

STATEMENT OF THE CASE

Appellant-Defendant, Hector R. Castillo (Castillo), appeals his conviction for two Counts of dealing in methamphetamine, Class A felonies, Ind. Code § 35-48-4-1.1.

We affirm.

ISSUE

Castillo raises one issue for our review, which we restate as follows: Whether the trial court's failure to sever the charges and hold separate trials constituted fundamental error.

FACTS AND PROCEDURAL HISTORY

In early 2010, Detective Randy Dings (Detective Dings), with the Hamilton County Sheriff's Office, assigned to the Indianapolis Metropolitan Drug Task Force, contacted Robert Ynman (Ynman) and asked him to become a confidential informant. In exchange for Ynman's assistance with successful drug cases, the State agreed to reduce charges Ynman had against him. On February 2, 2010, while working with Detective Dings and Indianapolis Metropolitan Police Department Detective Jesus Soria (Detective Soria), Ynman arranged a drug buy with Castillo, an acquaintance from his neighborhood, where Ynman agreed to purchase an ounce of methamphetamine for \$1,350.

After Detective Dings searched Ynman and Detective Soria wired Ynman with a microphone, Detective Soria drove Ynman to the prearranged meeting site he had set with Castillo. Once there, they saw a Hispanic male, who turned out to be Castillo, in a white hat seated on the porch. Castillo got into a white minivan and drove around to the alley behind the house. Detective Soria and Ynman followed Castillo to the alley and once there, Ynman

got out of the car and went inside the minivan with Castillo where he exchanged \$1,350 for an ounce of methamphetamine. After the transaction, Detective Dings then followed Castillo, who drove to a nearby gas station, and drove by Castillo four times to obtain an accurate look at Castillo. Detective Dings also made a video recording while at the gas station for future reference. That same day, Detective Dings compiled a photo array and Ynman picked Castillo as the dealer.

On February 11, 2010, Ynman arranged another transaction with Castillo to purchase two ounces of methamphetamines for \$2,700. However, this time, rather than have Ynman meet Castillo, Detectives Dings and Soria decided it would be best to initiate a traffic stop on Castillo before Castillo reached the prearranged location. Indianapolis Metropolitan Police Officers Luke Schmitt (Officer Schmitt) and Jeffrey Avington (Officer Avington) began following Castillo's white minivan and witnessed Castillo commit several traffic violations and drive erratically. The Officers eventually pulled Castillo over and when they walked up to Castillo's minivan, his windows were open. Castillo was wearing the same white hat that he wore during the February 2 drug buy. During the stop, Officer Schmitt's search dog made a positive identification for contraband although no illegal substances were found in the minivan. Believing that Castillo had discarded the drugs by throwing them out of the car window, the Officers searched an area where Castillo had slowed down and discovered two angled holes in an otherwise undisturbed area of snow. There, the Officers found two baggies containing approximately two ounces of methamphetamine.

On February 12, 2010, the State filed an Information charging Castillo with Count I, dealing in methamphetamine, a Class A felony, I.C. § 35-48-1-1.1; Count II, possession of methamphetamine, a Class C felony, I.C. § 35-48-4-6.1; Count III, conspiracy to commit dealing in methamphetamine, a Class A felony, I.C. §§ 35-41-5-2, 35-48-4-1.1; Count IV, dealing in methamphetamine, a Class A felony, I.C. § 35-48-1-1.1; and Count V, possession of methamphetamine, a Class C felony, I.C. § 35-48-4-6.1. On August 11-12, 2010, a jury trial was held. During the trial, Ynman initially identified Castillo's interpreter as the dealer from the February 2 drug buy. However, Ynman later confirmed that Castillo was the dealer. Additionally, Detective Soria was unable to make a definitive identification of Castillo as the dealer from the February 2 transaction, although the Detective was able to affirm that the dealer matched Castillo's appearance as an "Hispanic Male, approximately five foot six. Maybe a hundred and eighty pounds." (Transcript p. 196). Detective Soria went on to testify that when he later interviewed Castillo after he was arrested, Castillo was wearing the same white hat as the one the man who sold methamphetamine to Ynman. Finally, after Officer Avington testified that he had overheard some prosecutors discussing that at least two witnesses misidentified Castillo in court, Castillo requested a mistrial, which was denied by the trial court.

At the conclusion of the evidence, the jury found Castillo guilty of all Counts. However, the trial court only entered judgments of convictions on Counts I and IV after finding that the other Counts merged. On August 24, 2010, a sentencing hearing was held and the trial court imposed an aggregate sentence of forty-five years, with twenty-five years

executed and twenty years suspended to probation, and ordered the Counts to be served concurrently.

Castillo now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Castillo argues that it was fundamental error when the trial court failed to sever the charges against him. Generally, two or more offenses may be joined in the same information when the offenses are (1) same or similar character, even if not part of a single scheme or plan, or (2) based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan. I.C. § 35-34-1-9(a). However, Indiana Code section 35-34-1-11(a) provides for a right to severance of offenses that are joined solely on the ground that they are of the same or similar character:

(a) Whenever two (2) or more offenses have been joined for trial in the same indictment or information solely on the ground that they are of the same or similar character, the defendant shall have a right to a severance of the offenses. In all other cases the court, upon motion of the defendant or the prosecutor, shall grant a severance of offenses whenever the court determines that severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense considering:

- (1) the number of offenses charged;
- (2) the complexity of the evidence to be offered; and
- (3) whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

To trigger the provisions of I.C. § 35-34-1-11, a defendant must move for a separate trial before commencement of trial. *See* I.C. § 35-34-1-12(a). As such, a defendant waives

his right to have similar offenses tried separately when he fails to make a timely motion for severance. *Muse v. State*, 419 N.E.2d 1302, 1305 (Ind. 1981).

