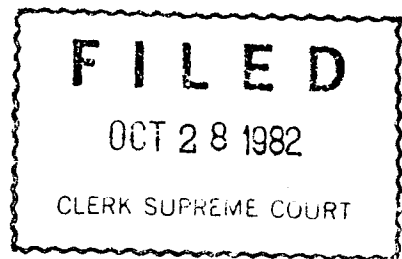


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,

)

Plaintiff-Appellee,

)

vs.

)

Filed October 28, 1982

338

SCOTT W. JOHNSON,

)

2-338

67560

Defendant-Appellant.

)

Appeal from Carroll District Court - Louie Beisser, Judge.

Defendant appeals from his convictions for assault with intent to inflict serious injury in violation of Iowa Code § 708.2(1) (1979), and criminal mischief in the second degree in violation of Iowa Code § 716.4 (1979), asserting: (1) that he was denied adequate time to prepare for trial; (2) that the evidence was insufficient to support trial court's judgment of guilty; and (3) that trial court abused its discretion in sentencing him to concurrent prison terms. AFFIRMED.

Joseph E. Halbur, Carroll, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Steven Foritano, Assistant Attorney General, for plaintiff-appellee.

Considered en banc.

PER CURIAM

Defendant, Scott W. Johnson, appeals from his convictions for assault with intent to inflict serious injury in violation of Iowa Code § 708.2(1) (1979), and criminal mischief in the second degree in violation of Iowa Code § 716.4 (1979). Defendant asserts: (1) that he was denied adequate time to prepare for trial; (2) that the evidence was insufficient to support trial court's judgment of guilty; and (3) that trial court abused its discretion in sentencing him to concurrent prison terms not to exceed two and five years respectively. We affirm.

On July 19, 1980, the victim was seriously injured when a pickup truck owned by defendant swerved and struck the victim and a parked van. A convicted felon testifying for the State pursuant to a plea bargaining agreement stated that he was driving the van when the defendant, who was a passenger, grabbed the steering wheel so as to cause the truck to strike the victim, with whom defendant had just had an argument.

Defendant was charged by county attorney informations with the two aforementioned crimes. Defendant, through counsel, requested immediate trial following arraignment. Trial court then erroneously informed defendant that he was entitled to at least fifteen days to prepare for trial. Trial to the court commenced after defendant stated that he wished an immediate trial. Defendant additionally waived any time in which to make pretrial motions. Defendant was tried that afternoon, was convicted and sentenced to concurrent prison terms not to exceed, respectively, two and five years. From this disposition defendant appeals.

I. Scope of Review. Our review of defendant's appeal is on assigned error only. Iowa R. App. P. 4.

II. Waiver. Defendant asserts that the trial court erroneously instructed defendant that he was allowed only fifteen days after the arraignment to prepare for trial. The State urges us to find that defendant expressly waived any such right by his demand for trial immediately following arraignment.

Prior to any discussion of the length of time to prepare for trial, defense counsel stated: "Yes, your Honor, we do waive time we are entitled to after arraignment. We have just been arraigned on this charge and we request that trial proceed immediately." In order to more fully understand defendant's statement, the court addressed the following questions to him:

THE COURT: Mr. Johnson, I need to address you again. If you would please come forward? The Rule of Criminal Procedure 45, provides that after a plea has been made, and you have made a plea of not guilty here, that no trial date—or a trial date shall be set which shall not be less than fifteen days after you have entered your plea, your plea being not guilty. Now, you have a right rather than having the trial at this time to wait and not have this matter heard before the court for fifteen days. In other words, you could wait today and it would have to go fifteen days. It could not be before that unless you waive it.

THE DEFENDANT: "No, I want to have this done now.

THE COURT: "Now, what is your pleasure, Mr. Johnson?

DEFENDANT: Have it done now.

THE COURT: All right. In other words then you understand in that by having it now then are you telling the court you want it now? You want this done or have this trial right now?

THE DEFENDANT: Yes.

THE COURT: All right. Is there any question in your mind what we're talking about when we say we are doing it now rather than waiting for 15 days? In other words that you have a right to wait 15 days if you want to. You understand that?

THE DEFENDANT: Yes.

THE COURT: All right. But you still want to dispose of this matter this afternoon?

THE DEFENDANT: Yes.

THE COURT: All right. . . . I would ask you once again, is this your desire that you waive the 15 days on each of these cases—

THE DEFENDANT: Yes.

THE COURT: That I referred to here---

THE DEFENDANT: Yes.

THE COURT: --and proceed with trial right now?

THE DEFENDANT: Yes.

THE COURT: It will be so ordered. We will commence.

The State concedes that trial court misapplied Iowa Rule of Criminal Procedure 45 because the rule applies only to trials of simple misdemeanors. The State further urges, however, that any error was waived upon defendant's request for immediate trial. We agree.

In the present case defendant got precisely what he requested--an immediate trial. We find the following principle to be applicable.

[A] party to a criminal proceeding will not be permitted to complain of error with respect to the admission or exclusion of evidence where . . . he himself has acquiesced in, committed, or invited the error.

State v. DeWitt, 286 N.W.2d 379, 383 (Iowa 1979) (citing State v. Hinkle, 229 N.W.2d 744, 750 (Iowa 1975)). Having concluded defendant acquiesced in the immediate trial, we find no issue for our review.

III. Sufficiency of the Evidence. Defendant urges that there was insufficient evidence to show the requisite intent needed for conviction on the charges. In reviewing sufficiency of the evidence, the principles which govern our consideration were well stated in State v. Knupp, 310 N.W.2d 179, 181-82 (Iowa 1981):

In reviewing trial court's disposition . . . we accord its factfindings the effect of a jury's special verdict. [citation] We examine all the evidence in the light most favorable to the State, accept all legitimate inferences reasonably deducible from the evidence, and uphold an order if there is substantial evidence reasonably tending to support it. [citation] In the criminal law context, substantial evidence means such evidence as could convince a rational trier of fact that an element of a crime has been proved beyond a reasonable doubt. [citations]

Applying these principles, we affirm the trial court.

The evidence shows that defendant and the victim had been involved in a heated argument and that the victim unsuccessfully tried to strike defendant. Several minutes later, defendant, a passenger in the truck, grabbed the steering wheel and caused the vehicle to hit the victim and the van. Trial court found that defendant did intend the natural consequences of his acts, i.e., that by pulling the steering wheel he intended to strike the victim. In sum, we find there was sufficient evidence for the trial court to find defendant guilty of the crimes charged.

IV. Sentence. Defendant argues that the sentence ordered by trial court was based on an erroneous application of the controlling statutes. He states that Iowa Code §§ 907.3, 901.5(1) (1979) provide that the trial court may grant a defendant a deferred judgment or sentence as long as the exceptions in Iowa Code § 707.3(1)(a)(b)(c)(d) (1979) do not apply. He further contends that trial court's failure to grant such a judgment or sentence was based upon an erroneous application of law. We disagree.

Trial court, in its ruling, specifically considered probation, deferred judgment, and deferred sentence. The court, however, found that for purposes of rehabilitation, and protection of the community, that defendant be incarcerated. Sentencing is a matter within the trial court's discretion. State v. Kendall, 167 N.W.2d 909, 911 (Iowa 1969). A reviewing court will not interfere with the sentence unless the trial court has abused its discretion. Id. The burden of proving an abuse of discretion rests upon the complaining party. State v. Buck, 275 N.W.2d 194, 195 (Iowa 1979). We find that defendant failed to carry his burden of proof in showing an abuse of discretion by trial court.

We affirm the trial court.

AFFIRMED.