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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0706**

State of Minnesota,
Respondent,

vs.

Dale H. Dufner,
Appellant.

**Filed April 28, 2009
Affirmed
Connolly, Judge**

Kandiyohi County District Court
File No. 34-CR-07-440

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and

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Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Stauber, Presiding Judge; Minge, Judge; and Connolly,
Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges the district court's denial of his motion to dismiss for lack of probable cause, arguing the district court erred by concluding that the charge of conspiracy to manufacture methamphetamine in one county was not barred by Minn. Stat. § 609.035 (2006), and the prohibition against double jeopardy, following appellant's conviction in a different county for manufacturing methamphetamine. Because the offenses in each county did not form a single behavioral incident, we affirm.

FACTS

On March 16, 2007, law enforcement agents observed appellant Dale H. Dufner and two individuals purchasing pseudoephedrine, a Schedule V substance, at stores in the City of Willmar, Kandiyohi County. *See* Minn. Stat. § 152.02, subd. 6 (2006) (defining pseudoephedrine as a methamphetamine-precursor drug). The agents arrested appellant and the two people with him, and the agents recovered methamphetamine from appellant's person during a search incident to arrest. Following appellant's arrest, law enforcement agents executed a search warrant at appellant's residence in Stearns County and found materials used in the manufacturing of methamphetamine.

Appellant was ultimately charged in Kandiyohi County with: (1) conspiracy to manufacture methamphetamine in the first degree in violation of Minn. Stat. §§ 152.021, subds. 2a, 3(a), 152.096, subd. 1 (2006); (2) possession of a substance with intent to manufacture methamphetamine in violation of Minn. Stat. § 152.0262, subd. 1 (2006); and (3) possession of a controlled substance in the third degree in violation of Minn. Stat.

§ 152.023, subds. 2(1), 3(a) (2006). Appellant was charged in Stearns County with manufacturing methamphetamine in the first degree in violation of Minn. Stat. § 152.021, subd. 2a(a). Appellant pleaded guilty to the Stearns County charge.

Following his conviction in Stearns County, appellant moved to dismiss the charges in Kandiyohi County for lack of probable cause, arguing that Minn. Stat. § 609.035, subd. 1 (2006) and the prohibition against double jeopardy barred prosecution on the Kandiyohi County charges. The district court denied appellant's motion and concluded that the charges in Kandiyohi County were not barred following appellant's conviction in Stearns County because the charges in each county were not part of the same behavioral incident since they were based upon distinct overt acts that were separated by time and place.

Appellant waived his right to a jury trial and proceeded to a court trial on the charges in Kandiyohi County. The district court found appellant guilty of conspiracy to commit a controlled substance crime first degree—manufacturing methamphetamine. Appellant was sentenced to 110 months in prison to run concurrent with his prison sentence of 86 months in Stearns County. This appeal follows.

DECISION

Minn. Stat. § 609.035, subd. 1, states:

[I]f a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses and a conviction or acquittal of any one of them is a bar to prosecution for any other of them. All the offenses, if prosecuted, shall be included in one prosecution which shall be stated in separate counts.

The statute prohibits serialized prosecutions and multiple sentences for offenses resulting from “the same behavioral incident.” *State v. Schmidt*, 612 N.W.2d 871, 876 (Minn. 2000). The statute was intended “to broaden the protection afforded by our constitutional provisions against double jeopardy.” *State v. Johnson*, 273 Minn. 394, 400, 141 N.W.2d 517, 522 (1966).

It is the state’s burden to establish that multiple crimes are not a single behavioral incident. *State v. Barnes*, 618 N.W.2d 805, 813 (Minn. App. 2000), *review denied* (Minn. Jan. 16, 2001). Where the facts are established, the determination of whether multiple offenses form part of a single behavioral act is a question of law subject to de novo review. *State v. Reimer*, 625 N.W.2d 175, 176 (Minn. App. 2001) (reviewing district court’s separate-incident determination de novo where the facts were undisputed).

In determining whether a series of offenses constitutes a single behavioral incident, the relevant factors are (1) unity of time and place, and (2) whether the segment of conduct involved was motivated by an effort to obtain a single criminal objective. *State v. Bookwalter*, 541 N.W.2d 290, 295 (Minn. 1995); *see State v. Soto*, 562 N.W.2d 299, 304 (Minn. 1997) (stating that the determination of whether multiple offenses are part of a single behavioral act involves an examination of all the facts and circumstances); *State v. Eaton*, 292 N.W.2d 260, 266 (Minn. 1980) (noting a single behavioral incident is the result of single motivation directed toward single criminal goal). Key considerations include whether the offenses can be explained without necessary reference to each other, *State v. Banks*, 331 N.W.2d 491, 494 (Minn. 1983), and whether the crimes were in furtherance of each other. *Mercer v. State*, 290 N.W.2d

623, 626 (Minn. 1980). Where offenses are committed and proven independently of the others, they are not part of a single behavioral incident. *State v. Butcher*, 563 N.W.2d 776, 784 (Minn. App. 1997), *review denied* (Minn. Aug. 5, 1997).

