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DISTRICT IV

December 7, 2015

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You are hereby notified that the Court has entered the following opinion and order:

2015AP484-CR

State of Wisconsin v. David Wade Givhan (L.C. # 2014CF579)

Before Lundsten, Higginbotham and Blanchard, JJ.

David Wade Givhan was convicted of seventeen drug-related crimes. In this appeal Givhan makes several arguments relating to the collection of trash outside his residence. He also challenges joinder of the counts for trial. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).¹ We affirm.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Evidence underlying several of the counts was obtained in a “trash pull” conducted by police. Police asked the trash collector to empty the garbage truck’s hopper, collect trash left outside the target residence, and then give the collected trash to police. Officer Andrew Reed testified that he told the trash collector how to properly collect the trash, including emptying the hopper before collecting the targeted trash. Reed watched the trash being collected, and then received it from the trash collector about thirty to sixty seconds later. Reed estimated that he watched from a distance of about six-to-ten house lengths. He admitted that he could not see inside the hopper when the trash was collected. Reed testified, however, that the only trash in the hopper was the trash he had seen outside the target residence. Reed and another officer searched the bags and found several drug-related items. Reed did not know the name of the trash collector. He did not know the number of trash bags collected nor did he catalog what items were found in which bags.

Givhan makes several arguments regarding the trash pull, casting them in terms of “chain of custody,” confrontation, due process, and discovery violations. Givhan’s ultimate goal in each argument is the same – suppression of the evidence obtained in the trash pull. We will address each argument in turn.

Givhan contends that his rights under the Confrontation Clause were violated because the trash collector did not testify at trial.² Whether a defendant’s constitutional confrontation rights were violated is a question of law that we review de novo. *State v. Rodriguez*, 2006 WI App

² The State questions whether Givhan preserved this objection at trial. We choose to address Givhan’s argument on the merits.

163, ¶13, 295 Wis. 2d 801, 722 N.W.2d 136. The Confrontation Clause³ bars admission of an out-of-court testimonial statement unless the declarant is unavailable and the defendant had a prior opportunity to examine the declarant with respect to the statement. See *Crawford v. Washington*, 541 U.S. 36, 68-69 (2004). In this case, the trash collector did not testify at trial and no out-of-court statement attributed to that person was introduced. Therefore, the Confrontation Clause was not implicated.

Givhan contends the State violated its obligations under WIS. STAT. § 971.23 by not disclosing to him the name of the trash collector. Under that statute, the State must disclose, among other things, a list of all witnesses that the State intends to call at trial. WIS. STAT. § 971.23(1)(d). The statute also creates a continuing duty to disclose any witnesses discovered after the initial disclosure to a defendant is made. WIS. STAT. § 971.23(7). The State did not call the trash collector as a witness at trial. Therefore, it was not required to disclose that person's name to Givhan.

Givhan contends that the State acted in bad faith by not documenting the number of trash bags collected, recording which evidentiary items were found in which bag, and by not preserving the actual trash bags. Givhan's argument is anchored in his right to due process. "[R]outine destruction [of evidence], without more, does not deprive a defendant of due process. To prevail on a due process challenge, the defendant must show that the evidence was apparently exculpatory or that it was destroyed in bad faith." *State v. Luedtke*, 2015 WI 42, ¶46, 362

³ The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." Article 1, Section 7 of the Wisconsin Constitution guarantees the accused "the right ... to meet witnesses face to face."

Wis. 2d 1, 863 N.W.2d 592. Bad faith exists only if “the officers were aware of the potentially exculpatory value or usefulness of the evidence” that was not preserved and “the officers acted with official animus or made a conscious effort to suppress exculpatory evidence.” *Id.* (quoted source omitted).

Reed testified that no other trash was present when the bags were searched. He took photographs of the contraband found in the trash rather than the entire collection of trash. Givhan has not shown how anything about the number of bags, the bags themselves, or knowing in which bag contraband was found would be exculpatory. Nor has Givhan pointed to any evidence of bad faith.⁴ Therefore, his due process right was not violated.

Givhan relies on the thirty-to-sixty second interval that the garbage truck was out of Reed’s sight to argue that the trash must be suppressed because the State did not establish the chain of custody. To establish the chain of custody, the State must show that it was “improbable that the original item has been exchanged, contaminated or tampered with.” *State v. McCoy*, 2007 WI App 15, ¶9, 298 Wis. 2d 523, 728 N.W.2d 54 (quoted source omitted). A perfect chain of custody is not required, and any alleged gaps in the chain go to the weight of the evidence and not its admissibility. *Id.* Suppression was not required.

Lastly, Givhan contends that the trial court erred when it denied his motion to sever the five delivery counts, derived from a series of controlled buys, from the other counts, derived from evidence found in the trash pull and a subsequent house search. Joinder is proper under

⁴ Givhan argues that the State “failed to establish a nexus between the evidence supposedly found, the trash, target residence and documentation of the trash bags allegedly collected.” However, all of those matters were addressed in Reed’s testimony.

WIS. STAT. § 971.12(1) when the crimes “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.” Crimes are considered the same or similar in character if they are the same type of offense that occurred over a relatively short period of time and the evidence as to each overlaps. *State v. Locke*, 177 Wis. 2d 590, 596, 502 N.W.2d 891 (1993). Crimes are considered to be connected or to constitute parts of a common scheme or plan when the crimes charged have a common factor or factors of substantial factual importance, e.g., time place, or *modus operandi*, so that the evidence of each crime is relevant to establish a common scheme or plan that tends to establish the identity of the perpetrator. *Francis v. State*, 86 Wis. 2d 554, 560-61, 273 N.W.2d 310 (1979). If a trial court refuses to sever, this court will not conclude that the trial court erroneously exercised its discretion unless the defendant can show that the failure to sever caused the defendant “substantial prejudice.” *Locke*, 177 Wis. 2d at 597.

Joinder was proper. The crimes all stemmed from Givhan’s drug dealing activities over a six-month period of time, a relatively short period of time. See *State v. Hamm*, 146 Wis. 2d 130, 139-40, 430 N.W.2d 584 (Ct. App. 1988) (acts occurring two years apart held to be properly joined). The same police officers were witnesses to each count. Evidence of each crime would be admissible to show a common scheme or plan. Therefore, Givhan was not prejudiced by joinder and the trial court did not erroneously exercise its discretion when it denied Givhan’s motion to sever.

Upon the foregoing reasons,

IT IS ORDERED that the judgment of conviction and postconviction order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals