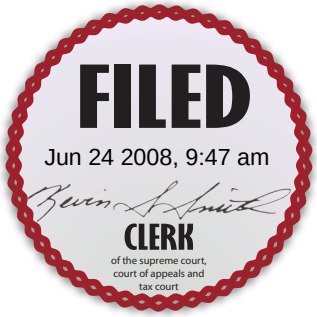

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IN THE
COURT OF APPEALS OF INDIANA

STATE OF INDIANA,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 09A02-0801-CR-7
	)	
WILLIAM S. ELPERS,	)	
	)	
Appellee.	)	

APPEAL FROM THE CASS SUPERIOR COURT
The Honorable Rick Maughmer, Judge
Cause No. 09D02-0704-FA-4

June 24, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

The State of Indiana appeals Cass Superior Court's dismissal of charges against William Elpers ("Elpers"). The State appeals the dismissal of charges pursuant to Indiana Code section 35-41-4-4(a)(3). Elpers argues that the State's failure to inform him of a newly filed information in another court before he testified in a different court prejudiced his substantial rights.

We affirm.

Facts and Procedural History

On October 7, 2005, the State charged Elpers in Cass Superior Court 1, under Cause number 09D01-0510-FA-5 ("Court 1"), with two counts of Class A felony child molestation, two counts of Class B felony incest, and one count of Class D felony vicarious sexual gratification. The child molestation and incest charges alleged deviate sexual conduct with his daughter, H.E.,[1] between August 1, 2002 and September 30, 2003. The vicarious sexual gratification charge alleged an act that occurred between July 1, 2005 and August 26, 2005.

On November 27, 2006, the day before trial in Court 1, the State requested and was granted a continuance over Elpers's objection. The State cited, among other things, newly discovered information, as their reason for requesting a continuance.

The very next day, on November 28, 2006, the State filed an Amended information alleging thirteen separate counts. Counts I through X alleged deviate sexual conduct with the time frames as follows; Counts I and II, between January 1, 1996 and December 31, 1997; Counts III and IV, between January 1, 1997 and December 31, 1998; Counts V and VI, between January 1, 2002 and December 31, 2003; Counts VII and VIII,

[1] All allegations in Courts 1 and 2 involve H.E.

between January 1, 2002 and December 31, 2003; and Counts IX and X, between January 1, 2003 and December 31, 2004. Counts XI and XII allege fondling of self in front of a minor between January 1, 2002 and July 26, 2004. Count XIII alleges child solicitation between January 1, 2000 and December 31, 2005.

On February 5, 2007, Elpers moved to strike the amended information because of the State's failure to comply with the requirement to file amended charges before the omnibus date.[2] See Fajardo v. State, 859 N.E.2d 1201 (Ind. 2007). After a hearing, Court 1 struck the amended information and restored the original information. After another joint request for a continuance, Court 1 confirmed the trial date for May 1, 2007.

On April 30, 2007, the day before the rescheduled trial in Court 1, the State filed an information in Cass Superior Court 2 under Cause number 09D02-0704-FA-4 ("Court 2"). The Court 2 information alleged two counts of Class A felony child molestation and two counts of Class B felony incest involving H.E. that occurred between January 1, 1996 and December 31, 1998.

Elpers's trial in Court 1 began on May 1, 2007 and on that date, the State dismissed Count V in Court 1. After a three-day jury trial, Elpers was acquitted as to the remainder of the charges in Court 1. Only after his acquittal did Elpers receive notice of

[2] No omnibus date for Court 2 was in the materials provided to this Court. However, as noted above, the trial in Court 2 was scheduled for November 28, 2006. Court 2 Tr. p. 6. Therefore, we can assume that the amended charges were not filed thirty days before the omnibus date pursuant to Ind. Code § 35-34-1-5(b). The omnibus date is the date from which various other procedural deadlines are to be established. Ind. Code § 35-36-8-1 provides that the judicial officer must set an omnibus date at the initial hearing. The date must not be sooner than forty-five days or later than seventy-five days after the initial hearing, unless the prosecution and defense agree otherwise. With few exceptions, as listed in Ind. Code § 35-36-8-1(d), the omnibus date is maintained until final disposition of the case.

the Court 2 case, on May 4, 2007. The State filed an amended information on May 17, 2007.

