FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	197 Filed August 29, 1985
vs.	)	5-264 84-708
DONALD LEE PARKS,	)	
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Polk County - A. M. Critelli, Judge.

Defendant appeals from the judgment of conviction and sentence of Delivery of a Schedule II Controlled Substance (cocaine) in violation of Iowa Code section 241.401. AFFIRMED.

Charles Harrington, Appellate Defender, and B. John Burns, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Pamela S. Greenman, Assistant Attorney General, for plaintiff-appellee.

Considered by Donielson, P.J., and Schlegel, and Sackett, JJ.

SACKETT, J.

FACTS

Parks met a Rhonda Currie in Des Moines in August of 1982. Parks and Currie used cocaine and had sexual relations. In October, Parks and his girlfriend (not Currie) left Des Moines suddenly and went to Texas. Parks subsequently asked Currie to meet him in Texas. She had, however, in the meantime, spoken with law enforcement persons and agreed to keep them informed as to Parks' activities. In November, Currie joined Parks in Texas. Currie then returned to Des Moines, met with federal and state agents, and agreed to set up a buy from Parks. Currie introduced Parks to an officer Shay who posed as a farmer wanting to buy cocaine. A meeting was set up and Parks brought in a sample of "coke balls" which at Shay's request were left with Shay and Currie.

The state initially filed a charge of delivery of a simulated controlled substance (cocaine). Parks moved to dismiss the charge based on outrageous police conduct. About two months later, the two charges upon which Parks was tried were filed.[1] Parks moved to dismiss these charges claiming they were filed as a result of prosecutorial vindictiveness. Parks was tried to the court and convicted of delivery of a Schedule II Controlled Substance (cocaine) in violation of Iowa Code section 204.401 (1985). He appeals from this judgment and sentence contending:

> 1. That the trial court incorrectly overruled his motion to dismiss because of alleged prosecutorial vindictiveness.
> 2. That the trial court erred in allowing cross-examination concerning his financial transactions.
> 3. His trial counsel was ineffective in failing to alert the trial court to an erroneous statement of law concerning entrapment.
> 4. That there was insufficient evidence to support a finding that he was not entrapped.
> 5. The trial court improperly relied on unproven charges in sentencing.

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[1] One of these charges is the basis for this appeal. Parks was acquitted on the other charge.

PROSECUTORIAL VINDICTIVENESS

The state filed the present charge after Parks filed a pretrial motion to dismiss in a separate criminal case. Parks claims the trial court erred in overruling his motion based on prosecutorial misconduct. The trial court concluded Parks failed to demonstrate vindictive prosecution and found:

> (1) A trial information was filed on June 29, 1983 charging defendant with Delivery of a Simulated Controlled Substance representing it to be cocaine. This charge alleged an occurrence date of January 22, 1983.
> (2) On July 20, 1983 defendant filed a motion to dismiss the above charge, alleging outrageous conduct on the part of the Des Moines Police Department.
> (3) On September 13, 1983, a preliminary complaint was filed against defendant charging him with two counts of Delivery of a Controlled Substance, to-wit: Cocaine. Count I alleged an occurrence date of January 15, 1983 and Count II alleged an occurrence date of January 19, 1983. The trial information on these two charges was filed November 1, 1983.
> (4) Odell McGhee, Assistant County Attorney, is the only attorney in the County Attorney's Office assigned to drug cases. The present case is one of ten cases which McGhee had been investigating and working on since January, 1983.
> (5) The first Parks case was the first simulated drug case to be prosecuted since the statute went into effect.
> (6) McGhee knew of the additional buys at the time he filed the simulated drug charge, and decided to file additional charges at least as of June 29, 1983 when the first charge was filed.
> (7) The reason for the late filing of the present charges was McGhee's case load and the fact that he had just been assigned to the drug docket in January, 1983 and he was the only prosecutor assigned to this docket.
> (8) Defendant's motion to dismiss in the simulated drug case was overruled on October 15, 1983. Defendant's motion to reconsider was likewise overruled.

A court is usually not free to interfere with a prosecuting official's discretionary decision to prosecute crime. United States v. Cox, 342 F.2d 167, 171 (5th Cir. 1965). However, a prosecutor's decision to charge a defendant is tempered by the defendant's due process right to assert his procedural right without fear of retribution. See North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed 656 (1969) (court found a rebuttable presumption of vindictiveness where the same judge imposed a heavier sentence after a second conviction following a successful appeal of defendant's original conviction); Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974) (where presumption recognized where defendant was reindicted on a more serious charge following a successful appeal of his original conviction).

