IN THE COURT OF APPEALS OF IOWA

No. 0-484 / 88-1839

338

STATE OF IOWA,

Appellee,

vs.

EUGENE W. BAKER, JR.,

Appellant.

Appeal from the Iowa District Court for Scott County, David J. Sohr, Judge.

The defendant appeals his convictions, following a jury trial, for possession of both heroin and cocaine with intent to deliver. **AFFIRMED.**

John O. Moeller, Davenport, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, William E. Davis, County Attorney, and Realff H. Ottesen, Assistant County Attorney, for appellee.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ.

SCHLEGEL, P.J.

Defendant Eugene W. Baker, Jr. appeals his jury conviction on two counts of possession of controlled substances with intent to deliver. Baker argues the trial court erred in failing to sustain his motions to suppress certain evidence and for in camera inspection of a police confidential informant source file. Baker also contests the use of statements he made contemporaneous with his arrest and a definitional instruction given the jury. Baker also challenges the sufficiency of the evidence to convict him. We affirm.

I.

In March 1988 Davenport police officer William Thomas, a detective in the vice and narcotics unit, supervised a controlled drug purchase from a mobile home trailer owned and occupied by defendant Eugene Baker. Thomas sent a confidential informant to Baker's residence to purchase drugs. Thomas then sought and obtained a search warrant for the trailer and other buildings and cars on the property.

When the warrant was executed, officers found large amounts of cocaine, heroin, and cash; drug paraphernalia; and several persons. Officers discovered Eugene Baker standing in the middle of a bedroom. A search of the bedroom revealed a large amount of cash, a revolver, a substantial amount of drugs, drug paraphernalia, police scanners, a telephone answering machine with a tap detector, and written records of drug sales. Upon arrest and being advised of his constitutional rights, Baker apparently stated in response to a question that the trailer was his residence and that he lived there alone. Baker was charged with one count of possession of heroin with intent to deliver and one count of possession of cocaine with intent to deliver, both in violation of Iowa Code section 204.401(1)(a) (1987). Five other persons were arrested inside or leaving the trailer; all were charged either with possession of a controlled substance or possession with intent to deliver.

Before trial Baker filed a motion to require the State to allow an in camera inspection of the police department's "confidential source file," which contains information about the confidential informant. The purpose of the inspection, Baker stated, would have been to bring to light

> [v]arious discrepancies between the objective facts discovered and known to the defendant and the statements of the confidential source as reported by Office [sic] Thomas[, but which] defendant is unable to elaborate . . . because the information provided may be incriminatory to the defendant and at the least will allow the State to attempt to correct or explain discrepancies prior to trial.

The court overruled the motion, noting Baker had indicated he knew the identity of the confidential informant and that that person would be subject to subpoena and examination.

Baker also filed a motion to suppress for use as evidence all items seized from his trailer. He argued that the property seized was not described in the warrant, that there was not probable cause to support issuance of the warrant, and that substantial and material misstatements were made to the judge who issued the warrant. Relying on State v. Groff, 323 N.W.2d 204, 206-08 (Iowa 1982), the trial court ruled that Baker and his codefendants had failed to prove by a preponderance of evidence that the affiant police officer--as opposed to the confidential informant--had made deliberate falsehoods or had exhibited a reckless disregard for the truth.

Baker and two codefendants were tried in October 1988. The State introduced as evidence items seized during the execution of the search warrant. During trial Detective Thomas testified over objection that Baker had stated the trailer was his and that he lived there alone. At the conclusion of evidence, the court instructed the jury on, among other things, the definition of "constructive possession." A jury found Baker guilty of possessing both heroin and cocaine with intent to deliver. He has appealed the resulting convictions on those charges.

II.

Baker's first assignment of error is that the trial court should have made an in camera inspection of the confidential source file.[1] In conjunction with an in

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1. The confidential source file apparently contains detailed information about an informant's name, address, criminal history, and financial background. Presumably it also includes details concerning the informant's reliability with respect to individual arrests for which the informant provided information.

camera examination, Baker also sought an ex parte presentation of relevant information to establish discrepancies in the officer's claimed basis for the search warrant.[2] Although it is less than evident from the briefs and various arguments made by Baker, it appears the relief he seeks is not disclosure of the confidential source's identity, nor even disclosure of the contents of the confidential source file, but an in camera comparison of the contents of the file with unspecified self-incriminating evidence. Defendant claimed at the hearing on his motions that this comparison would bear directly on the truth of the officer's statements in obtaining the search warrant. This particular twist in the law appertaining to confidential informants appears to be one of first impression in Iowa.

