FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA 659

STATE OF IOWA,

Appellee,

vs.

RICKI FAY SUNTKEN,

Appellant.

Filed September 23, 1980

0-231
63694

Appeal from Hamilton District Court - George Fagg, Judge.

Defendant appeals from conviction of delivery of a controlled substance (marijuana) for profit in violation of section 204.401(1)(b), The Code. REVERSED.

Keith Van Doren of Hemingway, Myers & Bottorff, Webster City, Iowa, for appellant.

Thomas J. Miller, Attorney General; and Shirley Ann Steffe, Assistant Attorney General; for appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Defendant appeals from conviction of delivery of a controlled substance (marijuana) for profit in violation of section 204.401(1)(b), The Code. Four issues are raised by defendant on appeal as a basis for reversal of his conviction: (1) whether when the information, as amended, charged that defendant "did deliver for profit a controlled substance" the trial court should have granted defendant's motion for judgment of acquittal on the ground that the State failed to prove that defendant realized a profit; (2) whether the State failed to show that defendant knowingly and voluntarily waived his constitutional rights to an attorney and to remain silent following his arrest so that his motion to suppress incriminating statements should have been granted; (3) whether the evidence shows that as a matter of law defendant had been entrapped by state agents; and (4) whether the trial court erroneously allowed a state agent to testify as to prior criminal activities by defendant.

I. We find no merit in any of the first three issues. As to the first contention, the information clearly identified the statutes under which defendant was charged. Under these statutes, it is delivery of a controlled substance "for purpose of making a profit" which is proscribed. See section 204.410, The Code; State v. Metcalf, 260 N.W.2d 857, 860 (Iowa 1977). As such, it is not necessary to establish that defendant profited in fact. The second issue involves a factual determination and we independently review the totality of circumstances surrounding defendant's waiver of his Miranda rights. Such review causes us to agree with the trial court's order denying defendant's motion to suppress. In addition, we do not believe that defendant was entitled to a determination that he was entrapped as a matter of law. Under the standard applied in State v. Pooler, 255 N.W.2d 328, 330 (Iowa 1977), this issue was clearly for the jury.

II. Defendant's final contention presents a difficult issue concerning the rule limiting admissibility of evidence of other crimes. He asserts that it was error for the trial court to permit a State's witness to testify, over objection, that defendant admitted that he had previously attempted to sell the controlled substance in question to "a guy in Omaha" over a year prior to the present offense and that defendant, who is 23 at the time of trial, also admitted to being involved in activity involving drug sales since he was age 17.

The application of the rule prohibiting introduction of evidence of other crimes, as it applies to drug sales, has been involved in several decisions of the Iowa Supreme

Court. In State v. Klauer, 226 N.W.2d 803, 804 (Iowa 1975), State v. DeAnda, 218 N.W.2d 649, 651 (Iowa 1974), and State v. Mullen, 216 N.W.2d 375, 377 (Iowa 1974), the issue arose only in terms of the inadmissibility of such evidence to show predisposition in cases where the defense involved entrapment. No consideration was given to whether such evidence might be admissible on other theories. The holding in these three cases appears to be that admission of such evidence is ordinarily reversible error.

The issue is more thoroughly reviewed in the recent case of State v. Howell, 290 N.W.2d 355, 360 (Iowa 1980). There the court recognized that drug sale prosecutions, as such, do not provide an exception to the general rule excluding evidence of other crimes. The decision cites Klauer, DeAnda, and Mullen as authority for the general rule of inadmissibility. The court, in Howell, recognized exceptions permitting such evidence when it tends to prove: (1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme or system of criminal activity embracing the commission of two or more crimes so related that proof of one tends to prove the other, or (5) identity of the person charged.

The State first seeks to sustain the admissibility of the defendant's prior drug sale activities in the present case on the basis of the second exception listed above. It urges the testimony that defendant admitted prior drug transactions was properly admitted to prove intent to profit, an element of the offense charged. However receptive we might otherwise be to the logic of this argument, we believe it is foreclosed by the court's holding in Howell. Howell involved a prosecution for possession of a controlled substance with intent to deliver. After considering the exceptions to the rule limiting admissibility of evidence of other crimes, including the "intent" exception, the court held it improper to admit evidence of prior drug sales. If prior drug sales are not admissible to show intent to deliver in a prosecution for possession with intent to deliver, then we discern no basis for admitting such evidence to show intent to profit in a prosecution for delivery for profit. We conclude that the element of motive recognized as one of the Howell exceptions, must be treated the same as intent in this regard. Nor do we believe the challenged evidence in the present case involves a common scheme or system of criminal activity embracing the commission of two or more crimes so related that proof of one tends to prove the other. For an example of that exception, see State v. Brewer, 247 N.W.2d 205, 214 (Iowa 1976). The other exceptions discussed in Howell are inapplicable on their face.