Appellant argues that this court should reverse the district court's order denying his motion to dismiss because his actions in both counties represented a common scheme to manufacture methamphetamine, which cannot be bifurcated into separate charges based upon whether the acts occurred on or before March 16, 2007, or whether the acts occurred in Kandiyohi or Stearns County. We disagree. Appellant's charge in Kandiyohi County for conspiracy to manufacture methamphetamine and his conviction in Stearns County for manufacturing methamphetamine were not part of a single behavioral incident, because they did not share a unity of time or place and because the conduct involved was not motivated by an effort to obtain a single criminal objective.

The facts required for the state to prosecute each of appellant's charges are different. Appellant completed all of the acts necessary for the state to convict him for manufacturing methamphetamine in Stearns County before he began purchasing pseudoephedrine on March 16, 2007 in Kandiyohi County. *See State v. Heath*, 685 N.W.2d 48, 61 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004) (holding that Minn. Stat. § 609.035 did not bar prosecution for conspiracy to manufacture and possession where the acts that constituted the conspiracy occurred before the second behavioral incident in which controlled substance was possessed). Although the evidence that appellant had a methamphetamine-manufacturing facility in his residence may be relevant to the conspiracy charge, that fact was unnecessary to sustain a conviction of

conspiracy to manufacture methamphetamine. *See State v. Martinez*, 530 N.W.2d 849, 850-51 (Minn. App. 1995), *review denied* (Minn. June 14, 1995) (affirming that, under Minn. Stat. § 609.035, subd. 1, two counties’ possession-of-a-controlled-substance charges were not part of a single behavioral incident because defendant possessed marijuana in two separate locations for two separate purposes). Likewise, the activities that occurred in Kandiyohi County were unnecessary to obtain appellant’s conviction in Stearns County.

Appellant contends that his case is comparable to *State v. Carr* in which this court barred prosecution of a defendant for both possessing methamphetamine and manufacturing methamphetamine under Minn. Stat. § 609.035, subd. 1. 692 N.W.2d 98, 100-01 (Minn. App. 2005). In *Carr* this court concluded that the offenses were part of the same behavioral objective because “the methamphetamine found . . . was in liquid form, and . . . was not yet in a usable form, [and therefore,] the only reason to possess it would be to complete the manufacturing process.” *Id.* at 102.

Carr is distinguishable from the present case. The Minnesota Supreme Court has held that multiple offenses of the same character are not necessarily part of a single course of conduct. *See Soto*, 562 N.W.2d at 304 (rejecting the argument that multiple sales of controlled substance were part of single course of conduct); *Eaton*, 292 N.W.2d at 266-67 (holding that claimed plan to swindle as much as possible was too broad to be single criminal goal). And in *Carr* we noted that “a conspiracy to manufacture methamphetamine will typically be completed by the time the conspirators are in possession of the drug.” *Carr*, 692 N.W.2d at 102; *see Heath*, 685 N.W.2d at 61. Two

courses of conduct, such as conspiracy to manufacture and possession, may be charged in some circumstances. But, our decision in *Carr* turned upon the fact that the methamphetamine that was found was in liquid form. *Carr*, 692 N.W.2d at 102. Thus, in *Carr* the manufacturing process was not complete and there was only one discrete batch of methamphetamine. *Id.* Although both offenses in appellant's case share the general objective to manufacture methamphetamine, appellant was charged in Stearns County for manufacturing a discrete batch of methamphetamine in the past and appellant was charged in Kandiyohi County for conspiring to manufacture an additional discrete batch of methamphetamine in the future. The offenses did not share a single criminal goal. Each offense had the criminal goal of producing a discrete amount of methamphetamine at separate times. Therefore, the offenses were not part of the same behavioral incident.

Because we conclude appellant's offenses in Stearns and Kandiyohi County were not part of the same behavioral incident, we affirm the Kandiyohi County district court's denial of appellant's motion to dismiss for lack of probable cause based on Minn. Stat. § 609.035 and the prohibition against double jeopardy.

Affirmed.