IN THE COURT OF APPEALS OF IOWA

No. 0-092 / 99-444
Filed March 29, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOHN DEWAYNE PHILLIPS,
Defendant-Appellant.

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CLERK SUPREME COURT

Appeal from the Iowa District Court for Black Hawk County, Joseph C. Keefe and Larry J. Conmey, Judges.

John Phillips appeals his conviction and sentence following a bench trial for delivery of a controlled substance (marijuana), second offense, and failure to affix a drug tax stamp. **AFFIRMED.**

Brandon Adams of Frerichs Law Office, P.C., Waterloo, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kim Griffith, Assistant County Attorney, for appellee.

Heard by Mahan, P.J., and Zimmer, and Vaitheswaran, JJ.

VAITHESWARAN, J.

On January 9, 1998, John Phillips sold a pound of marijuana to a confidential informant, at Waterloo's River Front Stadium. At the behest of law enforcement officers, the informant had purchased marijuana from Phillips two other times within the previous five weeks. Phillips already had a conviction for delivery of a controlled substance, dating back to 1995.

The district court convicted Phillips of delivering a controlled substance, second offense, in violation of Iowa Code section 124.401(1)(d)(1997) and failure to affix a drug tax stamp to the marijuana, in violation of Iowa Code section 453B.12. The court sentenced him to an indeterminate term not to exceed ten years on the delivery charge and an indeterminate term not to exceed five years on the drug tax stamp charge, with both to be served concurrently. Phillips appealed. He asserts the district court (1) erred in rejecting his defenses of sentencing entrapment and manipulation and (2) abused its discretion in admitting evidence of his prior conviction. We affirm.

I. Sentencing Entrapment and Manipulation

Phillips maintains law enforcement officers purposefully set up the drug sting in a public place over a five week period in order to permit an enhanced sentence. Relying on federal precedent which has recognized the doctrines of sentencing entrapment and manipulation, he contends this conduct was impermissible. The State counters that Phillips waived error.

The State filed a motion for adjudication of law points seeking clarification as to whether Phillips could raise a claim of sentencing entrapment. Phillips's resistance to the State's motion reveals Phillips retreated from his pure

"sentencing entrapment" theory after the State pointed out that Iowa appellate courts have not recognized such a defense. The district court nevertheless ruled on the applicability of that theory. Phillips expressly appealed the final judgment and sentence, as well as "each and every other ruling adverse to the Defendant." Therefore, we will consider the merits of his sentencing entrapment defense. Additionally, we note that, while Phillips never raised before the district court the concept of sentencing manipulation that he now raises on appeal, federal courts have not always distinguished the two concepts. *See, e.g., United States v. Barth*, 990 F.2d 422, 425 (8th Cir. 1993). Therefore, we will consider this defense as well.

As the issue of sentencing entrapment was raised in a motion for adjudication of law points, our review is for errors of law. *Mortensen v. Heritage Mut. Ins. Co.*, 590 N.W.2d 35, 38 (Iowa 1999); *State v. Mann*, 463 N.W.2d 883 (Iowa 1990).

"Sentencing entrapment occurs 'where outrageous government conduct overcomes the will of a defendant predisposed to deal only in small quantities of drugs, for the purpose of increasing the amount of drugs and the resulting sentence imposed against that defendant.'" *United States v. Williams*, 109 F.3d 502, 512 (8th Cir. 1997) (citation omitted). Sentencing manipulation occurs when the government stretches out its investigation in an attempt to increase the sentence the defendant receives. *United States v. Shephard*, 4 F.3d 647, 649 (8th Cir. 1993).

The district court refused to allow Phillips to pursue his defenses, reasoning:

> 1. The Iowa Supreme Court has not approved or indicated any approval of such a legal concept.
> 2. The Iowa law does not have sentencing guidelines that can be adjusted. The Iowa Sentencing Court only has a right to consider probation after conviction. It cannot adjust the length of this sentence imposed by the Iowa Legislature.
> 3. Even if such a doctrine were viable in Iowa, the conduct of all officers as to whether or not it was "outrageous" must rely on presentation of evidence at trial, so it's premature."