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2. The only support appellant supplies for this proposition is Kiser v. Vietor, No. 87-2287, slip op. at 2 (8th Cir. 1987) (order), in which the United States Court of Appeals for the Eighth Circuit granted mandamus ordering the Honorable Harold D. Vietor to conduct an adversary proceeding to determine the extent to which the defendant-petitioner Kiser had sufficient assets not subject to forfeiture from which he could pay the costs and attorney fees for his criminal defense. The mandamus order was not provided to this court, but it is briefly quoted in the related appeals:

> For the protection of Petitioner's Fifth Amendment privilege of self-incrimination, any examination of Petitioner to determine his financial condition shall be conducted ex parte and in camera. . . .

United States v. Unit No. 7, 853 F.2d 1445, 1447 (8th Cir. 1988) (affirming order releasing portion of forfeited property), vacated, 883 F.2d 53, vacated and dismissed, 890 F.2d 82 (8th Cir. 1989).

We review the actions of the district court for an abuse of discretion in declining to grant the motions for _in camera_ inspection and _ex parte_ presentation. _State v. Groscost_, 355 N.W.2d 32, 36 (Iowa 1984). Defendant has the burden of showing the court's ruling was clearly unreasonable or was premised on completely untenable grounds. _State v. Halstead_, 362 N.W.2d 504, 506 (Iowa 1985); _State v. Trudo_, 253 N.W.2d 101, 106 (Iowa), _cert. denied_, 454 U.S. 903 (1977).

The underlying law of disclosure relating to confidential informants appears settled. "With regard to existence of 'probable cause' relative to search or arrest, the disclosure of an informant's identity need not ordinarily be disclosed where reliability is satisfactorily established." _State v. Denato_, 173 N.W.2d 576, 578 (Iowa 1970) (citing, _inter alia_, _Spinelli v. United States_, 393 U.S. 410 (1969)). "On the other hand, when, upon showing made there is reason to believe disclosure of an informer's identity and nature of his communication is material to an accused's defense or requisite to a fair trial, the confidentiality referred to supra, disappears." _Id._ (citing _Roviaro v. United States_, 353 U.S. 53 (1957)); _accord_ _State v. Lamar_, 210 N.W.2d 600, 603 (Iowa 1973). This occurs "when the informer was a participant in, or a witness to, the crime charged." _State v. Battle_, 199 N.W.2d 70, 71 (1972). The _Denato_ court also stated:

> "The scope of the [government's] privilege [of nondisclosure] is limited by its underlying purpose. . . .
>
> "A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. . . ."

Denato, 173 N.W.2d at 578 (quoting Roviaro, 353 U.S. at 60-61) (emphasis omitted). Whether disclosure should be ordered, however, "depends 'on the particular circumstances of each case.'" Id. at 579 (quoting Roviaro, 353 U.S. at 62).

"The burden of showing need for disclosure is upon defendant. Mere speculation an informer may be helpful is not enough to carry the burden and overcome the public interest in the protection of an informer." Battle, 199 N.W.2d at 72; accord Lamar, 210 N.W.2d at 603.

The Iowa Supreme Court has held that when a defendant knows the identity of an informant, there is no cause for disclosure. State v. Grady, 215 N.W.2d 213, 215 (Iowa 1974). If the defendant does not know the identity of the informant, the defendant must make an appropriate showing of the need for disclosure. Id.; accord State v. Sheffey, 243 N.W.2d 555, 560 (Iowa 1976) (quoting Grady). The Iowa Supreme Court in both Grady and Sheffey notes that a defendant may take the stand at a pretrial proceeding to make a record showing the need for disclosure. Sheffey, 243 N.W.2d at 560; Grady, 215 N.W.2d at 215. Relying on

Simmons v. United States, 390 U.S. 377, 394 (1968), among other federal cases, the Iowa Supreme Court has indicated that such "testimony could not have been used against him in trial on the issue of his guilt." Sheffey, 243 N.W.2d at 560; Grady, 215 N.W.2d at 215.

In Simmons, the United States Supreme Court felt it intolerable to require a defendant to be faced with what may only loosely be called the "choice" between "a valid Fourth Amendment claim, [and] in legal effect, . . . waive[r] [of] his Fifth Amendment privilege against self-incrimination." 390 U.S. at 394. Consequently, the court held "that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection." Id.

In a distinct, albeit similar, line of cases, the Iowa Supreme Court has held that access to police investigation reports is available, "if at all, only upon proper motion and the exercise of the court's sound discretion." State v. Groscost, 355 N.W.2d 32, 35 (Iowa 1984) (citing State v. Kase, 339 N.W.2d 157, 159 (Iowa 1983)).

> When the reporting officer has testified for the State, however, the general rule requires that upon defendant's demand the court should examine the report in camera, in the presence of attorneys for both parties, to determine whether any of the material is germane to the witness's direct testimony. If so, it should be supplied to defense counsel. [Citations.] Where the court refuses to supply all or a portion of the report

> to the defense, it should be preserved and certified to this court as part of the record on appeal.

