Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

FILED
Apr 08 2009, 9:25 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

MARK SMALL
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

MARJORIE LAWYER-SMITH
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

ALAN KIBLER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0807-CR-589
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven R. Eichholtz, Judge
Cause No. 49G23-0706-FB-117975

April 8, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Alan Kibler appeals his convictions for Conspiracy to Commit Dealing in a Narcotic Drug, as a Class B felony,[1] Dealing in a Narcotic Drug, as a Class B felony,[2] and Possession of a Narcotic Drug, as a Class D felony.[3] We affirm the Conspiracy conviction and reverse and remand with instructions to vacate the convictions for Dealing and Possession.

Issue

Kibler raises two issues on appeal,[4] which we consolidate to: Whether his convictions violate the principles of double jeopardy.

Facts and Procedural History

On June 21, 2007, Indianapolis Metropolitan police officers observed a gold Lexus pull into a Preston-Safeway grocery store parking lot. Kibler was driving the Lexus and had two passengers in the vehicle, one male (Brad Elliot) and one female. Minutes later, a silver Ford Festiva, driven by Darrell Fields, pulled alongside the Lexus.

Elliot exited the Lexus and entered the front passenger side of the Ford for only a minute before exiting. Elliot walked to the driver's window of the Lexus and leaned in, talking to Kibler. At that time, the officers approached the vehicles. Fields immediately put

---

[1] Ind. Code § 35-41-5-2; Ind. Code § 35-48-4-1.
[2] I.C. § 35-48-4-1.
[3] I.C. § 35-48-4-6.
[4] Kibler also raises the issue of the sufficiency of the evidence for the possession conviction. However, because we reverse the conviction on grounds of double jeopardy we need not address the sufficiency argument.

the Ford into gear and drove off. Kibler attempted to do the same but police vehicles blocked the Lexus from exiting. When the officers ordered Elliot to the ground, Elliot complied, but in the process, dropped a clear bag, which was later determined to contain balloons of heroin.

After Kibler was read his Miranda rights, he stated that he had arranged to buy ten "tacos" (balloons of heroin) from Fields and had given Elliot the money to buy the heroin when they reached the arranged meeting place. Kibler also stated that the heroin was for his use.

The State charged Kibler with Conspiracy to Commit Dealing in a Narcotic Drug, as a Class B felony, Dealing in a Narcotic Drug, as a Class B felony, and Possession of a Narcotic Drug, as a Class D felony. After a bench trial, Kibler was found guilty as charged. The trial court sentenced Kibler to the minimum of six years for each of the Class B felonies, suspending five years on each count, and 180 days, completely suspended, for the possession conviction. The sentences were ordered to be served concurrently.

Kibler now appeals.

Discussion and Decision

Kibler contends that his convictions for Dealing in a Narcotic Drug and Conspiracy to commit the same violate the Indiana Double Jeopardy Clause, Article I, Section 14 of the Indiana Constitution, specifically the "actual evidence test" as defined in Richardson v. State, 717 N.E.2d 32 (Ind. 1999). We initially reiterate that "a defendant may be convicted of both conspiracy to commit a felony and the underlying felony." Spivey v. State, 761 N.E.2d 831, 836 (Ind. 2002). Under the statutory elements test, a conspiracy to deal an illegal drug

conviction and a dealing of the same or different illegal drug conviction will always pass muster because conspiracy requires proof that the defendant made an agreement to deal and performed an overt act in furtherance of that agreement but does not require the actual delivery of that drug. See Moore v. State, 691 N.E.2d 1232, 1236 n.4 (Ind. Ct. App. 1998).

However, such a combination of convictions can violate the Indiana Double Jeopardy Clause via the actual evidence test if the State does not make a clear distinction between the overt act or acts supporting the conspiracy and the underlying offense. See Lee v. State, 892 N.E.2d 1231, 1235-36 (Ind. 2008). "To show that two challenged offenses constitute the same offense under the actual evidence test, a defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish all the essential elements of one offense may also have been used to establish all the essential elements of a second challenged offense." Tyson v. State, 766 N.E.2d 715, 716-17 (Ind. 2002). Application of this test requires the reviewing court to evaluate the evidence from the fact-finder's perspective for the essential elements of each of the challenged crimes. Lee, 892 N.E.2d at 1234. The "reasonable possibility" double jeopardy test turns on a practical assessment of whether the fact-finder "may have latched on to exactly the same facts for both convictions." Id. at 1236. In this process, it is appropriate to consider the charging information, jury instructions and arguments of counsel. Id.

The essential elements of the offense of conspiracy to deal a narcotic drug are: (1) the defendant (2) agreed with one or more other persons to commit the crime of dealing in a narcotic drug (3) with the intent to commit dealing in a narcotic drug and (4) the defendant or

one of the persons to the agreement performed an overt act in furtherance of the agreement. Ind. Code §§ 35-41-5-2; 35-48-4-1. The essential elements of the offense of dealing in a narcotic drug, as charged, are: (1) the defendant (2) knowingly or intentionally (3) financed the delivery of (4) a narcotic drug, pure or adulterated. Ind. Code § 35-48-4-1(a)(1)(D).