Elpers moved to dismiss the charges in Court 2 alleging that they should have been filed and tried in Court 1. After a hearing, the trial court dismissed the charges in Court 2 finding that the charges should have been filed in Court 1. The State appeals.

Discussion and Decision

The State argues that the trial court abused its discretion when it dismissed the charges in Court 2 because the charges were not barred by statute. A trial court's grant of a motion to dismiss an information is reviewed on appeal for an abuse of discretion. State v. Isaacs, 794 N.E.2d 1120, 1122 (Ind. Ct. App. 2003). The trial court's decision will only be reversed when that decision is clearly against the logic and effect of the facts and circumstances. Id.

The trial court determined that the Court 2 charges should have been charged and tried in Court 1 and that the State, having failed to do so, violated Indiana code section 35-41-4-4(a)(3) (2004). Indiana Code section 35-41-4-4(a) bars prosecution if all of the following exist:

> (1) There was a former prosecution of the defendant for a different offense or for the same offense based on different facts.
>
> (2) The former prosecution resulted in an acquittal or a conviction of the defendant or in an improper termination under section 3 of this chapter.
>
> (3) The instant prosecution is for an offense with which the defendant should have been charged in the former prosecution.

The State argues that this statute does not apply for two reasons. First, when the charges in Court 2 were filed, Elpers had not been tried or acquitted in Court 1. Second,

the State does not believe that Elpers should have been charged with these crimes in Court 1 only that he could have been so charged.

Contrary to the State's assertion, Indiana Code section 35-41-4-4 does not require that the former prosecution be completed at the time the new charges are filed. The concept of a former prosecution includes situations where the former prosecution has not yet resulted in an acquittal, conviction, or improper termination when the new charges are filed. See Hamer v. State, 771 N.E.2d 109 (Ind. Ct. App. 2002) (the State's filing of the related new information in a different court three months before a guilty plea on the original information found to be a former prosecution). Elpers satisfies the first two requirements of the statute: Elpers was previously prosecuted and acquitted for child molestation and incest charges.

This case therefore focuses on the interpretation of "should have been charged" in part (a)(3) of the statute. Id. at 111; Williams v. State, 762 N.E.2d 1216, 1219 (Ind. 2002); Sharp v. State, 569 N.E.2d 962, 967 (Ind. Ct. App. 1991); State v. Burke, 443 N.E.2d 859, 861 (Ind. Ct. App. 1983). The term "should have been charged" must be read in conjunction with the joinder of offenses statute, and dismissal of offenses joinable for trial. In relevant part, Indiana Code section 35-34-1-9 provides:

> (a) Two (2) or more offenses may be joined in the same indictment or information, with each offense stated in a separate count, when the offenses
>
> * * *
>
> (2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

Also, Indiana Code section 35-34-1-10 provides:

> (c) A defendant who has been tried for one (1) offense may thereafter move to dismiss an indictment or information for an offense which could have been joined for trial with the prior offenses under section 9 of this chapter. The motion to dismiss shall be made prior to the second trial, and shall be granted if the prosecution is barred by reason of the former prosecution

Id.

Court 2 made a finding pursuant to Indiana Code section 35-41-4-4(a)(3) and determined that the information filed against Elpers alleging child molestation and incest involving the same victim should have been included in the information filed and litigated in Court 1. Appellant's App. p. 11. In reviewing this statutory scheme, we have characterized it in this way: "Thus, our legislature has provided that, where two or more charges are based on the same conduct or on a series of acts constituting parts of a single scheme or plan, they *should* be joined for trial." State v. Wiggins, 661 N.E.2d 878, 880 (Ind. Ct. App. 1996) (emphasis in original).

In this case, the charges were not based on a single instance of molestation or incest but rather, were based on a series of acts that constituted parts of a single scheme or plan of molestation or incest. Although the various charges related to conduct that occurred over nine years, the crimes alleged in Court 1 were the same type of criminal conduct as the crimes charged in Court 2. More importantly, all charges, under both causes, involved the same alleged victim.

The purpose of this statutory scheme is to "provid[e] a check upon the otherwise unlimited power of the State to pursue successive prosecutions." Id. at 881. Without such a check on the State's power, the State could charge Elpers with one count of child molestation or incest, take it to trial, and repeat the sequence over and over with other

allegations of a similar nature involving the same victim. Such a process would be absurd and violative of even basic notions of fairness and due process. And at all relevant times, the State had the right to dismiss its allegations in Court 1 (as it did the day before the first trial in Court 1) and refile both old and new allegations in Court 1 or Court 2. We are at a loss to understand why the prosecutor chose not to do so.

