

SUPREME COURT OF ARKANSAS

No. CR07-585

CHOR J. PHAVIXAY,

APPELLANT,

VS.

STATE OF ARKANSAS,

APPELLEE,

Opinion Delivered 5-29-08

PETITION FOR REHEARING

DISSENTING OPINION.

ROBERT L. BROWN, Associate Justice

The State is justifiably alarmed over the opinion in this case because it limits the prosecutor's ability to prove intent and identity in drug cases. I would grant the petition for rehearing.

The following two sentences in the majority opinion highlight the problem: "However, in the instant case, Phavixay was charged with only the actual delivery of methamphetamine. Intent was not at issue." *Phavixay v. State*, ___ Ark. ___, ___, ___ S.W.3d ___, ___ (April 10, 2008).

As the State underscores in its petition for rehearing, Phavixay was not merely charged with delivery. Intent is *always* an element for delivery of methamphetamine. See Ark. Code Ann. § 5-2-204(b) (Repl. 2006) and § 5-64-401(a) (Repl. 2005) . For the crime to occur, the defendant must knowingly and purposefully transfer the drug to another for money. See

Ark. Code Ann. § 5-2-203(b) (Repl. 2006). For this court to conclude otherwise is simply not correct and is misleading for law enforcement.

Intent, to be sure, can be proved by eyewitness testimony, but it can also be proved by “[e]vidence of other crimes, wrongs, or acts.” Ark. R. Evid. 404(b); *Scroggins v. State*, 312 Ark. 106, 848 S.W.2d 400 (1993). For the majority to curtail the prosecutor in proving intent, as it does in this case, runs directly counter to our case law. *See, e.g., Brunson v. State*, 368 Ark. 313, 325, 245 S.W.3d 132, 142 (2006) (“[T]his court has long held that it is proper to allow the State to prove its case as fully as possible.”).

The same holds true for proving identity. Showing that the defendant made a similar drug buy from the same police informant ten days earlier confirms that there was no mistaken identity by the informant at trial.

The State is absolutely correct that rehearing needs to be granted. I respectfully dissent.

CORBIN and GUNTER, JJ., join this dissent.