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IN THE COURT OF APPEALS OF IOWA

No. 1-168 / 90-381

STATE OF IOWA,

Appellee,

vs.

JOHN WILLIAM NOSA,

Appellant.

Appeal from the Iowa District Court for Scott County, Margaret S. Briles, Judge.

Nosa appeals his convictions, following a jury trial, for four counts of delivery of cocaine. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Ahmet S. Gonlubol, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Bruce Kempkes, Assistant Attorney General, William E. Davis, County Attorney, and Realff H. Ottesen, Assistant County Attorney, for appellee.

Heard by Donielson, P.J., and Schlegel and Hayden, JJ.

HAYDEN, J.

John Nosa allegedly sold cocaine to an undercover agent on four separate occasions. A jury found him guilty of four counts of delivery of cocaine. He has appealed the resulting convictions and sentences.

Nosa contends the district court erred by restricting his attorney's closing argument. He asserts his attorney should have been allowed to argue for conviction on only one count instead of four, on a theory that the undercover agent had acted improperly by failing to arrest Nosa after the first transaction. The district court, in its instructions, had already rejected Nosa's theory that the four alleged drug sales should be treated as a single transaction.

Nosa also contends his trial attorney rendered ineffective assistance by failing to rely on a defense of entrapment. He suggests this claim of ineffective assistance is so clear from the present record it can be resolved on direct appeal.

Finally, Nosa contends the sentencing court abused its discretion by refusing to waive the mandatory minimum period of incarceration provided under Iowa Code section 204.413. He argues such a waiver was available under Iowa Code section 901.10 and was warranted by the facts of this case.

Our standard of review is on errors of law. Iowa R. App. P. 4. We have reviewed Nosa's objections. We first

address those premised on abuse of the trial court's discretion.

I. Abuse of Discretion.

We review the trial court's rulings for abuse of its discretion. State v. Lass, 228 N.W.2d 758, 770 (Iowa 1975). However, the trial court's rulings will not be disturbed absent an abuse of that discretion. State v. Christensen, 323 N.W.2d 219, 222 (Iowa 1982); State v. Lewis, 391 N.W.2d 796, 798 (Iowa App. 1986). We will not find an abuse of discretion unless "such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." Id. The burden of proving abuse of discretion lies with the defendant. Id.

A. Closing Arguments. Nosa contends the trial court abused its discretion by correcting his counsel's closing argument in the presence of the jury. He claims he should have been allowed to present his theory of defense.

We find no abuse of discretion. Nosa has cited no law supporting the theory of defense he advanced in closing arguments. In fact, Nosa's counsel admitted the theory advanced "had never been recognized by any court in the land." We determine the trial court acted within its discretion in correcting Nosa's closing argument. We affirm the trial court on this issue.

B. Mandatory Minimum. Nosa alleges the trial court erred by refusing to waive the mandatory minimum period for

incarceration under Iowa Code section 204.413 relating to drug offenses. He further claims the court abused its discretion by "stacking" the four convictions with separate sentences. However, we note the trial court imposed concurrent rather than consecutive sentences. Thus, the most Nosa could serve is ten years, whether for one conviction or four.

We determine the trial court acted within its discretion in sentencing as it did. We affirm the trial court on this issue.

II. Ineffective Assistance of Counsel.

Nosa claims his trial counsel was ineffective for failing to present an entrapment defense. Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. State v. Mulder, 313 N.W.2d 885 (Iowa 1981); State v. Nebinger, 412 N.W.2d 180 (Iowa App. 1987).

The State argues a defendant asserting an entrapment defense may not assert another defense inconsistent with entrapment. See State v. Bruno, 204 N.W.2d 879, 882 (Iowa 1973). However, the Iowa Supreme Court has recently questioned the continuing validity of the Bruno rationale. State v. Broughton, 425 N.W.2d 48, 50-51 (Iowa 1988).

> State courts have generally held that a defendant is entitled to the benefit of any defense shown by the evidence, even if the facts on which such defense is based are inconsistent with the defendant's own testimony.

Id. at 51.

Our review on the facts shows the two defenses are not inconsistent. Nosa argues he is entitled to present a theory the four drugs deals were in reality only a singe continuing transaction. He further argues he was entrapped by the police and their paid informant into engaging in the drug deals. Presumably, he argues but for the enticement of the police and their agent, he would not have engaged in this criminal activity. We determine these two defenses are not inconsistent. Like the supreme court in Broughton, we need not reach the issue of the applicability or viability of Bruno. See id.

We determine this issue should be preserved for a postconviction action. There, the evidence may be more fully developed and Nosa's trial counsel given the opportunity to answer this claim.

We affirm the trial court on the exercise of its discretion in closing argument and sentencing issues. We preserve the ineffective assistance of counsel claim for postconviction relief.

AFFIRMED.