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MICHAEL R. CONKLIN, Appellant-Defendant, vs. STATE OF INDIANA, Appellee.

No. 64A03-9103-CR-69

COURT OF APPEALS OF INDIANA, THIRD DISTRICT

587 N.E.2d 725; 1992 Ind. App. LEXIS 277

March 10, 1992, Filed

PRIOR HISTORY: [**1] APPEAL FROM THE PORTER SUPERIOR COURT. The Honorable Thomas W. Webber, Judge. Cause No. 64D01-8904-CF-114D

LexisNexis (TM) HEADNOTES - Core Concepts:

COUNSEL: ATTORNEY FOR APPELLANT: GARY S. GERMANN, CHUDOM, MEYER & GERMANN, 3437 Airport Road, Portage, IN 46368.

ATTORNEYS FOR APPELLEE: LINLEY E. PEARSON, Attorney General of Indiana, LOUIS E. RANSDELL, Deputy Attorney General, Office of Attorney General 219 State House, Indianapolis, IN 46204-2794.

JUDGES: SULLIVAN, STATON, HOFFMAN

OPINIONBY: SULLIVAN

OPINION: [*726] SULLIVAN, J.

Appellant-defendant Michael R. Conklin (Conklin) appeals his conviction for dealing cocaine, a Class B felony.

The evidence relevant to the appeal discloses that during the early morning of April 25, 1989, police officers in Porter County executed several arrest warrants involving illicit drug activities. Among those arrested was Kip Gillie (Gillie). After his arrest, Gillie volunteered to complete a drug sale with Conklin which had been prearranged for that afternoon.

According to the plan, Conklin would visit Gillie in the afternoon. Conklin would purchase approximately two grams of cocaine.

Prior to Conklin's arrival, Gillie was outfitted with a recording device, and two police officers hid in the bedroom. Upon his arrival at Gillie's apartment, [**2] Conklin received approximately two grams of cocaine and at the time consumed about one-third of that total amount. After a brief conversation between Gillie and Conklin, the officers, who were located approximately eight feet from the conversants, shouted "police." Conklin ran from the apartment, dropped the cocaine on the stairs, and was subdued by police officers.

Conklin was arrested and charged with dealing in cocaine, a Class B felony. After a trial by jury, Conklin was convicted of the charge. This appeal ensued.

Conklin raises two issues for review:

(1) Whether the trial court erred in allowing testimony into evidence regarding previous uncharged acts of dealing in cocaine; and

(2) Whether the conviction is supported by sufficient evidence.

[*727] It is without question that as a general proposition evidence of extrinsic criminal conduct is prejudicial and inadmissible. Here Gillie was permitted to testify that Conklin had in the distant past sold cocaine. This is a classic case of inadmissible prior criminal conduct. The evidence of past conduct adduced through the testimony of Gillie does not establish a common scheme or plan with regard to the offense here charged. At best [**3] it shows that two to three years previously, Conklin had sold cocaine. An inference is therefore invited to the effect that "once a cocaine dealer, always a cocaine dealer". The law is otherwise. *Street v. State (1991) 5th Dist. Ind.App., 567 N.E.2d 1180,* trans. denied.

Such evidence is inadmissible if, as here, it merely shows a tendency on the part of the defendant to commit certain types of crimes. *Manuel v. State (1977) 267 Ind. 436, 370 N.E.2d 904.* To be admissible under the theory propounded here, the evidence of Conklin's prior activity must be "so related in character, time and place of commission as to establish some plan which embraced both the prior . . . criminal activity and the charged crime." *Malone v. State (1982) Ind., 441 N.E.2d 1339, 1347.*

No connection was established between Conklin's past conduct and the cocaine possession here involved. To the contrary, the quantity involved, two grams, one-third of which was consumed by Conklin at the time, strongly indicates personal use. It does not suggest an intent to distribute the remaining quantity to others. See *Isom v. State, 589 N.E.2d 245* [**4] (March 3, 1992) 2d Dist. Ind.App., N.E.2d . The evidence of past conduct here was too remote in time, place and circumstance to constitute a common scheme or plan. *Clark v. State (1989) Ind., 536 N.E.2d 493; Riley v. State (1986) Ind., 489 N.E.2d 58.*

Nevertheless, there is evidence that Conklin did have the requisite intent to deliver. According to Gillie, Conklin indicated after using a portion of the cocaine, that "he had to go, he had to go deliver it to somebody, some people at work. . . ." Record at 297. However, this evidence is not so overwhelming as to permit us to conclude that the inadmissible evidence of prior conduct did not contribute to the jury verdict. We are therefore unable to affirm the dealing conviction.

Rather than reverse and remand for a new trial, however, we reverse and remand with instructions to enter a conviction for the necessarily lesser included offense of possession of cocaine as a Class D felony, pursuant to *I.C. 35-48-4-6*. See *Isom v. State, supra.*

STATON, J. CONCURS
HOFFMAN, J. DISSENTS WITH OPINION

DISSENTBY: HOFFMAN

DISSENT:

DISSENTING OPINION

HOFFMAN, J.

I respectfully dissent. Implicit in Conklin's defense [**5] was an admission that he possessed cocaine but that the evidence did not demonstrate that he intended to deliver the cocaine. Instead, Conklin attempted to demonstrate that he purchased the cocaine for his own personal use. The State then presented evidence to refute Conklin's defense through evidence that Conklin was purchasing the cocaine to deliver to co-workers and through evidence of Conklin's pattern for dealing in cocaine.

As noted by the majority, generally evidence of extrinsic criminal activity is prejudicial and inadmissible. However, evidence of unrelated criminal conduct by a defendant may be admissible to prove an accused's identification, knowledge, intent or motive, or to demonstrate a common plan or scheme of criminal activity from which the accused originated the charged crime. *Sharp v. State (1989), Ind., 534 N.E.2d 708, 711,* reh. den., cert. den. *494 U.S. 1031, 108 L.Ed.2d 617, 110 S.Ct. 1481.* In *Sharp, supra,* evidence of uncharged acts was admissible to demonstrate the defendant's intent and motive to sell drugs and his common scheme of criminal activity.

Id. at 711-12;

cf. *Collins v. State (1988), Ind., 520 N.E.2d 1258,*
[**6] 1260-61 (evidence of previous [*728] drug use admitted to
refute defenses of entrapment and immunity).

Such is the case here.

The testimony was relevant to intent and motive and was invited by Conklin in order for the State to rebut his sole defense that the cocaine was purchased for his own consumption. Also, because the evidence of uncharged acts of selling was connected to Gillie, a nexus exists between Conklin's past conduct and that giving rise to the present action.

Conklin asserts that the evidence demonstrates that he was a user of cocaine and that he consumed some cocaine in the presence of Gillie. The evidence of Conklin's use of cocaine does not preclude an intent to deliver as well. The evidence demonstrated that Conklin purchased the cocaine, in part, with an intent to deliver it to his co-workers. Accordingly, because the jury's verdict is supported by sufficient evidence, the judgment of conviction should be affirmed.