



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed April 23, 1986

146

vs.

)

HUGHES A. BAGLEY, JR.,

)

5-693
85-178

Defendant-Appellant.

)

Appeal from the Iowa District Court for Plymouth County (3406-A)

- Richard J. Vipond and Phillip S. Dandos, Judges.

Defendant appeals his conviction and sentencing of drug trafficking charges.

AFFIRMED.

Charles Harrington, Chief Appellant Defender, and John P. Messina,
Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Pamela S. Greenman
Dahl, Assistant Attorney General, for plaintiff-appellee.

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

SCHLEGEL, J.

Defendant appeals his conviction and sentencing of drug trafficking charges. We affirm.

On January 31, 1984, defendant was charged, by information, with four counts of drug trafficking. The counts included manufacturing of marijuana in violation of Iowa Code section 204.401(1)(b) (1983), possession of marijuana with intent to deliver in violation of Iowa Code section 204.401(1)(b) (1983), and possession of a simulated controlled substance with intent to deliver in violation of Iowa Code section 204.401(2)(b) (1983). On November 7, 1984, the jury found defendant guilty of manufacturing and delivery of marijuana. Defendant then filed a motion to elect counts for sentencing on December 10, 1984, urging that he was guilty of only one offense and therefore the two counts should be merged into one. The motion was denied and defendant was sentenced to two concurrent indeterminate five-year terms. After defendant filed for a correction of sentence, the trial court resentenced him to reflect a conviction of only one count of violation of Iowa Code section 204.401(1)(b) (1983), and a single five-year indeterminate term was imposed.

The issues raised on appeal are: (1) whether the search of defendant's rooms was valid; (2) whether defendant was entitled to a mistrial based upon the expert testimony that opined that defendant possessed drugs with intent to deliver; (3) whether defendant was entitled to a mistrial after receiving a directed verdict on the simulated controlled substance charge; and, (4) whether defendant was illegally convicted of two crimes based upon a single offense. We will relate the facts as they apply to the separate issues on appeal.

I. Search and Seizure Issue. Defendant alleges that his fourth amendment rights were violated when the sheriff's deputy and the DCI agent entered his rooms at his parents' home and seized marijuana plants, a hydroponics growing

system, a scale, seven bottles of capsules, a marijuana growers guide, and personal correspondence with High Times magazine. In considering the alleged violation of constitutional safeguards, we are obligated to make an independent evaluation of the totality of the circumstances shown by the entire record. State v. Campbell, 326 N.W.2d 350, 352 (Iowa 1982).

The sheriff's deputy and the DCI agent were summoned to defendant's residence by Hughes A. Bagley, Sr., defendant's father and owner of the house. The deputy and agent were told of the parents' concern about the legality of their son's recent behavior. Defendant's father asked the agents to search the entire house and led them downstairs to the basement. The officials asked about the living conditions and arrangements with their son and both parents stated that no rent was asked for or paid and that there was never any agreement that defendant had what they considered an apartment within the house. The father described the basement as a common area and then gave the officials permission to enter an enclosed structure or room within the basement. The door was open when the agents first saw the room and they also saw a tub with hoses running inside the room when they descended the stairs into the general basement area. Both officials testified that they could see various materials for growing plants and packages of seeds not only through the open door but also through cracks in the partition wall itself. There was a combination lock on the door but it was just hanging on the door as the door itself was open.

The officials inquired as to who actually used this room and what was in it. Defendant's father explained that defendant had built the room and used the room but that he, the father, had been inside the room on several occasions and had several items that he owned stored there. Both of defendant's parents stated that they were never denied access to the room and could enter the room whenever they wished and the door would be unlocked for them. Based upon

this information, the officials entered the room and seized evidence that was later used against defendant.

After the search of the basement room was nearly completed, defendant's father directed the official's attention to two upstairs bedrooms used by defendant. By this time DCI agent Henderson had arrived and, after looking in the two rooms from the hallway, left the house to obtain a search warrant for the rooms. After he obtained the warrant, he and the other officials seized additional evidence from the upstairs rooms.

From this factual basis defendant alleges that his father did not have the authority to consent to either the basement search or the upstairs search. He also contends that the upstairs search is invalid due to the inadequacies of the information provided by agent Henderson in obtaining the search warrant.

