FILED
AUG - 9 1979
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff - Appellee,) Filed August 9, 1979
vs.)
JACK EUGENE WHITNEY, JR.,) 151 / 62065
Defendant - Appellant.)

Appeal from Warren District Court - M. C. Herrick & Thomas S. Bown, Judges.

Defendant appeals from his conviction on two counts of burglary in the first degree, alleging that certain evidence was improperly admitted at trial, that insufficient evidence existed to show that he was armed during the commission of the crimes, and that the trial court acted illegally or abused its discretion in sentencing him to two twenty-five year terms to be served consecutively. - Affirmed as modified, reducing sentence to twenty-five years.

James F. Fowler, of Wilson, Goodhue & Fowler, Indianola, for Defendant - Appellant.

Thomas J. Miller, Attorney General of Iowa, and Ann Fitzgibbons, Assistant Attorney General, for Plaintiff - Appellee.

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

PER CURIAM

Defendant appeals from his conviction on two counts of burglary in the first degree in violation of section 713.2, Supplement to the Code 1977. Defendant asserts that the trial court erred in overruling his motion to suppress certain evidence, that insufficient evidence existed to show he was armed during the burglary, and that the trial court abused its discretion and exceeded its statutory authority in sentencing him to two consecutive twenty-five year prison terms. We affirm the trial court but modify the judgment as it relates to sentencing.

I. Defendant claims that his constitutional rights were violated when police officers searched first his person and then the car which he was driving. A description of the car, the car license plates and the occupants of the car were supplied to the Warren County Sheriff following one break-in. Sheriff William Mathews initiated a radio dispatch asking all officers in the area to be on the watch for a car carrying occupants as described to him. Chief of Norwalk Police, Michael Richardson, subsequently stopped the car meeting the description. Defendant Jack Whitney was driving the car and Steven Green was his passenger. Richardson asked Whitney and Green to step out of the car, after which he searched their persons and found knives on both of them. Richardson did not know at that time that they were suspects in a break-in.

Sheriff Mathews then arrived. In looking through the car window, he saw a television set partially covered by a red blanket. It appeared to him that other articles were under the blanket. Without asking defendant's consent, he uncovered the blanket, exposing the other articles which later were identified as items taken in a break-in at a farm home. Defendant and Green were then placed under arrest. The knives carried by both defendant and Green and the stolen articles found in the automobile were admitted into evidence despite defendant's motion to suppress. Since defendant claims a violation of his rights under the federal and state constitutions, our review of this issue is de novo. State v. Ege, 274 N.W.2d 350, 352 (Iowa 1979).

Searches and seizures by law enforcement personnel are subject to fourth amendment scrutiny. Id. at 353. Warrantless searches and seizures are per se unreasonable unless they fit within one of several well-defined exceptions. Id. The

State carries the burden of proving that the officers' actions were lawful. Id.

The stop of the vehicle that defendant was driving constituted a seizure of the person within the Fourth Amendment. State v. Cooley, 229 N.W.2d 755, 759 (Iowa 1975). The stop is constitutionally permissible if the stopping officer has specific cause to reasonably believe criminal activity is afoot. State v. Dixon, 241 N.W.2d 21, 23 (Iowa 1976); Cooley, 229 N.W.2d at 759. Here Chief Richardson had reason to stop the car which defendant was driving because of the radio dispatch issued by the sheriff. The stop or seizure of defendant was permissible. Furthermore, the search of defendant in a routine self-protective patdown procedure was likewise permissible since Richardson could reasonably believe that the occupants of the auto were wanted by the sheriff because of possible involvement in a criminal activity and that it was, therefore, likely that they would be carrying dangerous weapons of some sort. See Dixon, 241 N.W.2d at 24 (McCormick, J. specially concurring.)

The subsequent discovery of the items in the car by Sheriff Mathews was also permissible. Mathews knew that defendant and Green met the description of two men wanted in the break-in of a farm home. Their auto had been stopped pursuant to a dispatch issued by him. Once a vehicle has been reasonably stopped, officers are in a place where they have a right to be and materials readily observable in the car could be lawfully seized and admitted into evidence. Dixon, 241 N.W.2d at 24; Cooley, 229 N.W.2d at 760. Here, only the partially-covered television set was readily observable. Nonetheless, Mathews' uncovering of the other items was permissible since he had reasonable cause for believing, under the circumstances of defendant's detention as a probable suspect for burglary, that these hidden items would offend against the law. Dixon, 241 N.W.2d at 24. The trial court did not err in overruling defendant's motion to suppress.

