FILED
AUG 26 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

394

STATE OF IOWA,	)	Filed August 26, 1982
Plaintiff-Appellee,	)	
vs.	)	2-144 66631
PHILLIP JOHN MILLER,	)	
Defendant-Appellant.	)	

Appeal from Adair District Court, Richard D. Morr, Judge.

Defendant appeals from his conviction of escape in violation of Iowa Code § 719.4(1). AFFIRMED.

John E. Wietzke, Greenfield, for defendant-appellant.

Thomas J. Miller, Attorney General, and Lona Hansen, Assistant Attorney General, for plaintiff-appellee.

Heard en banc.

PER CURIAM

Defendant appeals from his conviction of escape in violation of Iowa Code § 719.4(1)(1979). Defendant and another man allegedly escaped from jail after they were taken outside to exercise in a city park. On appeal, defendant asserts (1) that the trial court denied him his constitutional right to an impartial jury by overruling his motion for change of venue; (2) that Iowa Code § 719.4(1) (escape by person charged with or convicted of felony from detention facility or institution or from custody of police officer or employee) is unconstitutionally vague on its face and as applied to defendant's conduct; (3) that the trial court should have instructed the jury to acquit the defendant if it is found that the sheriff had entrapped him, permitted him to leave the jail area, abandoned him outside the jail, or given him indefinite instructions as to what to do; (4) that there was insufficient evidence of the elements of escape from custody to support defendant's conviction; and (5) that the trial court should have granted defendant's motion for a new trial based on the State's failure to produce a statement that would have raised a question as to defendant's sanity. We affirm.

The principal facts of this case are not in dispute. Defendant Phillip J. Miller was charged by information filed November 18 and December 16, 1980, of burglary in the second degree and was being held by the Adair County Sheriff Don W. Carrick under a warrant of commitment on $5000 bail bond. At about 4 o'clock p.m. on January 18, 1981, the sheriff took defendant and another man, Albert C. Staiano, to the back porch of the jail and told them to "go out and exercise where you did yesterday." The two men had exercised the day before in the grassy area of a city park located just west of the jail, at which time the sheriff had instructed them not to leave the park area. The sheriff usually kept

watch on prisoners while they exercised in this area, but on this occasion he was called back to his office to answer a telephone call. When he returned about five minutes later, both defendant and Staiano were gone. They were found later that night in a town about ten miles from the jail. Defendant was charged and convicted of escape and sentenced to a five-year indeterminate term.

Our review of this case is on assigned error except with regard to issues involving alleged violations of constitutional safeguards, in which case we review the record de novo. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975).

I. Defendant first asserts that the denial of his motion for change of venue prejudiced his right to a fair and impartial trial under Iowa R. Crim. P. 10, and the sixth amendment to the United States Constitution. Defendant testified in support of his motion that a number of other charges had been brought against him in Adair County, that there had been publicity about these charges, and that his aunt had stopped speaking to his mother after she learned defendant had been charged with escape.

The disposition of a motion for change of venue is governed by Iowa R. Crim. P. 10, which provides:

> If the court is satisfied from a motion for change of venue and evidence adduced in support thereof that such prejudice exists in the county in which the trial is to be had that there is a substantial likelihood a fair and impartial trial cannot be had there, the court shall transfer the proceeding to another county in which no such situation exists.

The moving party has the burden of showing his entitlement to a change of venue. State v. Dague, 206 N.W.2d 93, 94 (Iowa 1973). Although a petition for change of venue "on its face proper and sufficient" generally creates a prima facie case, State v. Hephner, 161 N.W.2d 714, 716 (Iowa 1968), the State's failure to

affirmatively counter the petition does not conclusively establish grounds for a change of venue. State v. Dague, 206 N.W.2d at 94. Rather, the movant must prove the existence of prejudice in fact, or the publication of material so potentially prejudicial that prejudice must be presumed. State v. Cuevas, 288 N.W.2d 525, 527 (Iowa 1980). He must further show that such prejudice created a "substantial likelihood" that a fair and impartial trial cannot be achieved in the county.

Because the constitutional right to a fair trial is involved in the ruling on a motion for change of venue, the appellate courts review the record de novo to determine whether the trial court abused its discretion. State v. Love, 302 N.W.2d 115, 122 (Iowa 1981); State v. Cornelius, 293 N.W.2d 267, 269 (Iowa 1980). In this case, a de novo review of the record does not show that the trial court abused its discretion by overruling defendant's motion for change of venue. Defendant did not produce evidence that potential jurors in Adair County entertained any prejudice against him. Nor did he present affidavits or testimony from disinterested witnesses as to the sentiment of the community. His only evidence, concerning two of his relatives, was not probative of the sentiment of the community. Under these circumstances, and particularly considering the length of time between defendant's burglary charge and the escape incident, we conclude that the trial court correctly overruled defendant's motion for a change of venue.

Furthermore, defendant's motion for change of venue was not timely filed. In accordance with Iowa R. Crim. P. 10(4) and 10(9), a motion for change of venue must be filed within forty days of arraignment, unless the court extends the period for good cause shown. In this case, defendant appeared for arraignment on January 20, 1981, but did not move for change of venue until March 6, 1981, which

was more than forty days later. Since "good cause" for the delay was not shown, the defendant is deemed to have waived the motion. Iowa R. Crim. P. 3.