Id. (citing State v. Jacoby, 260 N.W.2d 828, 840 (Iowa 1977); State v. Mayhew, 170 N.W.2d 608, 614 (Iowa 1969)) (footnote omitted). The defendant may not simply make a dragnet request for court examination of files for unidentified "'exculpatory' material." Id. at 37.

With the foregoing principles in mind, we turn to the instant case. Here, as in both Grady and Sheffey, there is a strong indication that defendant knows who the informant is, and defendant would not, therefore, have been entitled to a disclosure. Grady, 215 N.W.2d at 215 (citing, inter alia, Sorrentino v. United States, 163 F.2d 627, 629 (9th Cir. 1947)). Even being uncertain as to the identity of the informant or the details of that informant's statements to the police, the appropriate route would have been for defendant to make his offer during the hearing on his motions. Baker did not make a record either in the hearing on the combined motions or at trial to support the necessity of the relief requested. Defendant is in error in asserting he was unable to test the veracity of the officer or discover misrepresentations in connection with the application for the warrant without abandoning his fifth amendment privileges. Sheffey, 243 N.W.2d at 560; Grady, 215 N.W.2d at 215; see Simmons, 390 U.S. at 394. Because the informant disclosure cases treat identity disclosure as an opportunity to examine the informant, we see no reason why the principles governing disclosure of the informant's identity should not apply to disclosure of the informant's statements to police.

Even assuming the particular relief sought here of an _in camera_, _ex parte_ inspection and comparison of representations made by the informant is less like disclosing the informant identity and more in the nature of discovering police reports, we do not think defendant should prevail. The decision whether to disclose such materials would lie in the trial court's sound discretion. _Groscost_, 355 N.W.2d at 35 (citing _Kase_, 339 N.W.2d at 159). Even though defendant may have applied with requisite specificity for review of documents and evidence, _id_. at 37, we have nothing indicating he made motions at the appropriate times, and he did not attempt to certify them to this court as part of the record on appeal. _Id_. (citing _State v. Jacoby_, 260 N.W.2d 828, 840 (Iowa 1977); _State v. Mayhew_, 170 N.W.2d 608, 614 (Iowa 1969)). Again, we think he could have made a record, including testifying on his own behalf, showing his need for disclosure. _Simmons_, 390 U.S. at 394.

We hold the trial court did not abuse its discretion in refusing to grant defendant's motions for an _in camera_ inspection of the confidential source file or for an _ex parte_ presentation of evidence.

III.

Defendant argues he is entitled to a new trial because the trial court improperly admitted testimony of defendant's "admission" that he owned the residence and that he lived there by himself. He contends the statements should not have been admitted because they were not specified in the minutes of testimony pursuant to Iowa Rule of Criminal Procedure 5(3) and were not revealed in a rule 13(2)(a) discovery request by a codefendant.[3]

Trial courts have considerable discretion in passing on motions for a new trial, State v. Ware, 205 N.W.2d 700, 702 (Iowa 1973), and we reverse only upon a showing that that discretion was abused. State v. Brewer, 247 N.W.2d 205, 211 (Iowa 1976). The trial court is in a better position to decide whether prejudice could only be avoided by granting a new trial. See State v. Brown, 397 N.W.2d 689, 699 (Iowa 1986): State v. Bishop, 387 N.W.2d 554, 561 (Iowa 1986). Defendant must show the ruling was clearly unreasonable or was premised on untenable grounds. State v. Halstead, 362 N.W.2d 504, 506 (Iowa 1985); State v. Trudo, 253 N.W.2d 101, 106 (Iowa); cert. denied, 454 U.S. 903 (1977).

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3. Defendant's rule 13 discovery claim is deemed waived because not raised at trial. "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . [i]n case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection. . . ." Iowa R. Evid. 103(a)(1); Iowa R. Crim. P. 20 (rules of evidence applicable to criminal proceedings).

Iowa Rule of Criminal Procedure 5(3) requires the State to "file the minutes of evidence of the witnesses," including a full and fair statement of the witness' expected testimony," when it files an information. Cf. Iowa R. Crim. P. 4(6) (similar requirement for indictment). These rules are designed to apprise a criminal defendant "fully and fairly" of the testimony expected at trial. State v. Musso, 398 N.W.2d 866, 868 (Iowa 1987) (quoting State v. Lord, 341 N.W.2d 741, 743 (Iowa 1983)). "When minutes fail to adequately do so to defendant's prejudice a reversal will follow" id. (citing State v. Walker, 281 N.W.2d 612, 614 (Iowa 1979)). "But when the challenged minutes, though incomplete, put defendant 'on notice of the necessity of further investigation of the witness' probable testimony,' reversal need not follow admission of matters they do not disclose." Id. (quoting Lord, 341 N.W.2d at 743; other citations omitted).

