IN THE COURT OF APPEALS OF IOWA

No. 2-079 /91-728

FILED
MAY 23 1992
CLERK SUPREME COURT

1230

STATE OF IOWA,

Appellee,

vs.

CORY SAWVEL,

Appellant.

Appeal from the Iowa District Court for Dubuque County, Alan L. Pearson and James Bauch, Judges.

Sawvel appeals his convictions, following a jury trial, for two counts of delivery of LSD. **AFFIRMED.**

Roger J. Kurt, Dubuque, for appellant.

Bonnie J. Campbell, Attorney General, Bruce Kempkes, Assistant Attorney General, Fred McCaw, County Attorney, and Timothy Gallagher, Assistant County Attorney, for appellee.

Heard by Hayden, P.J., and Sackett and Habhab, JJ.

HAYDEN, P.J.

Cory Sawvel was charged with two counts of delivery of LSD. Count I initially alleged one of the deliveries had occurred within 1000 feet of a school. At the beginning of trial the State dismissed that element of count I. The delivery elements of both counts proceeded to trial.

Sawvel presented a defense based on mistake of fact. Sawvel did not deny making the sales. He claimed, however, it was his belief he was authorized to make the sales because he was acting as a confidential informant under authority of his uncle, a deputy sheriff.

The jury found Sawvel guilty of two counts of delivery of LSD. Sawvel has appealed.

Sawvel first contends the district court improperly instructed the jury. The district court relied on State v. Freeman, 450 N.W.2d 826, 828 (Iowa 1990) in fashioning its instructions on general intent. The instructions set forth an objective or reasonableness standard. Sawvel relies on Cheek v. United States, 498 U.S. ___, 111 S. Ct. 604, 112 L. Ed. 2d 617 (1991), and claims the instructions should have set forth a subjective standard. Failure to do so prohibited the jury from considering his actual mental state at the time of the offense. Sawvel asks this court to refine or overrule Freeman in light of Cheek. We decline to do so.

The issue before the Court in Cheek was whether "the District Court erred by instructing the jury that only an

objectively reasonable misunderstanding of the law negates the . . . willfulness requirement" in federal criminal tax statutes. Cheek, 498 U.S. at ___, 111 S. Ct. at 608, 112 L. Ed. 2d at 627. The Court held it was error to instruct the jury to disregard evidence of Cheek's understanding of the tax laws. Id. at ___, 111 S. Ct. at 611, 112 L. Ed. 2d at 631. The Court also stated

> [t]he general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system. Based on the notion that the law is definite and knowable, the common law presumed that every person knew the law. . . . The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses. Thus, the Court almost 60 years ago interpreted the statutory term 'willfully' as used in the federal criminal tax statutes as carving out an exception to the traditional rule. This special treatment of criminal tax offenses is largely due to the complexity of the tax laws.

Id. at ____, 111 S. Ct. at 609, 112 L. Ed. 2d at 628 (citations omitted).

We decline to extend the special treatment afforded to certain criminal tax offenses to the area of drug offenses. The rationale for affording special treatment in the criminal arena of tax offenses--the complexity of the applicable law--is absent in the criminal arena of drug offenses. We conclude the district court properly instructed the jury.

Sawvel next contends he was subjected to double jeopardy because he was tried on the remainder of count I after the element alleging proximity to a school was dismissed. Sawvel argues the remaining allegations are akin to a lesser included offense. Therefore, dismissal of the greater element was tantamount to an acquittal, barring prosecution of the remaining elements. Even assuming the remaining allegations constituted a lesser included offense, we reject defendant's argument. Acquittal of a greater charge does not preclude submission in the same prosecution of any lesser included offenses upon which a jury issue exists. State v. Hilleshiem, 305 N.W.2d 710, 717 (Iowa 1981).

