FILED
OCT 19 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Appellee,	)	Filed October 19, 1978
vs.	)	
MARK McCOY,	)	644 60614
Appellant.	)	

Appeal from Polk District Court - Dale S. Missildine, Judge.

Defendant appeals from sentence imposed following his plea of guilty to possession of hashish in violation of § 204.401(3), The Code. Affirmed.

Mr. Larry S. Krpan, of Des Moines, counsel for appellant.

Richard C. Turner, Attorney General of Iowa, Raymond W. Sullins, Assistant Attorney General, and Dan Johnston, Polk County Attorney, counsel for appellee.

Submitted to Donielson, Acting C. J., Snell, Oxberger and Carter, JJ.

DONIELSON, Acting C. J.

The defendant Mark McCoy was charged by a county attorney's information separately with delivery of cocaine and possession of hashish, § 204.401(3), The Code 1975. The defendant pleaded not guilty on the cocaine charge and was subsequently acquitted by a jury. Thereafter he pleaded guilty to possession of hashish. On appeal, defendant asserts that the sentence of 180 days in the county jail given by the trial court pursuant to § 204.401(3), The Code, was an abuse of discretion. He contends that he received excessive punishment because he exercised his constitutional right to trial by jury on the delivery charge. We affirm.

In State v. Grgurich, 253 N.W.2d 605, 606 (Iowa 1977) the standard of review was set forth: ". . . so long as the sentence is within the statutory maximum we will not reverse absent an abuse of discretion." A careful review of the record finds no evidence to support the allegation that the trial court was "punishing" the defendant for electing to stand trial on the cocaine charge. The trial court at sentencing stated on the record:

> THE COURT: This court takes the position and made it quite clear I think in taking the plea, I will listen respectfully to both the recommendation of the County Attorney and the recommendation of the counsel for defense. This Court does not intend to be bound by any plea bargaining in exchange for a plea. I think to do that is to abdicate the duty of the Court in trying to analyze the situation as the Court sees it, together with the pre-sentence investigation.

We are in accord with this pronouncement as to the role of the trial court in the sentencing procedure, and we find no evidence to support any other conclusion than that the trial court fulfilled this role.

A review of the pre-sentence report gives the defendant no comfort for it reveals some unfavorable factors that may have affected sentence. McCoy had been under treatment for barbiturate addiction and had had some lapses in that treatment. He had been involved with other drugs while serving as a part owner in a "head shop." Although the pre-sentence report recommends a modified weekend sentencing procedure, the county attorney's office recommended a substantially more severe sentence.

An abuse of discretion allegation is discussed in State v. Noonan, 246 N.W.2d 236, 237 (Iowa 1976):

> Guidelines for testing claims of abuse of discretion are familiar and of long standing. They were reviewed in State v. Warner, 229 N.W.2d 776, 783 (Iowa 1975):

> . . . The exercise of a lower court's discretion is not reviewable; it is only the alleged abuse of that power which is reviewable on appeal. . . . [citing authority] Generally, abuse of discretion will be found only where there is no support for the decision in the hearing evidence. . . . [citing authorities]. Rath v. Sholty, 199 N.W.2d 333, 336 (Iowa 1972).
>
> . . . '[A]buse of discretion' means no discretion to do what was done. Wilkes v. Iowa State Highway Commission, 186 N.W.2d 604, 607 (Iowa 1971).
>
> The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias. . . . [citing authority]. Wendel v. Swanberg, 384 Mich. 468, 185 N.W.2d 348, 351. 229 N.W.2d at 783.

Our review of the record and argument reveals nothing to indicate that the trial court did anything other than exercise its discretion in accordance with its pronouncement at the time of sentencing. The judgment of the trial court is affirmed.

Affirmed.