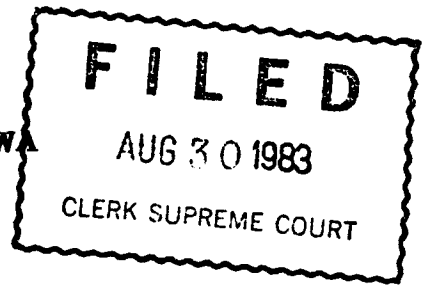


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed August 30, 1983
vs.	)	
EUGENE HAROLD PIETSCH, JR.,	)	<u>2-415</u>
Defendant-Appellant.	)	67754

Appeal from Story District Court, M. D. Seiser, Judge.

Defendant appeals from his conviction of possession of marijuana with intent to deliver for a profit. **AFFIRMED.**

Francis Hoyt, Appellate Defender, and Patrick R. Grady, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Joseph P. Weeg, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Schlegel, and Hayden, JJ.

OXBERGER, C.J.

Defendant appeals from his conviction of possession of marijuana with intent to deliver for a profit. Iowa Code § 204.401 (1979). On appeal, defendant asserts that (1) the employee who admitted police into defendant's place of business did not have "common authority" over the premises, so could not consent to the police search; (2) the employee's consent to search the business was not voluntary, given testimony that he did not think he had a right to refuse the police request; (3) there was not substantial evidence that defendant's purpose in processing and storing over 500 pounds of marijuana was to make a profit; and (4) the court abused its discretion in sentencing defendant to prison because the court felt that the community expected such punishment for drug dealers. We affirm.

The defendant was formerly the owner of the All American Building Center, a lumber yard in Nevada. He employed Robert Thompson as a bookkeeper. Thompson's responsibilities included unlocking the door in the morning, hiring lower level employees, and waiting on customers. Thompson had a key to the building and had occasionally stayed overnight.

The Nevada police evidently heard rumors that there was marijuana at the store. At 1:30 a.m. on October 12, 1980, a Nevada police officer approached Thompson, who was in his car with a date, and asked Thompson to go to the lumber yard and open it up. Thompson testified that he did not think he had the right to refuse the police. However, it is clear from Thompson's testimony that he simply chose to open the store at the officer's request, that he believed that he had the authority to open it at any time, that he would have opened it at that hour for any customer who might have needed some materials and asked him for assistance, and that he did not feel that he was being coerced by the officer. Indeed, he testified that he would have opened the store at 4 a.m. for anyone because that's the [k]ind of person I was, plus I was told the people wanted things, and I'm the only one living in town, to sell it to them, that's why."

Thompson and the officer went to the lumber yard, where the officer found large burlap bags full of marijuana and a fairly elaborate processing facility. The officer then acquired a search warrant, and returned and seized the evidence.

The defendant moved to suppress the evidence on the grounds, inter alia, that Thompson lacked authority to consent to the search of the lumber yard and that the consent was not freely given. Defendant testified that Thompson's authority to unlock the store after hours was limited to emergency situations. The court denied the motion to suppress, holding that Thompson had voluntarily consented to the search and that he had the authority to give such consent. The court held that because the original warrant for search was thus valid, the resulting search warrant and seizure of the large quantity of marijuana was also proper.

The defendant was tried to a jury, which found him guilty of possession of marijuana with intent to deliver for a profit. The court sentenced him to confinement for up to five years. The court's comments at sentencing showed that defendant was thought to be a good candidate for probation, aside from "the public's expectation is when we quote [sic] get a dealer, we put him away."

L. The Warrantless Search

Pietsch argues that the court erred in failing to suppress evidence seized pursuant to a warrantless search under the third-party consent exception. Bettuo v. Pelton, 260 N.W.2d 423, 425 (Iowa 1977). The State has the burden of showing by a preponderance of the evidence that Thompson had authority to consent to the search and that his consent was voluntarily given. Bettuo, id.

Our review of this constitutional claim is de novo. In this de novo review, we make an independent evaluation of the relevant circumstances in their entirety. State v. Jones, 274 N.W.2d 273, 275 (Iowa 1979), citing State v. Iowa Dist. Ct. in and for Johnson Cty., 247 N.W.2d 241, 245 (Iowa 1976).

Although the fourth amendment of the United States Constitution prohibits warrantless searches, a number of exceptions to the rule have been established. The United States Supreme Court has recognized the validity of a warrantless search when a third party has consented to it, United States v. Matlock, 415 U.S. 164, 171, 94 S. Ct. 988, 993, 39 L. Ed. 2d 242, 249-50 (1974), and the Iowa Supreme Court followed suit in Bettuo. In Matlock, the Court held that the exception must be established by a preponderance of the evidence. 415 U.S. at 177, n. 14, 94 S. Ct. at 996, 39 L. Ed. 2d at 253, citing Lego v. Twomey, 404 U.S. 477, 488-89, 92 S. Ct. 619, 626, 30 L. Ed. 2d 618 (1972). The validity of a warrantless search under the consent exception depends upon "proper consent" voluntarily given. Matlock, 415 U.S. at 165-166, 94 S. Ct. at 990, 39 L. Ed. 2d at 246. Proper consent depends upon the consenting party's having authority to give consent. Bettuo at 425, citing Stoner v. California, 376 U.S. 483, 489, 84 S. Ct. 889, 893, 11 L. Ed. 2d 856, 861 (1964).

