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February 24, 2016

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

2015AP1361-CR	State of Wisconsin v. Yoshida M. Tate (L.C. # 2013CF3297)
2015AP1362-CR	State of Wisconsin v. Yoshida M. Tate (L.C. # 2013CF4055)

Before Lundsten, Higginbotham and Blanchard, JJ.

Yoshida Tate appeals judgments convicting him of armed robbery, possession of a firearm by a felon, resisting an officer, and possession of THC. He also appeals the order on his motion for postconviction relief. Tate raises two issues: the validity of a mandatory DNA surcharge imposed upon the firearm count and the joinder of the charges. After reviewing the

record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2013-14).¹ We affirm for the reasons discussed below.

The parties agree that, at the time Tate committed the firearm offense, circuit courts had discretion whether to impose a DNA surcharge for that type of felony, but by the time Tate was sentenced, imposition of the surcharge had become mandatory for all felonies. *See* 2013 Wis. Act 20, §§ 2354, 2355, and 9426(1)(am). Tate contends that applying the mandatory statute to him represented an ex post facto violation. However, this court has already rejected that argument as to offenders in Tate’s position, concluding that the imposition of a single DNA surcharge is not punitive, but rather an administrative charge to pay for the collection of an offender’s DNA sample and the expenditures needed to maintain the state’s DNA data bank. *See State v. Scruggs*, 2015 WI App 88, ¶13, 365 Wis. 2d 568, 872 N.W.2d 146. We conclude that *Scruggs* is dispositive of the DNA surcharge issue in this case.

As to the joinder issue, there is a two-step process for determining whether joinder is proper. First, the court must determine whether the statutory criteria have been satisfied. The statute permits joinder of two or more crimes that are “of the same or similar character,” or are “based on the same act or transaction[s],” or are connected as “parts of a common scheme or plan,” regardless whether the crimes were charged in one or more complaint. *See* WIS. STAT. § 971.12(1) and (4). Second, even if joinder would be permissible under the statute, the court may direct that charges be tried separately to avoid prejudice to the defendant. WIS. STAT. § 971.12(3). The risk of prejudice is generally not significant when the evidence relating to each

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

charge would be admissible as other acts evidence at a trial on the other charge(s). *See State v. Bettinger*, 100 Wis. 2d 691, 697, 303 N.W.2d 585 (1981).

Here, the four charges against Tate were set forth in two complaints, revolving around events that had occurred on two different days. In Milwaukee County Case Number 13-CF-4055, the State charged Tate with armed robbery, party to a crime, based upon allegations that he was one of three armed men who robbed a man in front of the man's house, taking his watch, keys, driver's license, and cash, before shooting his dog as they ran off. In Milwaukee County Case Number 13-CF-3297, the State charged Tate with possession of a firearm by a felon, obstructing an officer, and possession of THC based upon events that occurred when the police executed a search warrant seeking evidence of the armed robbery, four days later. Specifically, when police executed the warrant, Tate dove out of the window of the residence being searched and then, upon being apprehended, gave police a false name, leading to the obstruction charge. During the search, the police recovered items belonging to the armed robbery victim, as well as the gun that formed the basis for the firearm charge. And finally, when Tate was booked following the execution of the search warrant, police discovered a small baggie of marijuana in his pocket, leading to the THC charge.

The armed robbery, possession of a firearm by a felon, and obstruction of an officer charges meet the "common scheme" criterion for joinder as well as the "other acts" admissibility test for avoiding prejudice. That is, based upon the State's theory that Tate had likely used the gun in the commission of the armed robbery, and that Tate's attempt to elude the police during the execution of the search warrant evinced a consciousness of guilt about the robbery and/or possession of the firearm, evidence of each charge would have been admissible at trial on the other charges.

The State concedes that evidence relating to the THC charge was unrelated to the armed robbery charge, and therefore did not satisfy the statutory joinder criteria. We therefore presume that Tate was prejudiced by the joinder of those two charges, and it is the State's burden to rebut the presumption with evidence that the joint trial did not, in fact, prejudice Tate. *See State v. Leach*, 124 Wis. 2d 648, 669, 370 N.W.2d 240 (1985). We conclude that the State has met its burden by pointing out that there was DNA evidence linking Tate to the armed robbery, as well as the victim's identification and the items from the robbery that were recovered from the residence where police found Tate. Given the strength of the State's case, we see no likelihood that severing the marijuana charge from the other three charges would have resulted in a different outcome.

Therefore,

IT IS ORDERED that the judgments of conviction and order are summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals