IN THE COURT OF APPEALS OF IOWA

No. 2-468 / 91-1068

FILED
DEC 29 1992
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

HENRY LEE MILLER,

Appellant.

Appeal from the Iowa District Court for Mahaska County, James D. Jenkins, Judge.

Defendant appeals from his convictions for five counts of theft in the third degree and one count of theft in the second degree. **AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Shari Barron, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Martha E. Boesen, Assistant Attorney General, and Charles Stream, County Attorney, for appellee.

Heard by Oxberger, C.J., and Hayden and Sackett, JJ.

Schlegel, J., takes no part.

OXBERGER, C.J.

On July 11, 1990, the State filed a trial information charging the defendant, Henry Miller, with five counts of theft in the third degree and one count of theft in the second degree. Thereafter, Miller filed several motions to suppress evidence discovered via allegedly improper search warrants. Miller claimed the search warrants contained an incorrect address of the place to be searched. The district court overruled the motions and the case proceeded to a jury trial.

At trial, the State produced the testimony of Ronnie Shafer and Jimmy Thomas. Shafer and Thomas both testified that they were responsible for several burglaries in Beacon, Iowa, during the spring of 1990. Shafer and Thomas lived in a cabin on Miller's land. After committing the burglaries, they would return to Miller's property and hide some of the stolen items.

Thomas testified that Miller did not know any of the items were stolen. Shafer gave conflicting testimony. He initially claimed Miller did not know any of the items were stolen. He then claimed Miller asked them to steal two Pomeranian dogs and helped them load stolen sign posts into a trailer. Shafer also claimed Miller knew where some of the stolen property was hidden on his property.

After trial, the jury returned a verdict of guilty as charged. Miller then filed two motions for new trial which

were denied. Thereafter, the district court entered judgment and sentenced Miller to a term of imprisonment not to exceed two years for each count of third-degree theft and a term of imprisonment not to exceed five years for the second-degree theft conviction. The court ordered the sentences to run concurrently. Miller appeals.

I. **Aggregation of Incidents.** Miller first contends it was improper for the State to aggregate some, but not all, of the thefts pursuant to Iowa Code section 714.3 (1991). The State argues this claim is a challenge to the indictment and, as such, is untimely and therefore waived.

Objections to indictments must be made prior to trial. Iowa R. Crim. P. 10(2)(b). Failure to timely raise objections shall constitute waiver unless the court, for good cause shown, grants relief from such waiver. Iowa R. Crim. P. 10(3). Miller failed to raise this objection prior to trial. He first raised this issue on appeal. He provides no reason upon which we may base a finding of just cause for his failure to do so. Accordingly, we hold this issue is waived.

II. **Sufficiency of Evidence.** Miller next contends the State failed to show sufficient evidence of Miller's involvement in a single scheme, plan, or conspiracy.

Iowa Code section 706.1 (1991) defines conspiracy and has been interpreted to "require that the conspirator actually agree at some point on the criminal act that

serves as the object of the conspiracy." State v. Boyer, 342 N.W.2d 497, 499 (Iowa 1984). However, "an agreement may be shown by circumstantial evidence such as the conduct of the alleged participants or evidence of a scheme." United States v. Garcia, 917 F.2d 1370, 1376 (5th Cir. 1990); State v. LaRue, 478 N.W.2d 880, 882 (Iowa Ct. App. 1991). A mere tacit understanding will suffice, and there need not be any written or spoken statement which communicates agreement. LaRue, 478 N.W.2d at 882.

Evidence presented at trial indicated Miller was aware of the thefts and hid stolen items on his property. From the evidence presented a jury could reasonably infer that Miller agreed to participate in the charged acts. We have also considered Miller's other claims regarding sufficiency of evidence and conclude substantial evidence supports the jury's verdict on all counts.

III. **Search Warrants.** Miller next contends the district court erred in denying his motion to suppress evidence obtained following execution of a search warrant containing an incorrect address.

Review of a search warrant involves a constitutional question, and our review is de novo. State v. Campbell, 326 N.W.2d 350, 352 (Iowa 1982). The test for determining the constitutional sufficiency of a warrant description is:

> Whether the place to be searched is described with sufficient particularity as to enable the executing officer to locate and identify the premises with reasonable effort, and whether there is any reasonable probability that another premise might be mistakenly searched. [citation omitted]

State v. Morales, 395 N.W.2d 655, 658 (Iowa App. 1986).

The search warrant described "the residences, outbuildings and curtilage located at 201 Kilbourn, Beacon, Iowa and all vehicles located on the premises in the possession of Hank Miller and persons unknown" to be searched. Miller lives on approximately forty acres of land in Beacon, Iowa. Numerous buildings are located on the property, including a body shop with the address 201 Kilbourn. Miller contends he resides at Rural Route 1, Box 1, Beacon, Iowa, although he also contends his address is 215 Flora. There is no record of the 215 Flora address. The address, 201 Kilbourn, appears on the body shop owned by Miller on Miller's property. We will not allow defendants to avoid execution of search warrants by alleging varying or fictitious addresses for varying buildings occupied by the same person on the same property. We hold the address, 201 Kilbourn, describes the place to be searched with sufficient particularity and accordingly affirm the trial court's denial of Miller's motion to suppress evidence based on the execution of the search warrant.

IV. **Sentencing**. Finally, Miller contends the district court abused its discretion in sentencing. He contends the district court denied probation because he refused to admit wrongdoing.

A sentencing judgment "will not be disturbed . . . unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play." State v. Ashley, 462 N.W.2d 279, 281 (Iowa 1990). To demonstrate an abuse of discretion, the challenging party must show that the court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Ramirez, 400 N.W.2d 586, 588 (Iowa 1987).

In this case, the trial court clearly stated Miller's refusal to admit his wrongdoing was a key reason for denying probation. The court stated:

> Mr. Dunn spoke of the reality of sentencing and asked for probation for his client. The whole purpose of probation is to help someone turn his life around when he acknowledges that he has done wrong and is willing to turn his life around. The defendant has denied any wrongdoing. He so testified at trial, and his attorney and he himself have here again today urged his innocence. Therefore, it seems to me that under those circumstances, probation is a total waste of time.

We know of no rule or theory of probation requiring a defendant to admit guilt in order to receive probation. The court provides no other reason for denying Miller's probation request. Miller's sole prior conviction was for driving while his license was suspended in 1956. No other

information was given to indicate Miller presented an ongoing threat to society.

We hold Miller's refusal to admit wrongdoing is an improper consideration upon which to solely base denial of probation. We vacate the sentence imposed by the trial court.

We remand this case for sentencing consistent with these guidelines.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.