Next the State urges that because the source of the challenged evidence is to be found in admissions made by the defendant, the evidence is admissible. The State cites no authority, and we have found none, for the proposition that evidence of other crimes is admissible simply because it comes in the form of admissions made by the person on trial. The State suggests that we should treat the matter similarly to the rule recognizing admissions as an exception to the hearsay rule. We find no merit in this suggestion. The hearsay rule is based on reliability of the evidence—the rule excluding evidence of other crimes is in no way based on reliability of the evidence.

Lastly, the State urges that the challenged evidence should be admitted under a catch-all theory of res gestae. State v. Oppedal, 232 N.W.2d 517, 521 (Iowa 1975), recognizes the "penumbra of vagueness and imprecision" which surrounds this term. Oppedal and State v. Lyons, 210 N.W.2d 543, 545-46 (Iowa 1973), do recognize that in some circumstances, statements by the accused at the time of the commission of the offense are part of the transaction itself and thus admissible as part of the entire account. But we believe some caution must be applied in the exercise of this rule, particularly in the case of drug related crimes where apprehension results from the use of undercover agents who associate with the accused over a period of time. Under such circumstances it is quite likely that the undercover agent will be privy, throughout the course of dealing, to various admissions of the accused involving other transgressions. But such admissions are no less prejudicial to the accused nor any more necessary to the prosecution of the principal charge than is generally the case with evidence of other crimes. We believe that this circumstance militates against admissibility of the challenged evidence.

Perhaps of more significance is the fact that for the res gestae exception, as recognized in Oppedal, 232 N.W.2d at 517, and McCormick on Evidence, 2d Ed., section 288 at 686-87, is lacking here. It was there stated that a principal reason for the exception is "the desire to permit each witness to tell his story in a natural way by telling all that happened at the time of the narrated incident, including those details which give life and color to the story." The challenged evidence in the present case gives no color to the witness's story with respect to the transaction with which the defendant was actually charged. Nor was such testimony necessary to permit the witness to tell his story in a natural way. Counsel for the State was forced to drag such testimony from the witness by the use of extremely leading questions.

For all of the reasons stated, we hold that it was error to admit the challenged testimony, that its admission was prejudicial to the defendant, and that a new trial should be and is hereby ordered.

REVERSED.

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

DONIELSON, J. (dissenting)

I dissent from the decision to reverse because I consider the general rule stated in Howell to be inapplicable to the defendant's situation.

Howell merely sets forth the general rule that evidence of prior crimes committed by the same defendant is inadmissible unless it falls within the scope of certain well-defined exceptions. Howell recites few facts involving evidence of prior crimes and no facts that are similar to the case before this court. Nor does Howell apply to the situation where, as here, the evidence sought to be admitted involves statements so closely related in time and place as to be an integral part of the crime charged. That this was in fact the situation involved in the instant case is illustrated by the fact the statements were made by defendant during the sale to the DCI agents and the fact that the prior crime alleged here was the attempted previous sale of the same marijuana that the defendant is now charged with selling. Moreover, I have additional doubts as to the applicability of the Howell rule here because I question whether defendant's admission that he had tried to sell the same marijuana before is actually evidence of another crime. However, if it is evidence of a prior crime, I think that it is admissible, even though perhaps prejudicial, because, being so closely related to the commission of the offense for which the defendant is charged as to form one continuous transaction, the State may present it to show the entire set of circumstances surrounding commission of the crime. State v. Oppedal, 232 N.W.2d 517, 521-23 (Iowa 1975); State v. Lyons, 210, N.W.2d 543, 545-46 (Iowa 1973). See also McCormick on Evidence § 288, at 686-87 (2d ed. E. Cleary 1972).

Accordingly, I would decline to grant a new trial to this defendant.