FILED
DEC 27 1979
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed December 27, 1979

vs.)

THOMAS R. FENNELLY,) 323
62773

Defendant-Appellant.)

Appeal from Scott District Court - C. H. Pelton, Judge.

Defendant appeals from his conviction of extortion in violation of section 720.1, The Code 1977, and of operating a prohibited collection service in violation of section 726.16, The Code 1977. AFFIRMED AND REMANDED FOR RESENTENCING.

Greg Egbers of Betty, Neuman, McMahon, Hellstrom & Bittner, Davenport, for defendant-appellant.

Thomas J. Miller, Attorney General, and Jeanine Freeman, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant appeals from his conviction of extortion in violation of section 720.1, The Code 1977, and of operating a prohibited collection service in violation of section 726.16, The Code 1977.[1] His principal contentions on appeal assert trial court error with respect to:(a) improper admission of hearsay statements; (b) failure to find entrapment as a matter of law; (c) failure to sustain defendant's motion for directed verdict as to each charge; and (d) basing defendant's sentence of incarceration on one of the charges upon an impermissible sentencing factor. We separately consider these contentions.

I. It was the theory of the State with respect to each of the charges against defendant that he was assisting Randy Griffith and Arthur Stowe in collecting a gambling debt from the victim. As part of its case in chief, the State offered tape recordings of telephone conversations between the victim and Griffith and Stowe. The defendant initially challenged the use of such statements by motion in limine. When the taped statements were later offered in trial, he failed to object although he did lodge hearsay objections to testimonial reference by some witnesses to the substance of the tapes. On this record, we deem it clear that defendant has failed to preserve error on the claims now asserted. Twyford v. Weber, 220 N.W.2d 919, 924 (Iowa 1974).

We note, however, that the statements in question were clearly otherwise admissible as statements of coconspirators in the course of and in furtherance of the conspiracy. See State v. Kidd, 239 N.W.2d 860, 864 (Iowa 1976). Prima facie evidence of the conspiracy is found in defendant's own statement to the victim at the time he attempted to collect the debt, indicating that he was a partner of Griffith and Stowe. While the better practice is to require a prima facie showing of conspiracy before receiving the coconspirator's statements, the order in which the evidence is received is within the sound discretion of the trial court. State v. Priebe, 198 Iowa 609, 611, 199 N.W. 276, 277 (1924).

II. We also find that defendant has failed to preserve error on his claim that the evidence shows entrapment as a matter of law. The trial court submitted the issue of entrapment to the jury under proper instruction. The defendant did not object to such procedure, did not assert that the jury should be peremptorily instructed on the presence of entrapment, and did not move for a directed verdict on grounds of

---

[1] These convictions were on counts I and III of the information. Count II of the information charging conspiracy was never submitted to the jury.

entrapment. Issues not properly raised in the trial court will not be considered for the first time on appeal. State v. Jump, 269 N.W.2d 417, 430 (Iowa 1978).

III. Defendant's assertion that he should have been granted a directed verdict on each charge hinges largely on a ruling favorable to him under Division I. Because we hold the coconspirators' statements were admissible, we find the evidence amply supports the verdict on each count. A court should not direct a verdict of acquittal if there is any substantial evidence reasonably tending to support the charge. State v. Veverka, 271 N.W.2d 744, 746-47 (Iowa 1978).

IV. Lastly, we consider defendant's claim that his sentence of incarceration on the conviction of operating a prohibited collection service was based upon an impermissible sentencing factor. The consideration of improper factors in sentencing may be grounds for appellate relief. State v. Remmers, 259 N.W.2d 779, 783-86 (Iowa 1977).

The trial court, in sentencing defendant to incarceration on count III of the information, indicated that he did so because of defendant's illegal gambling activities and to protect the public from such activities in the future. Defendant asserts that this conclusion on the part of the trial court was based upon unproven charges of illegal gambling against defendant which were listed in the presentence investigation report.

We find the record negates any such contention. In sentencing defendant, the trial court stated:

> The Court rejects the Defendant's application for probation. The reasons are: the Defendant's plenty bright; he's a college graduate; he's got a fine military background; he supports his ex-wife, present wife and a youngster from a previous marriage. In the past he's been active in the church but he was, I think, having heard this trial, it's quite apparent to this Court that the Defendant has for some time been engaged in a very substantial and regular gambling operation .... In this Court's opinion, he was engaged in a rather sophisticated illegal gambling activity and this Court has an obligation under the law to stop him ... (emphasis supplied)

The trial court's conclusion that defendant had been engaged in illegal gambling activities was adequately supported by evidence other than the unproven charges listed in the presentence investigation report.

While we must reject defendant's contention that the trial court employed improper standards in sentencing him, we do find that the sentence imposed on count III of the information does not comply with the applicable statute. The trial court made it

clear that he was sentencing defendant (on count III of the information) under section 725.18, Supplement to the Code 1977. This is an aggravated misdemeanor under that statute. Although the indeterminate sentencing statute (section 902.3, Supplement to the Code 1977) does not apply to aggravated misdemeanors, the trial court imposed an indeterminate sentence. Such sentence was not authorized by the statutes. We affirm the convictions of both count I and III but remand for resentencing on count III.

AFFIRMED AND REMANDED FOR RESENTENCING.