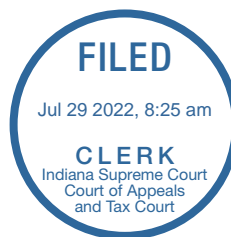


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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IN THE COURT OF APPEALS OF INDIANA

Christopher Aaron Susaraba,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

July 29, 2022

Court of Appeals Case No.
21A-CR-1821

Appeal from the Kosciusko Circuit
Court

The Honorable Michael W. Reed,
Judge

Trial Court Cause No.
43C01-2103-F1-226

Weissmann, Judge.

[1] Christopher Aaron Susaraba appeals his conviction for Level 1 felony dealing in a controlled substance resulting in death, arguing that the State failed to prove the drugs that killed his fellow jail inmate originated with him. We find the State met that burden and affirm Susaraba's conviction. However, we sua sponte remand for correction of the sentencing documents.

Facts

[2] Two days after being arrested and placed in the Kosciusko County Jail, Susaraba provided a mixture of methamphetamine and heroin to a group of inmates in his cell block, including Daniel Swafford and Dennis McCrory. McCrory used a large amount of the drugs and began acting erratically and had trouble breathing. McCrory later was found unconscious in his cell and taken to Kosciusko County Hospital, but he died. Tests showed McCrory had opiates and heroin in his system. The coroner concluded McCrory died of acute mixed drug intoxication from using methamphetamine or heroin or some combination of both.

[3] The State charged Susaraba with dealing in a controlled substance resulting in McCrory's death, a Level 1 felony, and trafficking with an inmate, a Level 5 felony. The State also alleged Susaraba was a habitual offender. These charges were dismissed at the State's request when the State failed to subpoena witnesses necessary to establish McCrory's toxicology results for trial and the trial court denied its motion to continue. The State then refiled the same charges under a new case number. Susaraba moved to dismiss the second

proceeding, alleging that the dismissal and refiled violated his right to due process. After a hearing, the trial court denied Susaraba's motion, and the case proceeded to trial.

[4] The jury returned verdicts of guilty on both the dealing and trafficking counts and also determined Susaraba was a habitual offender. At sentencing, the trial court found the trafficking conviction "merged" with the dealing conviction and thus did not sentence Susaraba on the trafficking count. As to the dealing conviction, the court sentenced Susaraba to 30 years imprisonment, plus a 10-year habitual offender enhancement. Susaraba appeals his dealing conviction.¹

Discussion and Decision

[5] Susaraba attacks his conviction on two fronts. First, he claims that the trial court erroneously denied his motion to dismiss. Second, he asserts the evidence does not support his convictions. We also sua sponte address the trial court's attempt to solve a perceived double jeopardy issue by merging, without vacating, Susaraba's conviction for trafficking with an inmate.

I. Motion to Dismiss

[6] Susaraba claims the trial court's denial of his motion to dismiss the refiled charges allowed the State to circumvent the court's denial of the continuance—

¹ We remind Susaraba's counsel that Indiana Appellate Rules 50 and 51 specify the order in which documents should appear in Appellant's Appendix. Susaraba's appendix does not conform to those rules, rendering appellate review more difficult.

an essential delay if the State hoped to present laboratory evidence. Indiana Code § 35-36-11-2 required the State to file the notice of intent to introduce the laboratory report “not later than twenty (20) days before the trial date, unless the court establishes a different time.” Because the State did not meet that deadline, the State could not “introduce the laboratory report into evidence without the testimony of the person who conducted the test and prepared the laboratory report.” Ind. Code § 35-36-11-4. The State had not subpoenaed those witnesses in time for their appearance at trial, and the State’s motion for continuance failed.

[7] According to Susaraba, allowing the State to sidestep these statutes deprived him of due process under both the federal and state constitutions. *See* IND. CONST. art. I, § 13 (“In all criminal prosecutions, the accused shall have the right to a public trial, by an impartial jury . . . to be heard by himself and counsel . . . to meet the witnesses face to face”); U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . to be confronted with the witnesses against him”).

[8] The State responds by asserting Indiana Code § 35-34-1-13 authorized dismissal of the original charges and that refiling the charges did not impact Susaraba’s substantial rights. The State is correct.

A. Standard of Review

[9] We review the trial court's denial of a motion to dismiss for an abuse of discretion. *Johnson v. State*, 774 N.E.2d 1012, 1014 (Ind. Ct. App. 2002). We will reverse only when the decision is against the logic and effect of the facts and circumstances. *Id.*

B. Due Process

[10] The trial court was required to grant the State's motion to dismiss the original charges. *See* Ind. Code § 35-34-1-13(a) ("Upon motion of the prosecuting attorney, the court shall order the dismissal of the indictment or information."). But the State could refile the charges only if Susaraba's substantial rights were not prejudiced. *See Davenport v. State*, 689 N.E.2d 1226, 1229 (Ind. 1997), *reh'g granted in part*, 696 N.E.2d 870 (Ind. 1998).

