

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,

Plaintiff-Appellee,

vs.

GARY LEE JONES,

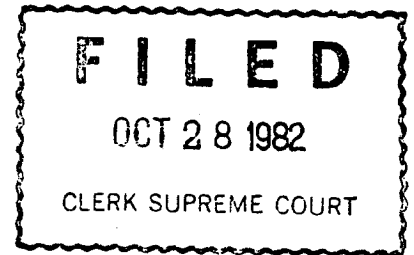
Defendant-Appellant.

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Filed October 28, 1982

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Appeal from Polk District Court, Harry Perkins, Judge.

The defendant appeals from his conviction and sentence for the aggravated misdemeanor of assault with intent to inflict serious injury, a violation of Iowa Code § 708.2(1)(1979). He contends that the trial court abused its sentencing discretion. He also contends that the imposition of a \$5000 fine in addition to a maximum prison term was so disproportionate to the offense as to constitute cruel and unusual punishment. Finally, he contends that his retrial after a declaration of mistrial exposed him to double jeopardy. He acknowledges that the present record is inadequate to permit consideration of the double jeopardy issue and asks the court to preserve his right to raise this issue in an application for postconviction relief. AFFIRMED.

Chris Odell, Assistant Appellate Defender, for defendant-appellant.

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

Considered by Oxberger, C.J., and Donielson, Snell, and Johnson, JJ.

PER CURIAM

On April 29, 1980, Robert Tully and David Vestal got into a brutal fight with one another in the parking lot of a Des Moines Quik Trip. Tully threw the first punch, and beat Vestal until he was bloody and knocked to the ground. When Vestal produced a knife, Tully removed his belt, swung it, and hit Vestal in the temple with the buckle, breaking the belt. Vestal retaliated by stabbing Tully once in the abdomen, and then chased him into the store. Gary Jones, a friend of Vestal who had accompanied him to the Quik Trip, followed Tully, shoved him through the store doors and hit Tully in the back with his hand as they were entering the store.

Jones and Vestal were charged with attempt to commit murder, in violation of Iowa Code Section 707.11 (1979). Due to alleged prosecutorial misconduct, a defense motion for mistrial was granted at Jones's first trial. At his second trial, the jury returned a verdict of guilty on the lesser included offense of assault with intent to inflict serious injury, Iowa Code, Section 708.2(1)(1979). The trial court entered judgment on the verdict, and sentenced Jones to a two-year term of incarceration as well as the statutory maximum fine of \$5000.

On appeal, Jones argues (1) that the trial court erred by considering his juvenile record when sentencing him for an aggravated misdemeanor; (2) that the imposition of the statutory maximum punishment was an abuse of discretion and violated the constitutional proscription against excessive fines; and (3) that following a declaration of mistrial necessitated by prosecutorial misconduct, his second trial subjected him to double jeopardy in violation of his constitutional rights. We affirm.

I. The Juvenile Record

The presentence investigation report (PSI) contained references to Jones's juvenile record.

In State v. Hagemeyer, 310 N.W.2d 218, 219 (Iowa 1981), the supreme court held that a trial court may not consider a prior juvenile record when sentencing a misdemeanor. Iowa Code § 232.55 provides:

2. The adjudication and disposition of a child and evidence given in a proceeding under this division shall not be admissible as evidence against the child in any subsequent proceeding in any other court before or after reaching majority except in the sentencing proceeding after conviction of a felony.

The court held that where the defendant was sentenced as a misdemeanor, it was error to consider his juvenile record during the sentencing proceedings.

In this case, the defendant failed to object at the sentencing hearing to inclusion of his juvenile record in the PSI and is therefore barred from raising this objection on appeal. "Matters not raised in the trial court ordinarily will not be considered for the first time upon appeal." State v. Messer, 306 N.W.2d 731, 733 (Iowa 1981), citing State v. Jump, 219 N.W.2d 417, 430 (Iowa 1978).

We are unable to find any authority for treating sentencing hearings differently from trials with respect to the necessity for raising objections at the hearing, and Jones has cited no authority that would permit us to make an exception to the general rule. We are therefore obliged not to consider this matter on appeal.

II. The Sentence

Jones argues that the court abused its discretion by sentencing him to the maximum term of imprisonment and the maximum fine for an aggravated misdemeanor.

The sentencing court considered the defendant's age, his employment records, his character and chances of reform, the nature of the offense as interpreted by Jones himself, his family history and education, and the need of the community to be protected from further offenses by Jones, as well as Jones's need for rehabilitation. The sentence to two years' imprisonment was not an abuse of discretion.

Nor was the \$5000 fine excessive. It is not a cruel and unusual punishment, for it does not involve unnecessary and wanton infliction of pain, and it is not grossly out of proportion to the severity of the crime. See Gregg v. Georgia, 428 U.S. 153, 173, 96 S.Ct. 2909, 2925, 49 L. Ed. 2d 859, 874-75, reh. denied, 429 U.S. 875, 97 S. Ct. 197, 50 L. Ed. 2d 158 (1976); accord State v. Carey, 306 N.W.2d 740, 743 (Iowa 1981). See also Rummel v. Estelle, 445 U.S. 263, 100 S.Ct. 1133, 63 L. Ed. 2d 382 (1980); State v. Jones, 298 N.W.2d 296, 299-300 (Iowa 1980).

III. Double Jeopardy

After the first trial ended in a declaration of mistrial, Jones and his co-defendant moved for dismissal on double jeopardy grounds, claiming that the mistrial had been prompted by prosecutorial misconduct. The trial court overruled the motion and the case proceeded to jury trial.

Retrial is constitutionally impermissible if "the mistrial results from judicial or prosecutorial impropriety designed to avoid an acquittal." State v. Manning, 224 N.W.2d 232, 235 (Iowa 1974).

Because circumstances pertaining to the asserted misconduct were not fully put on the record during argument on the motion, and the record is too scant to enable Mr. Jones to argue the merits of his double jeopardy claim, he asks this court to preserve his right to argue a double jeopardy claim in a postconviction action under Iowa Code, Chapter 663A (1981).

It is incumbent upon the defendant to provide a record which "affirmatively discloses the error upon which he relies." State v. Mark, 286 N.W.2d 396, 402 (Iowa 1979) citing State v. Bakker, 262 N.W.2d 538, 544 (Iowa 1978). It is therefore impossible for us to consider the issue of double jeopardy at this time.

AFFIRMED.

I would eliminate the \$5000 fine. The defendant is indigent. The record does not disclose anything that would indicate the defendant will have funds to pay the fine in the future. The spectre of the unpaid fine may hamper the defendant's rehabilitation.