by the jury of simultaneous possession of drugs and firearms and possession of a controlled substance with the intent to deliver.

On appeal, Lee challenges the conviction for possession of a controlled substance with the intent to deliver because the offense was a lesser-included offense of simultaneous possession of drugs and firearms for which he was also convicted. He claims that this violated Arkansas Code Annotated section 5-1-110(a)(1) (Supp. 2007), which prohibits the conviction for more than one offense if one offense is included in the other.[1]

The State's initial response is that Lee's double-jeopardy argument is not preserved for appeal. Citing *Brown v. State*, 347 Ark. 308, 65 S.W.3d 394 (2001), the State asserts that because Lee's counsel made the argument before the jury convicted Lee, he failed to preserve the issue. In *Brown*, defense counsel argued, in directed-verdict motions, that double-jeopardy required that the State elect between first-degree battery and terroristic-act charges. *Brown*, 347 Ark. at 316–17,

[1]Section 5-1-110(a)(1) provides that a defendant may not be convicted of more than one offense if one offense is included in the other offense as defined in subsection (b) of this section. Ark. Code Ann. § 5-1-110(a)(1). Subsection (b) provides that an offense is included in an offense charged if the offense is established by proof of the same or less than all of the elements required to establish the commission of the offense charged. Ark. Code Ann. § 5-1-110(b)(1).

65 S.W.3d at 399. The motions were denied, and the jury returned a guilty verdict, convicting the defendant of second-degree battery and a terroristic act. *Id.* at 317, 65 S.W.3d at 399.

On appeal, Brown argued that his convictions violated his double-jeopardy rights. *Id.* at 317, 65 S.W.3d at 399. The State argued that Brown's directed-verdict motions were not specific enough; therefore, his arguments were not preserved. *Id.*, 65 S.W.3d at 399. The supreme court held that Brown's arguments were not preserved because the challenge to his convictions came before he was convicted by the jury.

> [A] defendant cannot object to a double jeopardy violation until he has actually been convicted of the multiple offenses, because it is not a violation of double jeopardy under § 5-1-110(a)(1) for the State to charge and prosecute on multiple and overlapping charges. It was only after the jury returned guilty verdicts on both offenses that the circuit court would be required to determine whether convictions could be entered as to both based on the same conduct. *See* Ark. Code Ann. § 5-1-110(a)(1) (Repl.1997); *Hill v. State*, 314 Ark. 275, 862 S.W.2d 836 (1993) (citing *Hickerson v. State*, 282 Ark. 217, 667 S.W.2d 654 (1984); *Swaite v. State*, 272 Ark. 128, 612 S.W.2d 307 (1981)).

Brown, 347 Ark. at 317, 65 S.W.3d at 399–40. The supreme court held that because Brown moved for a directed verdict based on double jeopardy before he was convicted of any offense, his motion was ineffective. *Id.*, 65 S.W.3d at 400. It also held that because Brown failed to object after the jury convicted him of both charges, he waived his double-jeopardy argument for purposes of appeal. *Id.*, 65 S.W.3d at 400.

While *Brown* holds that a double-jeopardy argument must be made after a defendant has been convicted and while Lee did not make his double-jeopardy argument after the jury convicted him, we hold that *Brown* does not bar Lee's appeal. Lee's double-jeopardy argument was made after the parties rested, after the jury was instructed, and during their deliberations.

There was no question that the parties understood that this argument was directed to Lee's would-be conviction. At the beginning of the trial, Lee's counsel advised the trial court that he had a double-jeopardy argument, but stated that the court might prefer to hear it during sentencing. The prosecutor concurred, stating that the argument would not be ripe until the sentencing phase of the trial. But while the jury deliberated, the trial court requested that the parties present arguments on the double-jeopardy issue, stating, "go ahead and do that now so we will have that out of the way." Thus, the trial court understood that Lee's double-jeopardy argument was directed to his convictions, but required the parties to make the argument during the jury's deliberations. We hold that these facts are distinguishable from those in *Brown* and that *Brown* does not bar Lee's appeal.[2] Accordingly, we hold that Lee's double-jeopardy argument is preserved.

On the merits, Lee argues that his conviction for possession of a controlled substance with the intent to deliver violates Arkansas Code Annotated section 5-1-110(a)(1) because that offense was a lesser-included offense of simultaneous possession of drugs and firearms. He contends that this court should overrule *Rowbottom v. State*, 341 Ark. 33, 13 S.W.3d 904 (2000), where our supreme court held that a defendant can be convicted of simultaneous possession of drugs and firearms and a lesser-included felony-controlled-substance offense. He argues that the *Rowbottom* holding is inconsistent with section 5-1-110(a)(1) and (d)(1) and that the *Rowbottom*

[2]In addition to *Brown*, the State also relies upon *Hollins v. State*, 80 Ark. App. 342, 96 S.W.3d 755 (2003). However, for the same reasons that *Brown* is distinguishable from the instant case, *Hollins* is likewise distinguishable.

court did not consider the 1995 General Assembly's expressed intent that only certain exceptions existed to the double-jeopardy rule, which do not apply in this case.

We are without authority to overrule decisions made by the supreme court. *Roark v. State*, 46 Ark. App. 49, 55, 876 S.W.2d 596, 599 (1994). Moreover, we are bound to follow the decisions of our supreme court. *Benjamin v. State*, 102 Ark. App. 309, 316, 285 S.W.3d 264, 270 (2008). The defendant in *Rowbottom* presented the same argument to the supreme court that Lee presents here, and our supreme court rejected it. That case was handed down in 2000, after the 1995 legislation upon which Lee relies. The supreme court, expressly relying upon the General Assembly's intent, stated that convictions for simultaneous possession of drugs and firearms and for possession with the intent to deliver (the same offenses Lee was convicted of) do not violate double-jeopardy rules. *Rowbottom*, 341 Ark. at 40, 13 S.W.3d at 908.

Affirmed.

KINARD and GRUBER, JJ., agree.