IN THE COURT OF APPEALS OF IOWA

No. 1-102 / 90-598

FILED
JUN 25 1991
CLERK SUPREME COURT

263

STATE OF IOWA,

Appellee,

vs.

DINO J. ANTON,

Appellant.

Appeal from the Iowa District Court for Scott County, John A. Nahra, Judge.

The defendant appeals from his conviction, following a jury trial, for delivery of cocaine. He challenges an instruction and an evidentiary ruling. The State requests correction of an allegedly illegal sentence. **AFFIRMED.**

Becky Fitz Flores, Davenport, for appellant.

Bonnie J. Campbell, Attorney General; Bruce Kempkes, Assistant Attorney General; William E. Davis, County Attorney; and Hugh J. Pries, Assistant County Attorney, for appellee.

Considered by Oxberger, C.J., and Hayden and Habhab, JJ.

HABHAB, J.

Dino Anton was charged with delivery of cocaine. A jury found him guilty. He appeals, and we affirm.

Anton presented a defense of entrapment. Specifically, he alleged confidential informant Jim Williams had "set him up" for arrest by giving him drugs to deliver, asking him to deliver them to an undercover officer as a favor, and then receiving the same drugs back again, a form of "take-back" entrapment.

A jury found Anton guilty of delivery of cocaine. The court then sentenced him to imprisonment for up to ten years. However, the court waived the mandatory minimum period of incarceration provided in section 204.413. In so doing, the court apparently relied on mitigating circumstances for a first offender, as permitted by Iowa Code section 901.10.

Anton has appealed his conviction. He contends the district court failed to give adequate instructions on the elements of an entrapment defense and where the burden of proof rested. As explained later, he also challenges the exclusion of certain testimony by one Randy Dyer.

The State cross-appeals, contending the district court imposed an illegal sentence by "waiving" the minimum period of incarceration pursuant to Iowa Code section 901.10. The State argues the case should be remanded for correction of the allegedly illegal sentence.

265

I.

The defendant's first allegation of error involves the jury instruction on entrapment. The instruction, in applicable part, provides:

> Entrapment also may occur if the police, through an agent or informant, have provided the defendants with a controlled substance all or a portion of which of the same substance is later delivered to another agent of the police agency. Under this method of entrapment, the State must prove beyond a reasonable doubt that no police agents provided the defendants with the mixture containing cocaine later delivered to Agent Roach

The defendant contends the last sentence of the paragraph should have read "Under this method of entrapment, the State must prove beyond a reasonable doubt that no police agents or informer provided the defendants with the mixture containing cocaine later deliverable to Agent Roach". Defendant suggests the lack of the word "informant" in the last sentence constituted reversible error because without it the State did not have to prove beyond a reasonable doubt, that Jim Williams, the informer, furnished the drugs.

Jury instructions are designed to explain the applicable law to the jurors so the law may be applied to the facts proven at trial. State v. Freeman, 267 N.W.2d 69, 71 (Iowa 1978). It is axiomatic that instructions are to be reviewed in their entirety and not piecemeal. State v. Morrison, 368 N.W.2d 173, 175 (Iowa 1985). It is sufficient if instructions state the applicable law so that a jury of nonlawyers can understand it. Id. at 175-76.

We have reviewed the instructions and find that when considered together and not piecemeal they squarely place the burden to disprove any entrapment, whether committed by James Williams, Agent Roach, or anyone else related to the Metropolitan Enforcement Group (MEG), with the prosecution. To emphasize our position, we set forth additional parts of the court's instructions:

> Defendants [both] claim they were "entrapped." The State must prove by evidence beyond a reasonable doubt the defendants were not entrapped. Entrapment may occur in two different ways.
>
> "Entrapment" occurs when a law enforcement agent causes the commission of a crime by using persuasion or other means likely to cause a normally law-abiding person to commit the crime.
>
> You should consider the conduct of the law enforcement officer, his informant, and the defendants. This includes dealings leading up to the crime, the interaction between the agent or informant and the defendants, and the defendants' response to conduct of the agent or informant. These shall be considered in deciding what the effect of the [agent's] or informant's conduct would be on a normally law-abiding person.
>
> Entrapment also may occur if the police, through an agent or informant, have provided the defendants with a controlled substance all or a portion of which the same substance is later delivered to another agent of the police agency. Under this method of entrapment, the State must prove beyond a reasonable doubt that no police agents provided the defendants with the mixture containing cocaine later delivered to Agent Roach.
>
> * * *
>
> If the State has proved beyond a reasonable doubt that the defendants were not entrapped, they are guilty. However, if the State has not disproved the defense of entrapment, the defendants are not guilty.

