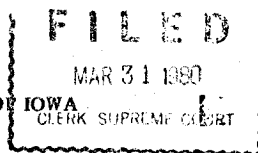


IN THE COURT OF APPEALS OF IOWA



428

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed March 31, 1980

vs.

)

LELAND DEAN GELDER,

)

366

Defendant-Appellant.

)

63419

Appeal from Grundy District Court - L. D. Lybbert, Judge.

Defendant appeals jury conviction of possession of a Schedule I Controlled Substance, lysergie acid diethylamide (LSD), with intent to deliver in violation of section 204.401(1)(b), The Code 1977, alleging trial court erred 1) in admitting evidence concerning possible future drug transactions, 2) in denying his motion for a new trial, and 3) in denying his request for commitment to a drug treatment facility pursuant to section 204.409(2), The Code 1977. AFFIRMED.

Lynn J. Wiese of Barker, McNeal & Wiese, Iowa Falls, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa; Jeanine Freeman, Assistant Attorney General; and Don Kliebenstein, Grundy County Attorney; for plaintiff-appellee.

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

PER CURIAM

Defendant, Leland Dean Gelder, appeals jury conviction of possession of a Schedule I Controlled Substance, lysergic acid diethylamide (LSD), with intent to deliver in violation of section 204.401(1)(b), The Code 1977. He alleges trial court erred 1) in admitting evidence concerning possible future drug transactions, 2) in denying his motion for a new trial, and 3) in denying his request for commitment to a drug treatment facility pursuant to section 204.409(2), The Code 1977. We affirm.

On the evening of September 29, 1977, Joel Adams met Special Agent James Wertz of the Division of Narcotics and Drug Enforcement, Iowa Department of Public Safety, in downtown Wellsburg, Iowa. Unaware Wertz was an undercover narcotics agent, Adams took Wertz to the residence of his supplier, defendant Gelder. After negotiations, a transaction occurred wherein Wertz paid defendant \$135 for 100 units of LSD. Upon Wertz's inquiry, defendant offered to sell Wertz larger amounts of LSD at a lower price in the future.

Based on these actions, defendant was later arrested and charged on May 3, 1978. On December 1, 1978, defendant filed an application pursuant to Iowa R. Crim. P. 19(4) for authorization to obtain an expert witness, alleging he was a chronic abuser of certain controlled substances and in need of proper medical and rehabilitative treatment. Trial court granted defendant's request on December 12, 1978, and ordered evaluations be conducted by the Black Hawk County Mental Health Center. Defendant filed a motion in limine on February 12, 1979, requesting, inter alia, suppression of statements made by defendant regarding future drug sales. Trial court overruled this portion of defendant's motion and trial commenced February 13, 1979. Although defendant, at trial, objected to admission of this evidence on grounds of irrelevancy, trial court overruled the objection. Defendant was convicted, as charged, by a jury on February 14, 1979. His motion for new trial, filed February 24, 1979, alleged evidence regarding future sales was inadmissible evidence of other criminal acts of defendant and was prejudicial. Trial court overruled the motion. Hearing was held April 16, 1979, on defendant's request to be placed in a drug treatment facility as provided by section 204.409(2). This request was denied and he was sentenced to serve an indeterminate sentence of imprisonment not to exceed five years at the Iowa Men's Reformatory.

I. Admission of Evidence. Defendant alleges trial court erred in admitting evidence concerning possible future drug transactions. He asserts the statements were

not part of the res gestae of the crime charged, but rather evidence of other crimes. He further argues the statements were not admissible to prove motive, intent, mistake, common scheme, or identity and did not constitute admissions. We find these contentions without merit.

Generally, evidence of other criminal acts by an accused is inadmissible. State v. O'Connell, 275 N.W.2d 197, 202 (Iowa 1979). Recognized exceptions to this rule permit admission of evidence of similar crimes when it 1) tends to establish motive, intent, absence of mistake or accident, a common scheme, and identity of the perpetrator, State v. Cott, 283 N.W.2d 324, 326 (Iowa 1979), or 2) the alleged act "is so related to the offense charged that proof of the former tends to establish the latter" State v. Horn, 282 N.W.2d 717, 729 (Iowa 1979). "The State [also] is . . . entitled to show what actually happened at the time of the offense." State v. Oppedal, 232 N.W.2d 517, 522 (Iowa 1975). Admissibility is a matter within trial court's broad discretion. Horn, 282 N.W.2d at 728.

Even assuming the challenged evidence shows other criminal acts of defendant, evidence of his offer to sell drugs to Special Agent Wertz in the future clearly falls within the recognized exceptions. It is relevant to establish defendant possessed the LSD with the intent to deliver it for a profit. See State v. Didley, 264 N.W.2d 732, 733 (Iowa 1978). The evidence also is part of the res gestae of the crime charged. The statements were contemporaneously made and relevant to show what actually happened at the time of the offense for which defendant was charged. Oppedal, 232 N.W.2d at 522; State v. Guess, 223 N.W.2d 214, 216 (Iowa 1974). "The fact that this may necessarily include recitation of the commission of another crime or other unfavorable circumstances does not render such evidence inadmissible." Id. (quoting State v. Drake, 219 N.W.2d 492, 494 (Iowa 1974)). Trial court properly admitted the evidence.

II. Motion for New Trial. In light of our disposition of trial court's ruling on admission of evidence concerning possible future drug sales, we hold trial court properly denied defendant's motion for new trial. Trial court has considerable discretion in determining whether to grant a motion for new trial. State v. Kaufman, 265 N.W.2d 610, 619 (Iowa 1978). We will not interfere where, as here, there clearly appears to be no miscarriage of justice. State v. Sheffey, 234 N.W.2d 92, 98 (Iowa 1975).

III. Denial of Commitment to Drug Treatment Facility. Defendant also requests remand of his case for resentencing. He complains trial court erred in denying

his request for commitment to a drug treatment facility pursuant to section 204.409(2).

The decision to honor that request, however, is within trial court's discretion. State v. Grimme, 274 N.W.2d 331, 338 (Iowa 1979); State v. Prothero, 242 N.W.2d 304, 306 (Iowa 1976); State v. Horton, 231 N.W.2d 36, 39 (Iowa 1975). Such discretion will be "exercised only after a finding that 1) addiction, dependency or chronic abuse exists and 2) the defendant will be aided by proper medical treatment and rehabilitative services." Horton, 231 N.W.2d at 39. We will not interfere absent a showing of abuse which is clearly unreasonable under the attendant circumstances. Id.

At the hearing to determine whether defendant should be committed to a drug treatment facility, it was established defendant had been using drugs for several years, resulting in a psychological, but not physical, dependency. While this evidence supports defendant's claim he should have been committed to a drug treatment facility, sufficient evidence in the record supports trial court's finding commitment was not warranted in this case. Trial court found defendant's use of drugs was only moderate and the success rate for treatment of such patients is poor. Under such circumstances, trial court did not abuse its discretion in denying defendant's request.

Judgment of trial court is affirmed.

AFFIRMED.