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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Appellee,	)	Filed October 7, 1977
v.	)	
	)	237
WAYNE ROBERT GRISWOLD,	)	59475
Appellant.	)	
	)	

Appeal from Cass District Court - Jerry L. Larsen, Judge.

Defendant appeals his conviction for possession of a schedule I controlled substance and resulting sentence. Affirmed.

Ken Sojka, of Buckley & Sojka, of Harlan, for appellant.

Richard C. Turner, Attorney General, J. Susan Carney, Assistant Attorney General, and Ray Yarham, Cass County Attorney, for appellee.

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

PER CURIAM

Defendant, Wayne Robert Griswold, stands convicted of possession of a schedule I controlled substance in violation of section 204.401 (3), The Code. This opinion will follow the organization which defendant uses in his prolix brief.

I. Defendant attacks the validity of his arrest, and thereby challenges the court's jurisdiction over his person. Even assuming defendant's arrest was unlawful, the point is of no aid to him. A court's jurisdiction over the person of a criminal defendant is not defeated by the manner in which that jurisdiction is acquired. Herman v. Brewer, 193 N.W.2d 540, 546 (Iowa 1972).

II. A. Defendant contends in his second division that he was not given the benefit of an adequate screening process prior to his arrest and the initiation of the prosecution against him. "[A] conviction will not be vacated on the ground that the defendant was detained pending trial without a determination of probable cause." Gerstein v. Pugh, 420 U.S. 103, 119, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). A petit jury has found the defendant guilty beyond a reasonable doubt. A fortiori, questions of probable cause to believe that he has committed a criminal act are settled.

B. The due process question which defendant raises here was settled long ago in Hurtado v. California, 110 U.S. 516, 4 S.Ct. 111, 28 L.Ed. 232 (1884). Because defendant cites no authority for the proposition that charging by information violates equal protection, we do not consider it.

C. Defendant also assails the minutes of testimony which were attached to the information as failing to sufficiently apprise him of the charges against him. He fails to explain how having the witnesses sign and swear to such minutes would clarify the charges against him. "[I]t has always been the Court's view that the notice component of due process refers to the charge rather than the evidentiary support for the charge." United States v. Agurs, 427 U.S. 97, 112, n. 20, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). The arguments in this division are without merit.

III. A. Defendant next contends that, because the sheriff disclosed evidence to a newspaper, defendant's due process rights were violated. He claims that it was error for the trial court to fail to dismiss the information on the basis of this disclosure. Assuming, for the sake of argument in this division only, that what the sheriff did was prejudicial, defendant was not entitled to the remedy he requested. Prejudice from

news articles may be avoided through change of venue.

Defendant cites the ABA Standards for Criminal Justice - Fair Trial and Free Press, section 2.1 (Approved Draft, 1968) in support of his theory. The Standards contemplate the promulgation of a rule of court against disclosures of evidence by the police. As is true of violations of the Iowa Code of Professional Responsibility for Lawyers, DR 7-107(B)(6), the violator would be subject to penalty, but the accused would not be set free.

B. Because we have assumed prejudice, for the purposes of this division, we need not consider the defendant's analogy to hearsay. He fails on this point because he has asked for the wrong remedy.

IV. Closely related to defendant's complaint in division III is his present assignment of trial court's refusal to grant a change of venue as error. Our manner of review is determined by State v. Pelelo, 247 N.W.2d 221, 223 (Iowa 1976):

> We review the evidence de novo to determine whether the trial court abused its discretion in holding that defendant failed to demonstrate a reasonable likelihood he would not receive a fair trial in [Cass] County. State v. Dague, 206 N.W.2d 93, 95 (Iowa 1973); Lloyd v. District Court of Scott County, 201 N.W.2d 720 (Iowa 1972).

Defendant contends that, because the affidavits which accompanied his petition for change of venue were uncontroverted, trial court was obligated to grant the motion. This contention pales in the light of State v. Dague, 206 N.W.2d 93, 94 (Iowa 1973). Trial court still had "discretion to determine, under the record made, the necessity or advisability of a change of place for trial." 206 N.W.2d at 94.

The articles which defendant relies upon to show prejudice are of three types. First are what may best be described as "rather commonplace generalized attacks on the courts and our system of criminal justice." State v. Pelelo, supra, 247 N.W.2d at 223. We note that similar articles in **Pelelo** were much closer in time to the trial than those here.

The second type of article named Griswold and described his arrest for the violation involved here. One such article mentioned defendant's being on probation or parole for a similar, earlier offense. These were published in September and October of 1975. Trial was begun on April 22, 1976, six months later.

The third group of articles simply reported the Iowa Supreme Court's affirmance of defendant's wife's conviction on drug charges. These were published on March 18 and 31, 1976. The defendant was also mentioned in one as having pled guilty in that prior transaction.

We have considered the news items and form affidavits which accompanied defendant's motion, the testimony presented at the hearing, the transcript of the voir dire, and the presentence report. There was no showing of a reasonable likelihood that defendant could not get a fair trial in Cass County.

V. In this division, defendant first points out the failure of the prosecution to disclose the name of Frank Eberlin, Jr. (identified as Frank Eblen III in the subpoena), as a rebuttal witness. He cites this as a violation of the prosecution's duty to disclose exculpatory evidence, and as a violation of a court order for a bill of particulars.

A. Defendant's argument that the prosecution somehow suppressed exculpatory evidence by not telling defendant about a rebuttal witness is mystifying. By definition, rebuttal evidence would not be favorable to the defendant. See State v. Hansen, 225 N.W.2d 343, 351 (Iowa 1975). Therefore, this cannot present a situation where "the omitted evidence [would create] a reasonable doubt that did not otherwise exist." United States v. Agurs, 427 U.S. 97, 112, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976); State v. Hall, 249 N.W.2d 843, 847 (Iowa 1977).

