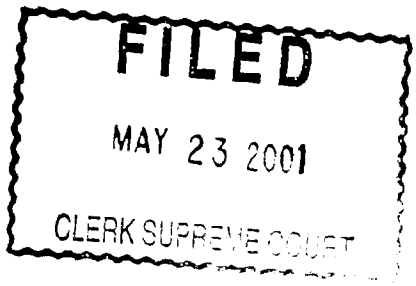
IN THE COURT OF APPEALS OF IOWA

No. 1-166 / 00-0576
May 23, 2001



STATE OF IOWA,
Plaintiff-Appellee,

vs.

RONALD WAYNE DeVRIES,
Defendant-Appellant.

Appeal from the Iowa District Court for Marshall County, Carl E. Peterson (pretrial motions) and Carl D. Baker (sentencing), Judges.

Defendant appeals from his conviction for possession of methamphetamine, third offense. *See* Iowa Code § 124.401(5) (1999). **AFFIRMED.**

Thomas M. Walter of Johnson, Hester, Walter & Breckenridge, L.L.P., Ottumwa, for appellant.

Thomas J. Miller, Attorney General, Mary E. Tabor and Bridget A. Chambers, Assistant Attorneys General, and James DeTaeye, County Attorney, for appellee.

Heard by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MAHAN, P.J.

On appeal from his conviction for possession of methamphetamine, third offense, the defendant argues the trial court erred in denying his motion to dismiss, in denying his motion to suppress, and in failing to suspend his sentence. We affirm.

Background Facts and Proceedings. On November 21, 1998, Ryan O'Neal, the loss-control manager at K-mart, observed Ronald DeVries grab four packs of lithium batteries and eventually conceal them in his coat sleeve. He watched as DeVries took two more packs of regular batteries and concealed them in his pants. O'Neal and an associate confronted DeVries after he exited the store without going through the checkout. They ushered DeVries to the loss-control office in the back of the store, and asked him to place all the merchandise he had taken on the desk. O'Neal asked DeVries to empty his pockets of any drugs or weapons. O'Neal testified he intended to turn over to the police any drugs DeVries might have in his pocket. DeVries removed a vial from his pocket and placed it on the table. O'Neal called the police. When DeVries learned the police were coming, he got nervous and asked O'Neal to get rid of the vial. When O'Neal refused, DeVries threw the vial to the ground and stomped on it.

Marshalltown Police Officers Stamp and Kearney were dispatched to the scene, in reference to a shoplifting. Kearney arrived before Stamp. Kearney went to the back of the store where O'Neal had DeVries. Kearney gathered the remains of the broken vial for testing. Stamp arrived at some point and charged DeVries with fifth-degree theft. Stamp asked Kearney to transport DeVries to the

police station. Before doing so, Kearney searched DeVries. He found a vial with a small chain and spoon attached. The vial found during the search tested positive for methamphetamine. No substance was found in the crushed vial.

The State filed a trial information, charging DeVries with possession of a controlled substance (methamphetamine), third offense (class "D" felony), in violation of Iowa Code section 124.401(5), as amended by Senate File 2391 (1997). DeVries filed a motion to dismiss, alleging the enhanced class "D" felony of section 121.401(5) denied equal protection and amounted to cruel and unusual punishment. He filed a motion to suppress as evidence the vial taken as a result of a warrantless search of his person. The court denied both motions. DeVries waived a jury trial. After a trial to the court, DeVries was found guilty as charged. The court sentenced him to five years imprisonment. DeVries appeals.

Scope of Review. We review DeVries's constitutional claims de novo. *State v. Adams*, 554 N.W.2d 686, 689 (Iowa 1996). We review the sentence imposed for correction of errors at law. Iowa R. App. P. 4.

Equal Protection. Generally, we deem the federal and state equal protection clauses to be identical in scope, import, and purpose. *State v. Cronkhite*, 613 N.W.2d 664, 666 (Iowa 2000). Therefore, we apply the same analysis in considering the state equal protection claim as we do in considering the federal equal protection claim. *State v. Ceaser*, 585 N.W.2d 192, 196 (Iowa 1998).

