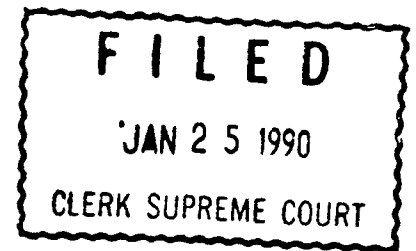


IN THE COURT OF APPEALS OF IOWA

No. 9-341 / 88-1476



STATE OF IOWA,

Appellee,

vs.

GENE RYAN BOYKIN,

Appellant.

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Appeal from the Iowa District Court for Woodbury County, Terry L. Huitink, Judge.

The defendant appeals from his conviction, following a jury trial, on five counts of delivery of a controlled substance. **AFFIRMED.**

Frank Cosgrove, Sioux City, for defendant-appellant.

Thomas J. Miller, Attorney General; Bruce Kempkes, Assistant Attorney General; and J. Keith Rigg, Assistant County Attorney, for plaintiff-appellee.

Heard by Hayden, P.J., and Sackett and Habhab, JJ.

HABHAB, J.

Defendant Gene Boykin appeals from his conviction, following a jury trial, of five counts of delivery of a controlled substance. We affirm.

Defendant was charged on December 18, 1986, with five counts of delivery of a controlled substance. On January 27, 1987, he was arraigned in district court. The arraignment was in writing. The defendant entered a plea of not guilty and waived his right to a speedy trial.¹

On December 1, 1987, pursuant to a plea bargain with the State, defendant entered a guilty plea to two counts of delivery involving cocaine. There the matter rested until January 15, 1988, when the defendant, who was then represented by different counsel, filed a motion in arrest of judgment. In his motion, defendant contended that his guilty plea was defective because his first attorney had not informed him about the availability of the entrapment defense.

After a hearing on defendant's motion, the district court held that defendant's guilty plea should be vacated and the case immediately assigned for trial. The court in so ruling reasoned that defendant's initial counsel was ineffective for failing to advise defendant of a possible defense of entrapment. The State filed a notice of appeal and the defendant filed a notice of cross-appeal to this ruling. The appeals were subsequently dismissed and

1. This waiver of right was never withdrawn.

procedendo issued on June 23, 1988. After procedendo issued, the case was assigned for trial for August 23, 1988. On August 16, the defendant filed a motion to dismiss alleging in substance that the trial information should be dismissed for the State failed to arraign him anew after the trial court's ruling on his motion in arrest of judgment. The motion to dismiss was overruled.

Our scope of review is for errors at law. Iowa R. App. P. 4. Defendant first contends he should have been rearraigned after the district court vacated his guilty plea because then he would have been able to make use of depositions, motions, and discovery, the timeliness of which is measured against the date of arraignment. Our reading of the district court's ruling leads us to conclude that the district court did not grant defendant's motion in arrest of judgment, but rather used its discretionary powers under Iowa Rule of Criminal Procedure 8(2)(a) to permit defendant to withdraw his previously-entered guilty plea. See State v. Ramirez, 400 N.W.2d 586, 587 (Iowa 1987).

As it relates to the court's discretionary power under rule 8(2)(a), we note the following from the trial court's ruling:

[T]hat the defendant's plea of guilty should be vacated and held for naught, and that this cause should be immediately assigned for trial, by the court administrator at the earliest possible date.

This ruling by the court is consistent with the provisions of rule 8(2)(a) and obliges the defendant's prayer in his motion in arrest of judgment "for such further relief as the premises may demand." No appeal was taken from this ruling. Under the circumstances here, defendant was not required to be rearraigned.

But even if Judge Gaul's ruling could be interpreted as an "arrested judgment," we would reach the same result. Our law recognizes only three pleas in criminal cases: guilty, not guilty, or former conviction or acquittal. Iowa R. Crim. P. 8(2)(a).

It is clear here that the defendant first entered a plea of not guilty. Later he entered a plea of guilty. As noted, the guilty plea was then set aside by the trial court.

The matter proceeded to trial and the jury was told the defendant had entered a not guilty plea. His position, in our opinion, was precisely the same as if he had renewed his plea of not guilty. See State v. Lynch, 197 N.W.2d 186, 188 (Iowa 1972); cert. denied, 409 U.S. 1116 (1973).

The defendant expressed concern that he did not proceed with discovery based on his belief that he had to be rearraigned after Judge Gaul's ruling. But the defendant was told by the judge at the time his guilty plea was set aside that his case was to be "immediately set for trial." Except for a motion for continuance filed by the defendant

a few days before trial, the record is void of any request for discovery. Under these circumstances, we are unable to find prejudice.

Defendant next contends the trial court erred in refusing to instruct the jury that possession of a controlled substance is a lesser-included offense of the crime of delivery. We find defendant's arguments on this issue to be without merit. The statutory elements approach is the method used in Iowa for determining lesser-included offenses. See State v. Jeffries, 430 N.W.2d 728, 732 (Iowa 1988). Under this approach, the Iowa Supreme Court has clearly held that possession is not a necessary element of delivery; therefore, possession of a controlled substance is not a lesser-included offense of the crime of delivery of a controlled substance. State v. Kucera, 244 N.W.2d 571, 573 (Iowa 1976); State v. Grady, 215 N.W.2d 213, 214 (Iowa 1974).

Finally, defendant asserts that the trial court erred by refusing to grant a mistrial after a State's witness testified defendant had sold him drugs prior to the incidents at issue here. If the objection to a question is made and follows the answer, then a motion to strike, coupled with an application to have the objection precede the answer and an excuse for tardiness, must be made. State v. Washington, 356 N.W.2d 192, 194 (Iowa 1984).

Defendant, however, made no objections to the now ³²³ objected-to testimony of State's witness Wainwright. We, therefore, conclude defendant has failed to preserve error on this issue. See id.

AFFIRMED.