IN THE COURT OF APPEALS OF IOWA

No. 2-212 / 91-626

FILED
AUG 27 1992
CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

RICHARD JACKSON YOUNG,

Appellant.

Appeal from the Iowa District Court for Scott County, Margaret Briles and John Nahra, Judges.

The defendant appeals from his conviction, following a jury trial, of possession with intent to deliver a schedule II controlled substance while in possession of a firearm, failure to have controlled substance tax stamps, and carrying a dangerous weapon. **AFFIRMED.**

John O. Moeller, Davenport, for appellant.

Bonnie J. Campbell, Attorney General; Bruce Kempkes, Assistant Attorney General; William E. Davis, County Attorney; and Hugh Pries, Assistant County Attorney, for appellee.

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

DONIELSON, J.

On October 5, 1990, police officer William Thomas received an anonymous tip concerning purported drug dealing activity at a house at 1010 East 13th Street in Davenport. On October 31, 1990, he saw three people leave that residence and enter a motor vehicle. One person carried a Halloween mask while another carried a black bag or container.

Officer Thomas followed the vehicle and noticed that the occupants appeared to be lighting a pipe. He also observed that the driver, Richard Young, was weaving, failed to use turn signals, and remained stopped at a green light. Officer Thomas then radioed for a uniformed patrol to stop the vehicle.

Officer Christensen pulled the car over on Eastern Avenue. Officer Thomas, who had stopped nearby, approached the vehicle. As he approached, he noticed that Young was leaning forward in an apparent attempt to conceal something under the front seat. Officer Thomas asked Young to step out of the vehicle. As Young exited the vehicle, Officer Thomas saw a handgun on the floorboard.

He then frisked Young and placed him under arrest. The other two occupants exited the vehicle. A subsequent search of the automobile produced a bag of cocaine, a digital pocket scale, a micro torch, a glass pipe, a glass beaker, a cutting substance, a spoon, and a vial. The search of Young produced two thousand dollars in cash and a

pill container, which contained several controlled substances, including Valium, Xanax and Percodan.

Based upon his prior observations of the house and the results of the search of the automobile, Officer Thomas obtained a warrant to search, inter alia, the residence at 1010 East 13th Street. The search uncovered Valium, a scale, drug paraphernalia, and packing material.

The defendant was charged with possession with intent to deliver a schedule II controlled substance while in possession of a firearm, failure to have controlled substance tax stamps, and carrying a dangerous weapon. Prior to trial, Young and his codefendants filed motions to suppress evidence seized pursuant to an allegedly-illegal investigatory stop and an allegedly-invalid search warrant. The district court denied these motions and also denied Young's motions for severance and to dismiss. Following a joint trial, the jury convicted Young on all three counts. On April 18, 1991, the district court sentenced Young to concurrent terms of imprisonment not to exceed twenty, five, and two years on the respective counts.

Young has appealed. He contends that the district court erred in: (1) refusing to suppress evidence obtained as a result of an allegedly-illegal investigatory stop; (2) refusing to suppress evidence obtained pursuant to an allegedly-invalid search warrant; (3) refusing to grant his motion for a directed verdict of acquittal on the

possession with intent to deliver charge; (4) refusing to rule that Iowa Code § 204.401(1)(e) is unconstitutionally vague on its face and as applied; and (5) improperly instructing the jury regarding the penalty enhancement provision. We affirm the district court.

I. Motion to Suppress. Young asserts that the district court erred in denying his motion to suppress. Young's motion to suppress challenged the search of Young and the automobile which he was driving, and the subsequent search warrant for the residence at 1010 East 13th Street which was based, in part, on evidence obtained from the search of Young and his vehicle.

When a defendant is alleging error involving a constitutional right, such as here, we make an independent evaluation of the totality of the relevant circumstances to determine if such an error was made. Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975); State v. Jeffries, 417 N.W.2d 237, 239 (Iowa App. 1987). Our standard of review is de novo. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975).

The State argues that Young has waived his challenge of the suppression motion on two grounds: (1) that Young failed to state any constitutional or statutory grounds in his motion to suppress; and (2) that the motion to suppress was untimely.

Before reaching the merits of the suppression motion, we must determine if the issue is properly before us. The State argues the motion to suppress was untimely. The belated filing of a motion to suppress is a sufficient ground for the court to uphold the district court's ruling on the motion to suppress, "even though the State did not argue waiver and the trial court did not base its ruling on the late filing of the motion[ ]." State v. Rhiner, 352 N.W.2d 258, 261 (Iowa 1984). "We will uphold a ruling of the court on the admissibility of evidence on any ground appearing in the record, whether urged below or not." State v. McCowen, 297 N.W.2d 226, 227-28 (Iowa 1979). The court need not follow the district court's premise in order to sustain the district court's conclusion. Id.

