

FILED

JUN 30 1978

238

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Appellee,

vs.

RUSSELL EUGENE LINK,

Appellant.

Filed June 30, 1978

543
60761

Appeal from Mills District Court - Paul H. Sulhoff, Judge.

Defendant appeals his convictions of possession of amphetamines with intent to deliver, in violation of § 204.401(1), The Code 1975, contending that the trial court erred in admitting into evidence and allowing the jury to hear a tape recording which contained portions which were garbled and indistinct. AFFIRMED.

Timothy I. Markel, of Glenwood, counsel for appellant.

Richard C. Turner, Attorney General of Iowa, and H. Walter Green, Mills County Attorney, counsel for appellee.

Submitted to Allbee, C. J., Donielson, Snell, Oxberger, and Carter, JJ.

DONIELSON, J.

Defendant-Russell Eugene Link appeals his two convictions of possession of amphetamines with intent to deliver, in violation of § 204.401(1), The Code 1975. He now contends that the trial court erred in admitting into evidence and allowing the jury to hear a tape recording in which he allegedly discusses a narcotics sale with an informant and a state undercover agent, on the ground that the tape was so garbled and indistinct as to be of insufficient probative value.

Initially, the State asserts that this issue is not reviewable by this court because defendant did not file a bill of exceptions concerning the contents and objectionable aspects of the tape. See Chapter 786, The Code. However, in the instant case, we do not believe that it would have been either feasible or productive for defendant to have filed a bill of exceptions since the thrust of his claim is that the tape is so garbled and indistinct as to be unintelligible. Consistent with his argument, it would have been impossible for defendant to have set forth the contents of the recording or make a more specific objection than the one he advanced in his motion in limine and during trial. Consequently, we conclude that defendant was not required to file a bill of exceptions in order to obtain appellate review of this issue.

The State also contends that the tape is not a part of the record on appeal because the contents were not transcribed as part of the trial transcript. We disagree. Under rules 10(a) and 11(c), Rules of Appellate Procedure, the tape itself, as an exhibit, is part of the record, notwithstanding the fact that the notice of appeal in this case was filed before these rules became effective on July 1, 1977. See rule 702, R. App. P.

In reaching the merits, the admission of a tape recording containing portions which are garbled and inaudible is a matter within the sound discretion of the trial court. *United States v. Williams*, 548 F.2d 228, 232 n. 13 (8 Cir. 1977); *United States v. Lane*, 514 F.2d 22, 27 (9 Cir. 1975); *United States v. Howard*, 504 F.2d 1281, 1287 (8 Cir. 1974); *United States v. Skillman*, 442 F.2d 542, 552 n. 8 (8 Cir.), cert. denied, 404 U.S. 833, 92 S.Ct. 82, 30 L.Ed.2d 63 (1971); see *Annot.*, 57 A.L.R.3d 746 (1974). We have reviewed the tape recording in question and clearly find no such abuse of discretion here. See generally *State v. Russell*, 261 N.W.2d 490, 495-496 (Iowa 1978). The judgment of the district court is affirmed.

AFFIRMED.