IN THE COURT OF APPEALS OF IOWA

No. 0-378 / 98-1968
Filed August 30, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LARRY JAMES DALY,
Defendant-Appellant.

FILED
AUG 30 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Robert J. Blink, Judge.

Larry James Daly appeals his various drug convictions. **CONVICTION AND JUDGMENT AFFIRMED, SENTENCE AFFIRMED AS MODIFIED.**

Linda Del Gallo, State Appellate Defender, and Stephan J. Japuntich, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, John P. Sarcone, County Attorney, and Jamie Bowers, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Streit and Vaitheswaran, JJ.

VAITHESWARAN, J.

In this appeal from various drug-related convictions, Larry Daly contends the district court: (1) abused its discretion in admitting evidence of his prior convictions for purposes of impeaching his credibility; (2) erred in considering jury instructions outside his presence; (3) considered uncharged offenses in sentencing him; and (4) erroneously refused to permit a reduction in his mandatory minimum sentence based on good and honor time credits earned and not forfeited. We affirm the conviction and judgment and affirm the sentence as modified.

I. Background Facts and Proceedings

The essential facts elicited at trial are as follows. A Des Moines police officer conducted surveillance of a home which was the suspected site of illegal drug activity. The officer saw a man leave the home, had another officer stop him for a seat belt violation, and discovered a bag of methamphetamine in the car. Based on this information, the officer applied for and obtained a warrant to search the home. On executing the warrant, police discovered Daly standing in an upstairs bedroom next to another man. On the dresser in front of the two men was a granite slab with a line of methamphetamine and a straw next to it, as well as a rock of methamphetamine. Officers also found additional methamphetamine under the mattress, close to $3000 in cash in Daly's wallet, a bag of marijuana, and other items consistent with drug trafficking.

A jury convicted Daly of possession of a controlled substance with intent to deliver methamphetamine, failure to possess a tax stamp, and possession of a controlled substance (marijuana), in violation of Iowa Code sections

124.401.1(b)(7), 453B.3 and 453B.12, and 124.401(5) (1997). The district court adjudged him guilty and sentenced him to terms not exceeding seventy-five years, five years, and six months respectively, with the sentences to run concurrently. The court noted Daly would be required to serve a mandatory minimum sentence of twenty-five years on the first count. This appeal followed.

II. Admission of Prior Convictions for Impeachment Purposes

A. Motion in Limine. Before trial, the State notified Daly of its intent to rely on evidence pertaining to a 1993 search of Daly's business which yielded drugs and drug-related items resulting in convictions on multiple drug-related counts. In response, Daly's attorney filed a motion in limine seeking to exclude this evidence. Daly contended the evidence: (1) was inadmissible prior bad act evidence under Iowa Rules of Evidence 402, 403, and 404, and (2) was inadmissible for impeachment purposes under rule 609(a)(1). The district court agreed the evidence was inadmissible prior bad act evidence and sustained that portion of Daly's motion in limine. The court, however, overruled the second portion of the motion, concluding evidence of the prior convictions was admissible under rule 609(a)(1) to impeach Daly's credibility. The court reasoned:

> the significant difference between how this evidence comes in under 404(b) and how it comes under 609 is directly proportioned to the question of how much detail. Coming in under 609, it would be the inquiry either on direct or cross, have you been convicted of a crime, what crimes have you been convicted of, and when did they occur and that would--that would be the extent of the interrogation.
>
> The information under 404(b), of course, would be far broader.

On appeal, Daly contends the district court abused its discretion in admitting the prior convictions for impeachment purposes. He does not challenge the district court's balancing of prejudicial and probative concerns under rule 404(b). Instead, Daly contends the district court should have similarly balanced the competing interests under rule 609(a) to also exclude the evidence for impeachment purposes.[1]

The State counters (1) error on this issue was not preserved and (2) the type of probative value/prejudicial effect balancing test a court should engage in under Rule 609(a) is less stringent than the analysis under rules 403 and 404 and permits admission of the evidence at issue here.

As an initial matter, we conclude Daly preserved error by obtaining a ruling on the portion of the motion in limine addressing the prior convictions as impeachment evidence. Accordingly, we will address the merits.[2]

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[1] The court's ruling on the 404(b) question does not preclude us from determining this related but distinct question. *Cf. United States v. Valencia*, 61 F.3d 616, 619 (8th Cir. 1995) (noting court had discovered no authority which would foreclose analysis on a federal rule 609 question where a court had previously ruled evidence inadmissible under rule 404(b)).

