

FILED

JAN 28 1977

112

IN THE COURT OF APPEALS OF THE STATE OF IOWA
CLERK SUPREME COURT

THE STATE OF IOWA,)

Appellee,)

Filed January 28, 1977

vs.)

JAMES MELVIN YATES,)

Appellant.)

18
58664 & 65

Appeal from Lee District Court - J. R. Leary, Judge.

Appeal from Guilty Plea conviction and sentencing for
conspiracy. - Reversed.

Appeal from Guilty Plea conviction and sentencing for
receiving and concealing stolen property. - Remanded for re-
sentencing.

David J. Isaacson, of Des Moines, for appellant.

Richard C. Turner, Attorney General, and Barry M. Anderson,
Lee County Attorney, for appellee.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger
and Carter, JJ.

OXBERGER, J.

The defendant James Melvin Yates entered guilty pleas to two unrelated crimes: (1) conspiracy to commit a felony, a violation of Section 719.1, The Code and, (2) receiving and concealing stolen property, a violation of Section 712.1, The Code. He was sentenced to serve five years at Fort Madison on the receiving and concealing charge. He received a three year sentence in the conspiracy charge to run concurrently with the longer term.

We reverse the conspiracy conviction due to the failure of the trial court to comply with the *Sisco* standards in accepting the defendant's guilty plea. *State v. Sisco*, 169 N.W.2d 542 (Iowa 1969). We remand the receiving and concealing case for resentencing since the trial court's sentence was based in part on the fact of defendant's guilty plea to the conspiracy charge.

I. *The Conspiracy Charge.* The trial court, the Honorable J. R. Leary, in accepting defendant's plea of guilty to the charge of conspiracy, failed to:

1. Determine whether there was a factual basis to justify a finding of defendant's guilt of the crime of conspiracy. *Ryan v. Iowa State Penitentiary, Ft. Madison*, 218 N.W.2d 616, 619 (Iowa 1974). *Sisco*, 169 N.W.2d at 548.
2. Advise the defendant of his right to remain silent. *Brainard v. State*, 222 N.W.2d 711, 715-16 (Iowa 1974); *State v. Bell*, 210 N.W.2d 423, 426 (Iowa 1973); *Sisco*, 169 N.W.2d at 551.

In *Brainard* the court reiterated that although no rigid formula need be followed, meaningful compliance with the *Sisco* guidelines is required. 222 N.W.2d at 714. During the guilty plea proceeding the colloquy between the judge and the defendant did not include any inquiry into the factual basis for the plea. Further, the defendant was merely informed that the State at trial

would have to prove its case beyond a reasonable doubt "without the necessity of your producing any witnesses." This record fails to reflect an adequate *Sisco* compliance. The conspiracy charge must be reversed and remanded with directions to set aside the conviction and sentence and permit the defendant to plead anew. *State v. Wall*, 239 N.W.2d 548, 550 (Iowa 1976).

This resolution makes it unnecessary for us to reach the other issue urged as error by the defendant upon the conspiracy charge. Accordingly, we indicate no view regarding the appearance of the assistant county attorney as the prosecutor of the conspiracy charge. Defendant had alleged a violation of attorney-client privilege since the assistant county attorney had been the law partner of the county attorney who had earlier represented the defendant on the conspiracy charge before election to the office of county attorney.

II. *The Receiving and Concealing Charge.* Defendant seeks to invalidate the guilty plea on this charge, as well, by resort to the attorney-client privilege. Here he argues that since the county attorney had been his counsel at one point during the pendency of the conspiracy charge, he should not have been allowed to prosecute the receiving and concealing charge.

The defendant states that to permit a prosecutor who has represented the defendant in the past to prosecute his former client would undermine public confidence in lawyers. However, the cases cited by the defendant all involve situations where the crime involved had been committed during the time the prosecutor was defense counsel.

In *State v. Orozco*, 202 N.W.2d 344, 345 (Iowa 1972) the court said:

" . . . an attorney may not participate in the prosecution of a criminal case if, by reason of personal relations with the accused, he has acquired knowledge of facts on which the prosecution is based or which are closely interwoven therewith. . . . "

In the *Orozco* case the prosecutor had represented the defendant at the arraignment and then was appointed an assistant county attorney. At the start of trial the defense lawyer turned prosecutor appeared for the State. However, he withdrew prior to the impanelling of the jury. The court said the defendant was not prejudiced. In *Orozco* the prosecutor did not make any investigation nor develop a confidential status as a result of any consultation.

The key words are "knowledge of the facts on which the prosecution is based." *Orozco*, 202 N.W.2d at 346. In this case the defendant does not claim that the prosecutor received any information concerning the crime of receiving and concealing. Indeed, this crime was not committed until two months after the prosecutor had ceased serving as defendant's counsel.

The defendant's claim is that the prosecutor may have learned of facts concerning the defendant's own life and character which may have helped the prosecution. The defendant offers no evidence of such information. He cites no authority to support this rule.

We find no Iowa case directly on this point. The Texas Court of Criminal Appeals in *Reed v. State*, 503 S.W.2d 775 (1974) held that the trial court did not err in refusing to disqualify the prosecutor in an assault case who had previously represented the defendant as a retained attorney in a felony case in another court.

We do not decide whether a prosecutor who learns specific character information during a professional relationship with his client and later attempts to prosecute him for a subsequent crime using such information violates the attorney-client privilege. There is no indication within the record that this particular issue is before us now.

Defendant urges that even if the prosecution itself is not subject to attack the sentencing was tainted by it and must be set aside. We note the prosecutor during the sentencing proceeding said:

"My concern is that while this case (conspiracy) was pending Mr. Yates became involved with . . . this charge of receiving stolen property . . . These charges being filed had little or no effect on Mr. Yates and I do not feel probation would be appropriate."

The defendant contends that the prosecutor's statement indicated a personal knowledge of defendant's character based on his prior representation of the defendant that would make him an inappropriate candidate for probation. The defendant does not offer any evidence that the judge considered this possibility. The judge already knew from the pre-sentence report that the defendant had committed a new crime while the first case was pending. We will not indulge in speculation regarding what the judge may have concluded from the prosecutor's comments without more of a record than is present here.

We find no basis for resentencing upon the grounds urged by defendant. However, we do remand the receiving and concealing case for resentencing upon another ground. A trial court may consider " . . . any information about an accused derived from events prior or subsequent to the crime for which sentence is to be pronounced." State v. Summers, 219 N.W.2d 26 (Iowa 1974). The trial court consideration of the appropriate sentence relied at least in part on the fact that the defendant was guilty of another crime, conspiracy.

Since we have reversed the conspiracy conviction the defendant is now restored to his previous status of the presumption of innocence on that charge. He is entitled to a sentencing upon the receiving and concealing charge without regard to the con-

spiracy charge. Defendant has demonstrated that he stands to benefit substantially either from the standpoint of time served or possible time to be served from a resentencing on the receiving and concealing charge. See *Sanders v. United States*, 541 F.2d 190 (8th Cir. 1976).

We do not reach the issue whether it was reversible error for the prosecutor to appear at the combined sentencing proceeding where he previously had been defense counsel on one of the criminal charges. However, we do not want to be understood to approve such conduct.

REVERSED AND REMANDED.