

IN THE COURT OF APPEALS OF IOWA

FILED

SEP 21 1982

CLERK SUPREME COURT

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed September 21, 1982

125

vs.

)

FREDERICK JOSEPH CANTU,

)

2-125

65838

Defendant-Appellant.

)

Appeal from Scott District Court - Margaret S. Briles, Judge.

Defendant appeals his conviction and sentence, after a jury trial, on a charge of delivery of a controlled substance (marijuana) in violation of Iowa Code § 204.401(1) (1979), asserting that trial court erred in admitting evidence over proper objections and that the sentence which imposed a prison term of up to 10 years was not authorized by Iowa Code § 204.401(1). The State concedes improper sentencing. AFFIRMED IN PART AND REMANDED FOR RESENTENCING.

Francis C. Hoyt, Jr., Appellate Defender, and Scott D. Rosenberg, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Richard Cleland, Assistant Attorney General, for plaintiff-appellee.

PER CURIAM

Defendant, Frederick Joseph Cantu, appeals his conviction and sentence, after a jury trial, on a charge of delivery of a controlled substance (marijuana) in violation of Iowa Code § 204.401(1) (1979). On appeal defendant asserts that trial court erred in admitting evidence over proper objections and that the sentence which imposed a prison term of up to 10 years was not authorized by relevant Iowa Code §§ 204.401(1), 902.3 and 902.9(4) (1979). The State concedes improper sentencing. We affirm defendant's conviction but remand the case to trial court for resentencing.

Trooper LeRoy Orth of the Iowa State Patrol was in a restaurant in Mt. Joy, Iowa, when an informant came over and said that he had been approached by a person who offered to sell the informant marijuana. Orth, who was off-duty and in civilian clothes, called Officer Bradford Thompson, an undercover narcotics agent of the Division of Criminal Investigation. Thompson came to the restaurant and conferred with Orth and the informant. The informant gave Thompson a small plastic bag containing a green plant-like substance, allegedly a sample of the substance for sale. Thompson and the informant then went outside and met defendant and a woman; defendant was carrying a suitcase. Orth watched from inside the restaurant until the four disappeared from view. Defendant then handed the suitcase to Thompson so that he could examine its contents; inside were eight plastic bags of what Thompson believed was marijuana. Defendant and Thompson then allegedly made a deal for the sale of the substance, and Thompson placed the defendant under arrest.

On February 28, 1980, the Scott County Attorney's office filed a criminal information against the defendant, charging him with violation of Iowa Code § 204.401(1). Following a jury trial, defendant was found guilty. Trial court sentenced defendant to 10 years. From this verdict and sentence, defendant appeals.

I. Scope of Review. Our review of defendant's appeal is on assigned error only. Iowa R. App. P. 4.

II. Admission of Alleged Hearsay Testimony. Defendant first assigns as error trial court's allowance of the following allegedly hearsay testimony given by Trooper Orth:

Q. While you were at the Edgetowner restaurant, did you have occasion to become involved in the investigation of an alleged drug sale?

A. Yes, sir I did.

Q. And how did you become involved in that investigation?

A. I had a party come up and advise me that as he was leaving the restaurant, a party approached him, offered to sell him some—

MR. WALKER: I object to this as being hearsay.

THE COURT: Overruled.

A. Offered to sell him some marijuana and he wanted to know if I was interested, so I told him yes, that I would make a phone call.

Appendix at 5. The State submits that trial court did not abuse its discretion since the testimony was not offered to prove the truth of the matter asserted rather, it was admitted to explain the subsequent actions of Trooper Orth.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." State v. Rush, 242 N.W.2d 313, 319 (Iowa 1976). While hearsay is generally inadmissible, State v. Williams, 305 N.W.2d 428, 432 (Iowa 1981), the court has recognized the distinctions "between statements offered to prove the truth of a matter asserted and those offered to prove only (1) the fact such statements were made or (2) effect on subsequent actions of the hearer." State v. Rush, 242 N.W.2d at 319. Statements offered to explain the subsequent action of the person to whom it was addressed are not hearsay. State v. Nowlin, 244 N.W.2d

596, 600 (Iowa 1976); State v. VanRees, 246 N.W.2d 339, 344 (Iowa 1976). "Such evidence is not offered as an assertion but to give character to conduct." State v. Nowlin, 244 N.W.2d at 600. The critical question is to determine the purpose for which Trooper Orth's statement was offered. See State v. Williams, 305 N.W.2d at 432.

