IN THE COURT OF APPEALS OF IOWA

No. 1-210 / 90-1119

FILED
AUG 27 1991
CLERK SUPREME COURT

595

STATE OF IOWA,

Appellee,

vs.

JOSE SANTANA LOPEZ HERNANDEZ,

Appellant.

Appeal from the Iowa District Court for Woodbury County, Phillip S. Dandos, Judge.

Defendant appeals his conviction, following a jury trial, contending the two charges against him should have been severed for separate trials. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Julie Ann Halligan, Assistant Attorney General; Thomas S. Mullin, County Attorney; and Kandice Wilcox, Assistant County Attorney, for appellee.

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

HABHAB, J.

Jose Santana Lopez Hernandez was accused of selling cocaine to an informant on May 8, 1989. Some two months later, on July 11, 1989, Lopez Hernandez was apprehended by police for he met the description of a person who had been selling drugs in bars. On this occasion, police discovered a ziplock bag containing four packets of cocaine on the ground where Lopez Hernandez had been. Police concluded that the packaging of the four packets was consistent with the practices of drug dealers.

On the basis of these two incidents, Lopez Hernandez was charged, in a single trial information, with two crimes:

Count I

> Said defendant, on or about May 8, 1989, in Woodbury County, Iowa, did: unlawfully deliver cocaine, a Schedule II controlled substance, in violation of Iowa Code section 204.401(1)(a).

Count II

> Said defendant, on or about July 12, 1989, in Woodbury County, Iowa, did: unlawfully possess with intent to deliver cocaine, a Schedule II controlled substance, in violation of Iowa Code section 204.401(1)(a).

The defendant moved to sever the two charges, but the district court denied this motion.

A jury found Lopez Hernandez guilty of delivery of cocaine on Count I of the information and guilty of the lesser-included offense of simple possession of cocaine on Count II of the information. Lopez Hernandez now appeals from the resulting convictions.

Lopez Hernandez contends the district court erred by refusing to sever the two charges against him. He argues the two charges did not qualify for inclusion in a single information under Iowa Rule of Criminal Procedure 6(1) because the two charges did not arise from occurrences "constituting parts of a common scheme or plan." That rule provides:

> Two or more public offenses which arose from the same transaction or occurrence or from two or more transactions or occurrences constituting parts of a common scheme or plan may be alleged and prosecuted as separate counts in a single complaint, information or indictment, unless, for good cause shown, the trial court in its discretion determines otherwise. Where a public offense carries with it certain lesser included offenses, the latter should not be charged, and it is sufficient to charge that the accused committed the major offense.

The primary issue on appeal is whether the trial court abused its discretion in denying the defendant's motion to sever the charges against him. Severance is a matter of trial court discretion. State v. Bair, 362 N.W.2d 509, 511 (Iowa 1985). On appeal, the defendant is charged with demonstrating that the trial court abused its discretion in denying the severance motion. State v. Gibb, 303 N.W.2d 673, 677 (Iowa 1981).

Iowa Rule of Criminal Procedure 6(1) permits the joinder of offenses in a single complaint, information or indictment when the offenses charged are based on: (1) the same transaction or occurrence; or (2) a common scheme or plan. State v. Lam, 391 N.W.2d 245, 249 (Iowa 1986). The

underlying theme of rule 6(1) "is the achievement of judicial economy through the joinder of related offenses." Id. The "common scheme" language was added to rule 6(1) in 1983, to liberalize and broaden charging practices so as to allow prosecutors more leeway in joining multiple offenses for a single prosecution. Id. The trial court found defendant's dealing in drugs suggested a common plan or scheme to sell cocaine. We agree.

The State's evidence is sufficient to support a finding the two offenses charged in the information were parts of a common scheme or plan to sell cocaine. The first count was a result of a confidential informant's controlled buy from the defendant. The buy occurred on May 8, 1989, at a bar known as "The Pink Pussy Cat." The informant paid $45.00 for two quarter grams of cocaine.

The second count was a result of events which transpired on July 11, 1989. As we stated earlier in this opinion, the defendant was apprehended by police for he met the description of a person who had been selling drugs in bars. Immediately prior to apprehension, the defendant was seen walking near the area of The Pink Pussy Cat and Pat's Place (the back doors to The Pink Pussy Cat and Pat's Place both open to the same parking lot). When apprehended, a ziplock plastic bag containing four packets of cocaine was found in the area where defendant had just run.

Like the trial court, we conclude that the defendant's actions and activities rise to the level of a common plan

or scheme to sell cocaine. It is unimportant to the severance question that the July 12 incident did not result in a delivery. This is so for to effectuate delivery under the circumstances here, you would in some manner have to possess cocaine. The fact that a little over two months separated the incidents is not controlling for by its very nature all drug dealings do not occur at the same time. On the contrary, those who deal in this illegal activity may do so over prolonged periods of time. We find the trial court did not abuse its discretion in refusing to sever the two charges.

Additionally, defendant is not entitled to relief on this claim, as he failed to demonstrate that prejudice occurred due to the joinder. State v. Lam, 391 N.W.2d at 251. It is apparent from the evidence the jury was able to separately consider the evidence on each charge in reaching its verdict. The refusal to sever was proper.

AFFIRMED.