

IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

TIMOTHY LLOYD GINAPP,)

Defendant-Appellant.)

1-58

65011

Appeal from Cerro Gordo District Court - Ralph F. McCartney, Judge.

Defendant-appellant appeals from a jury conviction of acting with or entering into a common scheme or design with one or more other persons to deliver a scheduled II controlled substance, cocaine, for the purpose of making profit and not for accommodation in violation of section 204.401(a), The Code 1979. Defendant contends that trial court erred 1) in admitting into evidence tape recorded conversations and testimony of certain out of court statements over his motion in limine and objections at trial because such evidence was inadmissible hearsay; and 2) in overruling his motion for new trial based on these alleged errors. **AFFIRMED.**

Mark R. Schoeller, Clear Lake, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Mark R. Schuling, Assistant Attorney General, for plaintiff-appellee.

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

PER CURIAM

Defendant-appellant, Timothy Lloyd Ginapp, appeals from a jury conviction of acting with or entering into a common scheme or design with one or more other persons to deliver a schedule II controlled substance, cocaine, for the purpose of making profit and not for accommodation in violation of section 204.401(a), The Code 1979. Defendant contends that trial court erred in admitting into evidence tape recorded conversations and testimony of certain out of court statements over his motion in limine and objections at trial because such evidence was inadmissible hearsay. He also asserts that trial court erred in overruling his motion for new trial based on these alleged errors. We affirm.

Defendant was charged originally by information with violation of section 204.401(la), The Code 1979, for delivery of a schedule II controlled substance. The information was subsequently amended to charge defendant with acting with or entering into a common scheme or design with one or more other persons to deliver a schedule II substance in violation of that same code section. Prior to trial, defendant filed a motion in limine to prohibit the State from offering into evidence or referring to tape recorded conversations in which the defendant was not a party because such conversations would be hearsay. Trial court considered the minutes of testimony filed with the original and amended informations and overruled the motion on the ground that the statements contained therein were not offered to prove the truth of the matter asserted, but were offered to indicate why state agents acted as they did. In the alternative, trial court ruled that the statements were reasonably attributable to co-conspirators and thereby admissible as an exception to the hearsay rule.

During trial, over defendant's repeated objections, tape recordings of surveillance and telephone conversations between state agents and suspects were admitted into evidence and played for the jury. State agents were also allowed to testify to the substance of other conversations they had with these suspects. Following conviction and denial of his motion for a new trial, defendant filed this appeal.

I. Scope of Review. Our review of defendant's appeal is on assigned error only. Iowa R. App. P. 4. Defendant's challenge to the trial court's ruling is limited to the specific basis of his objection below. State v. Kidd, 239 N.W.2d 860, 864 (Iowa 1976). If the hearsay rule can be found inapplicable under any theory, the ruling will be upheld.

Id.

II. Propriety of Trial Court's Rulings. Defendant asserts that the statements made by suspects to state agents which were recorded, played at trial, and testified to by the agents were hearsay and inadmissible. We disagree.

The Iowa Supreme Court, in State v. Miller, 204 N.W.2d 834 (Iowa 1973), adopted the definition of hearsay in rule 801, Federal Rules of Evidence, which provides, "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearings, offered in evidence to prove the truth of the matter asserted." Id. at 840. See also Kidd, 239 N.W.2d at 864. The supreme court has also adopted "rule 801 in so far as it excludes admissions from the definition of hearsay." State v. Hamilton, 236 N.W. 325, 330 (Iowa 1975). The court held in Kidd that "when there is substantial evidence of a conspiracy, whether the offense charged is conspiracy or not, everything said by any conspirator in furtherance of the common purpose is deemed to have been said in behalf of all parties to the conspiracy. [citation]. A statement by a co-conspirator of a party during the course and in furtherance of the conspiracy is thus admissible against the party as an admission [citations]." 239 N.W.2d at 864. However, the declaration is admissible only when a foundation for its reception is laid by independent proof of the conspiracy. State v. Blyth, 226 N.W.2d 250, 269 (Iowa 1975).

Conspiracy is defined in section 706.1, The Code 1979, as:

[A]n agreement or combination between two or more persons to engage in a course of conduct which will consist, in whole or in part, of criminal acts to be committed by one or more of the conspirators. A person shall not be convicted of a conspiracy without proof of an overt act by one or more of the conspirators evidencing a design to accomplish the purpose of the conspiracy by criminal means.

In the present case there is substantial evidence, independent of the allegedly hearsay statements, that defendant conspired with Lyle Sweeny to deliver one pound of cocaine to state agents. Agent Basler's testimony at trial provided the following foundation.

Basler and another agent attended a prearranged meeting with Sweeny and informant Chris Holahan for the purpose of discussing the purchase of a large quantity of drugs. At the meeting the agents purported they had a large quantity of money and were interested in making a large drug investment. Later, Agent Basler purchased a small sample of cocaine from Sweeny for \$500. The agents indicated to Sweeny that they were willing to purchase one pound of cocaine. After several conversations with Sweeny, Agent Basler expected to purchase the cocaine on March 18, 1979, but the cocaine did not arrive. He told Sweeny to call his (Sweeny's) connection in Mason City to "see what was going on." On March 21, 1979, Agent Basler telephoned Sweeny at a

number listed under the name of Tim Ginapp and, after speaking with Sweeny, talked to another person he believed to be "Tim." In a later telephone conversation on March 21, made to the same number, Agent Basler told Sweeny that he preferred to deal in large drug transactions at a public area. He met Sweeny at a restaurant parking lot where Sweeny counted the agent's money. Sweeny and the agents then drove to a grocery store where Sweeny got out of the car, crossed the parking lot, and met a man, identified as the defendant, who carried a white cardboard box. The two men returned to the agents' car; Agent Basler asked the defendant whether or not he had the cocaine, whereupon defendant opened the box to display its contents. Agent Basler was unable to see inside, so he asked for the box to get a better look. After the defendant gave him the box an arrest was made. Later, the contents of the box were identified as cocaine.

From this record, we conclude that there is substantial independent evidence for trial court's finding that a conspiracy existed among the defendant, Sweeny, and Holahan. There is also no doubt that the statements were made during the pendency and in furtherance of that conspiracy. Upon establishment of such foundation, out of court statements made by the co-conspirators were admissible. Kidd, 239 N.W.2d at 864. The record discloses that this testimony was accurately set out in the state's minutes of testimony and thereby provided an adequate foundation for the trial court's denial of the defendants motion in limine.

Focusing on the trial, we find the record discloses that many of the statements to which defendant objected were admitted into evidence prior to introduction of independent evidence of a conspiracy. Deference, however, is given to trial court's determination of the order in which evidence may be introduced. State v. Moore, 217 Iowa 872, 880, 251 N.W. 737, 742 (1933). Even assuming that trial court should not have admitted or allowed the statements into evidence prior to the establishment of the requisite foundation, such error was harmless because, as the trial progressed, independent evidence of a conspiracy was introduced, thereby establishing the required foundation. Trial court's rulings thus did not prejudice substantial rights of the defendant. Finding no error, we affirm trial court's judgment.

AFFIRMED.