FOR PUBLICATION

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IN THE
COURT OF APPEALS OF INDIANA

LEROY JONES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 27A02-1002-CR-168
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable Jeffrey D. Todd, Judge
Cause No. 27D01-0611-FA-209

July 7, 2010

OPINION - FOR PUBLICATION

FRIEDLANDER, Judge

Leroy Jones appeals his conviction of two counts of Dealing in Cocaine, one as a class A felony[1] and one as a class B felony.[2] Jones presents the following restated issues for review:

1. Should Jones's conviction for dealing in cocaine as a class A felony be reduced to a class B felony because the jury was incorrectly instructed regarding the statutory definition of "family housing complex"?

2. Did the trial court err in sentencing Jones to consecutive terms of imprisonment?

We reverse and remand.

The facts most favorable to the conviction are that on May 18, 2006, Donald Gipson, a confidential informant for the Grant County Joint Effort Against Narcotics Team (the JEAN Team), arranged a controlled drug buy with Jones. Gipson placed a phone call to Jones that was recorded by the JEAN Team. Gipson agreed to meet Jones at the Greentree West Apartments (Greentree) to purchase crack cocaine. Before completing the deal, Gipson met with members of the JEAN Team, who searched Gipson, fitted him with a wire, and gave him buy money. Gipson subsequently traveled to the prearranged location at Greentree, where he gave Jones two (2) fifty-dollar bills in exchange for ten rocks of cocaine. The transaction was monitored by various members of the JEAN Team. On June 1, 2006, Gipson arranged another controlled buy with Jones. Although this buy was supposed to have occurred at Greentree as well, it took place at a gas station where Jones happened to see Gipson as Jones went by.

On November 20, 2006, the State charged Jones with two counts of dealing in

[1] Ind. Code Ann. § 35-48-4-1(b)(3)(B)(iii) (West, Westlaw through 2009 1st Special Sess.).

cocaine. Under Count 1, relating to the May 18 transaction, Jones was charged with dealing in cocaine within 1000 feet of a family housing complex as a class A felony. Under Count 2, relating to the June 1 transaction, Jones was charged with dealing in cocaine as a class B felony. Jones was tried by jury and found guilty on both counts. Jones was sentenced to consecutive terms of thirty-five years on Count 1 and fifteen years on Count 2, for a total executed sentence of fifty years.

1.

Jones contends his conviction for dealing in cocaine as a class A felony should be reduced to a class B felony because the jury was incorrectly instructed regarding the statutory definition of the offense. Specifically, Jones contends the instruction in question utilized a definition of the phrase "family housing complex" that was not in effect at the time of the offense.

We review a trial court's decision regarding instructing the jury for an abuse of discretion. *Gamble v. State*, 831 N.E.2d 178 (Ind. Ct. App. 2005), *trans. denied*. In reviewing a trial court's decision to give or refuse a tendered instruction, we consider whether the instruction (1) correctly states the law; (2) is supported by evidence in the record; and (3) is covered in substance by other instructions. *Wal-Mart Stores v. Wright*, 774 N.E.2d 891 (Ind. 2002). We note that Jones frames this argument in terms of fundamental error because he failed to properly preserve the issue below by interposing a timely objection. *See Hornbostel v. State*, 757 N.E.2d 170 (Ind. Ct. App. 2001) (the failure to object at trial results in waiver of the issue on appeal unless appellant can establish fundamental error),

[2] I.C. § 35-48-4-1(a).

trans. denied. The fundamental-error exception to the waiver rule is narrow. *Caron v. State*, 824 N.E.2d 745 (Ind. Ct. App. 2005), *trans. denied*. To rise to the level of fundamental error, the error must be so prejudicial to the rights of the defendant that a fair trial is rendered impossible. *Id.* We may reverse on this basis only when there has been a blatant violation of basic principles that denies a defendant fundamental due process. *Id*. To prevail on a claim of fundamental error, the defendant must prove a violation occurred that rendered the trial unfair. *Id*. "In determining whether an alleged error rendered a trial unfair, we must consider whether the resulting harm or potential for harm is substantial. We look to the totality of the circumstances and decide whether the error had a substantial influence upon the outcome." *Id*. at 751 (internal citation omitted).

In order to convict Jones of dealing in cocaine as a class A felony, the State was required to prove, among other things, that he "manufactured, delivered, or financed the delivery of the drug … in, on, or within one thousand (1,000) feet of … a family housing complex[.]" I.C. § 35-48-4-1(b)(3)(B)(iii). Jones contends the trial court erroneously instructed the jury as to the meaning of the phrase "family housing complex" in this statute. The instruction in question is Final Instruction No. 2, which reads as follows: "The term 'family housing complex' means a building or series of buildings: that is operated as an apartment complex." *Appellant's Appendix* at 54. Jones notes that this definition was taken verbatim from the current version of Ind. Code Ann. § 35-41-1-10.5 (West, Westlaw through 2009 1st Special Sess.), which provides as follows:

> "Family housing complex" means a building or series of buildings:
>
> (1) that contains at least twelve (12) dwelling units:

(A) where children are domiciled or are likely to be domiciled; and
(B) that are owned by a governmental unit or political subdivision;
(2) that is operated as a hotel or motel (as described in IC 22-11-18-1);
(3) *that is operated as an apartment complex*; or
(4) that contains subsidized housing.

(Emphasis supplied.) This version of the statute became effective on July 1, 2006, which was after the date that Jones committed the offense in question. The version of the statute in effect on that day, i.e., May 18, 2006, provided as follows:

'Family housing complex' means a building or series of buildings:

(1) that is owned by a governmental unit or political subdivision;
(2) that contains at least twelve (12) dwelling units; and
(3) where children are domiciled or are likely to be domiciled.

