

IN THE COURT OF APPEALS OF IOWA

FILED

AUG 26 1982

CLERK SUPREME COURT

STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed August 26, 1982

391

vs.

)

MELVIN LAVERNE MATHIS,

)

2-245

65274

Defendant-Appellant.

)

Appeal from Black Hawk District Court - L. John Degnan, Judge.

Defendant appeals his conviction of second degree theft in violation of Iowa Code §§ 714.1(4) and 714.2(2). **AFFIRMED.**

Stephen J. Rapp of Rapp & Gilliam, Waterloo, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Joseph P. Weeg, Assistant Attorney General, for plaintiff-appellee.

Considered en banc.

Defendant appeals his conviction of second degree theft in violation of Iowa Code §§ 714.1(4) and 714.2(2). He claims that the evidence was insufficient to support the trial court's finding that he knew or should have known the guns he attempted to sell were stolen, an essential element of the crime. He also claims that the court abused its discretion in sentencing him to a term not to exceed five years. We affirm.

The first ground of defendant's appeal is predicated on the trial court's refusal to direct a judgment of acquittal. He contends that the State did not provide sufficient evidence that defendant knew or reasonably could have known that the guns, which were the subject of the theft charge, had been stolen. Such knowledge is a necessary element of the offense under Iowa Code § 714.1(4). Much of defendant's argument in this regard is premised upon the reviewing court accepting at face value his own testimony. Not only are we not inclined to do this, but in addition, we are not permitted to do so under the proper scope of appellate review in criminal cases. See, e.g., State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981).

Here the evidence presented by the State raised a substantial inference of guilty knowledge on defendant's part based upon defendant's false explanation of his reason for possessing the stolen property and his efforts to sell such property for a grossly inadequate price. Based upon such showing, the issue of guilty knowledge was for the trier of fact.

Defendant was originally sentenced to a term of incarceration not to exceed five years. Following a previous remand of the case to the district court for resentencing, a new sentence was imposed which involved an identical term of imprisonment. Defendant now claims that in the second sentencing proceeding the trial court abused its discretion in imposing sentence, failed to consider pertinent matters relating to his employment, and considered several

impermissible matters.

Sentencing is within the sentencing court's discretion, and if the sentence is within the statutory maximum, it will be set aside only if there is an abuse of discretion. State v. Hildebrand, 280 N.W.2d 393, 396 (Iowa 1979). Our review of the record on resentencing in the present case indicates no abuse of discretion by the trial court in arriving at the sentence which was imposed. Nor can we find that the trial court's sentence was induced by a failure to consider relevant matters or the consideration of impermissible sentencing criteria. We have considered all issues presented and find no basis for reversal.

AFFIRMED.