

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 9, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2004AP2248-CR

STATE OF WISCONSIN

Cir. Ct. No. 2002CF4320
2003CF711

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

BILLYE L. MASSEY,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: ELSA C. LAMELAS, Judge. *Affirmed.*

Before Wedemeyer, P.J., Curley and Kessler, JJ.

¶1 PER CURIAM. Billye L. Massey appeals from judgments of conviction for possessing cocaine with intent to deliver and violating the drug tax stamp law (“cocaine” convictions), and for possessing marijuana and felony bail-jumping (“marijuana” convictions), and from a postconviction order summarily

denying his motions for a new trial for trial counsel's claimed ineffectiveness. The issue is whether trial counsel was ineffective for failing to move to sever the cocaine and marijuana charges for separate trials. We conclude that Massey has not shown the substantial prejudice necessary to remand for an evidentiary hearing on trial counsel's effectiveness. Therefore, we affirm.

¶2 Massey was charged with possessing between five and fifteen grams of cocaine with intent to deliver, as a subsequent drug offense and as a party to the crime, in violation of WIS. STAT. §§ 961.41(1m)(cm)2, 961.48 and 939.05 (2001-02), and for a drug tax stamp violation, contrary to WIS. STAT. § 139.89 (2001-02), for offenses that occurred July 31, 2002.¹ Massey was later charged with possessing tetrahydrocannabinols ("marijuana"), as a subsequent drug offense, in violation of WIS. STAT. §§ 961.41(3g)(e) and 961.48, and felony bail-jumping, in violation of WIS. STAT. § 946.49(1)(b), for offenses that occurred December 20, 2002.

¶3 The trial court originally granted the State's motion to join the cocaine and marijuana cases for trial; defense counsel told the trial court that "[he] will probably oppose [joinder] on the grounds of unfair prejudice, yes; but ... would probably have to concede that they are joinable in the first instance." Defense counsel, however, never opposed joinder or moved for severance. A jury convicted Massey of all of the foregoing charges in a single trial.

¶4 Massey moved for a new trial, challenging his trial counsel's effectiveness for failing to move for severance. The trial court summarily denied

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

the motion, ruling that joinder was proper, and even had it not been, that Massey had not shown that he had suffered prejudice.

¶5 Joinder of crimes is governed by WIS. STAT. § 971.12(1), which provides in pertinent part:

Two or more crimes may be charged in the same complaint, information or indictment in a separate count for each crime if the crimes charged, whether felonies or misdemeanors, or both, are of *the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan.*

Id. (emphasis added).

Whether crimes are properly joined in a complaint is a question of law. The joinder statute is to be broadly construed in favor of initial joinder. Then if a motion for severance is made, a trial court must determine what, if any, prejudice would result in a trial on the joined charges; any potential prejudice must be weighed against the interests of the public in conducting a single trial on the multiple counts. This balancing of competing interests involves an exercise of discretion and a trial court's determination will not be disturbed on appeal in the absence of an abuse of that discretion.

State v. Bellows, 218 Wis. 2d 614, 622-23, 582 N.W.2d 53 (Ct. App. 1998) (citations omitted). “An erroneous exercise of discretion, in the balancing of these competing interests, will not be found unless the defendant can establish that failure to sever the counts caused ‘substantial prejudice.’” *State v. Locke*, 177 Wis. 2d 590, 597, 502 N.W.2d 891 (Ct. App. 1993) (quoting *State v. Hoffman*, 106 Wis. 2d 185, 209, 316 N.W.2d 143 (Ct. App. 1982)).

¶6 To maintain an ineffective assistance claim, the defendant must show that counsel's performance was deficient, and that this deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The

necessity to prove both deficient performance and prejudice obviates the need to review proof of one if there is insufficient proof of the other. *State v. Moats*, 156 Wis. 2d 74, 101, 457 N.W.2d 299 (1990). Thus, to constitute a constitutional violation, which would be necessary to sustain Massey's ineffective assistance challenge, he must show "substantial prejudice." See *United States v. Lane*, 474 U.S. 438, 446-50 (1986) (applying the harmless error rule to claims of misjoinder); *Locke*, 177 Wis. 2d at 597.

¶7 Because Massey is challenging trial counsel's failure to move for severance, no motion was ever filed or decided. We consequently review the trial court's reasoning in its postconviction order summarily denying Massey's motion for a new trial. In that order, the trial court explained why joinder was proper, negating Massey's ineffective assistance claim.

