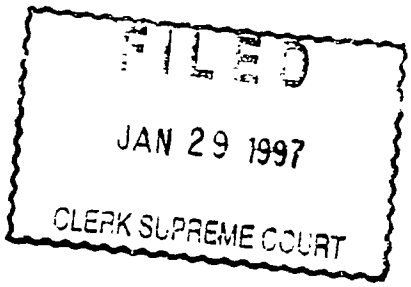
IN THE COURT OF APPEALS OF IOWA




No. 6-790 / 96-383

**STATE OF IOWA,**
Appellee,

vs.

000443

**JOHNNIE RAY McCOY,**
Appellee.

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Appeal from the Iowa District Court for Scott County, Edward B. deSilva, Judge.

Defendant appeals from judgment and sentence entered, following jury trial, of possession with intent to deliver crack cocaine, in violation of Iowa Code section 124.401(1)(b) (1995), and failure to affix a tax stamp, in violation of Iowa Code section 453B.12 (1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and John P. Messina, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, William E. Davis, County Attorney, and Realff Ottesen, Assistant County Attorney, for appellee.

Heard by Habhab, C.J., and Streit and Vogel, JJ.

**VOGEL, J.**

Johnnie McCoy was arrested for possession with intent to deliver and a tax stamp violation after law enforcement officers seized a bag of rock cocaine and various drug paraphernalia after executing a search warrant of McCoy's residence. The bag of crack cocaine contained twenty-six rocks, weighing a total of 10.38 grams. The officers also found a rock of crack cocaine under McCoy's bed, and another in a hole in the basement wall. These two rocks were never noted on the evidence log nor produced at trial. McCoy's counsel cross-examined the officers extensively about these errors. He moved for a directed verdict based, in part, on the missing two rocks because "it would [not] be fair to submit this matter to the jury." The court denied the motion ruling the missing rocks went to the weight of the evidence and the credibility of the State's witnesses.

On February 23, 1996, the court sentenced McCoy to an indeterminate twenty-five year sentence on the intent to deliver charge, a class B felony, because the amount of crack cocaine was "more than five grams." See Iowa Code section 124.401(1)(b)(3) (1995). It also imposed a five-year indeterminate term for the tax stamp violation. It ordered the sentences to run concurrently with one another, but consecutively with the sentence in the parole revocation, "[i]n the event there is a parole revocation . . . ."

McCoy appeals.

*I. Production of evidence.* McCoy argues it was error at law to submit the case to the jury as the State failed to produce the entire corpus delicti of the crime. Defense counsel, in a motion for judgment of acquittal, argues the two separate rocks of crack cocaine found under the bed and in the basement were not on the evidence log. We find the corpus delicti issue was not raised before the trial court and therefore not properly preserved. *See State v. Thomas*, 520 N.W.2d 311, 313 (Iowa App. 1994) (stating that defendant cannot raise an issue on appeal that was not originally raised at the trial level). Nonetheless, there was no dispute regarding the larger bags of drugs as they were recorded on the evidence log. Although McCoy contested some evidence was missing at trial, McCoy never contended the State failed to produce any evidence (the "corpus delicti") of the crime. The 10.38 grams of rock cocaine constituted the State's foundation of the crime. Accordingly, our standard of review is the substantial evidence standard. *State v. Schrier*, 300 N.W.2d 305, 306 (Iowa 1981).

Substantial evidence means any evidence that could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *State v. Robinson*, 288 N.W.2d 337, 339 (Iowa 1980). We review the evidence in the light most favorable to the State. *State v. LaPointe*, 418 N.W.2d 49, 51 (Iowa 1988). Direct and circumstantial evidence are equally probative provided the evidence raises "a fair inference of guilt and [does] more than create speculation, suspicion, or conjecture." *State v. Hamilton*, 309 N.W.2d 471, 479 (Iowa 1981) (citing *Schrier*,

300 N.W.2d at 308). McCoy does not challenge the sufficiency of the evidence as to the other crack cocaine found in twenty-five or twenty-six small bags within one larger bag in McCoy's bedroom along with other drug paraphernalia. We find there was sufficient evidence to affirm defendant's conviction.

*II. Sentencing.* McCoy's challenge to the legality of his sentencing is properly before us despite his failure to object to the trial court. *See State v. Thomas*, 520 N.W.2d 311, 313 (Iowa App. 1994) ("Generally, issues not raised in the trial court may not be raised for the first time on appeal . . . however, [this rule] is not ordinarily applicable to . . . procedurally defective sentences."). Our scope of review on this issue is for correction of errors at law. *See* Iowa R. App. P. 4.

The court submitted a special interrogatory to the jury regarding the amount of crack cocaine. The jury was instructed to circle one of the following options if it determined McCoy was guilty of the possession with intent to deliver crack cocaine: (1) five grams or more, or (2) less than five grams. The jury circled "five grams or more." It is a class B felony where the quantity involved is "more than five grams"; and a class C felony where the quantity is "five grams or less". Therefore McCoy argues the incorrect instruction to the jury impermissibly imposed a class B felony sentence. McCoy claims the judgment and sentence should be vacated with directions to enter judgment and sentence for a class C felony offense (five grams or less).

We agree that the court incorrectly worded the special interrogatory. *See* Iowa Code §§ 124.401(1)(b)(3), (1)(c)(3) (1995). However, an error regarding a special

interrogatory, when "unaccompanied by a showing of prejudice, does not prevent the imposition of [an enhanced] sentence." *State v. Beaver*, 429 N.W.2d 778, 779 (Iowa App. 1988). McCoy could only have been prejudiced if the amount of drugs in question was exactly five grams. There is uncontroverted evidence law enforcement officers discovered 10.38 grams of cocaine at McCoy's residence--more than twice the statutory threshold for elevating the crime. Thus, we find the defendant was not prejudiced and hereby affirm the trial court's sentence.

***III. Consecutive sentences.*** Our review on this issue remains correction of errors at law. *See State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996).

McCoy argues the trial court failed to exercise discretion in ordering the sentences to run consecutively with the revocation of his parole. We disagree. There is nothing in the record to indicate the trial court was unaware of its discretion in sentencing and properly exercised its discretion. The court stated:

> In the event there is a probation--parole revocation in that theft in the first degree that I referred to, it would appear that in view of the fact that the defendant was on parole at the time these acts occurred, that the sentences as imposed here should run consecutive with any sentence imposed thereon.

We affirm on all issues presented.

**AFFIRMED.**