**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**August 11, 2005**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 2004AP2219-CR** **Cir. Ct. No. 2004CF180**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**JOSEPH H. SAVAGE,**

**DEFENDANT-APPELLANT.**

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APPEAL from an order of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Deininger, P.J., Dykman and Higginbotham, JJ.

¶1 PER CURIAM. Joseph Savage appeals an order denying his motion to dismiss several criminal counts against him following a preliminary hearing.[1] We agree that bindover was improper on two of the counts, and therefore reverse the trial court's order in part and remand with directions that the matter proceed on the remaining counts.

## BACKGROUND

¶2 Following an investigation into an alleged drug ring and the execution of a search warrant which revealed drug paraphernalia, trace amounts of marijuana, and over $5,000 in Savage's residence, the State charged Savage with conspiracy to deliver marijuana in excess of 10,000 grams as a drug repeater; conspiracy to deliver cocaine in excess of 40 grams as a drug repeater; and aiding a felon as a habitual criminal.[2]

¶3 At the preliminary hearing, Shannon Van testified that he had observed Savage selling marijuana or bringing baggies for others to smoke approximately two or three times a week over a two month period, but had never seen him sell cocaine. Van also said that Savage had displayed nervousness about the police coming after him approximately three weeks before the arrests, but Savage had not told him it was in connection to drugs or told anyone else that the police were after them or advised anyone to leave town. Detective Darren Hynek testified that Savage had admitted purchasing quantities of marijuana in Madison

[1] This court granted leave for Savage to proceed with an interlocutory appeal by order dated October 1, 2004 and amended October 4, 2004.

[2] The State subsequently filed an information adding two counts of felony warehousing and counts of possession of marijuana and drug paraphernalia, none of which are at issue in this appeal.

and that one of his roommates sold cocaine. The State then informed the circuit court that an additional witness it had intended to present on the cocaine charge was unavailable, but that it did not need to present evidence on that count since it felt it had shown probable cause for the other related charges. The trial court bound Savage over for trial and denied his subsequent motions to dismiss the three counts at issue.

## DISCUSSION

¶4 A defendant should be bound over for trial "when there exists a set of facts that supports a reasonable inference that the defendant probably committed a felony." ***State v. Anderson***, 2005 WI 54, ¶25, ___ Wis. 2d ___, 695 N.W.2d 731 (citation omitted); WIS. STAT. § 970.03(1) (2003-04).[3] The purposes of a preliminary examination is "to protect the accused from hasty, improvident, or malicious prosecution and to discover whether there is a substantial basis for bringing the prosecution and further denying the accused his right to liberty." ***Bailey v. State***, 65 Wis. 2d 331, 344, 222 N.W.2d 871 (1974) (citation omitted). When reviewing a bindover determination, we will examine the record *de novo* to determine whether the evidence presented at the preliminary hearing established probable cause as a matter of law. ***Anderson***, ___ Wis. 2d ___, ¶26.

¶5 Once probable cause for one felony has been established, additional counts may be added so long as they are transactionally related to the charge supported by probable cause. ***State v. Burke***, 153 Wis. 2d 445, 453, 451 N.W.2d 739 (1990). Factors to consider in determining whether counts are transactionally

[3] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

related include: (1) the parties involved; (2) the witnesses involved; (3) the geographical proximity of the charges; (4) the temporal proximity of the charges; (5) the evidence required for conviction; (6) whether the charges share a motive; and (7) whether the charges share intent. ***State v. (Scott) Williams***, 198 Wis. 2d 479, 489, 544 N.W.2d 400 (1996). All seven factors must be considered together to determine whether there is a transactional relationship that "transcends mere similarity," and the multiple counts arise "from a common nucleus of facts." ***State v. Richer***, 174 Wis. 2d 231, 246-47 and 250-51, 496 N.W.2d 66 (1993).

*Marijuana Charge*

¶6 We are satisfied that Van's testimony that he had seen Savage selling marijuana on multiple occasions, combined with the officer's testimony that Savage had admitted traveling to Madison to obtain quantities of marijuana, were sufficient to establish probable cause that Savage had been selling enough marijuana to have committed a felony. The actual amount of marijuana involved could properly be determined at trial.

*Cocaine Charge*

¶7 The State does not dispute that it failed to provide probable cause specific to the cocaine charge against Savage at the preliminary hearing. It contends it was not required to do so, however, because the cocaine charge was transactionally related to the marijuana charge for which it did establish probable cause. The State points out that the court in ***State v. (John) Williams***, 198 Wis. 2d 516, 544 N.W.2d 406 (1996), used the allegations in the complaint rather than the preliminary hearing testimony to determine in the first instance which counts were transactionally related. The State then argues that the complaint here showed that

the drug charges were transactionally related based on allegations that Savage traveled to Madison to pick up both marijuana and cocaine at the same time.

