

IN THE COURT OF APPEALS OF IOWA

FILED

533 JUN 25 1985

STATE OF IOWA,

)

Plaintiff-Appellee,

)

vs.

)

CHESTER WALTON,

)

Defendant-Appellant.

)

Filed June 25, 1985
CLERK SUPREME COURT

5-189
83-1442

**Appeal from the Iowa District Court for Black Hawk County - C. W. Antes,
Judge.**

**Defendant appeals from his conviction for delivery of a controlled substance
(cocaine) in violation of Iowa Code section 204.401(1)(a). AFFIRMED.**

**Jon M. Kinnamon and Jerald W. Kinnamon of Kinnamon, Kinnamon, Russo &
Meyer, Cedar Rapids, Iowa, for defendant-appellant.**

**Thomas J. Miller, Attorney General, and Joseph P. Weeg, Assistant Attorney
General, for plaintiff-appellee.**

Heard by Snell, P.J., Hayden, and Sackett, JJ.

Defendant appeals from his conviction for delivery of a controlled substance (cocaine) in violation of Iowa Code section 204.401(1)(a). He claims the trial court erred in admitting into evidence various drug samples over his chain of custody objection, in failing to give certain requested instructions to the jury, and in imposing a prison sentence in the mistaken belief that such a sentence was statutorily required. We affirm.

I. Defendant first contends the trial court erred by admitting certain physical evidence; a white powder (later determined to be cocaine) that he allegedly sold to an undercover officer. He argues the State did not establish a reliable chain of custody for this exhibit. In order to satisfy the foundational requirements for physical evidence, the State must show "a sufficient custody to establish that the article has not been altered between the time it was obtained and the time it is introduced at trial. The showing required is that it is reasonably probable that tampering, substitution, or alteration did not occur." State v. Lamp, 322 N.W.2d 48, 57 (Iowa 1982). We will reverse a trial court's determination as to the sufficiency of chain of custody only when the court has clearly abused its discretion. Id.

We find no cause for reversal. The only weak link asserted by defendant in the chain of custody rests in the fact that the drug samples, which had been previously sealed in an evidence bag and mailed to the state criminalistic laboratory by certified mail, were left in an open area in the lab for approximately one week. The criminalist who analyzed the samples, however, testified that the three packets were closed except when the samples themselves were removed for analysis. She also testified that she wrote her initials and the date the samples were received on the evidence bag itself. Under such conditions and absent any evidence to the contrary, we do not presume that a state criminalistics employee will tamper with a sample received for analysis. Sechler

v. State, 340 N.W.2d 759, 765 (Iowa 1983). Defendant's argument to the contrary is mere speculation at best.

Defendant's other foundation objections are likewise without merit. He focuses on the discrepancy in the weight of the drug samples as reported by two of the State's witnesses (.34 gram vs. .36 gram) and on an allegedly improper identification by a State witness of the sample packets in the evidence bag. At most, such allegations affect only the weight of this evidence and not its admissibility; (see State v. Gibb, 303 N.W.2d 673, 681 (Iowa 1981) in any event, we do not believe they are relevant to the chain of custody issue.

We also reject defendant's claim that he was entitled to a jury instruction permitting the jury to determine the question whether, given that the evidence bag was left in the criminalistics lab for nearly a week, such evidence was in fact altered or tampered with. Defendant presented no evidence, and the record contains none, that raised the issue of alteration or tampering; without such a factual basis, defendant was not entitled to the requested instruction. See State v. Gilroy, 313 N.W.2d 513, 521 (Iowa 1981).

II. Defendant also contends the trial court erred in refusing to give his requested instruction about the limited reliability of testimony recounting prior oral conversations. Much of the evidence against him consisted of testimony by the undercover officer recounting his conversations with the defendant. He argues that he was entitled to an instruction telling the jury that testimony about a prior oral conversation was subject to mistakes in the interpretation of the conversation. We disagree. The subject matter of the proposed instruction was adequately covered by Instruction No. 7 given to the jury which stated in part:

In passing on the credibility of the witnesses and weighing their testimony, you may and should consider their ... strength of memory and means of knowledge of matters of which they speak, the remoteness of events about which they testify ... (and) whether their testimony is corroborated or contradicted by other witnesses or facts proven.

This instruction clearly and fairly set forth the relevant law; defendant was not entitled as a matter of law to have it submitted in any particular form. State v. Savage, 288 N.W.2d 502, 508(Iowa 1980).

III. Finally, we consider defendant's claim that the trial court imposed sentence on the basis of an erroneous interpretation of a sentencing statute. Iowa Code section 204.413 provides that a drug offender sentenced to prison must serve at least one-third of his or her maximum sentence before becoming eligible for parole. However, the Iowa Supreme Court has held that section 204.413 does not require a sentence of imprisonment. State v. Morehouse, 316 N.W.2d 884, 886 (Iowa 1982). Defendant contends that the trial court imposed sentence under the mistaken view that section 204.413 required imprisonment rather probation.

We find no error in the imposition of sentence. Specifically, we disagree that the trial court believed imprisonment was mandatory. Rather, the court stated "It will be, therefore, the judgment and sentence of this Court, based upon your prior record, that you will be sentenced to a term not to exceed ten years . . ." (emphasis added). The court's decision was clearly based on defendant's record and not on any misperception of the sentencing statute; otherwise, the court's statement would have no meaning.

We do not consider at this time defendant's allegation of ineffective assistance of counsel since there is presently no record from which to make such a determination. Defendant's conviction and sentence are affirmed.

AFFIRMED.