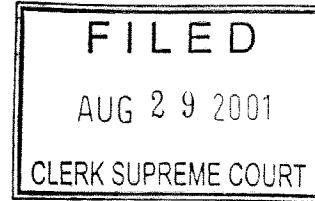


IN THE COURT OF APPEALS OF IOWA

No. 1-443 / 00-1212
Filed August 29, 2001



STATE OF IOWA,
Plaintiff-Appellee,

vs.

SIJUWOLA BALOGUN,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Kristin L. Hibbs,
Judge.

The defendant appeals his conviction and sentence, following a bench
trial, for possession with intent to deliver a controlled substance. **CONVICTION**
AFFIRMED; SENTENCE VACATED; AND CASE REMANDED FOR
RESENTENCING.

Linda Del Gallo, State Appellate Defender, and Robert P. Ranschau,
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney
General, Denver D. Dillard, County Attorney, and Jerry Vander Sanden,
Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Miller and Hecht, JJ.

HECHT, J.

Sijuwola Balogun appeals his conviction and sentence, following a bench trial, for possession with intent to deliver a controlled substance. Balogun contends the district court: (1) erred in failing to grant his motion for judgment of acquittal based on insufficiency of the evidence; and (2) abused its discretion in sentencing him to an indeterminate term of imprisonment not to exceed twenty-five years. We affirm Balogun's conviction; vacate the sentence; and remand the case for resentencing.

I. Factual Background and Proceedings. On October 21, 1999, Linn County Sheriff's officers executed a search warrant for an apartment located at 3404 Queen Drive SW, Cedar Rapids. Upon entering the apartment, officers found Balogun, his girlfriend, Regina Hansen, and their newborn baby. After searching the apartment, officers found crack cocaine in various sizes and amounts totaling 44.6 grams and valued at between \$7400 and \$11,000. In addition to the crack cocaine, the officers located a gram scale and several plastic baggies commonly used in the packaging and sale of the drug. The officers did not find evidence of personal drug use.

The officers also found a safe in the bedroom which contained \$3,454.11 in cash, a man's gold watch and rings. Next to the safe, the officers located a key to a safe deposit box rented by Balogun. The safe deposit box contained Balogun's checkbook, two one-dollar chips from a local casino, and \$1,387.41 in cash. Moreover, officers found cash totaling \$614.52 in several pairs of trousers lying on the floor as well as Balogun's Visa and Iowa identification card in the

trouser pockets. The officers also located mail addressed to Balogun at the apartment.

On November 3, 1999, the State charged Balogun with possession of a controlled substance with intent to deliver in violation of Iowa Code section 124.401(1)(b)(3). Balogun waived his right to a trial by jury, and trial commenced on May 1, 2000. Balogun was found guilty of the crime charged, and judgment was entered on the conviction on July 7, 2000. Balogun requested probation, but the court sentenced him to an indeterminate term of imprisonment not to exceed twenty-five years. Balogun appeals.

II. Discussion.

A. Sufficiency of the Evidence. We review claims of insufficiency of the evidence for errors at law. *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997). We review a trial court's findings in a bench trial as we would a jury verdict. *State v. Weaver*, 608 N.W.2d 797, 803 (Iowa 2000). We will uphold a finding of guilt if substantial evidence supports the verdict. *Id.*; Iowa R. App. P. 14(f)(1). Substantial evidence is evidence upon which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *Thomas*, 561 N.W.2d at 39; *State v. Robinson*, 288 N.W.2d 337, 341 (Iowa 1980).

In reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State, "including all legitimate inferences and presumptions which may be fairly and reasonably deduced from the record." *State v. Lambert*, 612 N.W.2d 810, 813 (Iowa 2000); *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997). All evidence is considered, "not just

that of an inculpatory nature.” *Lambert*, 612 N.W.2d at 813. Evidence that merely raises suspicion, speculation, or conjecture will not be considered substantial evidence. *Id.*

Balogun contends the State presented insufficient evidence to support his conviction of possession with intent to deliver a controlled substance. He asserts the State failed to produce sufficient evidence connecting him to the apartment on Queen Drive or the crack cocaine and the items found therein. To counter the State’s claim he was living at the apartment, Balogun relies primarily on his mother’s testimony indicating he lived with relatives elsewhere. Additionally, Balogun contends the money found in the safe deposit box constituted gambling winnings, not revenue collected from selling drugs. Finally, Balogun contends the money found in the trousers in the apartment, assuming arguendo the clothing was his, was given to him by his mother in recognition of the impending birth of his child.

We find the State produced substantial evidence connecting Balogun to the apartment, the crack cocaine, and the proceeds of drug sales. In addition to his presence in the apartment, the State produced evidence his mail, Visa card, identification card, clothing, and safe deposit box key were all in the apartment, establishing his joint control of the apartment and the items therein. Additionally, we conclude the considerable amount of cash found within Balogun’s clothing and safe deposit box constitutes substantial evidence connecting him to the proceeds of drug sales. In its findings and conclusions of law, the district court did not find the testimony of Balogun’s mother credible. The weight of the

evidence and the credibility of the witnesses are for the fact finder to determine. *State v. Bugely*, 408 N.W.2d 394, 395 (Iowa Ct. App. 1987). The district court did not err by denying Balogun's motion for judgment of acquittal because substantial evidence exists in the record to support his conviction.

B. Sentencing. Sentencing decisions of the district court are reviewed for errors at law. Iowa R. App. P. 4; *State v. Grandberry*, 619 N.W.2d 399, 401 (Iowa 2000). Sentences imposed by the district court are "cloaked with a strong presumption in their favor." *Grandberry*, 619 N.W.2d at 401 (citing *State v. Lloyd*, 530 N.W.2d 708, 713 (Iowa 1995)). "A sentence will not be upset on appellate review unless the defendant demonstrates an abuse of the trial court discretion or a defect in the sentencing procedure, such as trial court consideration of impermissible factors." *Lloyd*, 530 N.W.2d at 713 (citing *State v. Wright*, 340 N.W.2d 590, 592 (Iowa 1993)).