We agree with the first and second reasons set forth by the district court and accordingly conclude the court did not err in refusing to allow Phillips to pursue the defense of sentencing entrapment or the related defense of sentencing manipulation. Additionally, we note the trial evidence does not support a finding that police conduct was outrageous, that police purposefully attempted to increase the amount of drugs sold, or that police purposefully extended the investigation. As the district court stated, "[t]he Court finds the record to be devoid of any evidence which would suggest directly or indirectly that Defendant was pressured or in any way illegally induced into selling marijuana to [the confidential informant]." Therefore, even if our courts recognized the defenses of sentencing entrapment and manipulation, those defenses would fail under the circumstances of this case.

II. Prior Bad Acts

Phillips next contends the district court abused its discretion in permitting the State to introduce evidence of prior bad acts by Phillips, without first determining whether the probative value of the evidence exceeded its prejudicial effect. The State counters that defense counsel failed to preserve error with respect to this contention because he did not timely object and move to strike the evidence. We reject this argument. Defense counsel raised an objection as

soon as it became apparent that the State intended to ask the officer about the prior conviction. Although he only raised a relevancy objection and did not specifically contend that the evidence was more prejudicial than probative, we have stated such an objection is sufficient to preserve error. *See State v. Sallis*, 574 N.W.2d 15, 17 (Iowa 1998); *State v. Slayton*, 417 N.W.2d 432, 435-36 (Iowa 1987). Therefore, we will address the merits.

Our review of a district court's ruling on admissibility of evidence under rule 404(b) is for abuse of discretion. *State v. Casady*, 491 N.W.2d 782, 785 (Iowa 1992); *State v. Most*, 578 N.W.2d 250, 253 (Iowa App. 1998). In determining whether evidence of past crimes is admissible, the court considers whether (1) the evidence is relevant to a legitimate issue in the case, other than the defendant's general propensity to commit crimes, and (2) there is clear evidence the defendant committed the prior crime. *Most*, 578 N.W.2d at 253. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Iowa R. Evid. 401.

A court may exclude relevant evidence if its probative value is outweighed by the danger of unfair prejudice. Iowa R. Evid. 403. Probative value measures the strength of the relevant evidence to the issues in the case. *Most*, 578 N.W.2d at 253. Unfair prejudice is "an undue tendency to suggest decisions on an improper basis, commonly though not necessarily, an emotional one." *Casady*, 491 N.W.2d at 786 (quoting *State v. Plaster*, 424 N.W.2d 226, 231 (Iowa 1988)).

The State argued evidence of Phillips's prior crime was admissible to prove absence of mistake or accident, identity, or intent under Iowa Rule of Evidence 404(b).[1] The district court questioned the relevance of the solicited testimony for these purposes, ordered the State to abbreviate its questions on the prior conviction, then overruled defense counsel's relevancy objection to the testimony. The court did not expressly conclude that the probative value of the challenged evidence outweighed its prejudicial effect. Phillips maintains this omission amounted to an abuse of discretion.

Like the district court, we have our doubts as to whether the proffered testimony advanced any issue in the case. Phillips did not contend his sale of the drugs was a mistake or accident, nor was there any question as to his identity. Despite these concerns, however, we note that the relevancy standard is extremely broad. The State was required to prove Phillips intended to deliver a controlled substance. *See* Iowa Code § 124.401(1)(d). We cannot conclude Phillips's prior drug conviction was completely irrelevant to the issue of intent, although the conviction was not needed in light of the remaining testimony. Additionally, we note the danger of unfair prejudice is minimized because this case was tried to the court rather than a jury. *Casady*, 491 N.W.2d at 786. Finally, while the court made reference in its ruling to Phillips's prior conviction, it appears the court only considered the conviction for purposes of sentence enhancement. Accordingly, we conclude the district court did not abuse its

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[1] Iowa Rule of Evidence 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

discretion in admitting the disputed testimony and we affirm his conviction and sentence.

AFFIRMED.