IN THE COURT OF APPEALS OF IOWA

No. 8-463 / 97-1186
Filed October 29, 1998

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CLERK SUPREME COURT

STATE OF IOWA,
Appellee,

vs.

DEAN MICHAEL BORNS,
Appellant.

Appeal from the Iowa District Court for Muscatine County, Patrick J. Madden, Judge.

Dean Michael Borns appeals from his conviction and sentence for delivery of a controlled substance and drug tax stamp violation. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Martha J. Lucey, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, Richard R. Phillips, County Attorney, and Richard Westphal, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Huitink and Vogel, JJ.

HUITINK, J.

Dean Michael Borns appeals from his conviction and sentence for delivery of a controlled substance and drug tax stamp violation. We affirm.

I. Background Facts and Proceedings.

Dean Borns sold a controlled substance (cocaine) to an undercover officer on February 28, 1996. He was not arrested at that time. Approximately one month later authorities confronted Borns about the sale and asked him to act as an informant and engage in drug purchases from a known drug dealer. Hoping to avoid a prison sentence, Borns agreed and signed a document captioned "Cooperating Individual Acknowledgment."

In an effort to cooperate with officials, Borns engaged in two drug purchases. Neither of the drug buys resulted in arrests or charges against those involved. Borns declined to participate in any subsequent controlled drug transactions.

Borns was arrested on December 31, 1996, for his sale of drugs to the undercover agent on February 28, 1996. Following his arrest, Borns' offer of additional cooperation was declined. He was charged as a habitual offender with delivery of a controlled substance and failure to affix a drug tax stamp.

Prior to trial Borns moved to compel enforcement of an alleged cooperation agreement with the State. He claimed the State had promised to spare him a prison sentence if he cooperated in arranging controlled drug transactions. The State denied making any sentencing concessions citing the absence of any such provision in the

"Cooperating Individual Acknowledgment" Borns signed. The court found no such concessions were made, and, even if there were, Borns had not fully complied with the alleged agreement. The court also found Borns had not detrimentally relied on any promises of leniency made by law enforcement officials.

A jury found Borns guilty as charged. The court sentenced him to concurrent fifteen-year and five-year sentences on the habitual offender and drug tax stamp violations. It ordered Borns to serve an additional consecutive five-year sentence under section 124.401A (sale of drugs within 1000 feet of a school).

Borns appeals. He claims the district court erred in denying his motion to compel the enforcement of the cooperation agreement. He requests his conviction be reversed or in the alternative that the cooperation agreement be enforced so he would be resentenced to probation. Borns also claims the district court erred in failing to recognize and exercise the discretion it had in sentencing him pursuant to Iowa Code section 124.401A. We affirm.

II. Standard of Review.

We review the district court's imposition of sentence for an abuse of discretion. *State v. Sandifer*, 570 N.W.2d 256, 257 (Iowa App. 1997). An abuse of discretion is found when the sentencing court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.*

To the extent Borns' claims raise constitutional issues, we review de novo. *State v. Aschan*, 366 N.W.2d 912, 916 (Iowa 1985).

In ruling on a motion to compel, performance of a cooperation agreement, the trial court possesses the same limited discretion it exercises when ruling on a motion to dismiss for failure to provide a speedy trial under Iowa Rule of Criminal Procedure 27. *State v. Hovind*, 431 N.W.2d 366, 368 (Iowa 1988). Review of the trial court's ruling is not de novo. *Id.* The trial court's decision upon conflicting evidence is controlling. *State v. LaPlant*, 244 N.W.2d 240, 242 (Iowa 1976). We will reverse only upon a showing that the trial court abused its limited discretion.

III. Merits.

A. Cooperation Agreement.

According to Borns, the issue is "whether the agents promised defendant he would not go to prison and if the agents made such a promise, whether the State should be allowed to renege on that promise after the defendant relied and acted thereon to his possible danger and detriment."

During cross-examination at the hearing on Borns' motion to compel, Borns testified:

> Q. They never specifically told you on that day if you make some buys for us, you won't go to prison, right?
> A. Not in them words.
> Q. That's what you were hoping for, right?
> A. No. That was my understanding when I told them I didn't want to go to prison, they said well, you want to make some buys for us.
> Q. They never said Dean, make some buys for us and we guarantee you won't go to prison, right?
> A. No. They said they couldn't guarantee nothing.
> Q. In fact, they told you they couldn't guarantee make some buys and you won't go to prison.

A. No, they said you make some buys, you help us and we'll help you.
Q. They never said we can't guarantee that you won't go to prison?
A. They didn't say that.
Q. What did they guarantee?
A. They said we can't give you nothing in writing.
Q. And they never verbally said Dean, you're not going to prison if you make some buys for us, right?
A. They never said that. That is what I assumed when they said you help us.
Q. They never said make two buys from . . . and you won't go to prison, right?
A. No.
Q. They never said make two buys from anybody and you won't go to prison. They never said that, did they?
A. No.