The supreme court has had occasion to consider circumstances, like those before us today, where permission to conduct a search has been given by a third party. In State v. Campbell, 326 N.W.2d at 353, the supreme court said:

These cases involve issues of (1) whether consent was in fact given by a third party, State v. Ahern, 227 N.W.2d 164, 167-68 (Iowa 1975); and (2) who has authority to consent, State v. Bakker, 262 N.W.2d 538, 546-47 (Iowa 1978). With respect to the latter issue it has been held that when the prosecution seeks to justify a warrantless search by proof of voluntary consent "it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected. United States v. Matlock, 415 U.S. 164, 171, 94 S. Ct. 988, 993, 39 L. Ed. 2d 242, 249-50 (1974).

The facts in Campbell are analogous to those before us in that the defendant in Campbell was living in a house leased by his sister and performed household and lawn chores in exchange for a room to use. Campbell's sister permitted the police to search his room where the clothes previously worn by her brother were seized and eventually used as evidence against him. In discussing whether

the sister had the constitutional authority to permit the parties to search her brother's room, the supreme court said:

Critical in our findings on this issue is the showing that Cathy Campbell had not enjoyed a close relationship with defendant, had taken him in partly of necessity, and had been apprised that he had only recently been released from prison. As holder of the lease-hold interest in the subject premises, Cathy Campbell would have dominion over the entire household except as she voluntarily relinquished it in favor of the defendant. Defendant's right to privacy under such circumstances must be viewed not in light of what he would wish to have but rather in terms of what his sister would wish to give. We find nothing in the record which suggests that Cathy Campbell relinquished her dominion over her household so as to preclude her authorization of the acts which took place in the present case. Evidence of her infrequent entry of defendant's room was tied to lack of reason for being there rather than lack of authority. The evidence as a whole satisfies the test of Matlock that she possessed "common authority over or other sufficient relationship to the premises" in order to consent to the search thereof.

The record before us shows that defendant's parents allowed their 38-year-old son to move into the house primarily due to parole or probation considerations. We also can conclude from the totality of the circumstances that neither parent, especially the father, relinquished control over any area of the house. Finally, the very fact that defendant's father summoned the police and encouraged the search demonstrates a somewhat less than close relationship. Defendant's right to privacy therefore, viewed in the terms of what his father wished to give, cannot invalidate the warrantless search of the basement room in this case.

As we have noted, the father also gave permission to search the upstairs bedrooms. Despite the permission, a search warrant was obtained and the search was conducted under its authority. Defendant, however, attacks the constitutional sufficiency of the warrant. Because our analysis of the basement search also would apply to the bedrooms upstairs, we need not address whether the warrant was valid.

II. Mistrial Issues. Defendant argues that the trial court erred in refusing to grant a mistrial due to (1) the allegedly improper testimony of a State's witness, and (2) the trial court's acquittal of defendant on the simulated controlled substance charges.

During the course of the State's direct testimony of an expert witness, testimony was given regarding seven jars of blue and white capsules which were found in one of the rooms defendant occupied. During this direct examination the following exchange took place:

Q. Does the quantity of the capsules in those seven jars mean anything to you as a law enforcement officer?

MR. GOODWIN: Excuse me, Your Honor. I would object to that question in that it's not a question for expert testimony.

THE COURT: Overruled.

THE WITNESS: Yes. It means to me intent to deliver, as the quantity—each jar contains approximately 1,000 tablets—or capsules, rather, which would appear to me to be far more than a quantity necessary for personal use.

The trial court subsequently struck the expert's answer and admonished the jury to disregard it, but denied defendant's motion for a mistrial.

The trial court has broad discretion in ruling on a request for a mistrial. State v. Trudo, 253 N.W.2d 101 (Iowa 1977), cert. denied, 434 U.S. 903, 98 S. Ct. 299, 54 L. Ed. 2d 189. In order to demonstrate abuse of discretion the defendant must show that the trial court's discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. Id. Any error in admission of evidence is cured by a cautionary instruction to the jury, except in extreme cases where the prejudicial effect would probably remain with the jury. State v. Coffee, 182 N.W.2d 390, 392 (Iowa 1970); State v. Peterson, 189 N.W.2d 891 (Iowa 1971). The burden is on the defendant to show

the requisite prejudice. State v. Dalglish, 223 N.W.2d 627 (Iowa 1974); State v. Chadwick, 328 N.W.2d 913, 916 (Iowa 1983).

The crucial question, therefore, becomes whether the answer was so prejudicial to defendant that the jury would not be able to disregard it. The proof of prejudice to defendant is further affected, however, by the trial court's acquittal on the charges of the possession and intent to deliver controlled substance charges. Thus, we are confronted with the issue of whether the testimony of the witness, and the subsequent acquittal on the controlled substance issue so adversely prejudiced defendant on the marijuana charges that a refusal to grant a mistrial would be clearly untenable and unreasonable.