II. Defendant claims that insufficient evidence existed to show that he was armed during the robbery and that, therefore, the charge against him was not supported by the evidence. Steven Green, defendant's accomplice, testified that when he and defendant began the ride to the country to perpetrate the break-ins, defendant had removed his knife because it was poking him. Green could not say that defendant had the knife on him during the break-ins but was able to testify that the knife was on defendant's person

when their car was stopped by Richardson. Green did testify that he had his knife on his person at all times, including the times during the break-ins.

The State maintains that defendant failed to preserve error on this issue. The defendant raised this issue by means of a motion for directed verdict at the close of the State's evidence but he failed to renew his motion at the close of defendant's evidence. Where defendant makes a motion for directed verdict at the close of the State's evidence but fails to renew that motion at the close of all evidence, the motion is deemed waived and error cannot be posited on it. State v. Beyer, 258 N.W.2d 353, 356 (Iowa 1977); State v. Evans, 248 N.W.2d 521, 522 (Iowa 1976); State v. Dahlstrom, 224 N.W.2d 443, 446 (Iowa 1974). In this case, though, the defendant made an opening statement, which he had reserved the right to make, at the close of the State's evidence and then defendant rested. No new evidence was presented. Where defendant rests after the trial court overrules his motion for directed verdict made at the close of the State's case, error may be predicated on the court's ruling. Dahlstrom, 224 N.W.2d at 446.

In determining the propriety of a court's ruling on a motion for directed verdict, the evidence is viewed in a light most favorable to the State. State v. Overstreet, 243 N.W.2d 880, 883 (Iowa 1976). Every legitimate inference that may be fairly and reasonably deducted therefrom must be carried to the aid of the evidence. Id. If there is any substantial evidence which reasonably tends to support the charge, a court should not direct a verdict of acquittal. Id.

The State contends that because Green, defendant's accomplice, was armed throughout the break-ins, defendant may also be charged as if he were armed. We agree with the State. All parties participating in a robbery need not be armed; if one is armed, all are armed. State v. Johnson, 162 N.W.2d 453, 455 (Iowa 1968). "An allegation that the joint perpetrators of the offense were armed with a dangerous weapon is satisfied by proof that one of them was so armed at the time their confederacy was carried out." Id.

Defendant claims that the testimony of Green that he was carrying a knife was not sufficiently corroborated. Corroborating evidence is necessary to support a conviction based upon the testimony of an accomplice. State v. Vesey, 241 N.W.2d 888,

890 (Iowa 1976). But it is not necessary that such evidence go to the whole of the accomplice's testimony or every material fact. Id. Here sufficient evidence existed beyond the testimony of Green to connect defendant to the crime. Further testimony corroborating Green's statement that he had a knife throughout the break-ins was unnecessary.

III. Defendant indirectly complains about the trial court's instructions to the jury. Defendant did not except at trial to the court's instructions and, therefore, error was not preserved. State v. Sallis, 262 N.W.2d 240, 248 (Iowa 1978).

IV. Finally, defendant maintains that the trial court acted illegally or, in the alternative, abused its discretion in sentencing him to two twenty-five year terms to be served consecutively. While we do not determine whether the court acted illegally, we do find that the trial court abused its discretion in providing that the sentences should run consecutively. A reviewing court will not disturb sentence imposed by the trial court where it falls within the statutory maximum and where no abuse of discretion is shown. State v. Thompson, 275 N.W.2d 370, 371 (Iowa 1979); State v. Moreland, 252 N.W.2d 465, 466 (Iowa 1977); State v. Kendall, 167 N.W.2d 909, 911 (Iowa 1969). A reviewing court uses its power to examine judgment and reduce the penalty sparingly. State v. Hubbs, 268 N.W.2d 188, 191 (Iowa 1978). Although a sentence for each crime of twenty-five years falls within statutory requirements, section 713.2 and section 902.9(1), Supplement to the Code 1977, we find that a total sentence of fifty years imprisonment for the crimes committed in this case is excessive even in light of defendant's past criminal activities and poor probation record. Neither defendant's needs nor society's interests are best served by such a lengthy sentence for the particular crimes committed here. See e.g., Hubbs, 268 N.W.2d at 191. We conclude that two twenty-five year sentences, to be served concurrently, is the proper punishment in this case.

AFFIRMED AS MODIFIED.