In United States v. Goodwin, 457 U.S. 368, 102 S.Ct. 2485, 73 L.Ed.2d 74 (1982), the court held that the addition of charges prior to defendant's trial is not likely to be tainted with improper motivation as to justify a presumption of prosecutorial vindictiveness. However, a defendant can prevail who demonstrates actual prosecutorial vindictiveness. Goodwin, 457 U.S. at 384, 102 S.Ct. at 2494, 73 L.Ed. at 87.

The trial court found the charges were filed late because of the case load of the county attorney. There is no evidence here of vindictiveness. The trial court's refusal to dismiss the charges is affirmed.

II. CROSS-EXAMINATION

The state asked Parks on cross-examination certain questions about his financial affairs in the two years prior to trial. Parks claims the trial court abused its discretion in allowing the cross-examination. The state claims that the matter of Parks' financial affairs was addressed on direct examination, that the examination was probative of Parks' character for truthfulness or un-

thruthfulness, and that the court under Rules of Evidence 608(b) had discretion to allow the examination. On direct examination, Parks testified his occupation was setting up old-time photo setups. He did not identify the time period during which he had been so employed.

Cross-examination of the accused in a criminal case is strictly confined to the matters testified to on direct examination. Iowa R. Crim. P. 19(1). Cross-examination may deal with matters inquired into on direct and questions fairly within the area of these matters constitute proper cross-examination. State v. Luter, 346 N.W.2d 802, 813 (Iowa) cert. denied ___ U.S. ___, 105 S.Ct. 116, 83 L.Ed.2d 59 (1984).

The trial court has broad discretion concerning the scope of cross-examination. See State v. Jackson, 259 N.W.2d 796, 801 (Iowa 1977); State v. Broten, 176 N.W.2d 827, 828 (Iowa 1970). Parks cites our case of State v. Roghair, 353 N.W.2d 433, 435 (Iowa App. 1984) in support of his position. Roghair is clearly distinguishable because in Roghair the state was attempting to question defendant concerning his financial statement as shown by his affidavit of indigency. We determined there was additional prejudice because of the fact that the jury was prejudiced against the defendant because he used public funds. Roghair, 353 N.W.2d at 435. Parks here sought to show that he was a legitimate businessman and did not have another means of livelihood. When Parks opened the subject of his business, he could not escape cross-examination of the details thereof. We find no abuse of discretion by the trial court in allowing the cross-examination.

III. INEFFECTIVE COUNSEL

Parks filed a notice of the Defense of Entrapment. The trial court found:

> As the trier of fact in these proceedings, after giving due consideration to the total record, this court would find that the police authorities and in particular Officer Shay made no concerted and intentional effort to coerce

> the defendant into committing a crime or violating the law by urging or even condoning improper sexual activity or promises of same as between the defendant and confidential informant, Rhonda Currie.

Parks contends the finding reflects an improper statement of the law of entrapment in Iowa and his trial counsel was ineffective for failing to point out the flaw to the trial court. He urges that in this case the trial court concluded because the police did not condone or urge the sexual activity between Currie and Parks entrapment was not shown.

In State v. Mullen, 216 N.W.2d 375, 382 (Iowa 1974) the Iowa court adopted an objective test for determining entrapment in articulating the National Commissions Study Draft of a New Federal Criminal Code § 702 (1970) defining the defense:

> (2) Entrapment defined. Entrapment occurs when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause normal law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

The comment following the rule relevantly states: "The defense is treated primarily as a curb upon improper law enforcement techniques to which the predisposition of the particular defendant is irrelevant." However, here the trial court merely made a determination that the relationship between Parks and Currie was not such as would result in entrapment. Having made such a finding, police involvement is not relevant. Counsel was not ineffective.

IV. ENTRAPMENT

Parks contends there was insufficient evidence to support a finding he was not entrapped. Parks contends that he knew he was dealing with an undercover policeman. This, coupled with substantial other evidence, supports a finding he was not entrapped.

V. SENTENCING

Parks contends the trial court relied on unproven or unadmitted criminal charges in deciding what sentence to impose. A trial court may not rely on unproven or unadmitted criminal charges in deciding what sentence to impose on a defendant. State v. Black, 324 N.W.2d 313, 315-16 (Iowa 1982); State v. Messer, 306 N.W.2d 731, 733 (Iowa 1981).

The trial court found Parks' record, though somewhat confused, indicated that Parks has had numerous prior felony convictions. The court did mention that Parks had a related drug charge that was pending trial for a second time following a mistrial and two cases pending for operating a motor vehicle while intoxicated. The sentencing record does not reflect that the pending charges were considered in determining Parks' sentence. The trial court clearly stated what it considered in determining the sentence to the imposed and said: "The court has taken into consideration the substantial felony record of the defendant. . . ." There is no indication the trial court considered unproven charges.

AFFIRMED.