Sawvel characterizes another issue as relating to double jeopardy. Defendant testified before a federal grand jury and was promised limited use immunity from prosecution for his testimony by the federal prosecutor. Sawvel acknowledges a federal grant of immunity does not ordinarily bar a state prosecution for the same acts. See United States v. Wheeler, 435 U.S. 312, 317, 98 S. Ct. 1079, 1082, 55 L. Ed. 2d 303, 308 (1978). However, under the facts of this case Sawvel argues the State should be bound by the federal agreement because the assistant county attorney who prosecuted Sawvel was also a special assistant U.S. attorney with responsibility for drug cases. We find no evidence indicating the State prosecutor relied on any information given by Sawvel to the federal grand jury.

There is no evidence indicating the defendant was misled concerning the nature and extent of his immunity. We determine the State prosecution proceeded in conformity with the immunity provided to the defendant by the federal prosecutor. We affirm on this issue.

Sawvel next contends the district court erred by excluding his proposed evidence about the federal prosecutor's grant of limited use immunity for the acts constituting count I. Sawvel claims the testimony was necessary to corroborate his state-of-mind defense: his cooperation was consistent with his claim he was acting on behalf of law enforcement and providing them with information. Like the district court, we fail to see how the defendant's state of mind four months after committing both crimes is relevant to defendant's state of mind on the date of the offenses. Furthermore, the record reveals the jury heard evidence defendant had cooperated with law enforcement authorities and he voluntarily testified before the grand jury. We hold defendant suffered no prejudice as a result of the district court's ruling.

Sawvel also challenges other evidentiary rulings. He contends the district court erred by excluding certain proposed testimony from his family members and others. Sawvel claims this testimony would have supported his claim that he reasonably believed his actions had been authorized by his uncle, the deputy sheriff. Sawvel also contends the district court erred by allowing his uncle to give hearsay

testimony. These allegations are without merit, and we affirm the district court's rulings.

Sawvel next contends the prosecutor committed misconduct during jury selection by referring to that portion of the charge concerning the sale of a drug near a school. Sawvel contends such remarks were prejudicial and inflammatory. It is true the jurors should not have heard this information during their selection. The district court accordingly admonished the jury to disregard any reference to that provision. Generally, an improper comment is not unduly prejudicial if the court admonishes the jury to disregard it. State v. Williams, 315 N.W.2d 45, 55-56 (Iowa 1982). Furthermore, a finding of prejudice usually requires "persistent efforts to inject prejudicial matter before the jury." State v. Webb, 244 N.W.2d 332, 333 (Iowa 1976). Defendant raises additional claims of prosecutorial misconduct; however, those claims are not properly preserved. Therefore, upon consideration of the isolated incident, we conclude the prosecutor was not guilty of misconduct.

Finally, Sawvel contends the sentencing court violated principles of double jeopardy and abused its discretion by resentencing defendant to serve two twenty-five-year concurrent terms after concurrent ten-year sentences had previously been imposed. Apparently the district court thought defendant was convicted of two class C felonies for which the maximum period of confinement is ten years. See

Iowa Code § 902.9(3) (1991). However, defendant's crimes were two class B felonies which required imposition of twenty-five-year terms of imprisonment if the district court considered imprisonment as an appropriate sentencing option. See Iowa Code §§ 204.401(b)(5); 902.9(1) (1991). When the district court became aware of the problem, it brought defendant before it for resentencing. The court had withheld its original sentencing order upon learning of the invalidity of the original sentence.

A sentencing court is bound to impose the sentence prescribed by statute. State v. Ohnmacht, 342 N.W.2d 838, 842-43 (Iowa 1983). A sentence which is not authorized by statute is void. Id. at 843. The court may correct an illegal sentence at any time. Iowa R. Cr. P. 23(5)(a). The sentencing court never filed the original sentencing order. Jeopardy thus never attached at the defendant's initial sentencing. The sentencing court properly required defendant to be sentenced anew. A thorough review of the record reveals the second sentence was imposed in accordance with the law. We hold the sentencing court did not violate principles of double jeopardy or abuse its discretion. We affirm.

AFFIRMED.