

FILED

IN THE COURT OF APPEALS OF IOWA 30 1981

CLERK SUPREME COURT

WILLIS OTIS MOORHEAD,)

Plaintiff-Appellant,)

Filed: January 30, 1981

vs.)

STATE OF IOWA,)

9-308

Defendant-Appellee.)

64608

Appeal from Dallas District Court - Robert Frederick, Judge.

Defendant appeals from trial court's ruling that he was not an accommodation seller pursuant to section 204.410, The Code 1979, alleging that the evidence was insufficient to prove an intent to deliver for profit and that trial court erroneously considered evidence of other crimes in finding that defendant delivered with intent to profit. AFFIRMED.

Joseph E. Owens, Des Moines, Iowa, for plaintiff-appellant.

Thomas J. Miller, Attorney General of Iowa, and Julie Pottorff, Assistant Attorney General, for defendant-appellee.

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

Defendant, Willis Otis Moorhead, appeals from trial court's ruling that he was not an accommodation seller pursuant to section 204.410, The Code 1979. Trial court entered the ruling after defendant pleaded guilty to a charge of delivery of marijuana in violation of section 204.401(1), The Code 1979. Defendant argues that the evidence was insufficient to prove an intent to deliver for profit and that the trial court erred in considering evidence of other crimes in determining that he delivered with an intent to profit. We affirm.

On April 24, 1979, defendant was charged by information with delivery of a controlled substance (hash oil) in violation of section 204.401, The Code. The information was later amended to charge delivery of marijuana in violation of section 204.401(1), The Code, to which defendant pleaded guilty. He later filed a motion to withdraw his plea because he thought probation was a possibility. In exchange for defendant's withdrawal of that motion, the prosecutor consented to an accommodation hearing to determine the intent-to-profit issue. After this hearing, trial court ruled that the State had disproved that the delivery was merely for accommodation purposes and not with an intent to profit as claimed by defendant. Defendant's appeal followed.

I. Scope of Review. Since this is an action at law, our review is on assigned errors only. Iowa R. App. P. 4.

II. Intent to Profit. Defendant claims that the evidence presented at the accommodation hearing was insufficient to prove his intent to profit from the delivery of the controlled substance. We disagree.

We note initially that the applicable law does not entitle defendant to an accommodation hearing. As the State describes in its brief, section 204.410, The Code, was amended in 1976 to eliminate the prior provision which allowed defendant the opportunity for such a hearing. State v. Grimme, 274 N.W.2d 331, 338 (Iowa 1979), clearly states that this bifurcated procedure was abrogated by the 1976 amendment. Since the State apparently waived this issue by consenting to the hearing in exchange for defendant's withdrawal of his motion to withdraw his prior guilty plea, however, we address defendant's contention on the merits.

In weighing the evidence to determine whether it is sufficient to establish an intent to profit, we view all the evidence in the light most favorable to the prosecution. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). In this case, Ken Carter, special agent for the Division of Criminal Investigation, testified that he bought four grams of

hash oil from defendant for \$140, or \$35 per gram. He saw defendant take the substance from a box containing fifteen or sixteen vials of hash oil and a quantity of U.S. currency folded over. After Carter asked defendant if he would sell for \$30 per gram, defendant told Carter that \$35 per gram was the going price. On a later occasion, Carter saw a triple beam balance scale at defendant's residence. Defendant also told Carter that he (defendant) sold a certain kind of marijuana at \$45 per ounce after purchasing a one-pound bag of it for \$480, or \$30 per ounce. We find this evidence, when construed most favorably in the State's favor, is sufficient to disprove defendant's accommodation theory and prove that he delivered with an intent to profit.

III. Evidence of Other Crimes. Defendant also argues that the trial court erred in considering evidence of his other criminal activity in ruling on the accommodation issue. Our examination of the transcript, however, reveals that defendant made no objection at the hearing when the evidence was presented. Since the trial court was not made aware of the alleged error, we will not consider it for the first time on this appeal. See State v. Holmes, 276 N.W.2d 823, 828 (Iowa 1979).

Finding no error, we affirm trial court's ruling and consequently affirm defendant's conviction and sentence.

AFFIRMED.