FILED
MAY 31 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Appellee,	)	Filed May 31, 1978
v.	)	
GEORGE CLAYTON BLUE,	)	493/59552
Appellant.	)	

Appeal from Hardin District Court - Albert L. Habhab, Judge.

Appeal from convictions for conspiracy to commit larceny and larceny of property over $20 in value in violation of §§ 719.1, 709.1 and 709.2, The Code. Defendant raises evidentiary and double punishment issues. Modified and affirmed.

William L. Kutmus, Des Moines, for appellant.

Richard C. Turner, Attorney General, Faison Sessoms, Assistant Attorney General, and Jim R. Sween, Hardin County Attorney, for appellee.

Submitted to Allbee, C.J., Snell, Oxberger and Carter, JJ.; Donielson, J., takes no part.

PER CURIAM

George Clayton Blue appeals his convictions for conspiracy to commit larceny and larceny of property over $20 in value, violations of §§ 719.1, 709.1 and 709.2, The Code. He raises a variety of contentions which we consider in the order briefed.

I. Defendant first insists that a notebook which was taken from his person when he was incarcerated in the Black Hawk County jail in Waterloo after his arrest should have been suppressed. His complaint is based on the lack of a warrant for the seizure and on the delay which occurred between his arrest in Newton and his incarceration in Waterloo.

Warrantless searches for evidence of crime are reasonable when conducted pursuant to a valid arrest. United States v. Robinson, 414 U.S. 218, 235, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973). Searches and seizures which could be made at the time of arrest may also be conducted later, when the accused arrives at the place of detention. United States v. Edwards, 415 U.S. 800, 803, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974), citing Abel v. United States, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960); see State v. Salazar, 213 N.W.2d 490, 492 (Iowa 1973). Thus, the defense having stipulated that the arrest was valid, seizure of the notebook was within the search incident to arrest exception to the warrant clause. Exigent circumstances justifying the use of that exception are apparent when consideration is given to the ease with which the notebook could be destroyed. And the search and seizure here was certainly not of the variety which "violate the dictates of reason because of their number or their manner of perpetration," a question reserved in United States v. Edwards, 415 U.S. at 808, n. 9. Trial court's refusal to suppress the notebook was correct.

II. Defendant's second contention is that tape recordings of conversations between a special agent and Roger Hertema should not have been admitted because a gap was left in the chain of custody. The supreme court has recently considered a closely related, but different, question on the foundation for tape recordings in State v. Russell, 261 N.W.2d 490 (Iowa 1978). Among the reasons recited for allowing admission of the tape in Russell was that the chain of custody had been established. 261 N.W.2d at 496. Russell, however, exemplifies a refusal to require technical or ironclad foundation requirements for such recordings. Instead, the emphasis appears to be on whether the

offered recording is what it purports to be: an accurate reproduction of the conversations in question. This attitude is illustrated by Russell's approving quotation of United States v. Biggins, 551 F.2d 64, 67 (5th Cir. 1977), 261 N.W.2d at 495-96:

> If there is independent evidence of the accuracy of the tape recordings admitted at trial, we shall be extremely reluctant to disturb the trial court's decision. . . .

And, in State v. Anderson, 159 N.W.2d 809, 815 (Iowa 1968), the supreme court vested trial courts with "broad discretion to determine the admissibility of the evidence as relevant and trustworthy. . . ." See also State v. Singleton, 311 So.2d 881, 884 (La. 1975).

In the present case, special agent Roger Downs testified without equivocation that the tape introduced as State's exhibit 3 accurately reproduced the conversation between himself and Roger Hertema. The fact that the trial occurred approximately ten months after the conversations were recorded is, of course, entitled to some consideration. It is not sufficient, however, to support a finding that trial court abused its discretion in admitting these tapes. See also State v. Bakker, 262 N.W.2d 538, 542-43 (Iowa 1978).

III. Defendant next complains that trial court should not have allowed State's exhibits 24A through 24D, a chart which showed the temporal relationships between telephone calls among various parties and other events involved in the crimes. The bases for his complaint are that the exhibits violated the best evidence rule, that Roger Downs, the sponsoring witness, was not competent, and that the exhibits were prejudicial.

The best evidence rule had no application to this situation. The State was not attempting to prove the content of a writing. It was, instead, attempting to summarize information which was, in part, recorded in the telephone toll call records which were admitted pursuant to stipulation as plaintiff's exhibit 23. See Schiltz v. Cullen-Schiltz & Assoc., Inc., 228 N.W.2d 10, 19-20 (Iowa 1975) (The best evidence rule "has no application where the fact to be proven is independent of any writing even though the fact has been reduced to a writing or is evidenced by a writing."); see also U.S. Homes, Inc. v. Yates, 174 N.W.2d 402, 404 (Iowa 1970).