Iowa Code section 124.401(5), as amended in 1997, provides in pertinent part as follows:

> It is unlawful for any person knowingly or intentionally to possess a controlled substance. . . . Any person who violates this subsection is guilty of a serious misdemeanor for a first offense. A person who commits a violation of this subsection and who has previously been convicted of violating this subsection is guilty of an aggravated misdemeanor. A person who commits a violation of this subsection and has previously been convicted two or more times of violating this subsection is guilty of a class "D" felony.
>
> If the controlled substance is marijuana, the punishment shall be by imprisonment in the county jail for not more than six months or by a fine of not more than one thousand dollars, or by both such fine and imprisonment for a first offense. If the controlled substance is marijuana and the person has been previously convicted of a violation of this subsection in which the controlled substance was marijuana, the punishment shall be as provided in section 903.1, subsection 1, paragraph "b". If the controlled substance is marijuana and the person has been previously convicted two or more times of a violation of this subsection in which the controlled substance was marijuana, the person is guilty of an aggravated misdemeanor.

Iowa Code § 124.401(5) (1999). The statute grants leniency only to those charged exclusively with marijuana related offenses. *State v. Cortez*, 617 N.W.2d 1, 3 (Iowa 2000). "Once a defendant is convicted of a single offense involving other illegal substances . . . all crimes committed prior or subsequent thereto could be used to enhance the offender's sentence under the stricter, felony track." *Id.*

DeVries argues section 124.401(5) infringes upon his fundamental right "to be at liberty," and treats persons who possess marijuana differently than persons who possess all other types of drugs. Therefore, he contends, the statute violates equal protection. We disagree.

In an equal protection analysis, we first must determine the standard to be applied when reviewing the statute at issue: strict scrutiny or a rational basis test. *State v. Phillips*, 610 N.W.2d 840, 844 (Iowa 2000); *Fowler v. State*, 382

N.W.2d 476, 478 (Iowa Ct. App. 1985). We apply strict scrutiny when the statute in question contains a suspect classification or impinges upon a fundamental constitutional right. *Fowler*, 382 N.W.2d at 478. If such classes or rights are not involved, we apply the rational basis test. *Id.*

Our courts have consistently analyzed equal protection challenges to sentencing schemes under a rational basis test. *See Cronkhite*, 613 N.W.2d at 668; *Phillips*, 610 N.W.2d at 844; *Ceaser*, 585 N.W.2d at 196. "A statute is not subject to strict equal protection scrutiny merely because its violation threatens potential criminal sanctions." *Fowler*, 382 N.W.2d at 478 (quoting *State v. Wehde*, 258 N.W.2d 347, 352 (Iowa 1977)). We have previously addressed, and rejected, DeVries's contention the statute threatens his fundamental right "to be at liberty":

> While appellant tries to distinguish between the threat of criminal sanctions and the rights to travel and of liberty, we find this to be a distinction without a difference. Each time criminal sanctions are threatened, the right to travel and of liberty are also threatened. We find the rational basis analysis is the appropriate test to use.

Fowler, 382 N.W.2d at 478-79. We will apply the rational basis test.

Under a rational-basis analysis, a statute is constitutional "unless it is patently arbitrary and bears no rational relationship to a legitimate governmental interest." *State v. Bell*, 572 N.W.2d 910, 911 (Iowa 1997) (quoting *Glowacki v. State Bd. of Med. Exam'rs*, 501 N.W.2d 539, 541 (Iowa 1993)). Under the rational-basis test, (1) the statute must serve a legitimate governmental interest, and (2) the means employed by the statute must bear a rational relationship to that interest. *Id.* We presume statutes are constitutional, and place a heavy

burden on the challenger to rebut this presumption. *Id.* We are reluctant to interfere with the legislature's latitude in fixing punishment, and to be found unconstitutional, a statute "must clearly, palpably, and without doubt infringe upon the constitution." *Id.* (quoting *Glowacki*, 501 N.W.2d at 541).

It is within the province of the legislature to determine the most appropriate means of punishing and deterring criminal activity. *Cronkhite*, 613 N.W.2d at 669. The legislature determined it was appropriate to punish the repeated possession of methamphetamine or other "hard drugs" more harshly than the repeated possession of marijuana. As the district court pointed out, the distinction could have been because the "comparative impact and addictive qualities" of methamphetamine significantly outweigh those of marijuana. The more severe punishment for users of methamphetamine and other hard drugs bears a rational relationship to a legitimate government interest. DeVries has failed to show no legitimate reason could be conceived for the different classifications. The statute does not violate DeVries's equal protection rights.