Based on the facts and circumstances of this case, we conclude that the trial court did not abuse its discretion when it dismissed the information in Court 2. [3]

Affirmed.

MAY, J., concurs.

VAIDIK, J., dissents with opinion.

[3] Because of our resolution of this issue, we need not address Eplers's claim that the State prejudiced his substantial rights by failing to inform him of the newly filed information in Cause 4 prior to his testifying in Cause 5.

IN THE
COURT OF APPEALS OF INDIANA

STATE OF INDIANA,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 09A02-0801-CR-7
	)	
WILLIAM S. ELPERS,	)	
	)	
Appellee.	)	
	)	

VAIDIK, Judge, dissenting

I respectfully dissent from the majority's conclusion that the charges against Elpers are based on a series of acts constituting parts of a single scheme or plan and that therefore the charges in Court 1 and Court 2 should have been charged and tried together. Accordingly, I would hold that the trial court abused its discretion in dismissing the child molestation and incest charges against Elpers in Court 2.

The only issue in this case is whether the charges in Court 2 "should have been charged" and tried in Court 1. Ind. Code § 35-41-4-4(a)(3). The words "should have been charged" must be read in conjunction with Indiana's joinder statute, which has been

characterized as follows: "'[W]here two or more charges are based on the same conduct or on a series of acts constituting parts of a single scheme or plan, they *should* be joined for trial.'" *Williams v. State*, 762 N.E.2d 1216, 1219 (Ind. 2002) (quoting *State v. Wiggins*, 661 N.E.2d 878, 880 (Ind. Ct. App. 1996)). "This statutory scheme 'provid[es] a check upon the otherwise unlimited power of the State to pursue successive prosecutions.'" *Id.* (quoting *Wiggins*, 661 N.E.2d at 881). "Where the State chooses to bring multiple prosecutions for a series of acts constituting parts of a single criminal transaction, it does so at its own peril." *Id.*

Our Supreme Court has applied the successive prosecution statute in *Williams* and *Seay v. State*, 550 N.E.2d 1284 (Ind. 1990), *reh'g denied*. In *Williams*, the defendant sold cocaine to an undercover officer and then fled into a nearby vacant apartment when another officer attempted to stop him. When Williams was caught, the officer discovered cocaine on him. The State first charged Williams with residential entry and possession of the cocaine discovered on him at his arrest. The State later charged Williams with delivery of the cocaine to the undercover officer and possession of cocaine. Williams pled guilty to the first possession charge and, upon conviction, sought to dismiss the second set of charges. Our Supreme Court held that Williams was entitled to dismissal of the second set of charges because those charges "were based on a series of acts so connected that they constituted parts of a single scheme or plan. Therefore, they should have been charged in a single prosecution." *Williams*, 762 N.E.2d at 1220. Our Supreme Court distinguished *Williams* from *Seay*. In *Seay*, the defendant made four separate sales of controlled substances to a police informant and an undercover police officer in the late

summer and early fall of 1986. 550 N.E.2d at 1286. The defendant was tried and convicted of dealing in a controlled substance for sales made on July 14, 1986, and August 4, 1986. *Id.* While the jury was deliberating, the State filed additional charges based on sales made August 14, 1986, and September 2, 1986. *Id.* Seay argued the subsequent prosecution was barred by Indiana Code §§ 35-34-1-10(c) and 35-41-4-4. *Id.* at 1287. Our Supreme Court held that these four events were sufficiently separated by time and place such that joinder was not required and subsequent prosecutions were thus permissible. *Id.* at 1288.

I believe that *Seay* controls the outcome in this case. Although the charges in both Court 1 and 2 involve the same victim, they involve various sexual acts occurring over the course of nine years. In fact, the charges in Court 2 cover the time period of January 1, 1996, to December 31, 1998, while the charges in Court 1 cover the time periods of August 1, 2002, to September 30, 2003, and July 1, 2005, to August 26, 2005. The acts for the Court 2 charges occurred four-plus years before the acts for the Court 1 charges. I believe the acts in this case are sufficiently separated by time such that joinder is not required and subsequent prosecutions are permissible. I would therefore reverse the trial court.