[2] This case could be resolved on a waiver of error theory recently articulated by the United States Supreme Court. On May 22, 2000, the United States Supreme Court, citing Federal Rule of Evidence 609(a), held "a defendant who preemptively introduces evidence of a prior conviction on direct examination may not on appeal claim the admission of such evidence was error." *Ohler v. United States*, ___ U.S. ___, 120 S.Ct.1851, ____, 146 L.Ed.2d 826 (2000). That is precisely what happened here. Following the close of the State's evidence, Daly took the stand and immediately testified he had previously been convicted of drug-related crimes. Because our rule is identical to the federal rule in all material respects, we generally would find federal precedent particularly persuasive. *See State v. Reddick*, 388 N.W.2d 201, 203 (Iowa App. 1986). However, *Ohler* is contrary to clear Iowa precedent addressing the identical issue. *See State v. Griffin*, 323 N.W.2d 198, 202 (Iowa 1982); *State v. Jones*, 271 N.W.2d 761, 765-66 (Iowa 1978); *State v. Miller*, 229 N.W.2d 762, 769-770 (Iowa 1975); *cf. Ray v. Paul*, 563 N.W.2d 635, 638 (Iowa App. 1997) (holding party did not waive error concerning admission of stipulation by electing for strategic reasons to introduce stipulation as part of her case). Accordingly, we decline to follow *Ohler*.

B. Merits. We review issues relating to admissibility of evidence for abuse of discretion. *State v. Axiotis*, 569 N.W.2d 813, 815 (Iowa 1997). Daly alleges the district court abused its discretion when it failed to conclude the prejudicial nature of his prior convictions outweighed the probative effect.

Our court has considered the following factors in determining whether a defendant's prior convictions should be admitted for impeachment purposes: (1) the nature of the conviction, (2) the conviction's bearing on veracity, (3) the age of the conviction; and (4) its tendency to improperly influence the minds of the jurors. *Axiotis*, 569 N.W.2d at 816.[3] Daly focuses on the fourth Axiotis factor. He contends the offenses for which he was previously convicted were identical to the present offenses and, accordingly, the probability was high the jury would improperly consider the prior convictions as evidence of his propensity to commit drug-related crimes. The State counters the prior convictions were not remote in time and were critical to the issue of Daly's credibility.

The district court, in its ruling on the motion in limine, compared the outcome under the balancing test contained in both rule 404(a) and rule 609(a). The court noted the level of detail in questioning as a significant and distinguishing factor in excluding the evidence under one rule and admitting it under the other. The court permitted only a limited inquiry for impeachment purposes: 1) whether Daly had been convicted; 2) what crimes he was convicted of; and 3) when was he convicted. The transcript reveals Daly strictly adhered to this limitation. On direct examination, he testified as follows:

[3]Although Iowa Rule of Evidence 609(a) was amended in 1996, the current version contains the same balancing test.

> Q: Let's get one thing out right now, Mr. Daly. You've been convicted of crimes in the past, haven't you? A: Yes.
> Q: What crimes were you convicted of? A: Possession with Intent to Deliver Methamphetamine, Failure to Possess drug Stamp and Possession of Marijuana.
> Q: And when was that? A: Pardon me?
> Q: When was that? A: 1993.
> Q: Found guilty by a jury? A: No, I pleaded guilty.

Accordingly, despite the ability of a jury to be unduly prejudiced by information regarding similar convictions, the district court's limitation of the inquiry allayed this concern. Additionally, the court provided the jury with the following limiting instruction:

> Larry James Daly has admitted he was previously convicted of crimes.
> You may use that evidence only to help you decide whether to believe him and how much weight to give his testimony.

In light of these limitations, we conclude the district court did not abuse its discretion in admitting Daly's prior convictions for impeachment purposes.

III. Consideration of Instructions Outside Jury's Presence

Daly next maintains the court and attorneys should not have discussed jury instructions outside his presence and we should presume this discussion was prejudicial. The State counters Daly failed to preserve error on this issue. In the alternative, the State contends: (1) the jury instruction conference was not a "critical stage of the trial" which triggered Daly's constitutional right to be present; (2) Daly's presence at a later hearing cured the error; (3) Daly waived his right to be present; and (4) Daly was not prejudiced by his absence.

The United States Constitution guarantees "an accused's right to be present in the courtroom at every stage of his trial." *State v. Webb*, 516 N.W.2d 824, 830 (Iowa 1994)(*quoting Illinois v. Allen*, 397 U.S. 337, 338, 90 S.Ct. 1057,

1058, 25 L.Ed.2d. 353, 356 (1970)). However, this right may be waived by the voluntary absence of the defendant. *State v. Hendren*, 311 N.W.2d 61, 62 (Iowa 1981) (*citing Diaz v. United States*, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed. 500 (1912)).

The pertinent facts pertaining to the instruction conference are as follows. The day before the conference, the court advised the parties and their attorneys the instruction conference would be scheduled for 9:00 A.M. the following morning. Daly's attorney appeared at that time but stated he did not know where his client was. Attempts to locate Daly were unsuccessful and, at 10:15 A.M., the court ordered the attorneys to proceed with the instruction conference. Daly's attorney did so, expressly refusing to waive objection to consideration of the instructions outside his client's presence. In the interim, police officers discovered Daly asleep in his home and escorted him to the courthouse. He appeared in time to voice any objections he might have had to the proposed instructions. Daly did not do so and, at that juncture, his attorney reaffirmed the prior record he had made on the proposed instructions.