B. Likewise, no violation of the bill of particulars occurred here. We assume, without deciding, that a bill of particulars was requested in a timely manner, and ordered. When a bill of particulars is furnished, the State is thereafter limited to proof of the matters specified in the bill. State v. Hall, 235 N.W.2d 702, 720 (Iowa 1975). By withdrawing the witness without an offer of proof, the State did not exceed the proof allowed by the bill of particulars.

C. Nor was the bill of particulars violated in the other respects mentioned by defendant. This court cannot find the "letter" which formed a part of the chain of possession of the State's tangible evidence that defendant refers to. Furthermore, this court cannot find any objection in the record which would support the contention made here. If either the letter or the objection exists, defendant has failed, in his brief, to direct the attention of this court to the part of the record upon which relies. See rule 344(a)(4), Rules of Civil Procedure, superceded by rule 14(a)(5).

Appellate Procedure. Therefore we do not consider the question.

Finally, defendant's argument that the rebuttal witness had knowledge of an admission by defendant adds nothing to the complaint discussed in section A of this division, and is without merit.

VI. Sheriff Voggesser's recounting of defendant's question to him was not hearsay. It was the admission of a party-opponent. Fed. R. Evid. 801(d)(2)(A). Rule 801(d)(2) has in substance been adopted as Iowa law. See State v. Kidd, 239 N.W.2d 860, 864 (Iowa 1976). For a clear explanation of the rule, see the Advisory Committee's Note to Federal Rule of Evidence 801(d)(2).

Defendant contends that the sheriff testified to the contents of the lab report and that such testimony constituted hearsay. The sheriff testified the report had defendant's name on it and that it was signed by James R. Dahlgran, a lab technician. Defense objections to the references to Dahlgran's signature and other contents were sustained. The portions of testimony which remain in the record are not hearsay. The testimony showed that the reference to defendant existed, and was not offered to show the truth of any matter which might have been asserted therein. See State v. Kidd, supra; Fed. R. Evid. 801(c). Defendant may have been entitled to a limiting instruction, but having failed to request it at trial, he cannot complain here.

The complaint that the characterization by the sheriff of the paper sack's contents as "contraband" amounted to introduction of evidence of other crimes was not raised in the trial court. We cannot consider it now. State v. Ware, No. 59445 (Iowa, Aug. 31, 1977).

VII. Defendant's complaint regarding the lab report reference to white pills is without merit. No prejudice could result, in light of the report including this statement: "The small white tablets in items A and B were examined for controlled substances with negative results." That is a clear statement that the white cross pills were not narcotics.

On the question of foundation for the lab report, trial court properly found that there was sufficient evidence to identify the substances referred to in the report as those substances in issue at trial. The sheriff testified that he received from the B.C.I.

lab the same packages he had sent, in substantially the same condition. That testimony was sufficient to support a finding it was "reasonably probable that tampering, substitution or alteration did not occur. Absolute certainty is not required." State v. Jeffs, 246 N.W.2d 913 (Iowa 1976).

We find nothing in the record to indicate that defendant argued the prosecution's failure to show compliance with the Iowa Administrative Code to trial court. We do not consider it now.

Finally, as to defendant's complaint regarding the reference to peyote buttons in the lab report, that report clearly showed that the peyote buttons and the mescaline involved were one and the same. No prejudice could arise from this reference.

VIII. Here, defendant asserts the prosecution's closing argument was improper in several respects. Section 780.6, The Code, governs closing arguments in criminal cases.

It was not error for trial court to refuse to limit the prosecution's rebuttal to new matters raised in the defense's argument. The statute allows the prosecution to respond "to the arguments of the defendant's counsel." We refuse to place limits on the prosecution which are greater than those in the statute. Defendant also objected to the prosecutor's statement that Sheriff Voggesser said he did not want to foul the case up. Admittedly, this was not an accurate recounting of what the sheriff said. There was, however, evidence indicating that the sheriff had in fact been attempting to use caution as he proceeded. This supplied an adequate basis in the record for arguing the import of the statement which the prosecutor used. We find no prejudice to defendant. See State v. LaMar, 260 Iowa 957, 965, 151 N.W.2d 496 (1967).

The argument as to credibility of witnesses, weight to be given their testimony and inferences to be drawn was within the bounds of proper argument.

The prosecution's argument that placed the sheriff's word against the defendant's had nothing to do with the burden of proof. It merely emphasized the jury's duty to consider the demeanor and probable veracity of the individual witnesses. The court carried out its duty to instruct on the prosecution's burden of proof. We will not assume that the jurors ignored their oath by failing to follow that instruction.

IX. In his last assignment of error, defendant lists several factors that he claims combined to coerce the jury into reaching a verdict. The case was submitted to the jury

at 2:25 P.M. on April 27, 1976. The verdict was reached that same day. In light of the short time needed to reach a verdict, we do not believe that coercion was a factor here. We also point out that instructions must be read as a whole, and not in isolation. State v. Tensley, 249 N.W.2d 659, 662 (Iowa 1977). Instruction 12 adequately deals with the problem which defendant raises. Defendant's citation to State v. Albers, 174 N.W.2d 649 (Iowa 1970) is misleading. When read in context, the statement which defendant takes from **Albers** does not preclude consideration of the short period of time needed to reach a verdict, when considering a claim of jury coercion.

We have considered each item on defendant's extensive list of trial court's purported defalcations. There is no merit in any of his assertions.

AFFIRMED.