[11] Dismissal and refile of the same charges does not prejudice a defendant's substantial rights when the State is not ready to prosecute in the first proceeding or when the State is attempting to avoid an adverse evidentiary ruling. *Id.* "The defendant's substantial rights are not prejudiced in these situations primarily because the defendant can receive a fair trial on the same facts and employ the same defense in the second trial as in the first." *Id.*

[12] Susaraba contends his substantial rights were implicated because he was denied his right to confront witnesses through the dismissal and refile. He fails to specify exactly what confrontation he was denied, and we discern no confrontation violation. At trial, Susaraba cross-examined the witnesses who

collected and tested McCrory's blood. He thus exercised his confrontation right as to the laboratory tests. He has alleged no violation of his rights to an early trial or any other substantial right resulting from the dismissal and refile. Nor has he offered us reason to depart from the general rule that dismissal to avoid adverse rulings normally does not violate a defendant's substantial rights. *Id.* The trial court did not abuse its discretion or violate Susaraba's due process right by denying his motion to dismiss.

II. Sufficiency of the Evidence

[13] Susaraba also claims the evidence did not support his conviction under the dealing statute. The State charged Susaraba with knowingly or intentionally delivering a controlled substance in violation of Indiana Code § 35-48-4-1 or Indiana Code § 35-48-4-1.1, resulting in the death of a human being who used the controlled substance. App. Vol. II, p. 112. Indiana Code § 35-48-4-1(a)(1)-(2) prohibits the knowing or intentional delivery or possession with intent to deliver cocaine or a narcotic drug. Indiana Code § 35-48-4-1.1(a)(1)-(2) bars the knowing or intentional delivery or possession with intent to deliver methamphetamine. "Deliver," in this statutory context, means "[a]n actual or constructive transfer from one person to another of a controlled substance" or "the organizing or supervising of [that] activity." Ind. Code § 35-48-1-11(1).

[14] The essence of Susaraba's claim is that the State failed to prove beyond a reasonable doubt that Susaraba delivered the drugs that caused McCrory's death. Susaraba misconstrues the dealing statute when he suggests it required

proof that he sold or delivered the controlled substance directly to McCrory. Under the circumstances of this case, the dealing statute only required proof that Susaraba delivered the drug to someone—not necessarily to McCrory—and that drug resulted in McCrory’s death when McCrory used it. *See generally* *Yeary v. State*, 186 N.E.3d 662 (Ind. Ct. App. 2022) (providing an overview of the dealing in a controlled substance resulting in death statute, commonly called the drug-induced homicide statute).

[15] Susaraba contends that the State, at most, established that he and McCrory used the same drugs. But Swafford testified that the jail block had no drugs available until Susaraba’s arrival. *Id.* at 181. Swafford also testified that he bought drugs from and used them with Susaraba two days before McCrory’s death and that Susaraba, McCrory, and he used drugs together on the day of McCrory’s death. *Id.* at 156.

[16] Alternatively, Susaraba argues that even if Swafford’s testimony pointed to Susaraba as the source of the drugs, Swafford’s testimony should be rejected under the incredible dubiousity rule. The incredible dubiousity rule is an exception to the rule that a single witness’s testimony may be sufficient to support a conviction. *C.S. v. State*, 71 N.E.3d 848, 851 (Ind. Ct. App. 2017). It applies only when three circumstances exist: 1) a sole testifying witness; 2) testimony that is inherently contradictory, equivocal, or the result of coercion; and 3) a complete absence of circumstantial evidence. *Moore v. State*, 27 N.E.3d 749, 756 (Ind. 2015). These circumstances are missing here.

[17] The prosecution did not rely solely on Swafford's testimony. The State called 12 witnesses, including James Walsh, who was part of the group who engaged in drug use with McCrory, Swafford, and Susaraba shortly before McCrory collapsed. Walsh testified that he was unaware of anyone but Susaraba dealing drugs in K block at the time. Tr. Vol. II, p. 190. McCrory told his fiancée to deposit \$150.00 into Susaraba's commissary account either on the day before or day of McCrory's death, and she did. *Id.* at 193. Together with Swafford's testimony, this circumstantial evidence suggested McCrory bought the drugs from Susaraba that eventually killed McCrory. Swafford's testimony was not incredibly dubious because he was not the sole testifying witness and circumstantial evidence of McCrory's guilt was introduced. *See Moore*, 27 N.E.3d at 756.

[18] Contrary to Susaraba's claim, the circumstantial evidence was sufficient to establish beyond a reasonable doubt that he knowingly or intentionally delivered a controlled substance that, when used by McCrory, resulted in his death. Given that determination and our earlier ruling that the trial court properly denied Susaraba's motion to dismiss, we affirm Susaraba's conviction.

II. Merger

[19] We sua sponte address the trial court's "merger" of the Level 5 felony trafficking count with the drug induced homicide conviction. Because the trial court entered judgment of conviction on the trafficking count, merging the offenses was not enough to resolve the court's double jeopardy concern. *See*

Gregory v. State, 885 N.E.2d 697, 703 (Ind. Ct. App. 2008) (ruling that when trial court entered judgment of conviction on jury’s verdicts of guilty for dealing and conspiracy and later merged the convictions for double jeopardy reasons, merger was insufficient because the lesser offense must be vacated to cure any double jeopardy violation). As the parties do not contest the trial court’s double jeopardy determination, we remand this case to the trial court to vacate the “merged” offense of Level 5 felony trafficking with an Inmate.

[20] Affirmed and remanded.

Robb, J., and Pyle, J., concur.