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IN THE
COURT OF APPEALS OF INDIANA

ANTOINE TINDER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 52A04-0610-CR-593
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MIAMI CIRCUIT COURT
The Honorable Rosemary Higgins Burke, Judge
Cause No. 52C01-0509-FA-196

July 26, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Following a jury trial, Antoine Tinder appeals his convictions of dealing cocaine, a Class A felony, and possession of marijuana, a Class A misdemeanor. On appeal, Tinder raises the issues of whether he was entitled to severance of the charges against him as a matter of right and whether the trial court abused its discretion in granting the State's motion to join counts and in denying Tinder's motion for severance. Concluding that Tinder was not entitled to severance and that the trial court acted within its discretion, we affirm.

Facts and Procedural History

While Douglas Stamper was incarcerated awaiting trial on pending forgery charges, his mother contacted the Miami County Police Department and requested that officers speak with her son. Captain David VanBaalen went to the jail and spoke with Stamper, who indicated that he might be able to purchase cocaine from a man known as "Blackstone." Stamper was subsequently released from jail in order to assist in a police investigation.

On August 31, 2005, Stamper phoned "Blackstone," whom Stamper now identified as Tinder, and asked to buy an "eight ball" or eighth-ounce of crack cocaine. Tinder instructed Stamper to meet him at a Village Pantry. After searching Stamper and his vehicle, police officers followed Stamper to the Village Pantry and set up surveillance. Tinder arrived and instructed Stamper to follow him inside. Stamper followed Tinder into the facility's bathroom and purchased crack cocaine from Tinder. Stamper subsequently gave the police a substance that testing indicated to be 2.21 grams of cocaine.

On September 6, 2005, Stamper again called Tinder, asked to purchase an eight ball,

and was told by Tinder to meet him at the Village Pantry. Officers again followed Stamper and set up surveillance. This time Tinder arrived with a companion, who accompanied Tinder and Stamper into the bathroom. Stamper again gave Tinder money, but testing revealed that the substance Tinder gave Stamper was neither cocaine nor a controlled substance.

Based on these transactions, police obtained a warrant to search Tinder's vehicle and house. While officers were on the way to execute the search warrant, they saw Tinder driving his vehicle and followed him. After Tinder left a recreation center, officers executed a traffic stop and searched Tinder's vehicle. Officers found a large baggie containing 7.22 grams of cocaine, and five small baggies containing a total of 1.20 grams of cocaine. Officers then searched Tinder's residence and found a set of triple beam scales and small amounts of marijuana.

The State charged Tinder with dealing cocaine, a Class B felony.[1] Under a different cause number, the State charged Tinder with possession of cocaine, a Class A felony, dealing in a look-a-like substance, a Class C felony, maintaining a common nuisance, a Class D felony, and possession of marijuana, a Class A misdemeanor. On February 15, 2006, the State filed a motion to join causes for trial and Tinder filed a motion to sever charges. The trial court held a hearing on the motions, denied Tinder's motion for severance and granted the State's motion for joinder.

On August 21-23, 2006, a jury trial was held. The jury found Tinder guilty of

possession of cocaine and possession of marijuana, not guilty of maintaining a common nuisance, and was unable to reach a verdict on dealing in a look-a-like substance or dealing cocaine. The State subsequently dismissed these charges. The trial court entered judgments of conviction for possession of cocaine and possession of marijuana, and sentenced Tinder to thirty years with five years suspended for the cocaine charge and one year for the marijuana charge, with the sentences to run concurrently. Tinder now appeals his convictions.

Discussion and Decision

The State may join two or more offenses in the same information if the offenses "(1) are of the same or similar character, even if not part of a single scheme or plan; or (2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan." Ind. Code § 35-34-1-9(a). However, under Indiana Code section 35-34-1-11(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:
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> (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.

Therefore, if the sole reason for joinder is that the offenses are of the same or similar

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[1] The State originally charged Tinder with dealing in cocaine, a Class A felony, but amended the charging information.

character, the trial court has no discretion, and must sever the offenses. Booker v. State, 790 N.E.2d 491, 494 (Ind. Ct. App. 2003), trans. denied. We review arguments that the trial court improperly denied a motion to sever as a matter of right de novo. Id. If the defendant was not entitled to severance as a matter of right, the trial court has discretion whether to grant severance, and we will review the trial court's decision for an abuse of discretion. Ben-Yisrayl v. State, 690 N.E.2d 1141, 1146 (Ind. 1997), cert. denied, 525 U.S. 1108 (1999). We will reverse for an abuse of discretion "only upon a showing of clear error." Id. (quoting Davidson v. State, 558 N.E.2d 1077, 1083 (Ind. 1990)).

Tinder argues that he was entitled to severance as matter of right because the only reason the charges were joined was that they were of a similar character. We disagree.

Tinder points to Goodman v. State, 708 N.E.2d 901 (Ind. Ct. App. 1999) and Pardo v. State, 585 N.E.2d 692 (Ind. Ct. App. 1992), and argues that based on their holdings, joinder was improper as the State failed to show a common modus operandi for Tinder's crimes. "Modus operandi means literally 'method of working,' and refers to a pattern of criminal behavior so distinctive that separate crimes may be recognized as the work of the same wrongdoer." Goodman, 708 N.E.2d at 903. We agree that there is nothing about Tinder's method of possessing or dealing drugs that is "unique in ways which attribute the crime to one person." Id. (quoting Penley v. State, 506 N.E.2d 806, 810 (Ind. 1987)). Therefore, joinder cannot be justified under the "modus operandi" theory.

The State does not argue that Tinder's crimes were distinctive, but argues that joinder was proper because the offenses "were based on the same conduct or on a series of acts

connected together or constituting parts of a single scheme or plan." Appellee's Brief at 6-7. In Chambers v. State, our supreme court held that the defendant was not entitled to severance because "[a]lthough the acts occurred over a period of time, it is clear they were detected by police by reason of a continuing surveillance of appellant and at least one of his customers." 540 N.E.2d 600, 602 (Ind. 1989), abrogated on other grounds, Fajardo v. State, 859 N.E.2d 1201 (Ind. 2007). Based on this circumstance, the court found "ample evidence from which the judge could determine that each of the counts grew out of the single intention of appellant to deal drugs." Id.; see also Sweet v. State, 439 N.E.2d 1144, 1147 (Ind. 1982) (holding that the defendant was not entitled to severance because "[t]he eight charges all arose from activities conducted during a period of approximately two months and involved many ongoing and continuous transactions with the same undercover police officers and the same informant"). Our supreme court relied on Chambers and Sweet and held that a 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." Richter v. State, 598 N.E.2d 1060, 1063 (Ind. 1992). The court recognized that "[t]his was clearly an on-going investigation over a relatively short period of time concerning appellant's activity as a dealer in narcotics." Id.

Tinder makes a valiant effort to distinguish his case from Richter based on the different substances found during different points of the investigation, the different locations at which police determined Tinder possessed or sold drugs, and the presence of various people during the transactions or searches. Although we find Tinder's attempt creative, we

conclude that Richter, Chambers, and Sweet control the outcome here. All the evidence obtained against Tinder was the result of an on-going investigation based on information obtained through Stamper's controlled buys. Although the possession of marijuana, maintaining a common nuisance, and possession of cocaine charges arose from situations where Stamper was not present, the police uncovered the evidence leading to these charges as a result of warrants obtained based on the controlled buys conducted by Stamper. Likewise, the dealing in a look-a-like substance charge, although involving a different substance and an unidentified person, was based on the continuation of the investigation starting with the first controlled buy. We conclude that Tinder was not entitled to severance as a matter of right, as the charges against him stemmed from an on-going investigation over a short period of time involving Tinder's possession and distribution of narcotics.

Tinder concedes that if he was not entitled to severance as a matter of right, he cannot show that the trial court abused its discretion. We agree.

When using its discretion to grant or deny a motion for severance, the trial court shall consider whether the jury will be able to intelligently differentiate evidence and apply the law to each separate offense. Ind. Code § 35-34-1-11. Here, the jury found Tinder guilty of two counts, not guilty of one count, and was unable to reach a decision on two counts. Therefore, the jury was clearly able to differentiate between the offenses and apply the applicable law. See Harvey v. State, 719 N.E.2d 406, 409-10 (Ind. Ct. App. 1999). Additionally, in order to warrant reversal, Tinder must show prejudice. Id. at 409. As he was acquitted of one charge, and two charges were subsequently dismissed based on the jury's failure to reach a verdict,

he is unable to show prejudice caused by joinder. Waldon v. State, 829 N.E.2d 168, 175 (Ind. Ct. App. 2005), trans. denied (holding that the defendant failed to show prejudice where the jury was unable to reach a verdict on a number of charges that were subsequently dismissed); Harvey, 719 N.E.2d at 410 ("[I]t has long been the law of this state that acquittal of charges from one joined offense makes the misjoinder unavailable for reversal of the judgment."). We conclude that the trial court did not abuse its discretion in denying Tinder's motion for severance.

Conclusion

We conclude that Tinder was not entitled to severance and that the trial court did not abuse its discretion in denying Tinder's motion for severance.

Affirmed.

SULLIVAN, J., and VAIDIK, J., concur.