FILED
MAR 29 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Appellee,	)	Filed March 29, 1978
vs.	)	
LAMOYNE JOSEPH ROLLINS,	)	443 / 60470
Appellant.	)	

Appeal from Polk District Court - Gibson C. Holliday, Judge.

Defendant appeals his conviction of conspiracy to deliver heroin, in violation of § 204.401(1), The Code 1975, assigning as error the refusal of trial court to instruct the jury on the issue of accommodation as set forth in § 204.410, The Code 1975. AFFIRMED.

John C. Wellman, of Des Moines, counsel for appellant.

Richard C. Turner, Attorney General of Iowa, and Dan Johnston, Polk County Attorney, counsel for appellee.

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

DONIELSON, J.

Defendant-Lamoyne Joseph Rollins appeals his conviction of conspiracy to deliver heroin, in violation of § 204.401(1), The Code 1975, assigning as error the refusal of the trial court to instruct the jury on the issue of accommodation. He argues that this refusal resulted from the court's ex post facto application of a 1976 amendment to § 204.410, The Code 1975, pertaining to reduced sentences for accommodation offenses which became effective after the offense in the instant case was committed.

On August 15, 1976, a County Attorney's Information was filed against defendant, charging him with conspiracy to deliver a Schedule I Controlled Substance. The case was tried to a jury on December 6, 1976, and a verdict of guilty was returned on December 7. On January 11, 1977, defendant was sentenced to ten years imprisonment.

At trial, the State contended that Rollins and Jody Allen Reed entered into a conspiracy to travel to Chicago on June 1, 1976, to purchase one ounce of heroin and that Rollins returned to Des Moines with less than one gram of heroin even though ten grams had been purchased. At the close of the evidence, the court submitted proposed jury instructions. Defendant objected to the instructions as a whole on the ground that they did not contain proper reference to the issue of accommodation as set forth in § 204.410, The Code 1975, Acts 1971 (64 G.A.) ch. 148, § 410.

In his objections to the instructions, defendant asserted that under the old version of § 204.410 [Acts 1971 (64 G.A.) ch. 148, § 410], which was in effect at the time the offense occurred, one convicted of conspiracy would be entitled to an accommodation hearing. However, Rollins contended that under the revised version of § 204.410, Acts 1976 (66 G.A.) ch. 1245, ch. 4, § 231, effective July 1, 1976, which was in effect subsequent to the commission of the offense here but prior to defendant's trial, the issue of accommodation would apply only to cases involving delivery or possession with intent to deliver. Rollins argued that a retroactive application of the July 1, 1976 amendment would violate his constitutional rights to due process and equal protection.[1] For these reasons, defendant requested that the court instruct the jury on the accommodation issue. The court overruled Rollins' objections to the instructions and submitted them without change. After the jury returned a verdict of guilty, Rollins did not request an accommodation hearing.

[1] At trial, defendant apparently made no reference to the ex post facto application argument, or to its constitutional basis, Art. I, § 9, United States Constitution.

Rollins contends that under the old version of § 204.410 which was in effect prior to July, 1976, accommodation was a mitigating factor in the offense of conspiracy to deliver a controlled substance, since § 204.410 specified that any person convicted of a violation of § 204.401(1), including conspiracy, was entitled to a separate accommodation hearing. The old version of § 204.410, The Code 1975 provides:

> "**Reduced sentence for accommodation offenses.** Any person who enters a plea of guilty to or is found guilty of a violation of section 204.401, subsections 1 or 2, may move for and the court shall grant a further hearing [at which evidence may be presented by the person, and by the prosecution if it so desires,] relating to the nature of the act or acts on the basis of which the person has been convicted. If the convicted person [establishes by clear and convincing evidence that he] delivered or possessed with intent to deliver a controlled substance only as an accommodation to another individual and not with intent to profit thereby nor to induce the recipient or intended recipient of the controlled or counterfeit substance to become addicted to or dependent upon the substance, the court shall sentence the person as if he had been convicted of a violation of section 204.401, subsection 3." (emphasis added)[2]

According to defendant's theory, in the amended version of § 204.410, effective July 1, 1976, the accommodation issue is only applicable in a prosecution for unlawful delivery or possession with intent to deliver, and not conspiracy. The amended version of § 204.410, The Code, reads as follows:

> "**Accommodation offense.** In a prosecution for unlawful delivery or possession with intent to deliver a controlled substance, if the prosecution proves that the defendant violated the provisions of section two hundred four point four hundred one (204.401), subsection one (1), of the Code, but fails to prove that the defendant delivered or possessed with intent to deliver the controlled substance for the purpose of making a profit, the defendant shall be guilty of an accommodation offense and shall be sentenced as if he had been convicted of a violation of section two hundred four point four hundred one (204.401), subsection three (3) of the Code. An accommodation offense may be proved as an included offense under a charge of delivering or possessing with the intent to deliver a controlled substance in violation of section two hundred four point four hundred one (204.401), subsection one (1), of the Code." (emphasis added)

Consequently, according to defendant's argument, the 1976 amendment removed accommodation as a mitigating factor in the offense of conspiracy. Both at trial and on appeal, the State has contended that the 1976 amendment to § 204.410 served only to clarify the existing law and its application, not to change it. The State asserts that both prior to and since the 1976 amendment, § 204.410 has applied only to those

[2] That portion of the section held unconstitutional in State v. Monroe, infra, at 32-37, and hence not in effect at the time of the conspiracy, is indicated by brackets.

situations involving delivery or possession with intent to deliver and consequently, neither version of the statute applies to those instances involving a conspiracy charge.

The State's reading and interpretation of the statutes is a sound and logical one. Although it appears from the first sentence of the old version of § 204.410 that the section applies to all those convicted under § 204.401(1) or (2), including those convicted of conspiracy, the second sentence significantly narrows the applicability of the statute. That sentence serves to activate the accommodation offense statutory provisions only in instances where the defendant is convicted of delivery or possession with intent to deliver, and not in those where the defendant is convicted of conspiracy to manufacture, deliver, or possess with intent to deliver. We see nothing in the amended version of the statute which in any way serves to change the effect or applicability of the accommodation offense as expressed in the old version. One convicted of conspiracy is not entitled to an accommodation hearing under either version of § 204.410.

Furthermore, as we interpret these statutes, defendant selected the wrong procedure to raise the issue of accommodation. If he desired to raise this issue, he should have requested an accommodation hearing rather than an accommodation instruction. Following State v. Monroe, 236 N.W.2d 24, 37 (Iowa 1975), and prior to the 1976 amendment, a person accused of delivery or possession with intent to deliver was entitled to a two-stage trial. According to **Monroe**, after the jury has resolved the main issue of defendant's guilt against the defendant, he is entitled the opportunity to have the intent issue posed by § 204.410 resolved by the jury in an accommodation hear. **Id.** However, it is incumbent upon the convicted defendant to request such a hearing prior to sentencing. State v. Still, 208 N.W.2d 887, 894 (Iowa 1973); State v. Miller, 241 N.W.2d 909, 910-911 (Iowa 1976). Failure to request an accommodation hearing prior to the time sentence is imposed waives any right to the hearing. State v. Everhart, 243 N.W.2d 574, 575 (Iowa 1976).

Consequently, even if we were to accept defendant's interpretation of the statutes, he would not be entitled to a jury instruction on the accommodation issue and he wavied his right to an accommodation hearing by failing to request one. State v. Everhart, supra. Accordingly, we affirm the district court.

AFFIRMED.