In both instances, the defendant was found in a home with other people where drugs were present. Both crimes involved the defendant throwing a baggie containing drugs away from his person to avoid criminal liability. The second [marijuana] offense[s] occurred within five months of the first [cocaine offenses], while the defendant was released on bail. The fact that the amount of cocaine recovered suggested dealing, rather than simple possession, does not undercut the fact that both of these offenses involved drug possession and similar conduct on behalf of the defendant. In sum, the court finds that there was sufficient evidence that the two offenses were of the same or similar character for purposes of joinder within the meaning of section 972.12 (1), Stats.

Even assuming *arguendo* that joinder was improper, the defendant has failed to demonstrate that he was prejudiced. The defense offered two witnesses to refute the allegations in each case. With respect to the July 31, 2002 [cocaine] incident, Angelo Harris testified that the baggie of cocaine did not come from his house and that he told the police that the defendant did not throw drugs out of the window. With respect to the December 20, 2002 [marijuana] incident, Ernest Carter testified that he did not see the defendant drop or throw anything on the floor. The

defendant testified that Harris threw the bag out the window on July 31, 2002. He also testified that he did not have marijuana with him at the residence on December 20, 2002. The jury found the eyewitness testimony of the officers to be credible in each case.

The defendant argues that if different juries had heard the testimony of Harris and Carter at different trials, reasonable doubt *might* have been created. He also suggests that the jury *might* have been more inclined to find him guilty because he was charged with more than one offense. Given the strength of the officer's testimony, there is not a reasonable probability that different juries would have found Harris or Carter to be more credible if their testimony had been presented at different trials. Moreover, the court gave an explicit limiting instruction that the jury was required to determine the defendant's guilt or innocence on each count without reference to his guilt or innocence on other charged counts. (Tr. 10/8/03 a.m., p. 72). The jury is presumed to have followed this instruction. *State v. Williamson*, 84 Wis. 2d 370, 396[, 267 N.W.2d 337] (1978)[, *declined to follow on a different ground than for the proposition cited here, Manson v. State*, 92 Wis. 2d 40, 45, 284 N.W. 2d 703 (Ct. App. 1979)]; *Roehl v. State*, 77 Wis. 2d 398, 413[, 253 N.W.2d 210] (1977). The defendant's speculative claims are insufficient to support a finding of substantial prejudice. Consequently, the court finds that trial counsel was not ineffective for failing to object to joinder of these cases for trial.

¶8 Whether the crimes were properly joined is a question of law. *See Bellows*, 218 Wis. 2d at 622. Construing the statute broadly in favor of joinder as required, we determine that both of the primary offenses involve controlled substances, and both were charged as subsequent drug offenses, in violation of WIS. STAT. § 961.48. Although Massey distinguishes the cocaine from the marijuana charges, insofar as the former was an intent to deliver charge as distinguished from simple possession, that distinction is insufficient to determine that these controlled substance offenses were not of “the same or similar character.” *See* WIS. STAT. § 971.12(1). Both offenses occurred at another's home with others present. Massey also was allegedly discarding the controlled

substances on each occasion, once he knew police were on the premises, in an attempt to avoid criminal liability. We independently determine that the controlled substance (cocaine and marijuana) offenses were “of the same or similar character” for purposes of broadly construing § 971.12(1) in favor of joinder.

¶9 We next determine whether the trial court erroneously exercised its discretion in balancing the potential prejudice to Massey against the public’s interest in a single trial. *See Bellows*, 218 Wis. 2d at 623. The trial court extensively considered Massey’s claimed potential prejudice in having to defend these charges in the same trial. It analyzed the witnesses’ testimony regarding Massey’s attempts to discard the controlled substances on each occasion. It also analyzed Massey’s speculative claims of what different juries *might* have found. In addition to its proper exercises of discretion in these regards, the trial court gave an explicit limiting instruction to the jury to determine Massey’s guilt or innocence on each count individually, and not in conjunction with the other charges. This limiting instruction, which the jurors are presumed to have followed, is specifically designed to avoid any prejudice resulting from joinder. We consequently conclude that the trial court did not erroneously exercise its discretion in determining that there was no substantial prejudice to Massey from the joinder of these cases. Thus, his ineffective assistance claim necessarily fails.

By the Court.—Judgments and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).