¶8 We disagree with the State's reading of ***(John) Williams***. It is true that the court in that case suggested that a complaint could be used to evaluate the transactional relationship between charges. We note, however, that in ***(John) Williams*** the transactional relationship was supported *both* by the allegations in the complaint and by the testimony at the preliminary hearing. Therefore, the question whether the allegations in the complaint were sufficient — standing alone — to establish a transactional relationship was not before the court in that case. Rather, in our view, the court was merely providing a convenient guideline for courts to use, on the implicit assumption that the facts alleged in the complaint would be supported by preliminary hearing testimony.

¶9 In contrast, the Wisconsin Supreme Court *did* explicitly consider the proper basis for determining whether a transactional relationship exists in ***Richer***. There, after a lengthy discussion of the evolution of the transactional relationship test, the court held that "counts contained in the information must flow from the same transactions for which evidence has been introduced at the preliminary hearing." ***Richer***, 174 Wis. 2d at 247.

¶10 The holding in ***Richer*** is in accordance with other cases holding that a prosecutor may include charges in the information which were not initially charged, so long as they are transactionally related. *See, e.g.,* ***Burke***, 153 Wis. 2d 445 (adding four additional charges of second-degree sexual assault based on vaginal intercourse, anal intercourse, touching a minor's breasts, and touching the defendant's penis to a minor's mouth to an original charge of second-degree sexual assault based on anal intercourse, when all of the acts happened in close

succession during the same episode); ***Bailey***, 65 Wis. 2d 331 (adding charges of indecent behavior with a child, enticement of a child for immoral purposes, and attempted enticement of a child for immoral purposes, to a first-degree homicide charge, all arising out of the abduction of a child which ended with her death). Logically speaking, the complaint could not be used as the sole basis for determining the transactional relationship of such subsequent charges, since they were not included in the complaint. The only way the transactional relationships of such charges could be evaluated would be based on the evidence adduced at the preliminary hearing. Therefore, notwithstanding the suggestion in ***John Williams*** that a court may use the complaint to determine the transactional relationship of multiple charges in the first instance, we are persuaded that a transactional relationship for each charge in the information still must be supported ultimately by the actual evidence adduced at the preliminary hearing upon which probable cause for a felony was found.

¶11 We conclude that there was insufficient evidence adduced at the preliminary hearing here to establish a transactional relationship between the cocaine charge and the marijuana charge for which probable cause was found. The only link to cocaine shown at the preliminary hearing was that one of Savage's roommates had been selling it. There was no testimony that Savage had ever sold cocaine, or that the marijuana Savage sold and the cocaine his roommate sold were either obtained or sold at the same time or coordinated in any other manner. *Cf.* ***Richer***, 174 Wis. 2d at 249-50 (upholding the dismissal of a drug count which occurred on a different date than another drug count, where there was no direct evidence about the second drug deal or any ongoing sting operation from which an ongoing operation could have been inferred). In other words, there was evidence of separate drug transactions, but no evidence presented that Savage was

involved with others in an ongoing drug enterprise involving both marijuana and cocaine. While we understand from the complaint that the State may have had such evidence, the testimony presented at the hearing utterly failed to establish any transactional link. Therefore, the cocaine charge should have been dismissed.

*Aiding a Felon Charge*

¶12 The State alleged that Savage aided a felon by tipping off one or more co-conspirators that the police were investigating them. The only evidence at the preliminary hearing regarding the aiding a felon charge was Van's testimony that Savage had expressed unease about having been contacted by police. There was no testimony that Savage ever attempted to warn anyone else that the police were after them or that he revealed the police were investigating drug activity. This was insufficient to establish probable cause specific to the aiding a felon charge. Nor was it sufficient to establish a transactional link to the marijuana charge, particularly since there was no evidence presented at the hearing that Savage was involved with others in dealing marijuana. In short, the facts necessary to establish that Savage was selling marijuana were entirely separate from the facts that would be necessary to show that he warned others that the police were investigating them. Therefore, the aiding a felon charge should also have been dismissed.

¶13 Accordingly, we reverse the trial court's order in part, and remand with directions that it dismiss Counts 2 and 3, and proceed with Counts 1, 6 and 7.

*By the Court.*—Order affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.