Cruel and Unusual Punishment. The Eighth Amendment to the United States Constitution and article I, section 17 of the Iowa Constitution prohibit cruel and unusual punishment.[1] "Although we have authority to interpret language in our state constitution to expand on the personal liberties guaranteed by similar or identical provisions in the federal Constitution, we have been reluctant to exercise this authority, in part out of a desire for consistency." *State v. Ramirez*, 597 N.W.2d 795, 797 (Iowa 1999).

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[1] The Eighth Amendment prohibition applies to the states through the Fourteenth Amendment. *Phillips*, 610 N.W.2d at 843.

Punishment may be cruel and unusual either because it inflicts torture or is otherwise barbaric or because it is "so excessively severe that it is disproportionate to the offense charged." *State v. Lara*, 580 N.W.2d 783, 785 (Iowa 1998) (quoting *State v. Robbins*, 257 N.W.2d 63, 68 (Iowa 1977)). Generally, a sentence that falls within the parameters of a statutorily prescribed penalty does not constitute cruel and unusual punishment. *Cronkhite*, 613 N.W.2d at 669.

As in the equal protection context, we afford the legislature substantial deference in setting the penalty for crimes. *Cronkhite*, 613 N.W.2d at 669. Legislative determinations of terms of imprisonment are given a strong presumption of constitutionality. *Lara*, 580 N.W.2d at 785. Notwithstanding, it is within the court's power to determine whether the term of imprisonment imposed is grossly disproportionate to the crime charged. *Cronkhite*, 613 N.W.2d at 669. If it is not, no further analysis is necessary. *Id.*

DeVries contends the statute punishes him disproportionately for an addiction he cannot control. He suggests a proportionate punishment would be to place him in drug treatment, rather than imprison him for five years "for something he cannot prevent." We disagree.

As the State suggests, DeVries may be understating his involvement with methamphetamine. Authorities caught him stealing lithium batteries, commonly used in manufacturing methamphetamine. Moreover, the statute does not "target" addicts. The statute provides penalties for the possession of methamphetamine, not its use. A sentencing statute does not become grossly

disproportionate simply because it can snare addicts as well as dealers. *United States v. Prior*, 107 F.3d 654, 660 (8th Cir. 1997), *cert. denied*, 522 U.S. 824, 118 S.Ct. 84, 139 L.Ed.2d 41 (1997) (rejecting defendant's Eighth Amendment claim that "because he is an addict, he is not as deserving of a life sentence as so-called drug kingpins."). DeVries's five-year sentence for his third conviction for possession of a highly addictive and dangerous controlled substance does not amount to cruel and unusual punishment. We affirm the district court on this issue.

Motion to Suppress. In our de novo review, we make an independent evaluation of the totality of the circumstances based on the entire record. *State v. Tolsdorf*, 574 N.W.2d 290, 291 (Iowa 1998). We are bound by findings of fact underlying the district court's ruling if they are supported by substantial evidence. *State v. Canas*, 597 N.W.2d 488, 492 (Iowa 1999). In reviewing the district court's ruling, we consider both the evidence presented at the suppression hearing and that introduced at trial. *Id.*

Warrantless searches and seizures are per se unreasonable unless the State proves by a preponderance of the evidence that one of the recognized exceptions to the warrant requirement applies. *Tolsdorf*, 574 N.W.2d at 292. The exceptions include searches based on consent, plain view, probable cause and exigent circumstances, and searches incident to arrest. *State v. Pickett*, 573 N.W.2d 245, 247 (Iowa 1997); *State v. Howard*, 509 N.W.2d 764, 766-67 (Iowa 1993). The State relies upon the search incident to arrest exception in this case.

A search incident to arrest prevents the arrestee from destroying evidence or gaining possession of a weapon which could be used to resist arrest or effect an escape. *Canas*, 597 N.W.2d at 492. The search must be substantially contemporaneous with the arrest and confined to the immediate vicinity of the arrest. *Id.* A search incident to arrest involves two questions: (1) whether the arrest was valid and, (2) if so, whether the search was reasonable both as to the area covered and the time within which it was made. *State v. Derifield*, 467 N.W.2d 297, 299 (Iowa Ct. App. 1991).

