IN THE COURT OF APPEALS OF IOWA

No. 1-185 / 90-1232

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STATE OF IOWA,

Appellant/Cross-Appellee,

vs.

RODNEY DeWAYNE SEALS,

Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Roger F. Peterson, Judge.

Both parties appeal an order granting defendant's motion for a new trial. **AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH DIRECTIONS.**

Bonnie J. Campbell, Attorney General, Bruce Kempkes, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and D. Raymond Walton, Assistant County Attorney, for appellant/cross-appellee.

Leslie Knock of Reed-Merner and Mershon, Snow & Knock, Cedar Falls, for appellee/cross-appellant.

Heard by Donielson, P.J., and Schlegel and Hayden, JJ.

SCHLEGEL, J.

Pursuant to Iowa Code section 814.5(1)(c), plaintiff State of Iowa appeals a district court order overturning a jury conviction on the class "B" felony charges of possession of or conspiracy to possess a controlled substance with intent to manufacture or deliver and granting a new trial to defendant Rodney D. Seals. The State contends the trial court erred in finding that it had erred in a question of law by refusing to grant a judgment of acquittal. The trial court found a judgment of acquittal should have been granted because accomplice testimony elicited by the State was not sufficiently corroborated to satisfy Iowa Rule of Criminal Procedure 20(3). The State asks us to reverse the trial court's order and to remand for reinstatement of the conviction.

Seals cross-appeals. He argues a second trial would violate the fifth amendment prohibition "for the same offense to be twice put in jeopardy." He contends that, because rule 20(3) does not allow the court to enter a judgment of acquittal before the submission of the case to the jury unless a ruling is clearly reserved until that time, he is being subjected to unconstitutional reprosecution. If we do not dismiss the State's appeal on constitutional grounds, Seals urges in the alternative that we take note of his entitlement to a judgment of acquittal and remand for entry of a judgment dismissing the case.

I.

Police officers went to a Waterloo apartment leased by Robert Hughes, a cocaine addict who was adept at converting powdered cocaine to rock cocaine. Hughes, Seals, and two other individuals were present. Police performed a consent search which yielded several items consistent with the manufacture and sale of rock cocaine, including paraphernalia and twenty-five grams of cocaine. Police also seized from a living room table a letter addressed to Seals at his sister's address in the same building. Seals had $97.61 with him when he was arrested the next day. Although police tested the evidence for fingerprints, none matched Seals'.

Hughes, who pleaded guilty to a class "C" charge and received probation in exchange for his cooperation, presented the State's main evidence against Seals. Hughes allegedly became an accomplice to Seals' plan to sell rock, or "crack," cocaine when Seals offered him $50 and cocaine to "cook" powdered cocaine into rock cocaine. Hughes testified that he accompanied Seals to a house where Seals purchased cocaine, razor blades, and plastic bags. They returned to the apartment where Hughes cooked a batch of crack. Then, according to Hughes, they cut the cocaine into $20 units which they packaged with the corners of plastic bags. Hughes testified that Seals left with the cocaine. Meanwhile, the other two individuals came to Hughes' apartment and smoked crack with him. Hughes

testified that Seals returned a couple of hours later with more powdered cocaine which Hughes was in the process of cooking when the police arrived.

After police had entered the apartment and had searched the occupants, they allowed Seals to leave. The State's evidence showed that the unemployed seventeen-year-old Seals had a car, had opened bank accounts with $900 in mid August 1989, and had $461.08 in accounts when he was arrested. The State also offered police testimony describing the methods of manufacture and delivery of cocaine.

Seals timely moved for a judgment of acquittal at the end of the State's evidence. See Iowa R. Crim. P. 18(8)(a). Seals specifically relied on Iowa Rule of Criminal Procedure 20(3), which specifies:

> A conviction cannot be had upon the testimony of an accomplice or a solicited person, unless corroborated by other evidence which shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

The trial court did not reserve its ruling as allowed by Iowa Rule of Criminal Procedure 18(8)(b), but instead overruled the motion. The jury returned a guilty verdict.