Here, we find that the motion to suppress was untimely. The defendant had forty days after his initial appearance to file the motion to suppress. Iowa R. Cr. P. 10(4), 11(1). As Young's initial appearance was on November 27, 1990, and the motion to suppress was filed on February 2, 1991, well over forty days had passed from the time of the initial appearance.

Young argues that by failing to make an objection to the district court, the State has waived any right it has to object to timeliness of appeal. Young offers no authority in support of this argument. Failure in the brief to cite authority in support of an issue may be deemed waiver of that issue. Iowa R. App. P. 14(a)(3).

In addition, in his reply brief, Young stated that the district court had entered an order for one of the codefendants giving her until the pretrial conference to file any motions (excluding motions in limine). Young asserts that this order was intended to apply to all defendants and that there was a specific agreement to apply this order to Young's case. However, Young does not cite any part of the appendix and thus has not even established the existence of such an order or agreement. Young offers no authority in support of this argument. Failure in the brief to cite authority in support of an issue may be deemed waiver of that issue. Iowa R. App. P. 14(a)(3).

Because Young's motion to suppress was governed by Iowa Rule of Criminal Procedure 10(4) and it was not filed within forty days of his arraignment as the rule required, it was untimely. The late filing was not excused, and the motion was waived. Therefore, we will not address the merits of the of the State's argument that Young failed to set forth any constitutional or statutory grounds in his motion to suppress. The court also will not address the admissibility of the evidence in general, as that issue is waived by the untimely filed motion to suppress.

II. Sufficiency of the Evidence to Prove Possession with Intent to Deliver. Young also argues that the evidence at trial was insufficient to prove that Young possessed cocaine with the intent to deliver and that a

motion for a directed verdict of acquittal should have been granted.

Our standard of review is well settled. A verdict will be upheld where there is substantial evidence to support the charge. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. Id. The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence at trial, not just the evidence that supports the verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980).

Here, the evidence produced at trial, taken in the light most favorable to the State, may reasonably lead to the inference that Young possessed the cocaine with the intent to deliver. This evidence included proof that Young, who was unemployed, possessed over two thousand dollars in cash, a loaded handgun, and numerous types of drug paraphernalia. In addition, Young possessed a cellular phone and an electronic name and address book. This evidence easily leads to an inference beyond "simple possession of cocaine." See State v. Sykes, 412 N.W.2d 578, 585 (Iowa 1987) (where scales and significant amounts of cash found in defendant's apartment).

Therefore, we find there was substantial evidence to support the verdict and that the motion for a directed verdict of acquittal was properly denied.

III. Constitutionality of § 204.401(e). Young asserts that the penalty enhancement provision of Iowa Code § 204.401(e) is unconstitutional. Specifically, Young challenges the provision as overbroad as it does not require any nexus between the possession of the weapons and the criminal conduct.

When a defendant is alleging error involving a constitutional right, such as here, we make an independent evaluation of the totality of the relevant circumstances to determine if such an error was made. Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975); State v. Jeffries, 417 N.W.2d 237, 239 (Iowa App. 1987). However, we have repeatedly held that ordinarily, matters not raised in the trial court, including constitutional questions, cannot be effectively asserted for the first time on appeal. State v. Lyon, 223 N.W.2d 193, 194 (Iowa 1974) An attack on the facial validity of a statute must be made by a pretrial motion to dismiss. See State v. Allen, 304 N.W.2d 203, 206 (Iowa 1981).

Here, Young did not challenge the statute's constitutionality before trial by motion as required by Iowa Rule of Criminal Procedure 10(2). The failure to timely raise such an objection shall constitute a waiver of

that argument. Iowa R. Cr. P. 10(3). Therefore, we will not address the merits of this argument.

IV. Improper Jury Instruction. Young also argues the trial court erred in failing to "require a nexus between the crime and the firearm" in its instruction. In general, the court shall instruct the jury as to the law applicable to all material issues in the case. Iowa R. Cr. P. 18(5)(f); Iowa R. Civ. P. 196. Here, Young's sole objection to the jury instruction dealt with the above issues of constitutional and statutory interpretation. Since we find those constitutional and statutory issues waived, we find no error in this jury instruction of the district court.

The costs of this appeal are taxed to Young.

For all the reasons stated, the judgment of the district court is affirmed.

AFFIRMED.