A preponderance of the evidence supports the search incident to arrest exception in this case. Iowa Code section 804.7(2) allows a police officer to arrest a person without a warrant where a public offense has been committed and the officer has reasonable grounds for believing the person arrested has committed it. Iowa Code § 804.7(2); *State v. Adams*, 554 N.W.2d 686, 690 (Iowa 1996). Information provided by loss prevention employees gave the officers reasonable grounds for believing DeVries shoplifted batteries from the store, thereby committing a fifth-degree theft. *See* Iowa Code §§ 714.1, 714.2(5). Stamp charged DeVries and asked Kearney to transport him to the police station. Kearney searched DeVries incident to the arrest. The district court erroneously found the search took place at the police station. Its finding does not affect the resolution of this issue, however. The search at the store was even more "substantially contemporaneous" with the arrest than a search at the station would have been. In addition, the officer properly limited the scope of his search to DeVries's person.

The record does not support DeVries version of the facts, which suggests Kearney did not find the second vial on his person. Rather, DeVries contends, he placed both vials on the table at the direction of loss prevention employees. DeVries argues the actions of loss prevention employees were at the direction of the police and resulted in an illegal search of his person. We disagree.

Fourth Amendment protection against warrantless searches and seizures does not apply to searches and seizures conducted by private individuals unless a private citizen acts as an agent of the state. *State v. Chambers*, 529 N.W.2d 617, 619 (Iowa Ct. App. 1994). Whether a private citizen has become an agent or instrument of the state depends on the total circumstances surrounding the challenged conduct. *State v. Knudsen*, 500 N.W.2d 84, 86 (Iowa Ct. App. 1993) (quoting *State v. Coy*, 397 N.W.2d 730, 731 (Iowa 1986), *rev'd on other grounds*, *Coy v. Iowa*, 487 U.S. 1012, 108 S. Ct. 2798, 101 L. Ed. 2d 857 (1988)).

The evidence does not support DeVries's contention he placed two vials on the table at the request of O'Neal, the loss-control manager. Kearney and O'Neal testified otherwise. Even if DeVries had placed both vials on the table, the actions of loss prevention employees did not rise to the level of government action. The record reveals no credible evidence showing the loss prevention employee's activities were "undertaken in cooperation with, at the request of, or to assist a law enforcement officer." *Knudsen*, 500 N.W.2d at 86.

The district court properly denied DeVries's motion to suppress. We affirm on this issue.

Sentencing. A sentence will not be upset on appellate review unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure, such as the trial court's consideration of impermissible factors. *State v. Witham*, 583 N.W.2d 677, 678 (Iowa 1998). Sentencing decisions of the trial court are cloaked with a strong presumption in their favor, and an abuse of discretion will not be found unless the defendant shows such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995).

In determining the proper sentence, the district court should weigh and consider all pertinent matters, including the nature of the offense, the attending circumstances, defendant's age, character, and propensities and chances of his reform. *State v. August*, 589 N.W.2d 740, 744 (Iowa 1999) (quoting *State v. Hildebrand*, 280 N.W.2d 393, 396 (Iowa 1979)). The courts owe a duty to the public as much as to defendant in determining a proper sentence. *Id.* The punishment should fit both the crime and the individual. *Id.*

Due to his long-term addiction to methamphetamine, DeVries claims he should have been given probation with substance abuse treatment in lieu of imprisonment. DeVries contends the district court failed "to recognize the enormous addictive power of methamphetamine."

DeVries's addiction was only one factor for the district court to consider. The possibility DeVries could benefit from treatment is outweighed by his failure to benefit from past probations and his continued pattern of criminal behavior. The presentence investigation report reveals an extensive criminal history,

beginning when DeVries was a juvenile. DeVries's history of drug convictions, theft, and other crimes, combined with unsuccessful probations, support the district court's decision to incarcerate DeVries in this case. We conclude the district court did not abuse its discretion in sentencing DeVries to five years imprisonment.

AFFIRMED.