Here, the State contends, and Castillo concedes, that he has waived any claims regarding severing the charges because he failed to request a severance as the statute requires. However, Castillo invokes the fundamental error doctrine, which is an exception to the general rule that the failure to object at trial constitutes a procedural default precluding consideration of the issue on appeal. *Jewell v. State*, 887 N.E.2d 939, 940 n.1 (Ind. 2008). The fundamental error exception is extremely narrow and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process. *Mathews v. State*, 849 N.E.2d 578, 587 (Ind. 2006). The error claimed must either make a fair trial impossible or constitute clearly blatant violations of basic and elementary principles of due process. *Brown v. State*, 929 N.E.2d 204, 207 (Ind. 2010), *reh'g denied*. This exception is available only in egregious circumstances. *Id.*

In applying the fundamental error exception, Castillo first claims that the two charges were joined solely because they were of the same of similar character, and as such, severance as a matter of law was required. Specifically, he argues that the two offenses “consisted of two different genres of drug crimes; a back alley buy with an informant on February 2, 2010 and a traffic stop with a constructive possession of sufficient quantity of meth to suggest an intent to deliver on February 11, 2010.” (Appellant’s Br. p. 13).

Our supreme court has determined that where multiple acts occurred over a period of time by reason of continuing surveillance of the defendant and his customers, no prejudice resulted to the defendant by the trial court's refusal to grant severance. *See Chambers v. State*, 540 N.E.2d 300, 602 (Ind. 1989), *abrogated on other grounds*, *Fajardo v. State*, 859 N.E.2d 1201 (Ind. 2007); *see also Sweet v. State*, 439 N.E.2d 1144, 1147 (Ind. 1982). Our supreme court's interpretation of the statute was reiterated in *Richter v. State*, 598 N.E.2d 1060, 1063 (Ind. 1992), where it held that the defendant was not entitled to severance where a confidential informant "was working with the police department on a continuing basis with regard to the surveillance of appellant and presenting him the opportunity to deal in cocaine." The court recognized that "[t]his was clearly an on-going investigation over a relatively short period of time concerning [the defendant's] activity as a dealer in narcotics." *Id.*

Castillo asserts that the facts of his case are different than *Chambers*, *Sweet* and *Richter*. The thrust of Castillo's argument is that because Ynman was not used in the second drug buy, the two cases are not a "single plan." We disagree. The facts reveal that Ynman was working with undercover police officers as a confidential informant on a continuing basis with regard to the surveillance of Castillo. While Ynman did not personally meet with Castillo at the second drug buy, Ynman was instrumental in setting up the drug buy and giving Castillo the opportunity to deal in methamphetamine. The two instances occurred within nine days and were uncovered as a result of the ongoing work of undercover police officers and Ynman. The charges stemmed from Castillo's first drug sale and second attempt

and were connected as part of a single scheme or plan and Castillo was not entitled to severance as a matter of right.

Castillo goes on to argue that even if we find that severance as a matter of right was not required, that severance would have promoted a fairer determination of guilt or innocence. He contends that the “two misidentifications [of Castillo by Ynman and Detective Soria], the lax surveillance, [], the drugs from half a block away, [] the bolstering, and bootstrapping prevented a fair application of the appropriate facts to the appropriate charge.” (Appellant’s Br. p. 17).

When offenses are joined under I.C. § 35-34-1-9(a), as here, the trial court will only grant severance if it is appropriate to a fair determination of the defendant’s guilt or innocence, based on a review of the number of offenses, complexity of the evidence, and whether the jury will be able to apply the law and distinguish the evidence for each offense. *Ben-Yisraly v. State*, 690 N.E.2d 1141, 1145 (Ind. 1997). A denial of severance after such a review will only be granted upon a showing of clear error in the course of the exercise of a trial court’s discretion. *Id.*

Despite Castillo’s contentions, he has failed to show that the trial court would have committed clear error if it had denied his request for severance, because the evidence was neither complex nor would the jury be unable to distinguish the evidence for each offense. When the first drug buy was arranged on February 2, Detective Soria dropped Ynman off at a prearranged location, and after Ynman emerged from the minivan, he had an ounce of

methamphetamine on his person. Detective Dings followed Castillo to the gas station and drove past him four times to ensure he obtained a good look at Castillo. After the second buy was set up on February 11, where Ynman arranged to purchase two ounces of methamphetamine, two ounces of methamphetamine in baggies were located in the snow a block and a half away from where Castillo was stopped. These facts were uncomplicated and the jury could easily apply the law and distinguish the evidence for each offense.

As to Castillo's argument that his conviction was based on misidentification, Castillo was first identified as the February 2 drug dealer by Ynman from a photo array on the day of the crime. While Ynman failed to initially identify Castillo during trial, he was later able to determine Castillo, which was further corroborated by Officer Avington and Detective Dings during trial. The fact that Ynman received a benefit from the deal between himself and the prosecutor's office was put before the jury, as was evidence of his involvement in the investigation and his attempts to identify Castillo at trial. As triers of fact, the jury may attach whatever weight and credibility to the evidence it believes is warranted, and the jury is free to believe portions of a witness's testimony but disregard other portions of the same testimony. *Parks v. State*, 734 N.E.2d 694, 700 (Ind. Ct. App. 2000), *trans. denied*. There

was adequate independent evidence to support each conviction had they been tried separately and Castillo was not prejudiced by the joinder of the charges.

CONCLUSION

Based on the foregoing, we conclude that fundamental error was not committed when his charges were not severed.

Affirmed.

DARDEN, J., and BARNES, J., concur.