Seals timely moved for a new trial, see Iowa R. Crim. P. 23(2)(b)(5), and for an arrest of judgment, see Iowa R. Crim. P. 23(3). Noting that the existence of corroborating evidence is a question of law, the trial court found that it had erred in finding that the State had presented

sufficient evidence to corroborate the testimony of the alleged accomplice. The court therefore granted the motion for a new trial pursuant to Iowa Rule of Criminal Procedure 23(2)(b)(5), which provides: "The court may grant a new trial . . . [w]hen the court . . . has erred in the decision of any question of law during the course of the trial . . . ."

II.

The trial court is vested with substantial discretion in ruling on motions for a new trial. State v. Sanders, 260 Iowa 327, 329, 149 N.W.2d 159, 160 (1967). We will interfere with such a ruling only when there is an abuse of discretion. An abuse of discretion generally is defined as a discretionary act "exercised on grounds clearly untenable or to an extent clearly unreasonable." State v. Blakwell, 238 N.W.2d 131, 138 (Iowa 1976). Moreover, we are slower to interfere with the granting of a motion for a new trial than its denial. Iowa R. App. P. 14(f)(4). We consider all of the evidence in the light most favorable to the State. State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981).

The State contends that several items of evidence corroborate the alleged accomplice's testimony: (1) Seals' ownership of a car; (2) Seals' failure to return to the apartment; (3) the presence of Seals' car an hour before the police arrived; (4) the physical evidence obtained in the police search; (5) the differing addresses Seals had

given; (6) the failure of Hughes or the other two individuals to have any money; (7) the fact that Seals was unemployed and had money in the bank; and (8) the fact that Seals had $97.61 when he was arrested. The State offers no Iowa authority on the sufficiency of the evidence to corroborate an alleged accomplice's testimony.

In State v. Vesey, the Iowa Supreme Court stated:

> The existence of corroborative evidence is a question of law for the court, but its sufficiency is ordinarily a question of fact for the jury. Any corroborative evidence which tends to connect the accused with the commission of the crime and thereby supports the credibility of the accomplice is sufficient. Such evidence may be direct or circumstantial. It must be inculpatory, but need not be entirely inconsistent with innocence. Each case must be judged on its own facts.

241 N.W.2d 888, 890 (Iowa 1976) (citation omitted) (discussing Iowa Code § 782.5 (1975), a provision identical to Iowa Crim. R. Proc. 20(3)). The Vesey court further stated:

> Whether evidence is corroborative depends on whether it supports some material part of the accomplice's testimony. It need not go to the whole of the accomplice's testimony or every material fact. The . . . requirement is met if it can fairly be said the accomplice is corroborated in some material fact tending to connect the defendant with the commission of the crime.

Id. (citation omitted). Further, "[c]orroboration of testimony which is not inculpatory is not corroboration of a material fact tending to connect the accused with the crime," id. at 891 (citations omitted), and evidence is insufficient if it merely shows an opportunity to commit a crime or merely raises a suspicion of the defendant's guilt, id.

None of the facts cited by the State is inculpatory or corroborative of the charges of possession or conspiracy to possess cocaine with intent to manufacture or deliver. Little of the evidence is corroborative of the alleged accomplice's testimony in any respect. The State offers only conjecture, conclusion, and suspicion as to Seals' ownership of a car or money. There is no independent evidence of illegal activities by Seals. We cannot say that this rises above showing mere opportunity to commit a crime or suspicion of guilt.

We agree with the trial court that the State's evidence was composed solely of an alleged accomplice's testimony and noncorroborative testimony. We find the trial court was correct in determining that it had erred in a refusing to grant a directed verdict of acquittal.

III.

Having thus determined the trial court erred in refusing to direct a verdict of acquittal, we must decide the proper disposition of the case. When the trial court commits an error of law, namely refusing to grant a judgment of acquittal, must we remand for a new trial, or must we remand for entry of a judgment of acquittal?

Seals contends the trial court's action amounts to a judgment of acquittal; therefore, he may not be retried. The argument thus is that no new trial may be had after a determination that there was insufficient evidence to

support a verdict. The State has failed entirely to address this issue, arguing only that we may reinstate the verdict without offending the fifth amendment.

