

FILED

SEP 24 1985

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed September 24, 1985

414

vs.

)

JAMES MATHIS a/k/a JAY MATHIS,

)

5-359
84-923

Defendant-Appellant.

)

Appeal from the Iowa District Court for Muscatine County - Robert K. Stohr, Judge.

Defendant appeals his conviction for unlawful possession of an offensive weapon in violation of Iowa Code sections 724.1(2) and 724.3. **AFFIRMED; SENTENCE VACATED; REMANDED FOR RESENTENCING.**

Charles Harrington, Appellate Defender, and Michael J. Laughlin, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Valencia Voyd McCown, Assistant Attorney General, for plaintiff-appellee.

Considered by Donielson, P.J., Schlegel, and Hayden, JJ.

SCHLEGEL, J.

In this case, defendant Mathis was convicted of unlawfully possessing an offensive weapon in violation of Iowa Code sections 724.1(2) and 724.3 (1983). After his conviction, defendant filed a motion for a new trial based upon newly discovered evidence, but his motion was denied. He was sentenced to prison for a period of not more than 15 years on the basis that he was found to be an habitual offender. On appeal, defendant alleges that the trial court erred in not granting him a new trial, and in failing to set forth reasons for ordering his sentence. We affirm the trial court's refusal to grant a new trial, and remand the case to the lower court for resentencing.

On October 3, 1983, defendant was arrested at his residence for allegedly assaulting a woman, Loreta Mae Cousins. Several squad cars were dispatched to the scene, and while defendant was being transported to the police station, one of the remaining officers at the scene saw defendant's friend, Joe Beverlin, open the trunk of defendant's car and take out a paper bag. The officer stopped Beverlin and asked to see the contents of the bag. Beverlin assented and the officer discovered a disassembled, sawed-off shotgun which Beverlin initially told the officer belonged to him. The officer arrested Beverlin and took him to the local police station. After several hours in the station, however, Beverlin signed a written statement alleging the gun actually belonged to the defendant. Beverlin explained that he initially claimed ownership of the gun because he was "scared" and was "trying to save a friend."

The State's evidence against defendant consisted mainly of Beverlin's testimony and a signed statement by Loreta Mae Cousins alleging that defendant had threatened her with the shotgun the day he was arrested. At trial, however, Cousins stated that she lied in her statement and that she included the part about the shotgun just to get the defendant into trouble. Beverlin refused to

testify against defendant initially, and relented only after spending time in jail for contempt of court.

The jury found defendant guilty and shortly thereafter defendant's counsel filed a motion for a new trial based on newly discovered evidence. Defendant alleged that, after the trial, Beverlin admitted to his friends that he lied on the stand and that in fact the defendant did not own the gun but rather he, Beverlin, had placed the gun in defendant's trunk without defendant's knowledge. Defendant produced affidavits of two witnesses in support of his allegations, but the trial court denied the motion.

I. Motion for a New Trial. To prevail on a motion for a new trial based upon newly discovered evidence, a defendant must show:

- (1) that the evidence was discovered after the verdict;
- (2) that it could not have been discovered earlier in the exercise of due diligence; (3) that the evidence is material to the issues in the case and not merely cumulative of impeaching; and (4) that the evidence probably would have changed the result of the trial.

State v. Allen, 348 N.W.2d 243, 246 (Iowa 1984); State v. Gilroy, 313 N.W.2d 513, 521-22 (Iowa 1981); State v. Farley, 226 N.W.2d 1, 3 (Iowa 1975); see also Iowa R. Crim. P. 23(2)(b)(8). In

Gilroy, 313 N.W.2d at 522, the supreme court stated that the trial judge is "vested with wide discretion" in passing on a motion for a new trial. "Motions for new trial on the basis of newly discovered evidence are not found, should be closely scrutinized and granted sparingly." See also Farley, 226 N.W.2d at 3.

In the case at bar, the newly discovered evidence is essentially a recantation of a witness's testimony. This issue is identical to the issue addressed by the supreme court in State v. Frank, 298 N.W.2d 324, 328 (1980).

The issue of recanted testimony usually arises when the recantation occurs after a verdict has been rendered. In such cases the recantation of testimony by a witness for the prosecution does not necessarily entitle the defendant to a new trial. The determination as to whether

a new trial should be granted is within the discretion of the trial court. State v. Thompson, 241 Iowa 16, 29, 39 N.W.2d 637, 645 (1949). That determination will not be disturbed upon appeal unless it is reasonably clear that such discretion was abused. State v. Taylor, 287 N.W.2d 576, 578 (Iowa 1980). Each case must be judged on its own peculiar facts. State v. Thompson, 241 Iowa at 29, 39 N.W.2d at 645.

In determining whether a new trial should be granted, the trial court is not required to believe the recantation. The court must make its decision on the basis of the whole trial and matters presented in conjunction with the motion. State v. Frank, at 328; State v. Compiano, 261 Iowa 509, 517, 154 N.W.2d 845, 849 (1967). In Compiano the supreme court said that a person

[C]onvicted of a crime should not be granted a new trial unless the trial court is satisfied that the testimony of a material witness was false or mistaken, and unless a jury might reach a different conclusion without such testimony.

A witness' recantation of his testimony is looked upon with utmost suspicion.

Id. at 516, 154 N.W.2d 849. Thus, a witness's recantation of testimony subsequent to trial does not give a litigant an automatic objection that the recanted testimony has no probative value and therefore could not be used to support a judgment.

Because the additional evidence is essentially a recantation of Beverlin's testimony, we hold defendant did not carry his burden in showing the third and fourth elements required in State v. Allen, 348 N.W.2d at 246. The trial judge specifically stated that he was satisfied that the jury was presented with all the facts. He also expressed doubt whether anything new added to the existing record would change the jury's mind. We find no abuse of discretion here and affirm the trial court's denial of defendant's motion for a new trial.

II. Reasons for Defendant's Sentence. The trial court found that defendant was an habitual offender under Iowa Code section 902.8 (1983). The record

indicates that the trial court erroneously understood section 902.8 to require a mandatory sentence. However, as indicated in State v. Washington, 356 N.W.2d 192, 197 (Iowa 1984), the supreme court stated that sentencing options are available under Iowa Code section 902.8. When a sentence is not mandatory under the Iowa Criminal Code, a trial court must exercise discretion in imposing a sentence. Id. at 197; see also State v. Hildebrand, 280 N.W.2d 393, 396 (Iowa 1979). The trial court must state on the record its reason for imposing a particular sentence. Iowa R. Crim. P. 22(3)(d); State v. Washington, 356 N.W.2d at 196; State v. Marti, 290 N.W.2d 570, 589 (Iowa 1980). A statement of a reason or reasons is necessary to allow the reviewing court to determine whether the sentence imposed constitutes an abuse of discretion of the sentencing court's discretion. State v. Washington, at 196; see also State v. Luedtke, 279 N.W.2d 7, 8 (Iowa 1979).

Because the trial court failed to state its reasons for imposing the sentence upon defendant, we remand the case for resentencing. We do not, of course, express any opinion as to what the sentence upon remand should be or how the sentencing court's discretion should be exercised.

The trial court's denial of defendant's motion for a new trial is affirmed and the case is remanded for resentencing.

AFFIRMED; SENTENCE VACATED; REMANDED FOR RESENTENCING.