

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

ELIZABETH A. GABIG
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ELLEN H. MEILAENDER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

MICHAEL SAYLOR,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 49A02-0510-CR-1016
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

INTERLOCUTORY APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Michael Jensen, Magistrate
Cause No. 49G20-0402-FA-024066

August 21, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Michael Saylor brings this interlocutory appeal seeking to reverse the trial court's denial of his motion to dismiss additional charges filed against him in a pending case. He argues that the State engaged in prosecutorial vindictiveness by filing additional charges against him when he refused to enter a plea agreement on various other charges and asserted his right to trial. Finding that the additional charges filed against Saylor were supported by probable cause and that no other evidence here suggests prosecutorial vindictiveness, we follow our case law and the precedent established by the United States Supreme Court and affirm the trial court.

Facts and Procedural History

Based on observations from an investigation conducted on February 11, 2004, and a residential search warrant executed on February 12, 2004, the State charged Michael Saylor with seven felony drug charges, including Class A Felony Dealing in Methamphetamine,¹ Class C Felony Possession of Methamphetamine,² Class A Felony Possession of Methamphetamine and a Firearm,³ Class A Felony Dealing in Cocaine,⁴ Class C Felony Possession of Cocaine,⁵ Class C Felony Possession of Cocaine and a Firearm,⁶ and Class D Felony Possession of a Controlled Substance.⁷ The State initially

¹ Ind. Code § 35-48-4-1.

² Ind. Code § 35-48-4-6.

³ *Id.*

⁴ I.C. § 35-48-4-1.

⁵ I.C. § 35-48-4-6.

⁶ *Id.*

entered into plea negotiations with Saylor, and he was informed that if a plea agreement could not be reached, additional charges would be filed against him. Unable to reach a plea agreement, Saylor decided to go to trial on these charges, and the State followed through with its assertion that it would file new charges. These included five felony charges: Class A Felony Conspiracy to Deal Cocaine,⁸ Class A Felony Dealing Cocaine,⁹ Class C Felony Possession of Cocaine,¹⁰ Class D Felony Criminal Recklessness,¹¹ and Class D Felony Pointing a Firearm.¹²

Saylor filed a motion to dismiss the additional amended charges with the trial court, arguing that “[a]llowing the State to amend has a chilling effect on the defendant’s exercise of his right to trial by jury.” Appellant’s App. p. 117. The trial court denied this motion. Saylor petitioned to have the order denying dismissal of the charges certified for interlocutory appeal, and such petition having been granted, this Court accepted jurisdiction.

Discussion and Decision

Saylor contends that the State engaged in prosecutorial vindictiveness when it filed these additional charges against him following his refusal to enter a plea agreement.

⁷ Ind. Code § 35-48-4-7.

⁸ Ind. Code § 35-41-5-2; I.C. § 35-48-4-1.

⁹ I.C. § 35-48-4-1.

¹⁰ I.C. § 35-48-4-6.

¹¹ Ind. Code § 35-42-2-2.

¹² Ind. Code § 35-47-4-3.

He argues that the trial court should have dismissed the additional charges against him before allowing his case to go to trial. We review a trial court's denial of a motion to dismiss for an abuse of discretion. *Murphy v. State*, 837 N.E.2d 591, 593 (Ind. Ct. App. 2005). We will, therefore, reverse the trial court only where its decision is clearly against the logic and effect of the facts and circumstances. *Id.*

Saylor argues that the State violated numerous of his State and Federal constitutional rights when it filed additional charges against him based on his decision to refuse a plea agreement and to take his case to trial. He recognizes that it is his burden to show that the State's decision to add criminal charges *before* going to trial was "motivated by a desire to punish him for doing something the law allowed him to do." Appellant's Br. p. 5. Further, he admits that "Indiana appellate courts, following United States Supreme Court decisions, have declined to find filing charges supported by probable cause in response to failed plea negotiations to be retaliation for the defendant's exercise of his right to trial." *Id.* at 6 (citing *United States v. Goodwin*, 457 U.S. 368, 380 (1982) (prosecutor's decision to file additional charges against a defendant because the defendant insists on going to trial does not give rise to presumption of prosecutorial misconduct); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *Reynolds v. State*, 625 N.E.2d 1319, 1322 (Ind. Ct. App. 1993) ("A prosecutor may file additional charges where an initial expectation that a defendant would plead guilty to lesser charges proves unfounded."), *trans. denied*).

However, Saylor goes on to argue that "there is a good faith argument such behavior can and should be sufficient evidence of prosecutorial vindictiveness *in some*

cases.” *Id.* To make this point, Saylor cites *Warner v. State*, 773 N.E.2d 239 (Ind. 2002), and *Owens v. State*, 822 N.E.2d 1075 (Ind. Ct. App. 2005). While these cases recognize that the filing of additional charges following a mistrial (in *Warner*) or against a defendant who successfully appeals a trial decision (in *Owens*) gives rise to a presumption of prosecutorial vindictiveness, neither case is relevant to the filing of additional charges before a trial even begins, and therefore, neither supports Saylor’s argument, particularly in the face of substantial on-point precedent to the contrary.

Moreover, Saylor makes no other argument that *his* case is a special case that warrants the preclusion of additional charges being filed before trial. He does not contend that the prosecutor failed to inform him that additional charges could be filed against him if he chose to continue to trial, and he does not argue that these charges are not supported by probable cause. Indeed, we do not regard Saylor’s argument as one that the prosecutor was *actually* motivated by vindictiveness, but rather only as an argument that the filing of additional charges here, for some reason not developed in Saylor’s brief, created an impermissible potential for vindictiveness. This is insufficient to warrant the dismissal of these charges.

Having failed to carry his burden to demonstrate *actual* prosecutorial vindictiveness under these facts, we cannot agree with Saylor. The trial court acted within its sound discretion when it denied Saylor’s motion to dismiss these additional charges.

Affirmed.

DARDEN, J., and RILEY, J., concur.

