

IN THE COURT OF APPEALS OF IOWA

SEP 29 1981

CLERK SUPREME COURT
Filed September 29, 1981

STATE OF IOWA,

Plaintiff-Appellee,

vs.

DANIEL A. TREIBER,

Defendant-Appellant.

1-199

65462

Appeal from Johnson District Court. Clinton E. Shaeffer, Judge.

The defendant appeals his conviction of voluntary manslaughter in violation of § 707.4, The Code. AFFIRMED.

John D. Cruise, of Barker, Cruise & Kennedy, Iowa City, Ia. and Donald S. Eisenberg, of Eisenberg, Giesen, Ewers & Hayes, Madison, Wis., for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa and Shirley A. Steffe, Assistant Attorney General for plaintiff-appellee.

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

PER CURIAM

The defendant appeals his conviction of voluntary manslaughter in violation of section 707.4, The Code 1979. He asserts (1) that the trial court improperly admitted testimony concerning the medical treatment given the victim; (2) that he was denied due process and equal protection of the law because the Iowa Rules of Criminal Procedure allow a county attorney to prosecute by information and cut off the accused's right to a preliminary hearing; and (3) that the application of State v. Hellwege, 294 N.W.2d 689 (Iowa 1980), to him operated like an ex post facto law. We affirm.

Our review is on error assigned. Iowa R. App. P. 4.

I. Admission of Evidence

The defendant argues that the court erred when it admitted evidence concerning the medical treatment given the victim and the cause of death. Defendant contends that the testimony was irrelevant because he stipulated that the cause of death was from knife wounds inflicted by the defendant. Defendant also contends that the testimony was cumulative and prejudicial.

Defendant's contention that his stipulation makes evidence regarding those elements of the crime irrelevant is without merit. When the defendant pled not guilty, this obligated the State to prove each element of the crime beyond a reasonable doubt, and the State "has the right, undiluted by stipulation, to present evidence relevant to the crime charged." State v. Cuevas, 288 N.W.2d 525, 530 (Iowa 1980). See also State v. Gibb, 303 N.W.2d 673, 682 (Iowa 1981); State v. Maxwell, 222 N.W.2d 432, 434 (Iowa 1974). The trial court did not err in admitting the testimony.

II. Preliminary Hearing

The defendant argues that he was denied due process and equal protection of the law when the county attorney filed an Information and thus cut off the defendant's opportunity for a preliminary hearing.

Under Iowa R. Crim. P. 2(4)(a), the defendant is entitled to a preliminary hearing unless (1) he is indicted by a grand jury, (2) a trial information is filed, or (3) he waives it. If the prosecutor decides to file a trial information, he or she must have a judge approve the information by finding that the evidence contained therein, if unexplained, would warrant a conviction by the jury. Iowa R. Crim. P. 5(4). If a preliminary hearing is held, the purpose is to determine whether there is probable cause to believe the

defendant committed the offense charged. Iowa R. Crim. P. 2(4)(b). Therefore, under either procedure, the judicial determination of probable cause required by Gerstein v. Pugh, 420 U.S. 103 (1975) is satisfied. Gerstein also held that a judicial hearing is not a prerequisite to prosecution by information. The defendant's right is the right to have an independent determination of probable cause, not the right to present exculpatory evidence, cross-examine witnesses, and be present with counsel. In State v. Lass, 228 N.W.2d 758 (Iowa 1975), an identical procedure to this case was followed: the defendant appeared, a preliminary hearing was set, but before preliminary hearing was held, the county attorney filed an information and the preliminary hearing was not held, and defendant was later convicted. The defendant challenged this procedure, but the court held that the conviction based on the prosecutor's information without a preliminary hearing was valid. Such is the case here. The defendant's constitutional rights were not violated by the procedure followed.

In any event, the failure to have a preliminary hearing would not void the conviction. "Defendant's course, if he believed the denial of his demand was wrong as to detention, was to obtain a writ of habeas corpus, and if that proved unsuccessful in the district court, to have that habeas corpus decision reviewed by us as a matter of right - rather than to assert subsequently that the conviction after full trial should be set aside." State v. Henderson, 268 N.W.2d 173, 176 (Iowa 1978).

III. Sentencing

The defendant was convicted of voluntary manslaughter in violation of section 707.4, The Code 1979, on June 7, 1980. The Court in Hellwege held that voluntary manslaughter is a felonious assault included within the meaning of the term forcible felony. The defendant was sentenced August 4, 1980. The trial judge applied the Hellwege decision to the defendant. Defendant argues this operated like an ex post facto law and was contrary to due process.

Voluntary manslaughter is a class "C" felony, and section 902.9, The Code 1979, provides that the punishment for a class "C" felony is confinement for no more than ten years, and a fine of up to \$5000. Section 907.3, The Code 1979, allows the trial judge to defer or suspend the sentence, but states that this section shall not apply to forcible felonies. Section 702.11, The Code 1979, defines forcible felony as "any felonious

assault, murder, sexual abuse, kidnapping, robbery, arson in the first degree, or burglary in the first degree." Since Hellwege interpreted voluntary manslaughter to be a forcible felony, the trial court stated it had no discretion to give the defendant probation, and sentenced him to not more than 10 years. Defendant contends this was error. We find no error and affirm the trial court.

In Knutson v. Brewer, 619 F.2d 747 (8th Cir. 1980), the defendant was charged and convicted of kidnapping for ransom. The term "for ransom" had never been interpreted to include an illegal act, as opposed to a payment of money, so the trial judge sentenced the defendant only for the lesser offense of kidnapping. The State brought certiorari to the Iowa Supreme Court, which held that defendant should have been sentenced for kidnapping for ransom. Defendant was resentenced to life imprisonment on remand. On direct appeal his conviction was affirmed. Defendant then petitioned the federal district court for writ of habeas corpus. The petition was dismissed. He appealed to the Eighth Circuit Court of Appeals, and the Eighth Circuit, in affirming the conviction, held that the Court's interpretation did not violate either the due process clause, or the ex post facto clause. The Court stated, "[w]hen a person does an act that he well knows to be a violation of some law, and when a statute is later interpreted to cover his conduct in a way that does not do violence to the ordinary understanding of the English language, the Fourteenth Amendment is not offended." Id. at 750. The Iowa Court in Hellwege simply gave a common sense interpretation to the terms already in the statute. An interpretation of an existing criminal statute does not violate the ex post facto clause, and it can violate the due process clause only when it interprets a law in an unexpected way, or unexpectedly expands a law to cover conduct without fair notice. Knutson, supra at 751. The Court's interpretation in Hellwege was not so unexpected so as to violate the defendant's due process right. Although the Court had not previously interpreted forcible felony to include voluntary manslaughter, "the Due Process Clause does not automatically guarantee that a defendant will receive the benefit of the narrowest verbally possible construction of a previously unexplicated phrase in a state criminal statute." Knutson, supra at 751. The trial court did not err in applying Hellwege to the defendant in this case.

Finding no error, we affirm the trial court.

AFFIRMED.