II. Defendant challenges the constitutional validity of Iowa Code § 719.4(1) on its face and as applied to his conduct. This section provides:

> A person convicted of a felony, or charged with the commission of a felony, who intentionally escapes from any detention facility or institution to which the person has been committed by reason of such conviction or charge, or from the custody of any public officer or employee to whom the person has been entrusted, commits a class "D" felony.

We first dispose of the facial challenge.

In State v. Ritchison, 223 N.W.2d 207 (Iowa 1974), the Iowa supreme Court stated that "in order to preserve for review any alleged error in ruling on the constitutionality of a statute, the party challenging the statute must do so at the earliest available opportunity in the progress of the case." Id. at 214. In the case of an attack on the facial validity of a statutue, the appropriate opportunity for raising the issue is therefore by pretrial motion to dismiss. State v. Allen, 304 N.W.2d 203, 206 (Iowa 1981). We conclude that because defendant did not timely raise the issue in a pretrial motion to dismiss, he is barred from raising it on appeal.

Defendant also contends that Iowa Code § 719.4(1) is unconstitutionally vague as applied to him. He claims that the sheriff's instructions were so vague that he had no way of knowing how far he could or could not go and was thus unable to determine whether he was violating the law. Defendant raised this argument in his motion for directed verdict and motion for a new trial.

The test for determining whether a statute is unconstitutionally vague is well established. A statute is void for vagueness if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. . . ." Connally v.

General Construction Co., 269 U.S. 385, 391, 46 S. Ct. 126, 127, 70 L. Ed. 322, 328 (1926); State v. Willis, 218 N.W.2d 921, 923 (Iowa 1974). The meaning of the statute may be ascertained "by reference to similar statutes, prior judicial determinations, reference to the dictionary, or... a common and generally accepted meaning." State v. Kueny, 215 N.W.2d 215, 217 (Iowa 1974).

We conclude that defendant's argument that the statute is unconstitutionally vague as applied to him is not supported in the record. An examination of the testimony reveals that the two men had been taken outside to exercise with specific instructions to stay in the area they had been in the day before, at which time they had been instructed not to leave the park area. Defendant testified that he knew he might be committing a crime by leaving this area and traveling to a place ten miles away. A person "of common intelligence" would understand that this conduct constituted "intentional escape" within the meaning of the statute and therefore was prohibited by it. Accordingly, defendant's motions for directed verdict and new trial based on the unconstitutionality of Iowa Code § 719.4(1) were properly denied.

III. Defendant argues that the trial court erred in refusing to sustain his motion for directed verdict and instructions to the jury on the sheriff's entrapment of defendant, voluntary abandonment of defendant, and permitting defendant to leave. Defendant seems to suggest that the court is bound to instruct the jury on whatever theories the parties request. This is not the law of Iowa, however. Sufficient evidence of a claim must exist before it can be submitted to the jury. Isaacs v. Bruce, 218 Iowa 759, 762, 254 N.W. 57, 59 (1934). There is no factual support in the record for the requested instructions.

The Iowa Supreme Court has adopted the following definition of "entrapment."

> Entrapment occurs when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause normally law-abiding persons to

> commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

State v. Mullen, 216 N.W.2d 375, 382 (Iowa 1974). Viewing the evidence in the light most favorable to defendant, see State v. Cooper, 248 N.W.2d 908, 910 (Iowa 1976), it cannot be said that the sheriff's behavior constituted entrapment. There was no inducement or persuasion on the part of the sheriff. At most, defendant was presented with an opportunity to escape, which is not sufficient to find entrapment.

Neither does the evidence support the arguments that the sheriff voluntarily abandoned defendant or permitted defendant to leave. The sheriff simply returned to the office momentarily to answer a call. His absence was not a license for the defendant to leave the designated area in total disregard of previous instructions.

IV. Defendant argues that there was insufficient evidence of the elements of escape from custody to support his conviction. However, this issue was not presented in the lower court. Because an issue may not be raised for the first time on appeal, State v. Williams, 285 N.W.2d 248, 269 (Iowa 1980), cert. denied 446 U.S. 921, defendant is barred from now raising it.

We nevertheless note that in disposing of this issue on its merits, appellate courts review the sufficiency of evidence in the light most favorable to the State. See State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981). Thus viewing the evidence, we believe it to be sufficient to support the defendant's conviction.

V. Defendant's final argument concerns the alleged failure of the county attorney to produce potentially exculpatory evidence. At the conclusion of the State's case, defendant requested that the trial court order the State to release

any exculpatory evidence. The State indicated that it had a tape-recorded statement Staiano had agreed to make in exchange for the State's dropping the escape charges against him, but that it did not believe the tape contained anything exculpatory. The trial court then offered defendant's counsel an opportunity to listen to the tape before the trial continued, but counsel refused. A transcript was later made of the tape, which contained Staiano's version of the escape, in which he made repeated references to defendant as "irrational" and "sick."

It is well settled that the State may not suppress exculpatory evidence. State v. Van Rees, 246 N.W.2d 339, 345 (Iowa 1976). It does not follow, however, that a defendant may dictate the manner in which he is to obtain such evidence. State v. King, 256 N.W.2d 1, 15 (Iowa 1977); State v. Brewer, 247 N.W.2d 205, 211 (Iowa 1976). We conclude that, since defendant's counsel knew that the statement had been taken and was given the opportunity to listen to it, the State's obligation to release exculpatory evidence was satisfied.

All issues here raised by defendant Phillip J. Miller have been considered and found to afford him no basis for appellate relief. The decision of the trial court is accordingly affirmed.

AFFIRMED.