

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Plaintiff-Appellee,

vs.

CARL GREGORY TYLER,

Defendant-Appellant.

Filed June 30, 1981

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65381

FILED

JUN 30 1981

CLERK SUPREME COURT

Appeal from Black Hawk District Court.

Roger Peterson, Judge.

Defendant appeals from his conviction and sentence for robbery in the second degree in violation of section 711.3, The Code 1979. AFFIRMED.

Michael M. Pedersen, of Martin, Keith & Peersen, Waterloo, Ia., for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa and Merle Wilna Fleming, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C. J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant appeals from his conviction and sentence for robbery in the second degree in violation of section 711.3, The Code 1979. We affirm.

At approximately 7:30 p.m. on January 29, 1980 an individual walked into the Derby station at 1718 Lafayette in Waterloo, Iowa, wearing a ski mask and a hooded sweatshirt. The individual demanded of Jessie Holder, the station attendant, all the money contained in the station. Holder did not comply, and the individual bolted from the station. Holder chased the individual down the alley behind the station, returned to the station, reported the incident to the police, and gave the police a description of the individual. At approximately 7:35 p.m. Officer Gary L. McBroom observed defendant two blocks from the Derby station moving in a direction away from the station. When McBroom approached defendant, defendant said, "I guess that I knew you guys would get me for the Derby station." Defendant was arrested and at approximately 7:45 p.m. was taken to the Derby station where Holder identified him as the robber. Defendant was subsequently convicted in a jury trial of robbery in the second degree in violation of section 711.3, The Code 1979, and sentenced to a period of incarceration not to exceed ten years.

I. Defendant filed a motion in limine asking that the State be prohibited from using Holder's out-of-court identification of defendant at trial. Defendant contends that because he was not represented by counsel when Holder identified him at the Derby station some fifteen minutes after the robbery, his sixth amendment right to counsel was violated. The trial court denied the motion.

The out-of-court identification took place after defendant was arrested but before he was formally charged with an offense. A person's sixth amendment right to counsel does not attach prior to being charged with an offense. Moore v. Illinois, 434 U.S. 220, 226, 98 S. Ct. 458, 464, 54 L. Ed. 2d 424, 432 (1977); Kirby v. Illinois, 406 U.S. 682, 688-89, 92 S. Ct. 1877, 1881-82, 92 L. Ed. 2d 411, 417 (1972); State v. Watts, 244 N.W.2d 586, 589 (Iowa 1976); State v. Salazar, 213 N.W.2d 490, 493 (Iowa 1973); State v. Jackson, 199 N.W.2d 102, 103 (Iowa 1972). The trial court therefore did not err in denying defendant's motion in limine.

II. During sentencing defendant contended that the trial court had the authority to give defendant a suspended sentence at that time, and the trial court said it had no such

authority. Accordingly, the trial court sentenced defendant to a period of incarceration not to exceed ten years. Defendant contends that the trial court erred in supposing itself not to have such authority. Defendant centers his argument around section 902.4, The Code 1979, which provides:

Reconsideration of felon's sentence. For a period of ninety days from the date when a person convicted of a felony, other than a class "A" felony or a felony for which a minimum sentence of confinement is imposed, begins to serve a sentence of confinement, the court, on its own motion or on the recommendation of the commissioner of social services, may order the person to be returned to the court, at which time the court may review its previous action and reaffirm it or substitute for it any sentence permitted by law.

Section 902.4 permits a sentencing court to substitute "any sentence permitted by law" for the sentence originally given to a convicted felon, unless the conviction was for a class "A" felony or a felony requiring a minimum sentence of confinement. Therefore, according to defendant, since he was not convicted of a class "A" felony or a felony requiring a minimum sentence of confinement, and since a suspended sentence is a legally permitted sentencing alternative under sections 901.5(3) and 907.3, The Code 1979, section 902.4 empowered the trial court to suspend defendant's sentence.

First, defendant insisted at sentencing and insists now that the trial court was empowered to reconsider defendant's sentence under section 902.4 at the time of sentencing. However, the literal meaning of section 902.4, as the trial court made amply clear at the time of sentencing is that a trial court may not reconsider a convicted felon's sentence until the felon begins serving a sentence of confinement. Obviously, at the time of sentencing defendant had not begun serving a sentence of confinement. Hence, the trial court did not err in refusing to consider defendant's sentence under section 902.4 at the time of sentencing.

Second, even assuming that the trial court could have reconsidered defendant's sentence at the time of sentencing, it could not then have suspended his sentence. Defendant argues that since section 902.4 permits the substitution of any sentence permitted by law, and since a suspended sentence is legally permissible, the trial court could have suspended defendant's sentence upon reconsideration. However, section 907.3, The Code 1979, prohibits suspending the conviction of a defendant convicted of a forcible felony. Defendant was convicted of a forcible felony. See section 702.11, The Code 1979. Since section 907.3 prevents defendant from receiving a suspended sentence

when originally sentenced, he could not receive a suspended sentence upon reconsideration under section 902.4. State v. Broten, 295 N.W.2d 453, 455 (Iowa 1980).

AFFIRMED.