Because Kibler was tried by the trial court and not a jury, we need not consider jury instructions. The charging information provides, as follows, for each charge, respectively:

> Count IV [Conspiracy]
> Brad Elliott and Alan Kibler, on or about June 21, 2007, did, with intent to commit the felony of Dealing in a Narcotic Drug, agree with each other to commit said felony of Dealing in a Narcotic Drug, which is to knowingly finance the delivery of a narcotic drug, that is: heroin, classified in Schedule I of the Indiana Uniform Controlled Substances Act, and Brad Elliot performed the following overt act in furtherance of the agreement: accepted delivery of said heroin from Darrell Fields[.]
>
> Count V [Dealing]
> Brad Elliot and Alan Kibler, on or about June 21, 2007, did knowingly finance the delivery of a narcotic drug, that is: heroin, classified in Schedule I of the Indiana Uniform Controlled Substances Act[.]

Appellant's Appendix at 22-23.

The evidence presented at trial indicated that Kibler agreed with Elliot to obtain heroin and called Fields to arrange the purchase of heroin. Kibler then drove himself, Elliot and a female passenger to a Preston-Safeway grocery store in Indianapolis. Kibler gave money to Elliot for the heroin. Upon arrival, Elliot exited the gold Lexus, driven by Kibler, entered the Ford Fiesta driven by Fields, exited the Fiesta, and walked to the driver-side window of the Lexus. When police officers apprehended Elliot as he was standing by the Lexus, Elliot dropped a bag containing balloons of heroin. The facts boil down to this:

Kibler made an agreement with Elliot, arranged the buy with Fields, drove to the arranged location, gave Elliot the money for the heroin, and Elliot obtained the heroin from Fields.

In the State's closing argument, the prosecutor supported the charge for conspiracy by stating:

> [Kibler] did intend to purchase that heroin that day. He agreed with Brad Elliot to commit dealing in a narcotic drug by ordering heroin from Darrell Fields. . . . He agreed with Brad Elliot to drive to that area to buy heroin. The Defendant Alan Kibler handed Brad Elliot the money to purchase the heroin and waited in the car until Brad Elliot was returning. He did intend to have that heroin for himself. He intended to take the heroin from Brad Elliott. Brad Elliot performed the following overt act by accepting delivery of heroin from Darrell Fields.

Trial transcript at 32-33. As to the evidence supporting the dealing charge, the prosecutor emphasized:

> [T]he defendant, again, called Darrell Fields to buy the heroin, drove to meet Darrell Fields to buy the heroin, waited for Darrell Fields to arrive at the location, intended to purchase the heroin, gave the money to Brad Elliot to buy the heroin, and intended to use that heroin when Brad Elliott returned with the heroin.

Tr. at 33. Furthermore in support of the aiding, inducing and causing Elliott to possess the heroin, the prosecutor noted: "[Kibler] had ordered the heroin from Darrell Fields, drove to that location to buy the heroin, and handed money to Brad Elliott to purchase that heroin[.]" Tr. at 31-32.

During closing arguments, the prosecutor used the evidentiary facts that Kibler arranged the buy with Fields, drove to the arranged location, and gave Elliot the money for the heroin to support each charge. These three facts establish all of the elements of both

Dealing in Heroin and Aiding, Inducing, and Causing Possession of Heroin. The State contends that Elliot's receipt of the heroin was the distinguishing fact that established the essential element of Conspiracy to Commit Dealing in Heroin. The prosecutor emphasized this fact in an effort to obtain a separate conviction, but truly, the actual evidence portrays Kibler's participation in a single transaction. Elliot's receipt of the heroin, rather than being unique to the conspiracy charge, is better viewed simply as additional evidence of guilt as to all the charges. Despite the State's valiant efforts to argue to the contrary on appeal, the wording of the charging information and particularly the arguments of the prosecutor in his closing argument simply contain too much overlap between the proof that Kibler dealt heroin and that he conspired to deal heroin. Thus, based on how the proof of these facts was presented at trial, the convictions violate the Indiana Double Jeopardy Clause under the actual evidence test.

Therefore, because three of the evidentiary facts were sufficient to establish all of the essential elements for Conspiracy as well as all of the essential elements of both Dealing in Heroin and Aiding, Inducing and Causing Possession of Heroin, the case was presented in such a manner that the same evidence was used to support all three charges. Thus, we remand to the trial court to vacate the convictions for Dealing in Heroin and Aiding, Inducing and Causing the Possession of Heroin.

Affirmed in part, reversed in part and remanded.

MATHIAS, J., and BARNES, J., concur.