Jury Inst. 19; App. 196; emphasis added). In addition, the court gave the general instruction that casts the burden on the State to prove the defendant's guilt beyond a reasonable doubt.

We also note that counsel for the defendant stated on the record the instruction "does reflect the status of the law and is . . . correct . . . ." We believe defense counsel's statement as to the disputed instruction is correct when considered in the light of the facts of this case. In addition, we find the trial court acted properly when it submitted this case to the jury for notwithstanding the defendant's complete reliance on the entrapment defense, a jury question was generated as to who the supplier of the cocaine was, i.e., the defendant contends it was the informant, James Williams, and the State denies that it was and places the blame on Dan Williams. We affirm on this issue.

II.

The defendant's second assignment of error involves the trial court's refusal to allow testimony by a witness for the defendant on the ground of relevancy. Specifically, the defendant sought to bolster his defense by submitting the testimony of a man named Randy Dyer. Dyer was convicted in 1986 of cocaine delivery. He accused Jim Williams of supplying cocaine to him as part of a take-back entrapment scheme. However, the jury at Dyer's trial specifically rejected, in a special interrogatory, the

possibility that James Williams had entrapped Dyer in any way.

Not only is this testimony irrelevant to the case at bar, it is remote and unreliable. What occurred five years ago between Dyer and Williams is not relevant to Anton's trial. The claimed transaction between Williams and Dyer was rejected by the jury. We affirm the trial court's decision to exclude the testimony of Mr. Dyer.

III.

The State raises an objection to the sentencing procedure followed by the trial court. Specifically the State objected to the district court using the word "waive" when addressing the minimum sentence required by Iowa Code section 204.413. This section provides that any person, like the defendant, found guilty of delivering cocaine "shall not be eligible for parole until the person has served a minimum period of confinement of one-third of the maximum indeterminate sentence prescribed by law."

As it relates to section 204.413, section 901.10 of the Iowa Code provides:

> A court sentencing a person for the person's first conviction under section 204.406, 204.413, or 902.7 may, at its discretion, sentence the person to a term less than provided by the statute if mitigating circumstances exist and those circumstances are stated specifically in the record. However, the state may appeal the discretionary decision on the grounds that the stated mitigating circumstances do not warrant a reduction of the sentence.

Each section cited in Code section 901.10 provides for a

minimum sentence.. Clearly, this statute allows for the imposition of a sentence to a term less than that provided by statute when mitigating circumstances exist and are set forth with particularity by the trial judge.

In State v. Beaver, 429 N.W.2d 778 (Iowa App. 1988), after holding that the trial court has the discretionary right, under section 901.10, to impose a lesser sentence than that imposed by section 902.7, we remanded for resentencing where the record was not clear whether the sentencing judge was aware of this authority. Section 902.7 deals with the imposition of a minimum sentence for a person who uses a firearm when committing a forcible felony.

Likewise, in State v. Draper, 457 N.W.2d 600 (Iowa 1990), the supreme court in its footnote no. 4 on page 604, instructed the trial court that since this was Draper's first conviction under section 204.401(1)(b), on remand it should consider any mitigating circumstances as provided under section 901.10 before sentencing the defendant. The supreme court there referred to our case of State v. Beavers.

We have reviewed the record and it is clear to us that when the court made its comments concerning the minimum sentence statute, it had in mind section 901.10. In addition, when it imposed the sentence less than that provided by statute, it, as required by section 901.10, found the existence of mitigating circumstances and

specifically stated those circumstances on the record. In reaching its decision, the trial court took into consideration the fact that the State encouraged the court to lessen the minimum sentence. Additionally, the jury, upon returning its verdict, asked the court for leniency in sentencing the defendant. The court was also impressed that at trial the defendant did not deny the essence of the facts which took place but merely contended he was entrapped. It is our opinion the trial court espoused sufficient reasons for lessening the minimum sentence.

The State has failed to convince us that, because the trial judge during the sentencing proceedings stated that he should "waive the mandatory minimum sentence" instead of sentencing the defendant "to a term less than provided by the statute," this case should be remanded for resentencing. Although we do not necessarily disagree with the State that what the court is authorized to do is to impose a term less than that provided by statute, we do not believe the use of the word "waive" is of such a significant departure from the statute so as to require a remand for resentencing. We accordingly affirm on this issue.

AFFIRMED.

Oxberger, C.J., concurs; Hayden, J., specially concurs.

HAYDEN, J. (specially concurring)

I concur in the result.