COURT OF APPEALS
DECISION
DATED AND FILED

August 15, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP3194-CR **Cir. Ct. No. 2005CF88**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

DAVID B. PERRY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dunn County: WILLIAM C. STEWART, JR., Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. David Perry appeals a judgment convicting him of five felonies. He argues that (1) the State presented insufficient evidence to support the convictions for manufacturing methamphetamine, possession of methamphetamine waste, and possession of drug paraphernalia, all as a party to a

crime; (2) the conspiracy charge was multiplicitous and violates WIS. STAT. § 939.72(2);[1] and (3) the bail jumping conviction was the product of an invalid plea. We reject these arguments and affirm the judgment.

¶2 Before trial, Perry waived his right to a jury trial on the bail jumping charge in favor of trial to the court. At that time, he stipulated to the admissibility of documents, showing that he was on bond for other charges at the time of the charged drug offenses. In order to avoid having the jury learn of the other charges, he agreed that the court would determine his guilt or innocence on the bail jumping charge based on the stipulation and the evidence adduced at the drug trial. After the jury convicted Perry on the drug and conspiracy charges, the court also found him guilty of bail jumping.

¶3 The State presented sufficient evidence to support the convictions. Bruce McIntyre, Perry's accomplice, testified that he and Perry each produced a substance in the woods on March 2, 2005, after together buying Sudafed-type products and mixing them with anhydrous ammonia, lithium and a xylene solvent. McIntyre testified that Perry got a "finished product." Police found some of the results of that manufacture in McIntyre's car the next morning, specifically, jars, a coffee pot and tubing that tested positive for the presence of methamphetamine.

¶4 Police obtained a search warrant for Perry's residence. They found a jar in a workbench cabinet in Perry's garage that contained methamphetamine residue. Perry told police that McIntyre had placed the jar there after they cooked methamphetamine in the woods. Police also found a liquid propane cylinder with

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

discoloration near the valve that tested positive for anhydrous ammonia. Expert testimony explained that anhydrous ammonia is a primary component for the manufacture of methamphetamine. Perry's admissions to police, McIntyre's testimony and the physical evidence allow the jury to reasonably infer that Perry was a party to the crimes of manufacturing methamphetamine, possessing manufacturing waste and possessing paraphernalia relating to methamphetamine production. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

¶5 Perry's argument that the conspiracy charge constitutes double jeopardy and violates WIS. STAT. § 939.72(2) is based on a mischaracterization of the State's case. The manufacturing charge refers to the methamphetamine manufactured on March 2, 2005. The prosecution made clear that the conspiracy charge relates to Perry's and McIntyre's future plans to manufacture additional methamphetamine. The conspiracy charge was based on Department of Justice Special Agent Judy Wormet's testimony that Perry's garage was a methamphetamine lab. Perry's statement to the police indicated that McIntyre "was having some problems getting the … meth to cook out at the end stages." His statement also suggests that Perry was instructing McIntyre on how to manufacture methamphetamine and intended to "cook" methamphetamine with him in the future.

¶6 Because the completed manufacturing of March 2, 2005, differs in time from the future manufacturing described in the conspiracy charge, the charges are different in fact. Perry cites nothing in the legislative history to support that the legislature did not intend multiple punishment for separate crimes that involve different time periods. The conspiracy charge and the manufacturing charge also have different elements, and the charges are based on different facts.

The fact that some of the evidence elicited by the State to prove the manufacturing count was also relevant to prove the conspiracy count does not make the two counts multiplicitous. *See* ***United States v. Felix***, 503 U.S. 378, 386 (1992). Neither the double jeopardy clause nor WIS. STAT. § 939.72(2) bars conviction on both charges. *See* ***State v. Anderson***, 219 Wis. 2d 739, 749, 580 N.W.2d 329 (1998).

¶7 Likewise, Perry mischaracterizes his pretrial decision to waive a jury trial on the bail jumping charge. He argues that the court was required to inform him of the elements of the offense, the potential penalties and the constitutional rights he waived as if this were a guilty or no contest plea. The colloquy makes clear that Perry would be tried by the court rather than a jury, utilizing a stipulation and the evidence presented at the jury trial. He did not, in effect, plead guilty or no contest. Perry merely stipulated to the admissibility of bond forms and the waiver of a jury trial on that issue. The procedures for accepting a guilty or no contest plea are not applicable.

By the Court.—Judgment affirmed.

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