The Iowa Supreme Court has visited similar issues before. The district court is without authority to enter a post-trial judgment of acquittal, unless the court has specifically reserved its ruling, and is restricted to granting a new trial or arrest of judgment. State v. Sullivan, 215 N.W.2d 491, 493 (1974). Seals utilized a proper procedure in attacking the verdict, and the trial court here did not exceed its authority when it granted a new trial because of its error of law. See Iowa R. Crim. P. 23(2)(b)(5).

In reaching its conclusion, however, it was necessary for the trial court to reach a legal conclusion on the sufficiency of the evidence. The conclusion which the court reached was that Seals was entitled to a judgment of acquittal. When the trial court reconsiders the matter and evaluates the sufficiency of the evidence, regardless of the label placed on it, the order is equivalent to a judgment non obstante verdicto. See State v. Deets, 195 N.W.2d 118, 125 (Iowa 1972); see also Sullivan, 215 N.W.2d at 493. Ironically, however, there is no authority under Iowa statutes or rules of procedure permitting the district court--that judge which we have often cited as the party best able to evaluate all of the evidence--to reconsider the sufficiency of the evidence and to grant a judgment of

acquittal after the jury has returned a verdict. Sullivan, 215 N.W.2d at 493; Deets, 195 N.W.2d 123-24. This quirk in our rules perhaps might be remedied by allowing the trial court to consider motions for judgment notwithstanding the verdict if such motions could be appropriately limited to prevent defendants from inundating the district courts with efforts to retry the case.

In any event, under the present posture of the case, that is, having obtained an order finding that he is entitled to a judgment of acquittal, Seals urges that former jeopardy has attached. Presumably our rules are designed with the policy that attacks on the sufficiency of the evidence and the failure of the district court to grant a directed verdict are best left to the consideration of the appellate courts. We note that had the trial court reserved its ruling on Seals' motion for a directed verdict or had Seals directly appealed solely on the issue of whether such a directed verdict should have been entered, we would not be concerned with the issue of whether former jeopardy attached on the trial court level. Nevertheless, because both parties have extensively briefed this court on the issue of the substantiality of the evidence, we have been able to make this independent evaluation in accordance with the overall policy. We thus need not address the issue of whether former jeopardy attached at the district court level and need address only whether we must remand with directions to enter a judgment of acquittal or remand for a new trial.

Seals has cited Burks v. United States, 437 U.S. 1 (1977), for our consideration. In Burks the United States Supreme Court held that, regardless of how a defendant seeks his right to a judgment of acquittal, "the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient, [and] the only 'just' remedy available for that court is the direction of a judgment of acquittal." Id. at 17-18. We think a similar result is required here. The United States Supreme Court rested its decision in part on the double jeopardy analysis and in part on the court's power under 28 United States Code section 2106 to "direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." This court has similar power under Iowa Code section 602.5106, which utilizes language nearly identical to that in section 2106. This would seem in accord with the result reached by the Iowa Supreme Court in State v. Vesey, 241 N.W.2d at 891. There, upon finding that the State had failed to present sufficient evidence corroborative of an alleged accomplice's testimony, the court reversed and remanded with instructions that the district court dismiss the charge against the defendant.

IV.

The issue of whether the State presented sufficient corroborative evidence being squarely before this court, we

find that the evidence presented did not corroborate the alleged accomplice's testimony as required by Iowa Rule of Criminal Procedure 20(3). We affirm that part of the district court's order finding that it had erred in failing to direct a judgment of acquittal. Because this court had the opportunity to evaluate the sufficiency of the evidence and because we find that the evidence was insufficient for conviction, we decline to address the issue of whether former jeopardy attached through the actions of the trial court. Under the double jeopardy clause, our determination that the evidence is legally insufficient now precludes a second trial, and the only appropriate remedy now available is entry of a judgment of acquittal. We therefore vacate that part of the district court's order granting a new trial and remand with directions to enter a judgment of acquittal.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED WITH DIRECTIONS.