When Orth's statements are examined in context, it is clear from the line of questioning by the county attorney that Orth's testimony was offered to explain his actions. The question came at a time when preliminary information was sought from Trooper Orth. The statement was offered not to prove the truth of the matter asserted, but rather to explain Trooper Orth's subsequent actions in calling DCI agent Thompson. [State v. Reynolds stated that "an investigating officer may explain his actions by testifying as to what information he had and its source regarding the crime and the criminal." 250 N.W.2d 434, 440 (Iowa 1977).] The court went on to hold that the trial court did not abuse its discretion by admitting statements made to the officer by third parties. Id.; See also State v. Lamp, 322 N.W.2d 48, 57 (Iowa 1982). Because Trooper Orth's statements were not submitted to prove the truth of the matter asserted, his statement accordingly was not hearsay. Trial court therefore did not abuse its discretion in admitting Orth's statements into evidence.

III. Best Evidence. The defendant next contends that State's exhibit number 12 was improperly admitted into evidence because it was not "the best evidence and is a copy." Exhibit number 12 is a copy of an internal routing card kept by the Iowa State Criminalistics Laboratory. The State asserts that exhibit number 12 is admissible under Iowa Code § 622.30(2) (1979), which provides:

If any business, institution, member of a profession or calling or any department or agency of government, in the regular course of business or activity has kept or recorded any memorandum, writing, entry print, representation or combination thereof, of any act, transaction, occurrence or event and in the regular course of business has caused any or all of the same to be recorded, copied or reproduced

by any photographic, photostatic, microfilm, microcard, miniature photographic, or other process which accurately reproduces or forms a durable medium for so reproducing the original, ... Such reproduction, when satisfactorily identified, is admissible in evidence as the original itself in any judicial or administrative proceeding whether or not the original is in existence or not an enlargement or facsimile of such reproduction is likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement or facsimile, does not preclude admission of the original.

During the State's case, a criminalist testified that the card was kept in the ordinary course of business. The card identified who the evidence technician was that received the evidence, where the evidence was stored when it was removed from the evidence room, who the criminalist was that examined the evidence, when the criminalist returned it to the evidence room, and when the agent picked it up. We find no abuse of trial court's discretion in admitting into evidence State's exhibit number 12.

IV. Foundation and Chain of Custody Challenges. The defendant next asserts that State's exhibits 2-9 were improperly admitted because the State failed to show a proper foundation and a proper chain of custody. These exhibits were the bags of marijuana contained in defendant's suitcase, numbered consecutively. Defendant's objection to the receipt of these exhibits was: "We would object to the entry at this time, Your Honor, in that no proper foundation has been laid and that a proper chain of custody has not been shown at this time."

The supreme court in State v. Thomas, 222 N.W.2d 488, 493 (Iowa 1974), held that the following objection was too general to preserve error: "Primarily, I don't believe the proper foundation has been laid for the chain of evidence." "A foundation objection must be sufficiently specific to alert trial court and opposing counsel to its basis." Id.

Likewise, we believe the objection proffered by the defendant to State's exhibits 2-9 is insufficient to preserve a question for review before us.

V. Propriety of Defendant's Sentence. Defendant was convicted of delivery of a schedule I controlled substance (marijuana) in violation of Iowa Code § 204.401(1) (1979). Trial court sentenced him "to serve a term of 10 years in the custody of the director of adult corrections." The State concedes that this sentence is erroneous.

The penalties for violating section 204.401(1) are broken down into four classifications:

Any person who violates this subsection with respect to: a. A substance classified in schedule I or II which is a narcotic drug, is guilty of a class "C" felony. b. Any other controlled substance classified in schedules I, II, or III, is guilty of a class "D" felony. c. A substance classified in a schedule IV, is guilty of a misdemeanor. d. A substance classified in schedule V, is guilty of a simple misdemeanor.

Iowa Code § 204.401(1)(a)(b)(c)(d) (1979). The trial court erred in sentencing defendant to be in prison for a term of ten years. Because marijuana is not a narcotic drug, defendant should have been sentenced under section 204.401(1)(b) to a period consistent with Iowa Code §§ 902.3, 902.9(4) (1979).

We remand this matter for resentencing consistent with this opinion.

AFFIRMED IN PART AND REMANDED FOR RESENTENCING.