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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Appellee,)

vs.)

Filed September 9, 1977

JAMES LEO HOLBROOK,)

Appellant.)

STATE OF IOWA,)

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58450

Appellee,)

vs.)

REAVES MARTIN HOLBROOK,)

Appellant.)

Appeal from Muscatine District Court - C. H. Pelton, Judge.

Appeal from conviction of crime of delivery of controlled substance claiming entitlement to new trial based on change in law on burden of proof in accommodation hearing. - Affirmed.

Richard C. Turner, Attorney General of Iowa, Raymond W. Sullins, Assistant Attorney General and David W. Newell, Muscatine County Attorney, for Appellee.

John M. Kinnamon & J. Nicholas Russo, of Kinnamon, Kinnamon & Heintz, of Cedar Rapids, for Appellants.

PER CURIAM

Defendants, James Leo Holbrook and Reaves Martin Holbrook, appeal their conviction by jury of the crime of delivery of a controlled substance in violation of Section 204.401(1), The Code. They were found guilty of delivering marijuana to another person with the intent to profit and not as an accommodation. Although separately charged, the cases were consolidated for trial and are treated as one on appeal. Defendants allege the trial court erred in : (1) overruling their motion in limine and in allowing into evidence testimony concerning an unrelated crime and (2) refusing to give specific requested instructions. They also argue that the **Monroe** decision regarding the retroactivity of the burden of proof in an accommodation hearing should be specifically extended to these defendants even though error was not preserved.

Defendants' first contention is that the trial court erred in overruling defendants' motion in limine and thereby allowing evidence of delivery of amphetamines which they claim was unrelated to the charge of delivery of marijuana. A ruling which denies a motion in limine cannot be the basis for appeal. The error, if any, must be preserved by proper objection at trial when the challenged evidence was offered. *State v. Garren*, 220 N.W.2d 898, 899 (Iowa 1974). Defendants properly preserved error by objecting when the evidence was offered.

The testimony involving the amphetamines concerns the activities of the defendants, an informant and an under cover police officer immediately after the delivery of the marijuana for which defendants were charged. Delivery of amphetamines, another controlled substance, itself is a crime and defendants objected to its introduction as irrelevant to the crime charged, prejudicial and contrary to *State v. Wright*, 191 N.W.2d 638 (Iowa 1971), which holds evidence of other crimes inadmissible with certain exceptions. They assert that none of the exceptions are applicable.

However, the State is always entitled to show what actually happened at the time of the alleged offense. This is true even though it may include recitation of the commission of another crime or other unfavorable circumstance. The focal point is whether the acts are all so closely related in point of time and place that

they form a continuous transaction. *State v. Drake*, 219 N.W.2d 492, 494 (Iowa 1974). See also *State v. Guess*, 223 N.W.2d 214, 216 (Iowa 1974); *State v. Garren*, 220 N.W.2d 898, 900 (Iowa 1974). In the instant case, evidence of the gift of the amphetamines was properly admitted and the trial court did not abuse its discretion in overruling defendants' motion for new trial. *State v. Jeffs*, 246 N.W.2d 913 (Iowa 1976), is factually inapplicable on this issue.

Defendants' second alleged error concerns the trial court's refusal to give two instructions requested by defendants. The first requested the court to instruct the jury that law enforcement officers are responsible for the informants and agents who work for them. Defendants' defense was one of entrapment and they attempted to prove the State's informant entrapped them and therefore the State was responsible for his acts. In response to the court's inquiry as to objections to instructions, defense counsel stated: "I have no objections to them in their final form." Any alleged error is not preserved, because of defendants' waiver. *State v. Dague*, 206 N.W.2d 93, 95 (Iowa 1973). See also *State v. Blyth*, 226 N.W.2d 250, 273 (Iowa 1975).

Even if preserved, defendants' claim is without merit. First, defendant cannot complain if the instructions fail to emphasize circumstances favorable to him. This is precisely what instructions should avoid. Second, as long as instructions cover the legal principles involved, the trial court has the right to choose its own language to best accomplish that purpose. *State v. Robinette*, 216 N.W.2d 317, 318 (Iowa 1974). The trial court's instruction included the same legal principles urged by defendant without the emphasis and in its own language. No error exists.

The second requested instruction of which defendants complain concerns the definition of entrapment. The definition of entrapment recognized in Iowa is set out in *State v. Mullen*, 216 N.W.2d 375 (Iowa 1974). Defendants allege that the trial court's definition was incredibly ambiguous. We disagree. If anything, the trial court's definition was much more precise and clear than the defendants' proposed instruction. In any event, it contains the legal principles recognized in *Mullen*. See also *State v. Leonard*, *infra*.

Defendants' final contention is that they were denied their constitutional

right to a fair trial because they, not the State, bore the burden of proof in the accommodation hearing. Specifically, defendants argue that the decision announced by our supreme court in *State v. Monroe*, 236 N.W.2d 24 (Iowa 1975), which places the burden of proof in an accommodation hearing on the State, should be extended so as to include these defendants. At the time defendants were tried, the controlling law of this State was *State v. Vietor*, 208 N.W.2d 894 (Iowa 1973), which held that a non-jury hearing with the defendant having the burden of proving accommodation did not offend due process. Subsequent to their filing notice of appeal, both *Monroe* and *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), upon which *Monroe* was based, were decided.

Monroe held that the constitutional requirement concerning the burden of proof was completely retroactive but that relief was available only in (a) the case at bar, (b) cases now pending on appeal where error has been properly preserved at trial, and (c) cases in which timely appeal is hereafter taken and in which error has been properly preserved. 236 N.W.2d at 39. Defendants argue that because their trial was completed before the announced decisions of *Monroe* and *Mullaney*, they should be excused from the rule that matters not raised in the trial court, including constitutional questions, cannot ordinarily be effectively asserted for the first time on appeal as a basis for reversal. *State v. Leonard*, 243 N.W.2d 75, 84 (Iowa 1976); *State v. Cooper*, 217 N.W.2d 589, 592 (Iowa 1974). They claim it would have been a futile effort to object, since *Vietor* was clearly the law and it would have been apparent error for the trial court to sustain such an objection citing *State v. Wisniewski*, 171 N.W.2d 882, 886-87 (Iowa 1969). Therefore, although the error was not preserved, defendants seek relief under the present law.

This same argument was recently raised and rejected by the supreme court in *State v. Leonard*, supra. As *Leonard* is still the law in the State of Iowa, we find no merit in defendants' argument since error was not properly preserved. *State v. Monroe*, supra. Defendants also ask us to review the record in light of *Monroe* without regard to technical errors as provided by §793.18, The Code. Even under §793.18, error must be preserved. See *State v. Galvin*, 181 N.W.2d 147 (Iowa 1970). Notwithstanding, a review pursuant to §793.18 discloses a fair trial was accorded defendants.

The judgment of the trial court is affirmed.