Based on this testimony and the absence of any express provisions in the "Cooperating Individual Acknowledgment," it was reasonable for the district court to conclude there was no agreement reached as Borns alleges. The district court properly found that at most, Borns held a subjective assumption that he would receive a suspended prison sentence.

Borns also seeks enforcement of the alleged cooperation agreement on equitable grounds. *See State v. Howe*, 514 N.W.2d 356 (Neb. App. 1994). In *Howe*, the Nebraska Court of Appeals found cooperation agreements were enforceable on equitable grounds if: (1) the agreement was made; (2) the defendant has performed whatever the defendant promised to perform; and (3) in performing, the defendant acted to his detriment or prejudice.

Assuming, without deciding, the *Howe* analysis is applicable here, we find Borns failed to establish its requisite elements. There is insufficient evidence the State made any sentencing concessions. Additionally, the record reflects Borns failed to fully perform his obligations under the alleged agreement.[1] Borns failed to follow specific instructions, including failing to tape record the controlled drug transactions. Further, despite repeated requests by law enforcement, Borns refused to provide additional cooperation before his arrest. Finally, we find Borns did not rely on the alleged promises of leniency to his detriment. The State gained no inculpatory evidence against Borns in exchange for his cooperation. Moreover, the district court granted Borns' motion in limine requiring the State to refrain from introducing any inculpatory statements Borns made to law enforcement officers subsequent to his decision to cooperate with the State.

The district court did not abuse its discretion when it denied Borns' motion to compel enforcement of his alleged agreement with the State.

B. Sentencing.

Borns contends the district court failed to recognize its discretion in sentencing him to an additional five-year term of incarceration for the sale of a controlled substance within 1000 feet of a school. He essentially asserts the district court treated

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[1] We note Borns' failure to perform his obligations under the alleged cooperation agreement is a separate basis for the district court's decision. *See State v. Hovind*, 431 N.W.2d at 368 ("When a defendant fails to uphold his end of a plea bargain, the State has no obligation to provide defendant the anticipated benefits of that bargain").

the five-year enhancement as a mandatory, rather than discretionary, sentence. We disagree.

When a sentence is not mandatory, the district court must exercise its discretion in determining what sentence to impose. *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996). A sentencing decision is cloaked with a strong presumption in its favor. *State v. Vanover*, 559 N.W.2d 618, 635 (Iowa 1997).

The district court had discretion pursuant to Iowa Code section 124.401A (1995), to enhance Borns' sentence for sale of a controlled substance within 1000 feet of a school. Our review of the record reflects the district court recognized the discretionary nature of section 124.401A. Specifically, it stated "under section 124.401A, a person who basically delivers drugs within 1000 feet of a school may be sentenced to an additional term of confinement of five years . . . ." (emphasis added). We therefore find Borns has not overcome the strong presumption in favor of the district court's sentencing decision.

AFFIRMED.

Vogel, J., concurs; Sackett, C.J., specially concurs.

SACKETT, C.J. (specially concurring)

I concur with the majority opinion. I write separately lest my vote for affirmance should be construed as approval of the manner used to engage defendant for undercover activities.

Defendant, having sold cocaine to an undercover agent, was very vulnerable when two special agents came to his home asking that he cooperate in future drug "stings." Defendant agreed to help and, without benefit of legal counsel, signed what was termed a "Cooperating Individual Acknowledgment."[1] No other written agreement was made nor was there a clear understanding of specifically what defendant was to do or what concessions he would receive for cooperating with the

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[1] The Cooperating Individual Acknowledgment provided as follows:

The undersigned cooperating individual agrees to the following:

1. That I will not violate criminal laws in furtherance of gathering information or providing services to [Division of Narcotics Enforcement]. I understand that any evidence of such a violation will be reported by DNE to the appropriate law enforcement agency.

2. That I have no official status, implied or otherwise, as Agent, Peace Officer, or employee of DNE or the Department of Public Safety.

3. That the information I provide may be used in a criminal proceeding and I may be called upon to testify to such information in a court of law and although DNE will use all lawful means to protect my anonymity, this cannot be guaranteed.

4. That I was advised that it is a criminal offense to threaten, harass, or mislead anyone who provides information about a crime to a law enforcement agency. If I experience anything of this nature, as a result of my cooperation with DNE, I will contact a DNE special agent immediately.

5. That in the course of a criminal investigation I may be requested to wear a body transmitter or make a recorded conversation to be used as evidence in a criminal prosecution per instructions by special agents of DNE.

I have read and understand the above regarding my conduct as a DNE Cooperating Individual.

[Signed by Dean M. Borns and dated March 22, 1996.]

State in obtaining evidence against other drug deals. As a result, despite defendant putting himself at risk, he ultimately was charged with the maximum offense his actions in selling the cocaine would justify.

Defendant advances that what has happened to him in this case will impair, if not defeat, law enforcement's use in this state of persons charged with crimes for undercover purposes. There is merit to his argument.

Care needs to be used in engaging persons for undercover purposes to (1) instill public confidence in the system, (2) discourage overreaching by law enforcement, and (3) assure the safety of those who agree to participate in the process. The manner used to engage defendant for undercover activity fell short of this care.