When a third party has "common authority" over the premises to be searched, it is no violation of the fourth amendment rights of the owner or resident when the third party grants authority for such a search. Bettuo at 425. In State v. Don, 318 N.W.2d 801, 804 (Iowa 1982), the supreme court, quoting Matlock, defined "common authority" as authority stemming from "mutual use of the property by persons generally having joint access or control for most purposes." Either joint access or control for most purposes is sufficient. Thompson had both.

Thompson clearly had joint access to the premises, since he had a key to the premises and was allowed access to all portions of the building pertinent to the search. He had access for most purposes, since his duties included bookkeeping, deliveries, waiting on customers, loading and unloading trucks, hiring lower echelon employees, and opening and closing the business. He had the authority to

admit other persons to the premises at any hour if an emergency existed, and had the authority to decide when an emergency existed. Pietsch conceded that he never told Thompson that he could not enter the business after regular business hours, and that he left Thompson's access to the premises up to Thompson's own discretion. From this, we conclude that Thompson had the authority to consent to a search of the premises, and that this authority satisfies the requirements of the consent exception to the warrantless search rule.

On the record, it is clear that Thompson was not threatened with arrest, that Thompson did not feel that he was in trouble with the police officer, that Thompson was not intimidated by the officer, and that the officer did not falsely claim that he had a warrant to search the business premises. It is also clear that Thompson expressly consented to the search by the police officer. Although Thompson expressed his opinion that it was his duty to go along with the police officer's requests, the mere expression of this opinion, in light of the other circumstances, does not suffice to demonstrate that Thompson merely acquiesced to the officer's authority.

In view of these considerations, we conclude that Thompson had the authority to consent to the search, that his consent was voluntarily given, and that Pietsch's constitutional rights were therefore not violated.

II. Sufficiency of the Evidence

Viewing all of the evidence in the light most favorable to the State, State v. McFadden, 320 N.W.2d 608, 614 (Iowa 1982)), we find that there was substantial evidence, is, enough to convince a rational trier of fact, that the defendant is guilty beyond a reasonable doubt. Id. The evidence consisted of 76 potted marijuana plants, approximately 511 pounds of marijuana in various stages of processing, marijuana laid out on racks being dried by fans, and marijuana pressed into bricks. It is not unreasonable for a juror to conclude from such evidence that the defendant intended to sell the marijuana that he was processing and that he intended to sell it for a profit.

III. The Sentence

In reviewing a sentence that is within the statutory parameters, we will interfere with a trial court's judgment only if the trial judge has abused his discretion. State v. Hildebrand, 280 N.W.2d 393, 396 (Iowa 1979).

Pietsch was found by the court to be a nonviolent individual who would not likely be a repeat offender. Nevertheless, because of the large amount of marijuana involved and "the public's expectation" that the courts will incarcerate drug dealers, the court sentenced Pietsch to an indeterminate term of five years pursuant to Iowa Code sections 204.401(1) and 902.9 (1979).

On reviewing the record, we find that the trial court considered all the factors that must be considered in determining what disposition is appropriate for any given defendant. It is clear that the court was concerned, not only to rehabilitate the defendant, but also to use the penalty as a means of deterring others from committing similar offenses. We do not find that this sentence constituted an abuse of discretion.

Having found no error, we affirm.

AFFIRMED.

All judges concur except Schlegel, J., who dissents.

SCHLEGEL, J. (concurring in part; dissenting in part)

I concur in divisions I and II of the majority opinion. I believe, however, that the sentencing judge applied improper factors in pronouncing sentence. I would therefore remand for resentencing.

The following language is found in State v. Hildebrand, 280 N.W.2d 393, 396 (Iowa 1979):

The trial court and we on review should weigh and consider all pertinent matters in determining proper sentence, including the nature of the offense, the attending circumstances, defendant's age, character and propensities and chances of his reform. The courts owe a duty to the public as much as to defendant in determining a proper sentence. The punishment should fit both the crime and the individual. [citation omitted.]

In this case, the sentencing judge stated as part of reasoning in placing defendant under incarceration his belief that "the community's attitude and the public's expectation is when we, quote, get a dealer, we put him away."

Rather than gearing the sentence to the individual, the court's statement indicates its belief that a dealer must always be incarcerated regardless of any other circumstances which may point to the appropriateness of an alternative sentence. This is the very sort of "a personal, inflexible policy relating to only one consideration" that was condemned in Hildebrand.

I would reverse the sentence imposed on defendant and remand for resentencing.