We conclude Daly's attorney preserved error on the issue of proceeding with the conference in his client's absence. However, we agree with the State's contention Daly's voluntary absence resulted in a waiver of error. We also agree with the State error was additionally waived when Daly did not voice any objections he might have had after appearing in time to do so. *Cf. State v. Brogden*, 407 S.E.2d 158, 163 (N.C. 1991) (holding defendant's absence from in-chambers discussion about jury instructions was harmless error where discussion was subsequently entered into record in open court, with defendant

present, and defense counsel had opportunity to make legal arguments and objections). We find it unnecessary to address the parties' remaining arguments concerning this issue.

IV. Consideration of Impermissible Sentencing Factors

Daly contends the district court considered impermissible factors in his sentencing. Specifically, he maintains the district court improperly relied on what he characterizes as "unproven contempt" charges arising from Daly's belated appearance on one day of trial and his exit from the courtroom when the jury was ready to announce its verdict.

We generally review a district court's sentencing decision for abuse of discretion or for a defect in sentencing procedure. *State v. Gonzalez*, 582 N.W.2d 515, 516 (Iowa 1998). A claim that a court impermissibly considered uncharged and unproven crimes implicates a defect in sentencing procedure rather than a court's exercise of discretion. *State v. Mateer*, 383 N.W.2d 533, 537 (Iowa 1986). The district court may not consider unproven or unprosecuted offenses when sentencing a defendant unless (1) the facts before the court demonstrate the defendant committed the offense or (2) the defendant admits committing the offense. *Gonzalez*, 582 N.W.2d at 516. Where improper factors are considered, a sentence must be vacated and the case remanded for resentencing. *State v. Sinclair*, 582 N.W.2d 762, 765 (Iowa 1998).

We conclude the district court did not rely on unproven charges. While Daly's absences at trial might have formed the basis for contempt charges, the district court did not suggest he should receive a stiffer sentence because these absences went unpunished. Instead, the court cited Daly's non-appearance to

highlight his poor attitude toward the judicial process. The court told Daly the absences

> demonstrated not only an unwillingness to comply with what society wants you to do, as your past criminal record shows, but I think show an abject, an absolute disregard for the fair process of law and a disregard of the rights that society would give to you notwithstanding your conduct. They are also indicative of someone unwilling to accept responsibility.

We agree with the State the district court considered Daly's trial absences as a reflection on his "character, propensities and chances of his reform", factors we have deemed relevant in meting out a sentence. *See State v. Bragg*, 388 N.W.2d 187, 191 (Iowa App. 1986). Accordingly, we conclude this case does not implicate a defect in sentencing procedure and the court did not abuse its discretion in considering Daly's lax conduct at trial.

V. Denial of Good Time Credits

Daly next contends the district court lacked authority to prohibit the Department of Corrections from applying good time credits to reduce the mandatory minimum portion of his sentence. The State concedes this point and additionally urges us not to remand the case for re-sentencing but to simply strike the portion of the judgment addressing good and honor time.

The district court imposed a mandatory minimum sentence of twenty-five years on the first count of possession of methamphetamine with intent to deliver. This sentence was imposed pursuant to Iowa Code section 124.413. However, the district court refused to authorize a reduction in this mandatory minimum sentence based on good time served. The court reasoned:

> As it relates to the issue of statutory good-conduct time, work credits, and program credits, this Court believes that the Legislature has mandated a minimum sentence and that that minimum

> sentence should be served without any application to it of statutory good-conduct time, work credits, or program credits. It's this Court's view that once the mandatory minimum sentence requirement is served, then the remainder of your time of incarceration may be reduced by as much as half of the maximum sentence because of statutory good-conduct time, work credits, and program credits, and then you may be eligible for parole before the sentence is discharged. I appreciate there may be differing views on that topic. I will, of course, accede to directions from the appellate courts in that regard, but it is this Court's view that when the Legislature states that there shall be a mandatory minimum sentence, that's what they mean, and the Department of Corrections shouldn't otherwise change what the Legislature has directed.

Iowa Code section 903A.5 (1997) states, "[g]ood conduct time earned and not forfeited shall apply to reduce a mandatory minimum sentence being served pursuant to section 124.406, 124.413, 902.7, 902.8, or 902.11." We agree with the parties that this provision entitled Daly to a credit on the mandatory minimum portion of his sentence for good time earned but not forfeited. Accordingly, we strike the portion of the October 13, 1998 sentencing order and judgment that held otherwise, as follows:

~~IT IS FURTHER ORDERED that the Defendant shall serve the entirety of the mandatory minimum sentence imposed. Statutory good conduct time, work credits and program credits shall not be applied to reduce the mandatory minimum sentence requirement. After the mandatory minimum sentence requirement is served, the remainder of~~ the Defendant's term of incarceration may be reduced by as much as half of the maximum sentence because of statutory good conduct time, work credits and program credits.

We affirm Daly's conviction and judgment and affirm his sentence as modified.

CONVICTION AND JUDGMENT AFFIRMED, SENTENCE AFFIRMED AS MODIFIED.