IN THE COURT OF APPEALS OF IOWA

FILED
JAN 30 1981
CLERK SUPREME COURT

STATE OF IOWA, )
Plaintiff-Appellee, )
vs. )
RANDALL CASON, )
Defendant-Appellant. )

Filed January 30, 1981

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63723

Appeal from Polk District Court - Louis A. Lavorato, Judge.

Defendant appeals his conviction for delivery of a controlled substance (marijuana) in violation of section 204.401(1), Supplement to the Code 1977. AFFIRMED.

Martha Shepard, Polk County Offender Advocate Office, Des Moines, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa; Shirley Ann Steffe, Assistant Attorney General; and Dan Johnson, Polk County Attorney; for plaintiff-appellee.

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

PER CURIAM

Defendant appeals his conviction for delivery of a controlled substance (marijuana) in violation of section 204.401(1), Supplement to the Code 1977. He claims that the trial court erred in allowing the introduction of evidence not included in the original minutes of testimony and not disclosed to defendant until after a mistrial and only nine days before the retrial. We affirm.

Defendant was arrested on January 19, 1979 for possession of marijuana and was formally charged by a trial information twelve days later. Trial commenced on April 18. It was discovered later that day that one of the state's witnesses knew two of the jurors. Because only one alternate juror had been selected, a mistrial was declared. Retrial was scheduled for April 27, but the court granted the state's motion for a continuance and rescheduled trial for May 9. On April 30, the state filed a notice of introduction of witnesses which contained evidence that the material seized at the time of defendant's arrest had been analyzed by the Bureau of Criminal Investigation laboratory and was found to be marijuana. These witnesses and their testimony were not included in either the minutes of testimony filed with the original information or in a prior notice of introduction of witnesses filed on February 26. At trial, defendant objected to the introduction of this evidence, claiming that it was barred by Iowa R. Crim. P. 18(2) and 18(3) in that notice of the laboratory test results was not filed at least ten days prior to trial. This objection was overruled and defendant was subsequently convicted and sentenced. This appeal followed.

Defendant's primary concern appears to be the fact that he did not have the full ten-day notice of the evidence regarding the BCI laboratory test results. Former Iowa R. Crim. P. 18(2) (now 18(4)) provides in part as follows:

> Additional witnesses in support of the indictment or trial information may be presented by the prosecuting attorney if he or she has given the defendant's attorney of record . . . a minute of such witness' evidence, as defined in rule 4(6)(a), at least ten days before the commencement of the trial.

Under former rule 18(3) (now 18(5)), if the ten-day notice of additional witnesses was not given, "the prosecutor may move the court for leave to introduce such testimony, . . . showing diligence, supported by affidavit or other evidence." That rule further provides that if the additional evidence goes to other than merely formal matters and if the prosecutor's motion for leave to introduce such evidence is sustained, "the

defendant shall elect whether said cause shall be continued on his motion, or the witness shall then testify."

We find no reason to disturb the judgment of the trial court. Initially, we question if defendant has waived this alleged error. During the trial when the prosecution sought to introduce the challenged evidence, defendant's attorney made it clear that she did not want to move for a continuance if the trial court allowed the evidence to come in. Failure to request such a continuance in these circumstances waives any objection to the timeliness of notice. State v. King, 256 N.W.2d 1, 9 (Iowa 1977); see also State v. Smith, 282 N.W.2d 138, 141 (Iowa 1979).

Even if waiver of this issue did not occur, we conclude that the trial court did not err in allowing the lab report to be introduced. The prosecutor stated at trial that he intended to introduce the report under section 691.2, The Code, under which BCI laboratory reports may be received in evidence with the same effect as if the BCI technician who performed the tests had testified in person. Under section 691.4, "[i]f such report is not given to the accused or his attorney at least four days prior to trial, such fact shall be grounds for a continuance." In this case, defendant's attorney received a copy of the report nine days before trial. In any event, she refused to request a continuance. Defendant argues that the state should not be allowed to use this evidence since notice of it did not come until after the April 18 mistrial. We fail to see the relevance of the timing of this notice of additional evidence vis-a-vis the earlier mistrial since the pertinent date for timing-of-notice purposes is May 9, the date of retrial. See State v. Love, No. 63626, slip op. at 3 (Iowa Jan. 14, 1981).

Finally, even if the ten-day notice requirement was not followed, any resulting error was harmless. The notice came nine days before trial--only one day short of the rule's requirements. Defendant had sufficient time in which to prepare his defense. The defense attorney must not have thought that the case was prejudiced by having notice of the new evidence for nine days instead of ten for she did not request a continuance; in fact, she refused to do so.

> This court has a long history of not reversing on the ground of technical defects in procedure unless it appears in some way they have prejudiced the complaining party or deprived him or her of full opportunity to make defense to the charge presented in the indictment or information. (citations) This includes defects relating to minutes of testimony. (citations)."

Smith, 282 N.W.2d at 141. Defendant was not prejudiced by introduction of this

testimony; any resulting error which may have occurred was harmless.

Finding no reason to reverse, we affirm defendant's conviction.

AFFIRMED.