Defendant argues that despite the acquittal and the admonitions of the trial court, the resulting prejudice is undeniable. His argument stops short of alleging bad faith on the part of the prosecutor, but the thrust of his allegations relate to the insufficiency of proof the State had when it chose to prosecute defendant on the intent to deliver the controlled substance. Our review of the record does show a lack of evidence as to whether defendant intended to deliver the alleged controlled substance. But we decline any apparent offer to find bad faith in this instance. Our refusal stems from the remaining fact that the trial court acquitted defendant on this charge. We combine that fact with the remaining evidence produced at trial that supports the jury's verdict finding defendant guilty of possession and intent to deliver marijuana. Several witnesses testified that they had seen marijuana growing in defendant's basement room and that defendant was growing it. The search yielded approximately 522 grams of marijuana. Plastic bags containing marijuana were found along with a scale. Finally, a witness testified that she bought marijuana from defendant on several occasions. A strong argument has been made by defendant that the testimony regarding the alleged intent to deliver the capsules could

have been a deliberate plan to influence the jury concerning defendant's desire to deliver other illegal drugs. However, there is overwhelming evidence that defendant manufactured or grew the marijuana and was selling it. Based upon the solid evidence against defendant on the marijuana counts, we cannot agree that any prejudice befell defendant due to the controlled substance testimony and acquittal. See State v. Trudo, at 108.

III. Correction of Sentence. The jury found defendant guilty of manufacturing marijuana and possession of marijuana with intent to deliver. The trial court then sentenced defendant to two concurrent five-year sentences. On December 28, 1984, defendant filed a motion for correction of sentence alleging that both counts are merely alternative means of committing the single offense of drug trafficking. See State v. Williams, 305 N.W.2d 428, 431 (Iowa 1981); Iowa Code § 204.401(1) (1983). The trial court acknowledged the mistake and eventually resentenced defendant. However, defendant argues on appeal that the trial court was without jurisdiction to correct the sentence because a notice of appeal had previously been filed. He cites State v. Tensley, 334 N.W.2d 764, 765 (Iowa 1983), for his authority.

At the outset, we note that Tensley dealt with the granting of discretionary review, rather than an appeal as a matter of right that is presented before us today. More importantly, however, a closer look at the chronological order of events persuades this court that the trial court did not necessarily lose its jurisdiction on this issue.

As noted earlier, defendant filed a motion for correction of sentence on December 28, 1984. On January 21, 1985, the trial court granted defendant's motion for correction of sentence and ordered resentencing to take place on February 1, 1985. Defendant filed his notice of appeal on January 28, 1985. The trial court eventually resentenced defendant on February 8, 1985. It is

clear from these facts that the trial court had decided to correct its error, or at least address the issue, before defendant filed his notice of appeal. All that remained was for the trial court to execute its order. Once notice of appeal is given, the trial court ordinarily loses jurisdiction and it immediately becomes lodged in this court. State v. Olson, 259 Iowa 756, ___, 145 N.W.2d 645, 648-49 (Iowa 1966). However, Iowa Rule of Criminal Procedure 23(5)(a) states that the trial court may correct an illegal sentence at any time. And, of course this would logically mean anytime before an appeal is filed, and certainly before discretionary review is granted. See State v. Tensley, at 765. However, we are aware of no authority that would allow a notice of appeal to divest the trial court of jurisdiction of its attempt to correct an illegal sentence after it has granted defendant's motion but before its actual execution. In State v. Young, 292 N.W.2d 432, 435 (Iowa 1980), the supreme court said:

If a sentence is illegal—for example, a court mistakenly imposes a ten-year term when the statute authorizes a five-year maximum—the practice in this state has been for the district court to correct the illegality when it comes to that court's attention, or for this court to do so or to direct the district court to do so when it comes to this court's attention. Thus rule 23(5)(a) really adds nothing new; it reflects what Iowa courts have been doing. . . . Nothing in rule 23(5)(a) expressly requires a motion thereunder prior to appeal, section 814.20 of the Code authorizes us to dispose of an appeal by affirmation, reversal, "or modification" of the judgment, and we prefer to remain with the prior practice.

In this case, the illegality of the sentence was brought to the court's attention and the court corrected it by resentencing defendant to a five-year indeterminate term. We conclude the trial court had the jurisdiction to correct this sentence and therefore affirm the sentence imposed on February 8, 1985.

Because we hold the trial court did not err on any of the issues raised on appeal, the judgment and the sentence is affirmed.

AFFIRMED.