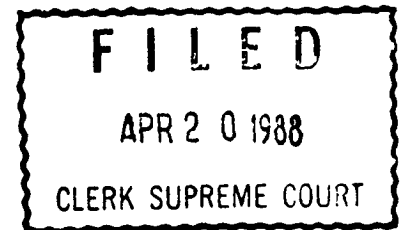


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,)
)
Plaintiff-Appellee,)
)
vs.)
)
RANDY A. DYER,)
)
Defendant-Appellant.)

196

Filed April 20, 1988

7-528
86-1207

Appeal from the Iowa District Court for Scott County (No. CR 123348-01),
James R. Havercamp, Judge.

The defendant appeals his conviction, following a jury trial, for delivery
of cocaine. **REVERSED AND REMANDED.**

Kent A. Simmons of Liebke & Simmons, Davenport, for defendant-appellant.

Thomas J. Miller, Attorney General; Mark J. Zbieroski, Assistant Attorney
General; and H. J. Pries, Assistant Scott County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., and Hayden and Sackett, JJ.

OXBERGER, C.J.

197

Randy Dyer appeals his conviction, following a jury trial, for delivery of cocaine. He contends he is entitled to a dismissal or directed verdict of acquittal because the State presented no evidence to contradict his defense of "take-back" entrapment. He also contends the trial court erred by refusing to give his requested instruction on that theory of defense. We reverse and remand.

On November 4, 1985, James and Rhonda Williams went to Dyer's home to discuss the sale of an Atari video game. While at Dyer's home, James Williams began discussing a cocaine sale he wanted to complete with a third person. Williams did not want to deal directly with the buyer because he had "ripped off" the buyer in a previous deal.

Williams asked Dyer to help him and produced a small bag of cocaine. He asked Dyer if he would keep the cocaine and then bring it to Williams' home later that evening. Dyer agreed and arrived at Williams' home that evening.

When Dyer arrived, he went to the kitchen with Rhonda. A conversation was taking place in the living room between Williams and the prospective buyer. When Williams came into the kitchen Dyer gave him the cocaine, which Williams mixed with another substance. Williams then told Dyer what to do and say in order to assuage the buyer's fears regarding the cocaine's purity.

Dyer then went into the living room and consummated the deal. The delivery of the money and cocaine was handled through Williams. Sometime after the deal, Williams went over to Dyer's home where Dyer returned the money from the sale to Williams.

This above evidence was adduced at trial. The State conceded Williams was acting as their agent in return for a favorable disposition of a pending drug

charge. The State did not, however, present any evidence on where Williams obtained the cocaine.

At the close of evidence, Dyer requested an instruction on "take-back" entrapment. The State objected because Dyer had not given pretrial notice of entrapment as required by Iowa Rule of Criminal Procedure 10.11(c). The trial court gave the entrapment instruction, but not in Dyer's requested form, because Dyer raised entrapment in his testimony. Dyer was subsequently convicted.

Dyer's first assignment of error concerns the trial court's denial of his motion for acquittal. He asserts the State produced no evidence contradicting his assertion the State supplied the cocaine to Williams. We hold the motion was properly overruled.

The take-back entrapment theory was first recognized in Iowa in the case of State v. Overmann, 220 N.W.2d 914 (Iowa 1974). The court in Overmann explained the defense as follows:

...if an accused produces evidence disclosing (1) the government, through an agent or informer, supplied drugs to defendant, and (2) the government, through an agent or informer, later reappropriates any of those drugs from the accused, then a "take-back entrapment" is shown. Under those circumstances the State must come forth with evidence which contradicts either of the above two elements. In event the State fails to do so then an accused is entitled to a dismissal of a matter of law. If, however, the State does produce evidence sufficient to create a fact issue as to a "take-back entrapment" the case should be accordingly submitted to the jury.

Id. at 917; see also State v. Wedelstedt, 263 N.W.2d 894, 900 (Iowa 1978); State v. Cooper, 248 N.W.2d 908, 910 (Iowa 1976).

We agree with Dyer that the State produced no evidence on the cocaine's supplier; however, the State was not aware such evidence would be necessary since Dyer did not give notice he was relying on entrapment as a defense. Failure to give notice under rule 10.11(c) bars the introduction of evidence unless the

defendant can show good cause for not giving notice. Iowa R. Crim. P. 10.11(c). The rule provides, however, that a defendant does have the right to testify to an affirmative defense, even in the absence of proper notice. Id. Dyer therefore could testify to the take-back entrapment defense, but he could present no other evidence on the issue.

A trial court must instruct on all issues raised during trial. Henderson v. Scurr, 313 N.W.2d 522, 525 (Iowa 1981); State v. Thomas, 262 N.W.2d 607, 612 (Iowa 1978). Failure to comply with rule 10.11(c) only bars the presentation of evidence; it does not bar the giving of an instruction on the defense raised. Cf. State v. Kittelson, 164 N.W.2d 157, 166 (Iowa 1969). Dyer's testimony raised the issue of the take-back entrapment defense. The court was then obligated to instruct the jury on that issue, even in the absence of notice.

But, as we review Dyer's motion for acquittal, we conclude the trial court properly denied the motion. The State should not be penalized in this situation because of Dyer's late raising of entrapment. The purpose of rule 10.11(c) is to allow the State to investigate these defenses and fully prepare for trial. To allow circumvention of the rule in this manner allows defendants to unfairly surprise the State and deny it its right to a fair trial. See State v. Taylor, 336 N.W.2d 721, 725 (Iowa 1983). The State should be given the opportunity to present whatever evidence it has on the issue. We therefore hold that the trial court was correct in denying Dyer's motion to acquit.

An examination of the evidence shows Dyer raised factual issues relating to the take-back entrapment defense. The State admitted Williams was acting as the State's agent in the transaction. Dyer then testified Williams supplied the drugs for the deal and the same drugs were then sold to the undercover police officer. The burden was then on the State to disprove Williams supplied

the drugs. We conclude this evidence warrants the submission of a take-back entrapment defense.

We do, however, find error in the entrapment instruction given by the court. Take-back entrapment is a specialized form of entrapment. The standard entrapment instruction fails to adequately address the theory because it requires the defendant to prove the State used persuasion or other means to induce commission of the crime. The take-back entrapment defense, on the other hand, only requires the defendant to prove the State furnished the contraband and that it later reappropriated it. The instruction given by the trial court placed a greater burden on Dyer than was required by the law.

The two special interrogatories given by the trial court also did not alleviate any error engendered by the erroneous instruction. These interrogatories only served to confuse the jury, as was shown by the jury's inconsistent answers. The interrogatories also failed to fully explain the legal principles involved in the defense. We therefore hold the defendant is entitled to a new trial with instructions submitted that explain the take-back defense.

The defendant's conviction is reversed and the case is remanded for a new trial.

REVERSED AND REMANDED.