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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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FILED JUNE 4, 1986

6-67
85-558

STATE OF IOWA,

Plaintiff-Appellee,

vs.

DAVID RUFFIN,

Defendant-Appellant.

Appeal from the Iowa District Court for Polk County (26513) - Luther T. Glanton, Judge.

Defendant was charged with two counts of delivery of a controlled substance and two counts of conspiracy to deliver a controlled substance. **AFFIRMED AS MODIFIED.**

Charles Harrington, Chief Appellate Defender, and B. John Burns, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa; Pamela Greenman Dahl, Assistant Attorney General; and Odell G. McGhee II, Assistant Polk County Attorney, for plaintiff-appellee.

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

HAYDEN, J.

Defendant David Ruffin was charged with two counts of delivery of a controlled substance and two counts of conspiracy to deliver a controlled substance. Jury trial commenced in January 1985 and the defendant was found guilty on all four counts. On April 12, 1985, the court entered judgment on the conviction and sentenced the defendant to a term of imprisonment not exceeding ten years.

Iowa Code section 706.4 provides:

> A conspiracy to commit a public offense is an offense separate and distinct from any public offense which might be committed pursuant to such conspiracy. A person may not be convicted and sentenced for both the conspiracy and for the public offense.

Each of the two counts of delivery of a controlled substance and the two counts of conspiracy stem from a single transaction in which the defendant arranged a sale of cocaine and heroin to two police department informants.

At the sentencing hearing, the State brought the merger issue to the attention of the court:

> THE COURT: The jury found (Ruffin) guilty on, what, three counts?
>
> MR. McGHEE: Four, Your Honor, which would, of course, at this time, since the conspiracy and delivery arose out of the two different sets of facts and circumstances, at this time they would come together and be considered to be one charge, and that charge is — I think the courts have decided that it was trafficking, and he could only be sentenced on two Class C's.

Without expressly indicating that the convictions were merged, the court responded:

> THE COURT: So therefore it would be the judgment of this Court that he be sentenced to ten years in prison, and he is put into the custody of the Director of Corrections, and he will name the place in which you should serve your sentence, and this period is not to exceed ten years, and the sentence will run concurrently and not consecutively.

In the April 12, 1985 sentencing order, the defendant was adjudged guilty of all four counts, with no express indication that he was being sentenced on two rather than four felonies. The order did not explain that the conspiracy and delivery counts arose from the same transaction. The defendant's sentencing order only shows that he was convicted of four felonies.

Ruffin argues on appeal that the trial court improperly sentenced him for the charges of conspiracy as well as the underlying offenses. We disagree.

The sentencing order does not indicate that any of the four counts merged. However, it is clear from the sentencing transcript that the court only intended to sentence Ruffin for delivery of heroin and cocaine. Accordingly, pursuant to Iowa Code section 814.20, we modify the sentencing order to clarify its compliance with applicable statutes. The order shall provide that the conspiracy and delivery counts arose from the same transaction and merge for purposes of conviction and sentencing. It shall further provide that defendant's term of imprisonment is based upon one count of delivery of heroin and one count of delivery of cocaine.

AFFIRMED AS MODIFIED.