MILLER *v.* STATE.

4755 261 S. W. 2d 411

Opinion delivered October 19, 1953.

CRIMINAL LAW—INTOXICATING LIQUORS.—One convicted of possessing intoxicants for the purpose of sale and fined $250 was also charged with the possession of untaxed liquor. On appeal from municipal to circuit court the defendant entered a plea of guilty to the charge of possession for sale, but stood trial on the second count and was fined $500. His defense was that two crimes could not be carved out of the same transaction. *Held,* there were two distinct offenses and a plea of guilty to one of them did not constitute double jeopardy when the second accusation was made.

Appeal from Phillips Circuit Court; *Elmo Taylor,* Judge; affirmed.

A. M. Coates, for appellant.

Tom Gentry, Attorney General, and *Thorp Thomas,* Assistant Attorney General, for appellee.

GRIFFIN SMITH, Chief Justice. Appellant was arrested while carrying a bucket containing several bottles of corn whiskey. In municipal court he was fined $250 under § 48-901(c), Ark. Stat's—possessing intoxicants for the purpose of sale. On a second charge growing out of the same transaction he was fined $500 and sentenced to serve three months in jail for possessing unstamped liquor. Ark. Stat's, § 48-934.

On appeal a plea of guilty to possession for sale was entered, but the defendant elected to stand trial on the charge of possessing the untaxed commodity. The jury assessed a fine similar to that adjudged in municipal court, but omitted the jail sentence. The appeal is from the $500 fine. It is contended that two offenses cannot be carved out of the same transaction, hence as to the contested judgment there should have been a directed verdict. *Holder* v. *Fraser, Judge,* 215 Ark. 67, 219 S. W. 2d 625.

In the cited case we said that if a thief simultaneously steals two objects the state may charge him with the theft of one, and under that indictment he cannot be convicted of stealing the other. A plea of double jeopardy would nevertheless bar a second trial for larceny, for there is only one offense which the state cannot subdivide by making separate accusations. In the succeeding paragraph, however, there is this sentence: "When the crimes involve the element of intent we see no difficulty in finding two offenses in one act."

In *Mullins* v. *Commonwealth,* 216 Ky. 182, 286 S. W. 1042, it was held that a former acquittal of unlawfully giving away liquor was no bar to prosecution for unlawfully possessing the same liquor, the offenses not being the same under that state's statutes. We approved this rule in *Eoff* v. *State,* 218 Ark. 109, 234 S. W. 2d 521, calling attention to a text in 22 C. J. S., p. 440. A

number of cases, both state and federal, are cited in the Eoff opinion, and it is conclusive here.

Affirmed.