FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,
Plaintiff-appellee,
vs.
JUDY J. COLEMAN,
Defendant-appellant.

Filed February 26, 1980

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Appeal from Polk District Court - Dale S. Missildine, Judge.

Defendant appeals sentence imposed upon her conviction of possession of a controlled substance (amphetamines) with intent to deliver, in violation of section 204.401, supplement to the Code 1977, and also appeals order overruling her motion for correction of sentence. Reversed and remanded for resentencing.

Martha Shepard of the Polk County-Des Moines Offender Advocate Office, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, Douglas F. Staskal, Assistant Attorney General, and Dan Johnston, Polk County Attorney, Des Moines, for plaintiff-appellee.

Heard by Oxberger, C.J., Donielson, Snell, Carter and Johnson, JJ.

DONIELSON, J.

Defendant appeals indeterminate 5-year sentence imposed upon her conviction of possession of a controlled substance (amphetamines) with intent to deliver, in violation of section 204.401(1), supplement to the Code 1977. Defendant also appeals order overruling her motion for correction of sentence. On appeal, defendant asserts she should have been sentenced as a serious misdemeanant pursuant to section 204.410, supplement to the Code 1977, not a felon, since the trial court failed to instruct the jury on the element of profit and the jury made no finding as to intent to profit. We reverse the overruling of defendant's motion and remand this case for resentencing.

Our scope of review is limited to correction of errors at law. Iowa R. App. P. 4.

Defendant was charged by information with possession of a schedule II controlled substance (amphetamines) with intent to deliver, in violation of section 204.401(1). In the jury trial, the State presented evidence on the elements of possession, intent to deliver, and intent to profit. At the close of the evidence, parties' attorneys received the proposed instructions. Instruction No. 8 defined the crime charged, but did not include the element of profit. None of the other instructions mentioned profit. Neither defense counsel nor the county attorney objected to this failure to instruct on the element of profit or requested any such instruction. The jury received these instructions, along with verdict forms also not mentioning the profit element. The jury returned a guilty verdict to the charge of possession of a schedule II controlled substance with intent to deliver, § 204.401(1), but made no finding concerning intent to profit.

Pursuant to sections 204.401(1), 902.9(4), and 902.3, defendant was sentenced to a term not to exceed five years. Such a sentence is applicable only if defendant is convicted as a class C felon of possession of a schedule II substance with intent to deliver for a profit. § 204.410. Defendant's motion for correction of sentence was overruled.

We hold the trial court's failure to instruct the jury or the jury's failure to make a finding as to profit prohibits imposition of a sentence as if intent to profit had been found, and the trial court erred in so sentencing her. Section 204.410, provides, in part:

> In a prosecution for unlawful delivery or possession with intent to deliver a controlled substance, if the prosecution proves that the defendant violated the provisions of 204.401, subsection 1, but fails to prove that the defendant delivered or possessed with intent to deliver the controlled substance for the purpose of making a profit, the defendant shall be guilty of an accommodation offense and shall be sentenced as if convicted of a violation of section 204.401, subsection 3.

Here, since the jury made no finding as to profit nor was instructed on the matter, we hold the prosecution failed to prove defendant delivered or possessed with intent to deliver the controlled substance for the purpose of making a profit. When an instruction marshals elements of a crime and mandates conviction on State's proof of those elements beyond a reasonable doubt, all essential elements of the crime must be included in the instruction. State v. Billings, 242 N.W.2d 736, 737 (Iowa 1977); State v. Watts, 223 N.W.2d 234, 237 (Iowa 1974). Accordingly, defendant was guilty only of an accommodation offense, and should have been sentenced under section 204.401(3), not section 204.401(1). See State v. Metcalf, 260 N.W.2d 857, 859-60 (Iowa 1977). Both parties agree the jury instructions were erroneous on this point.

The fighting issue here is whether this error can be attacked by defendant through a motion for correction of sentence. The State contends this error was an instructional one and could only be attacked by motion for a new trial, Iowa R. Crim. P. 23(2)(b). Under these circumstances, we believe defendant's motion was the correct procedure to challenge her sentence. Iowa R. Crim. P. 23(5) provides that a "court may correct an illegal sentence at any time." Since defendant's sentence violates section 204.410, a motion for correction of sentence is a correct and proper motion. We also find State's waiver argument unpersuasive. Defense counsel should not be expected to request instructions leading to conviction of a higher crime than that provable on the charge; it is the State's responsibility to object to such erroneous instructions.

We reverse the trial court's overruling of defendant's motion for correction of sentence and remand this case for resentencing in accordance with sections 204.410 and 204.401(3).

REVERSED AND REMANDED.