Whatever doubt which might remain on the subject is removed when consideration is given to the availability of State's exhibit 23. The possibilities of inaccuracies or fraud are thus minimized. Cf. U.S. Homes, Inc. v. Yates, 174 N.W.2d at 404 ("The underlying purpose of the best evidence rule is the prevention of fraud."); see generally E. Cleary, McCormick on Evidence § 231 (2d Ed. 1972).

Nor is defendant's challenge to Downs's competency well-founded. A witness, in order to be competent, must meet three criteria: (1) he must have knowledge of the facts about which he testifies; (2) he must have a recollection of those facts; and (3) he must be able to communicate his recollections to the court. State v. Harvey, 242 N.W.2d 330, 335 (Iowa 1976). The record demonstrates that Downs was familiar with the toll call records from which the chart was made, and that he had no difficulty in recalling and communicating those facts.

Finally, the admission of State's exhibit 23 and the opportunity for cross-examining Downs on exhibits 24A through 24D render the risk of that exhibit being prejudicially misleading highly remote. State's exhibits 24A through 24D were properly admitted. See generally McCormick, supra at § 213.

IV. Defendant moved for a directed verdict, claiming that the testimony of his co-conspirator was uncorroborated. He assigns trial court's refusal to grant the directed verdict as error.

The standards by which the adequacy of corroborative testimony is judged were reviewed in State v. Vesey, 241 N.W.2d 888, 890 (Iowa 1976). The State, in its brief, has accurately summarized important portions of the co-conspirator's testimony and has quite helpfully referred us to portions of the record which support material parts of the testimony of the co-conspirator, Roger Hertema. (Appellee's brief 18-23.) The facts on which Hertema was corroborated tended to connect defendant with the commission of the crime. This assignment is without merit.

V. The fifth division of defendant's brief is addressed to the propositions that defendant was subjected to double punishment and that the evidence was insufficient to support his conviction.

The sentences imposed upon the conspiracy count and the first substantive larceny count are not double punishment. Neither offense is included within the other. A conspiracy trial does not bar prosecution for the substantive offense. State v.

Reynolds, 250 N.W.2d 434, 439 (Iowa 1977), citing State v. Thompson, 241 Iowa 16, 21, 39 N.W.2d 637, 640 (1949). Those rules resolve the related double punishment issue arising from counts I and II of the information.

However, defendant has been subjected to double punishment by being sentenced on both count II and count III. Those two counts charge him with larceny for the theft of two tractors from the same person at the same time and place. The State has confessed error on this point, but suggests that the error has been waived because it was not raised until after presentation of the State's case in chief. State v. Birkestrand, 239 N.W.2d 353, 363 (Iowa 1976) does indeed contain language suggesting a waiver of double punishment is possible. Nonetheless, the supreme court in State v. Gilroy, 199 N.W.2d 63, 68 (Iowa 1972) raised the issue sua sponte to resolve it in defendant's favor. While Gilroy probably does not compel similar treatment here, the nature of the error and of the remedy suggest that following the Gilroy course is the better alternative. Therefore, the judgment entered upon count III will be annulled and set aside.

In reviewing defendant's challenge directed to the sufficiency of the evidence to support his conviction, we are guided by State v. Overstreet, 243 N.W.2d 880, 883-84 (Iowa 1976). The conviction is adequately supported by the evidence.

VI. Finally, defendant argues that it was error to allow the State to inquire into the nature of one of his prior felony convictions. Defendant had been convicted of conspiracy to embezzle or misapply bank funds and embezzlement or misapplication of bank funds. Trial court, in response to a motion in limine, permitted the State to solicit from defendant the number of prior convictions, but allowed inquiry into the nature of the second conviction alone. The court precluded inquiry into the nature of the conspiracy charge due to its similarity with the present count I. Defendant inconsistently complains in his brief both that "[i]t is almost impossible to gauge the speculation of the jury on the unexplained conviction," and that "[d]etails serve only to increase the prejudice the record creates. . . ." We are not persuaded that error occurred; the rule of State v. Martin, 217 N.W.2d 536, 542 (Iowa 1974) was properly applied.

All assignments have been considered. With the exception noted in division V, all are without merit.

The judgment entered on count III is hereby annulled and set aside. The judgments on counts I and II are each affirmed. The trial court record shall accordingly be corrected.

Affirmed as modified.