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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,) Filed May 22, 1984 194
vs.)
LARRY DEAN JOEL,) 4-86 / 69624
Defendant-Appellant.)

Appeal from the Iowa District Court for Buchanan County - L. John Degnan, Judge.

Defendant appeals his conviction and sentence imposed on his conviction of possession of a controlled substance (marijuana) in violation of Iowa Code section 204.401(3). AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

LuAnn White, Assistant Appellate Defender, for the defendant-appellant.

Thomas J. Miller, Attorney General, and Valencia Voyd McCown, Assistant Attorney General, for the plaintiff-appellee.

Heard by Donielson, P.J., and Snell and Sackett, JJ.

Defendant appeals his conviction and sentence imposed on his conviction of possession of a controlled substance (marijuana) in violation of Iowa Code section 204.401(3). He contends the trial court erred by communicating with the jury outside the presence of the defendant, his attorney, or the prosecutor. He also challenges an instruction which defined the crime of possession without stating that possession must be "knowing or intentional." In addition, he contends the evidence was insufficient to permit a rational jury to find that he had knowingly or intentionally possessed marijuana. Finally, he challenges that part of the sentencing order which required him, as a condition of his probation, to pay court costs and court-appointed attorney's fees. We affirm in part, vacate in part, and remand for resentencing.

I.

Defendant first alleges error in the court's communication with the jury outside the presence of defendant, his attorney, or the prosecutor. During its deliberations, the jury sent the judge a note asking to see a transcript of defendant's testimony. The judge responded with a note telling the jury that the testimony had not been transcribed and that the jury would have to rely on its memory.

The subject of judge-jury communications is covered by Iowa R. Crim. P. 18(5)(g):

> Report for information. After the jury has retired for deliberation, if there be any disagreement as to any part of the testimony, or if it desires to be informed on any point of law arising in the cause, it must require the officer to conduct it into court, and, upon its being brought in, the information required may be given, in the discretion of the trial court. Where further information as to the testimony which was given at trial is taken by the jury, this shall be accomplished by the court reporter or other appropriate official reading from the reporter's notes. Where the court gives the jury additional instructions, this shall appear of record. Provided, that the procedures described in this section shall take place in the presence of defendant and

counsel for the defense and prosecution, unless such presence is waived. (emphasis added)

Unfortunately for defendant, however, the record does not indicate that he was in fact absent when the court received and responded to the jury's inquiry. In order to preserve error on a claim under rule 18(5)(g), defendant was required to raise the issue in the trial court (e.g., by a motion for new trial and the filing of supporting affidavits) and then present a record adequate for our review. State v. Williams, 341 N.W.2d 748, 751 (Iowa 1983). Defendant's failure in this regard leaves us nothing to review.

Even if error was preserved and defendant was not present when the court told the jury there was no transcript, any such error was harmless beyond a reasonable doubt. See id. at 751-52; State v. Mueller, 344 N.W.2d 262, 268 (Iowa Ct. App. 1983). We feel compelled to note at this point that the court's response to the jury's inquiry was not wholly satisfactory. At this point in any trial (i.e., during the jury's deliberations), the proceedings have not yet been transcribed. The jury here obviously wanted to review a portion of defendant's testimony; the court clearly had the discretion under rule 18(5)(g) to have the court reporter or other court official read the desired testimony to the jury from the reporter's notes. However, defendant has failed to show how he was prejudiced by the court's failure to have those notes read to the jury. Under these circumstances, we find no reversible error.

II.

Defendant next claims that the court erred in failing to instruct the jury that the possession for which he was charged had to be knowing or intentional in order to convict him. "All instructions given must be read and considered together and related to each other, not piecemeal or in artificial isolation." State v. Johnson, 243 N.W.2d 598, 604 (Iowa 1976) (citations omitted). We find no error. Although Instruction No. 7 stated only that "it is unlawful for any person to

possess . . . the substance called marijuana . . ." without stating that such possession must be knowing, the next two instructions adequately covered this element. The term "possession" was defined in Instruction No. 8 and required a showing that the substance was "under the defendant's conscious, personal dominion and control" (emphasis added). In addition, the jury was told in Instruction No. 9 that it could not convict unless defendant was found to have possessed marijuana and that he did so "knowingly or intentionally." Therefore, the jury was made fully aware that defendant's possession had to be knowing or intentional.

III.

Defendant further alleges that there was insufficient evidence to support the jury's conclusion that he had knowing or intentional possession of marijuana. In reviewing claims of evidentiary insufficiency, we review all of the evidence and we do so in the light most favorable to the State. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). The question of witness credibility is left to the determination of the finder of fact. Id. at 341.

We believe the record contains sufficient evidence to support the jury's guilty verdict. Police officers Van Zuck and Nance testified that they saw defendant and another person in defendant's automobile. The officers were standing about five feet from that car at the time. Van Zuck testified he saw defendant with a pipe in his mouth, a small flame at the end of the pipe, and a cloud of smoke. Both officers testified that they definitely detected the smell of marijuana. When the officers ordered them out of the car, defendant shook his head and drove off. He was apprehended about an hour later and transported to the Safety Center. As he was getting out of the police car, a small wooden box containing marijuana and a pipe fell from his person. When Van Zuck told defendant, "you tried, but I found it," defendant replied "that's the breaks." From this evidence, a rational jury could conclude that defendant knowingly possessed marijuana. The jury was also free to disbelieve the testimony of defendant's alibi

witnesses. The court did not err in overruling defendant's motion for judgment of acquittal.

IV.

Finally, defendant challenges that part of the sentencing order which required him, as a condition of his probation, to pay court costs and court-appointed attorney's fees. He argues that the imposition of this condition, without a determination that he was able to pay, was an abuse of the trial court's sentencing discretion and a violation of his constitutional right to counsel.

We believe the sentence must be vacated for two reasons. First, the trial court may order a defendant to make restitution to the county for court costs and court-appointed attorney fees, but only to the extent that defendant is reasonably able to do so. Iowa Code § 910.2 (1983). This requires a court determination that defendant is in fact reasonably able to make such payments. State ex rel. Pillers v. Maniccia, 343 N.W.2d 834, 836 (Iowa 1984). In this case, the court made no determination of defendant's ability to pay. The following exchange took place at the sentencing hearing:

> MR. HAVENS: Your Honor, the only thing I would add, is that I would request on behalf of the State that a condition of his probation be that he reimburse the county for the court-appointed attorney fees.
>
> THE COURT: Okay. That is a fair recommendation and it is also considered by this Court in any kind of probation.
>
> I do not know what those fees amount to, but Mr. Ristvedt can give you a statement or advise you about it, so that you can find a way to repay it.

Thus, not only did the court not make a determination of defendant's ability to repay those costs, but the court was not even aware of what the total bill would eventually be. We must therefore vacate the restitution portion of the sentence and remand for a determination of defendant's ability to reimburse the county for those costs and implementation of a plan of restitution based on that determination.

Trial court's sentence is illegal for an additional reason. The court sentenced defendant to a six-month jail sentence, suspended that sentence, and placed him on probation for two years, but still required defendant to be jailed every weekend for two months. The supreme court has held that granting probation and imposing confinement are mutually exclusive except where expressly authorized by statute and that, to the extent such a split sentence is now authorized, the confinement may not be in a county jail. State v. Tensley, 334 N.W.2d 764, 764 (Iowa 1983). Thus, the court's sentence in this case was improper and must be vacated.

Defendant's conviction is affirmed. We vacate the sentence imposed and remand for resentencing in conformity with this opinion.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED FOR RESENTENCING.