COURT OF APPEALS
DECISION
DATED AND FILED

June 24, 2008

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP339-CR **Cir. Ct. No. 2004CF7066**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JASON E. KURTZ,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM SOSNAY, Judge. *Judgment affirmed; order affirmed in part, reversed in part, and cause remanded with directions.*

Before Wedemeyer, Fine and Kessler, JJ.

¶1 PER CURIAM. Jason E. Kurtz appeals from a corrected judgment of conviction for first-degree reckless homicide and for delivering a controlled substance, and from a postconviction order denying his motion for a new trial or a

retrospective hearing.[1] The issues are whether the trial court improperly denied Kurtz's motion for severance, and for a change of trial counsel. We conclude that the trial court did not err in denying Kurtz's severance motion; however, the trial court did not conduct an adequate inquiry into Kurtz's motion for a change of trial counsel. Therefore, we affirm the judgment and that part of the postconviction order confirming the trial court's previous denial of severance, but reverse that part of the order denying a change of counsel, and remand the cause with directions for a retrospective evidentiary hearing.[2]

¶2 Kurtz was charged with selling gamma-hydroxybutyric ("GHB") acid ("ecstasy") to a woman who later died from ingesting that substance, and from selling more than fifty grams of gamma-butyrolactone ("GBL" also known as "ecstasy") approximately eight months after the alleged GHB incident. The State later amended the GHB charge to first-degree reckless homicide. The charges were tried together, and a jury found Kurtz guilty of both the GHB homicide and the GBL sale, in violation of WIS. STAT. §§ 940.02(2)(a) (amended Feb. 1, 2003), 961.14(5)(ag) (2003-04) and 961.41(1)(hm)4. (amended Feb. 1, 2003).[3] For the homicide, the trial court imposed a thirty-five-year sentence, comprised of twenty- and fifteen-year respective periods of initial confinement and extended supervision. For the GBL sale, the trial court imposed a consecutive

[1] We use the phrase retrospective hearing as it is used in ***State v. Lomax***, 146 Wis. 2d 356, 362-65, 432 N.W.2d 89 (1988) and ***State v. Jones***, 2007 WI App 248, ¶19, ___ Wis. 2d ___, 742 N.W.2d 341, as the approach to retrospectively evaluate the merits of a defendant's motion for a change of trial counsel.

[2] If the remand or the appeal from the remand results in a new trial, the judgment would then be vacated.

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

sixteen-year sentence, comprised of six- and ten-year respective periods of initial confinement and extended supervision. Kurtz moved for a new trial on the basis of the trial court's denial of his severance motion and for a retrospective hearing on the change of counsel motion. The trial court summarily denied the motion; Kurtz appeals.

¶3 Prior to trial, Kurtz moved to sever the charges for separate trials. WISCONSIN STAT. § 971.12 addresses joinder of crimes, and provides:

> **(1)** JOINDER OF CRIMES. 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 two or more acts or transactions connected together or constituting parts of a common scheme or plan….
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> ….
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> **(3)** RELIEF FROM PREJUDICIAL JOINDER. If it appears that a defendant or the state is prejudiced by a joinder of crimes … the court may order separate trials of counts, grant a severance … or provide whatever other relief justice requires.

"To be of the 'same or similar character' under sec. 971.12(1), Stats., crimes must be the same type of offenses occurring over a relatively short period of time and the evidence as to each must overlap." ***State v. Hamm***, 146 Wis. 2d 130, 138, 430 N.W.2d 584 (Ct. App. 1988) (citation omitted). This court reviews an order denying a motion for severance first to determine whether, as a matter of law, joinder was proper, and then, whether the trial court erroneously exercised its discretion. *See* ***State v. Locke***, 177 Wis. 2d 590, 596-97, 502 N.W.2d 891 (Ct. App. 1993) (citation omitted).

¶4 Kurtz moved to sever the charges, contending that the transactions involved different substances, occurred at different places and different times, and involved different witnesses. He claims that trying the charges together would unfairly prejudice him because each would be other acts evidence of drug dealing in the other, as precluded by WIS. STAT. § 904.04, and would unfairly portray him as "a chronic drug dealer." Kurtz also claims that the victim's death in the GHB prosecution would unfairly and substantially prejudice him in the GBL prosecution. The prosecutor explained that GHB and GBL are "nearly identical substance[s]," and that once GBL is ingested, it converts to GHB. The prosecutor also claimed that Kurtz's sale of both drugs, each dissolved in water in a plastic bottle, showed a "unique chemical signature[]," presumably claiming a plan or modus operandi as would be admissible pursuant to § 904.04(2).

¶5 We independently conclude that these charges were properly joined. They both involved the sale of a form of liquid ecstasy dissolved in water, each sold in a plastic bottle. Although the transactions occurred approximately eight months apart, we have held that a two-year period between incidents is "a relatively short period of time" for purposes of joinder. *See* ***Locke***, 177 Wis. 2d at 596 (quoting ***Hamm***, 146 Wis. 2d at 138). Kurtz claimed that the prosecutorial witnesses and the evidence of the two charges did not overlap; the prosecutor disagreed. According to the prosecutor, Kurtz claimed that the first victim essentially compelled him to sell her the GBH. It would be proper for the State to respond to that claim by showing evidence of another ecstasy-related transaction, also dissolved in water in a plastic bottle. Moreover, the second buyer claimed that Kurtz warned him not to drink the substance, arguably prompted by the first victim's death from drinking the GBH. These arguable sub-theories are legitimate

examples of overlapping evidence to consider when determining the propriety of joinder.