We find the minutes contained in essence the evidence eventually elicited at trial. State v. Epps, 313 N.W.2d 533, 557 (Iowa 1981). The supreme court has indicated, moreover, that a defendant cannot claim surprise from a challenged statement consistent with the "overall nature" of the witness's testimony. State v. Ristau, 340 N.W.2d 273, 275 (Iowa 1983). Defendant knew Officer Thomas would testify, deposed him, and he knew Officer Thomas was instrumental in all aspects of the arrest. The minutes fully and fairly alerted defendant generally to the source and nature of the evidence against him. We hold there was no abuse of discretion in admitting the testimony relating to defendant's statements.

IV.

Defendant argues the trial court improperly instructed the jury on the definition of "constructive possession." He complains the jury could have inferred constructive possession from the fact that a controlled substance is found in a place subject to the defendant's sole or joint control and dominion. He contends the instruction should instead have referred to the exercise of dominion or control over the controlled substance itself.

Jury instructions are designed to explain the applicable law to the jurors so the law may be applied to the facts proven at trial. State v. Freeman, 267 N.W.2d 69, 71 (Iowa 1978). The trial court's decision on the instructions will not be disturbed absent an abuse of the trial court's discretion. State v. Christensen, 323 N.W.2d 219, 222 (Iowa 1982); State v. Lewis, 391 N.W.2d 726, 728 (Iowa App. 1986). We will not find an abuse of discretion unless "such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." Lewis, 391 N.W.2d at 728. The burden of proving abuse of discretion lies with the defendant. Id.

Instruction 23 defined "constructive possession" as occurring

> when the Defendant maintains control or a right to control the controlled substance, and may be imputed when the substance is found in a place which is immediately and exclusively accessible to the Defendant and subject to his dominion and control, or to the joint dominion and control of the Defendant and other persons. Mere proximity to or knowledge that a controlled substance existed on the premises is not, by itself, sufficient to prove constructive possession.

Baker would have instructed the jury that

> [i]n order to prove constructive possession of a controlled substance the State must prove by evidence beyond a reasonable doubt that on March 2, 1988, a defendant knowingly had both the power and the intention to exercise dominion and control over the controlled substance. Mere, [sic] proximity to, or knowledge that a controlled substance existed on the premises, is not sufficient to prove constructive possession.

Instruction 23 is much like uniform instruction 3007 approved by the supreme court in State v. Rudd, 454 N.W.2d 570, 572 (Iowa 1990). In Rudd the supreme court noted "possession may be imputed when the contraband is found in a place which is immediately and exclusively accessible to the accused and subject to [the accused's] dominion and control, or to the joint dominion and control of the accused an another." Id. at 571-72 (quoting State v. Reeves, 209 N.W.2d 18, 22 (Iowa 1973)) (brackets in original). The court indicated that the uniform instruction could be made more clear by adding language cautioning that the mere presence of the substances would not establish constructive possession. Id. at 572. Defendant asked for and received similar language in the last sentence of the instruction. We hold the trial court did not commit an abuse of discretion in instructing the jury on the law of constructive possession.

V.

Defendant's final assignment of error is that there was insufficient evidence to support his conviction. He contends his motion for a directed verdict of acquittal should have been granted. Citing State v. Aldapp, 307 N.W.2d 32, 39 (Iowa 1981), defendant complains there was insufficient evidence to convince a rational trier of fact that he could be guilty of possession of a controlled substance with intent to deliver.

Our standard of review for challenges to the sufficiency of evidence to convict is well settled. A verdict will be upheld where there is substantial evidence to support the charge. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). "Substantial evidence" means evidence that could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. Id. We view the evidence in the light most favorable to the State, including any legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). Nevertheless, we consider all the evidence at trial, not just the evidence that supports the verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980).

Looking at the evidence in a light most favorable to the State, we believe a rational trier of fact could conclude from the evidence that defendant had either actual or constructive possession of heroin and cocaine. Defendant was found alone in his own bedroom with substantial amounts of both drugs. There also was substantial evidence to show intent to deliver, including large amounts of cash, notes of sales, and other indicia of drug peddling, which we have set out above and need not repeat here. Considering all the evidence at trial in the light most favorable to the State, we find there was substantial evidence to support defendant's conviction. Thus, we hold the trial court did not err in refusing to grant defendant's motion for a directed verdict of acquittal.

VI.

Finding no error for which defendant is entitled to a reversal, we affirm his convictions of possession of controlled substances with intent to deliver.

AFFIRMED.