I.C. § 35-41-1-10.5, *amended by* P.L.26-2006, Sec.1 (2006). Jones contends application of the revised statute to his offense is a violation of the constitutional prohibition against ex post facto laws. He is correct.

Both the United States Constitution and the Indiana Constitution prohibit ex post facto laws. *See* U.S. Const. Art. I, § 10, Ind. Const. art. 1, § 24. The ex post facto analysis is the same under the Indiana Constitution as under the federal Constitution. *Jensen v. State*, 878 N.E.2d 400 (Ind. Ct. App. 2007). "The ex post facto prohibition forbids the Congress and the States to enact any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.'" *Jensen v. State*, 905 N.E.2d 384, 389 (Ind. 2009) (quoting *Weaver v. Graham*, 450 U.S. 24, 28 (1981)). If an ex post facto violation has indeed occurred, it constitutes fundamental error. *Ramon v. State*, 888 N.E.2d 244 (Ind. Ct. App. 2008). We must determine whether application of the revised I.C. § 35-48-1-10.5 in Jones's case violated the prohibition against

ex post facto laws.

As noted above, prior to July 1, 2006, the offense of dealing cocaine within 1000 feet of a family housing complex as a class A felony required proof of the following elements with respect to the location of the act of dealing: That it occurred in a building or series of buildings (1) that was or were owned by a governmental unit or political subdivision, (2) that contained at least twelve dwelling units, and (3) where children are domiciled or are likely to be domiciled. The amendment to I.C. § 35-48-1-10.5 broadened the kinds of places that qualify as a "family housing complex" within the meaning of I.C. § 35-48-1-10.5, and thus I.C. § 35-48-4-1(b)(3)(B)(iii). After the amendment, the following were also included: Buildings or series of buildings (2) that are operated as hotels or motels, (3) that are operated as an apartment complex, or (4) that contain subsidized housing. Jones was convicted pursuant to (3) above, i.e., a series of buildings operating as an apartment complex. Prior to the effective date of the amended I.C. § 35-48-1-10.5, the offense of dealing cocaine could not have been enhanced to a class A felony merely because it occurred in an "apartment complex", unless the apartment complex in question satisfied the definition of "family housing complex" set out in the pre-amendment form of the statute. The State contends that it did, i.e., that the evidence proved that Greentree was a "family housing complex" even under the former version of I.C. § 35-48-1-10.5, and therefore that the jury would not have reached a different verdict had the court instructed the jury as to the correct version of the statute. We disagree.

The State correctly notes that through the testimony of Steven Gause, Greentree's maintenance supervisor, the State established that there were ninety units at Greentree and

that "young families" live there. *Transcript* at 78. This testimony established the elements pertaining to the size of the complex and the fact that children lived there or were likely to do so. We can find no evidence, however, establishing that Greentree was owned by a governmental unit or political subdivision, the third element required to establish that Greentree was a "family housing complex" within the meaning of I.C. § 35-48-4-1(b)(3)(B)(iii) as it was defined on May 18, 2006. Thus, the evidence was not sufficient to prove Greentree was a family housing complex on the day in question and the jury could not have so found. Accordingly, because the trial court erroneously instructed the jury as to the meaning of "family housing complex", Jones's dealing conviction under Count 1 was enhanced via a statute that, *after* the acts were committed, changed the elements of the crime of which he was charged. This violates the prohibition against ex post facto laws and therefore constitutes fundamental error. As a result, Jones's conviction under Count 1 for dealing in cocaine as a class A felony must be reduced to the lesser included offense of dealing in cocaine as a class B felony.

2.

Jones contends the trial court erred in sentencing him to consecutive terms of imprisonment because the two offenses were nearly identical and involved state-sponsored buys of cocaine. We will address this argument because the same issue might arise upon remand.

The trial court sentenced Jones to consecutive terms of imprisonment for the two dealing convictions. Jones contends this was improper under *Gregory v. State*, 644 N.E.2d 543 (Ind. 1994). In *Gregory*, the defendant sold cocaine to the same police informant on four

consecutive days. As a result, the defendant was charged and convicted of four counts of dealing in cocaine as class A felonies based upon the quantity sold. The trial court sentenced him to the presumptive 30-year term for each and ordered the sentences to be served consecutively. The Supreme Court reversed the imposition of consecutive sentences, stating that "consecutive sentences are not appropriate when the State sponsors a series of virtually identical offenses." *Id*. at 544. We recently held that the clear import of *Gregory* is that "the State may not 'pile on' sentences by postponing prosecution in order to gather more evidence" in cases "arising from evidence gathered as a direct result of the State-sponsored criminal activity." *Williams v. State*, 891 N.E.2d 621, 635 (Ind. Ct. App. 2008).

In the instant case, Jones's two convictions stem from controlled buys involving the same confidential informant, the same quantity of the same drug, and although they occurred at two different locations, they both were supposed to have been consummated at the same place - Greentree. Moreover, they occurred only two weeks apart. Under these circumstances, consecutive sentences are not appropriate. *See Gregory v. State*, 644 N.E.2d 543.

We reverse the conviction for dealing in cocaine as a class A felony and remand with instructions to enter instead a conviction for dealing in cocaine as a class B felony. We also remand for resentencing consistent with the principles set out in this opinion.

Judgment reversed and remanded.

KIRSCH, J., and ROBB, J., concur.