¶6 The trial court properly exercised its discretion in determining that joinder of these charges was not prejudicial. The trial court concluded that "the crimes are … of the same type and occurred over a relatively short period of time." The trial court then considered the relevance and materiality of proof of one crime to the other, and based its decision on the "State's proffer that they intend to call this witness, and that is the theory of their case relative to the alleged violations by this defendant concerning both of these alleged crimes." The trial court acknowledged that "there is some prejudice involved," but determined, in its exercise of discretion, that the prejudice was neither consequential nor unfair considering the "[i]nculpatory evidence, or evidence that reflects the crime[s] charged." We conclude that the trial court did not erroneously exercise its discretion in denying Kurtz's motion for severance.

¶7 Kurtz's second claim is that further proceedings are warranted on his motion to change counsel because the trial court failed to conduct a full hearing to assess his motion. We agree and remand this matter for a retrospective evidentiary hearing for Kurtz to "fully articulate his reasons for wanting counsel discharged," and to allow the trial court to fully and fairly assess the bases for Kurtz's motion.[4] ***State v. Lomax***, 146 Wis. 2d 356, 365, 432 N.W.2d 89 (1988).

[4] At a retrospective evidentiary hearing, the trial court conducts a nunc pro tunc inquiry of the defendant about the circumstances at the time of the defendant's motion to determine whether there was a substantial breakdown in communication between the defendant and his or her trial counsel. *See* ***Jones***, 742 N.W.2d 341, ¶19. For the reasons stated in ***Lomax***, a retrospective hearing is the preferable approach to evaluate the status of the defendant-counsel relationship because if the trial court conducts an "adequate and meaningful nunc pro tunc inquiry," and properly determines that the motion should have been denied, a new trial is (continued)

> ¶8 In evaluating whether a trial court's denial of a motion for substitution of counsel is an abuse of discretion, a reviewing court must consider a number of factors including: (1) the adequacy of the court's inquiry into the defendant's complaint; (2) the timeliness of the motion; and (3) whether the alleged conflict between the defendant and the attorney was so great that it likely resulted in a total lack of communication that prevented an adequate defense and frustrated a fair presentation of the case.

Id. at 359-60 (citations omitted).

¶9 Kurtz's counsel moved to withdraw, and Kurtz moved for a change of counsel. Kurtz alleged that he sought a change of counsel "for personal and spiritual reasons, due to confinement, decisions & time frames made on each of these, and more. Out of slight personal-emotional constraints." At a hearing, trial counsel explained that Kurtz was not confident in his representation because Kurtz believed that his trial counsel was working for the State. Rather than conducting a colloquy with Kurtz, the trial court told him that it had read his criticisms of counsel, but that trial counsel was familiar with Kurtz's case, was competent to represent him, and was representing him capably, explaining that not "see[ing] eye to eye on everything is not justification" for a change of counsel; the trial court also told Kurtz that he could not "assure" him that another lawyer would represent him any better. The trial court did not, however, explore the extent of the communication breakdown between Kurtz and his trial counsel.

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unnecessary. *See* ***Lomax***, 146 Wis. 2d at 363 (quoting ***State v. Johnson***, 133 Wis. 2d 207, 226, 395 N.W.2d 176 (1986)). If the trial court determines that its nunc pro tunc inquiry cannot be "adequate and meaningful," then it must order a new trial. ***Id.*** If the trial court determines that there was a substantial breakdown in communication between the defendant and counsel, then it also must order a new trial. *See* ***Jones***, 742 N.W.2d 341, ¶19.

¶10 The trial court's inquiry of Kurtz regarding his reasons for seeking new counsel is inadequate and the record of Kurtz's complaint against trial counsel is insufficient for us to meaningfully review the trial court's denial. We therefore direct the trial court upon remand to allow Kurtz to fully explain his reasons for requesting new counsel to determine whether new counsel was warranted. *See* ***id.*** The trial court must allow Kurtz to "present whatever he deems necessary to fully articulate his reasons for wanting counsel discharged." ***Id.*** at 365. "The trial court must … make sufficient inquiry to ensure that a defendant is not cemented to a lawyer with whom full and fair communication is impossible; mere conclusions, unless adequately explained, will not fly." ***State v. Jones***, 2007 WI App 248, ¶13, ___ Wis. 2d ___, 742 N.W.2d 341 (citation omitted). The trial court must afford Kurtz

> sufficient leeway to prove … his contention that he had an irresolvable breakdown in communications with his trial lawyer. If, at the conclusion of that hearing, the trial court determines that … there was a substantial breakdown in communications between [Kurtz] and his lawyer, he is to be given a new trial.

Id., ¶19. The trial court will then have a sufficient record from which to exercise its discretion to determine whether a change of counsel is warranted to achieve the "proper balance between the constitutional rights of [this] defendant[] and the efficient administration of justice." ***Lomax***, 146 Wis. 2d at 365.

By the Court.—Judgment affirmed; 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. (2005-06).