Balogun contends the district court abused its discretion in sentencing him to prison rather than to probation by improperly considering his failure to plead guilty to the crime charged. In particular, Balogun points to a colloquy during the sentencing hearing:

THE COURT: Mr. Balogun, the Court has obviously heard the evidence in this case, as it was presented to me, and I've reviewed the presentence investigation report in this particular instance, and though none of us have referred to it, counsel and the Court have, or are all in agreement that the recommendation for ten years is not possible. The offense that you were convicted of carries with it a maximum penalty of 25 years in prison and a minimum sentence of \$5000.

It is the judgment and sentence of this Court that you are remanded to the custody of the director of the Iowa Department of Corrections for an indeterminate term not to exceed 25 years. That's the sentence. You are also fined in the amount of \$5,000.

DEFENDANT: 25 –

THE COURT: Excuse me, sir. The costs of this action and your court-appointed attorney fees. The reasons for this sentence include the Court's consideration of the nature, the nature of this offense.

Mr. Balogun, at this point you have not acknowledged any --

DEFENDANT: But –

THE COURT: Excuse me, sir. Don't interrupt me.

DEFENDANT: I understand.

THE COURT: This is the sentence. You have not acknowledged your guilt in this particular instance in the acceptance of any responsibility, and the evidence of your activity in the drug trade is clear. The Court believes that this will hold you accountable, will provide for your rehabilitation and will provide for the protection of the community.

The Iowa Supreme Court addressed the impermissibility of considering whether a defendant has pled guilty in sentencing decisions in *State v. Nichols*, 247 N.W.2d 249 (Iowa 1976). In *Nichols*, the defendant appealed his sentence, contending comments made to him by the trial court judge during the sentencing hearing established improper consideration of his failure to acknowledge guilt. *Id.* at 250. The trial judge's comments to the defendant included the following remarks:

In other words, I think I'm saying to you, Had you said 'Okay. I have done this, and I'm willing now to face the consequences of my acts,' you might then be able to persuade the court that sufficient turn-around had occurred, that you should be afforded another chance. However, under the record here, I just don't believe I can do that.

Id.

In *Nichols*, our supreme court examined the constitutional foundations for the right against self-incrimination under the Fifth and Fourteenth amendments to the United States Constitution and the prohibition against penalizing defendants for exercising that right. *Id.* at 251 (citing *Spevack v. Klein*, 385 U.S. 511, 514-

15, 87 S. Ct. 625, 628, 17 L. Ed. 2d 574, 577 (1966) ("the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence."); *United States v. Jackson*, 390 U.S. 570, 581-82, 88 S. Ct. 1209, 1216, 20 L. Ed. 2d 138, 147 (1968); *State v. Drake*, 224 N.W.2d 476, 479-80 (Iowa 1974) ("[t]his procedure certainly violated defendant's Fifth Amendment protection against self-incrimination, for at that time she could still appeal from a conviction she claimed was unfairly reached."). The court concluded:

the fact a defendant has exercised the fundamental and constitutional right of requiring the state to prove at trial his guilt as charged and his right as an accused to raise defenses thereto is to be given no weight by the trial court in determining the sentence to be imposed after the defendant's guilt has been established.

Nichols, 247 N.W.2d at 255. The *Nichols* court remanded the case for resentencing, holding "an impermissible consideration may well have been employed in imposing the sentence." *Id.* at 256. "Any doubt in this regard must be resolved in favor of defendant." *Id.*

Nichols explicitly holds it is impermissible for the district court in sentencing a defendant to consider whether he has pled guilty to the crime charged. *Id.* If there is any indication the district court considered this factor, we are to give the benefit of the doubt to the defendant, not the court. *Id.* As in *Nichols*, the district court in this case overtly referred to Balogun's refusal to admit his guilt to the crime charged. The State contends the outcome in this appeal is controlled by *State v. Bragg*, 388 N.W.2d 187 (Iowa Ct. App. 1986). *Bragg* involved a defendant who, in the view of the sentencing court, committed

perjury, and intimidated witnesses during the trial. *Id.* at 190. In *Bragg*, this court held the sentencing court did not abuse its discretion when, during a lengthy sentencing colloquy, the district court referred to the defendant's denial of wrongdoing as one of a plethora of justifications for the choice of incarceration instead of probation. *Id.* A majority of this court construed the sentencing court's remark as an appropriate comment on the defendant's attitude and need for incarceration, and found no abuse of discretion in an isolated reference to defendant's denial of wrong-doing. *Id.* at 192.

We believe *Nichols* rather than *Bragg* should control our decision in this case. The sentencing court gave a short list of reasons for her choice of imprisonment as the appropriate punishment. The first of the few reasons stated was the defendant's failure to admit guilt. "The trial court must carefully avoid any suggestions in its comments at the sentencing stage that it was taking into account the fact defendant had not pleaded guilty but had put the prosecution to its proof." *Nichols*, 247 N.W.2d at 256. The district court's express reference during a very brief colloquy regarding Balogun's failure to admit guilt convinces us "that an impermissible consideration may well have been employed in imposing the sentence." *Id.* Because any doubt in this regard must be resolved in favor of defendant, we conclude the district court abused its discretion by considering an impermissible factor in sentencing Balogun. We therefore affirm the conviction, vacate the sentence, and remand for resentencing.

CONVICTION AFFIRMED; SENTENCE VACATED; AND CASE REMANDED FOR RESENTENCING.