IN THE COURT OF APPEALS OF IOWA

No. 1999-562 (9-823) / 99-0180
Filed April 28, 2000

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CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KAREN MARIE ATKINSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Mahaska County, Richard J. Vogel, Judge.

Karen Atkinson appeals from her conviction and sentence for possession with intent to deliver a controlled substance (methamphetamine in excess of five grams) in violation of Iowa Code section 124.401(1)(b)(7) (1997). Atkinson claims the district court (1) erred in finding sufficient evidence that she possessed methamphetamine with the intent to deliver (2) erred in finding that her conviction was supported by the weight of the evidence, and (3) abused its discretion in sentencing her to an indeterminate term of imprisonment not to exceed twenty-five years. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, and Charles A. Stream, County Attorney, for appellee.

Heard by Sackett, C.J., and Vogel and Hecht, JJ.

SACKETT, C.J.

Defendant-Appellant, Karen Marie Atkinson, appeals contending there was not sufficient evidence to support the jury's finding she was guilty of possession of a controlled substance with the intent to deliver, to wit: methamphetamine, in violation of Iowa Code section 124.401(1)(b)(7) (1997).[1] She further contends that the verdict was not supported by the weight of the evidence and the district court abused its discretion in its sentencing order.

Defendant was a passenger in a car driven by her former husband, Scott Atkinson, and owned by a friend of his, Bill DeMoss. A policeman stopped the car after Scott allegedly made an illegal turn. Scott went with the policeman to the police car and was subsequently arrested for driving while his license was suspended. The officer testified while he was in the police car talking to Scott, defendant appeared to be moving around in the other car. Defendant was asked to exit the car and when she did she grabbed a purse. The purse was found to contain a glass tube that the officer determined looked as if it had been used for smoking crack cocaine or methamphetamine. A subsequent search revealed a black fanny pack bag under the driver's seat. The officer found what was identified

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1. I.C. § 124.401 provides:

> 1. Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with the intent to manufacture or deliver, a controlled substance, a counterfeit substance, or a simulated controlled substance, or to act with, enter into a common scheme or design with, or conspire with one or more other persons to manufacture, deliver, or possess with the intent to manufacture or deliver a controlled substance, a counterfeit substance, or a simulated controlled substance.
> * * *
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> (7) More than five grams but not more than five kilograms of methamphetamine, its salts, isomers, or salts of isomers, or analogs of methamphetamine, or any compound, mixture, or preparation which contains any quantity or detectable amount of methamphetamine, its salts, isomers, or salts of isomers, or analogs of methamphetamine.

as over [redacted] grams of methamphetamine in the pouch. The substance was both in a pharmacy fold and three individual baggies. There also was a scale in the pouch as well as some tape, car keys, what appeared to be a lighter, an electronic organizer and a cell phone. Defendant carried the same type of electronic organizer and had between one hundred fifty and two hundred dollars in cash. Defendant admitted to a second officer who came to the scene, that she had smoked methamphetamine from the pipe. She was at that time arrested for possessing drug paraphernalia.

Scott testified for defendant. He related that defendant called him for a ride. He drove his own car to her house in Des Moines. They took off in his car and he learned she wanted to go to Oskaloosa. He said she was a call girl and was seeing a client. Scott didn't want to drive his car to Oskaloosa and called DeMoss on his cell phone. DeMoss agreed to let Scott drive his car. Scott and defendant met DeMoss at a convenience store at Northeast 52nd and University in Des Moines. Scott testified he and defendant moved from his car to DeMoss's car. Scott said he took with him from his car keys and a black fanny pack. He said the fanny pack was in his hands and he eventually put it under the car seat. He further testified the methamphetamine in the fanny pack was his. Scott testified on cross-examination by the state that defendant knew there were drugs in the fanny pack and she also knew there were a substantial amount of drugs in the fanny pack.

The day before defendant's trial Scott pled guilty to possession with intent to deliver methamphetamine under five grams. He testified it was his intention to deliver the drugs that were in his fanny pack. He also said he was aware defendant

uses methamphetamine and he has sold it to her.

[redacted] contends both that there is not substantial evidence to support the jury's verdict and that the conviction was not supported by the weight of the evidence. The state concedes that the defendant preserved error on the substantial evidence claim by making a motion for a judgment of acquittal and on the weight of the evidence claim by making a motion for new trial. Both motions were denied.

We first determine whether there was substantial evidence to support the verdict. Our standard of review is for errors at law. *State v. Phams*, 342 N.W.2d 792, 795 (Iowa 1983). A jury verdict is binding upon this court unless there is no substantial evidence in the record to support it or such finding is clearly against the weight of the evidence. *State v. Torres*, 495 N.W.2d 678, 681 (Iowa 1993). Substantial evidence means such evidence as could convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. *See State v. Schrier*, 300 N.W.2d 305, 306 (Iowa 1981). We view the evidence in the light most favorable to the state and draw from it all fair and reasonable inferences taking all the evidence into consideration, both direct and circumstantial. *See State v. Duncan*, 312 N.W.2d 519, 522 (Iowa 1981).

The fanny pack was found under the front seat. Defendant sat in the front passenger seat. Scott testified the pack was his. Yet he said defendant knew there were a substantial amount of drugs in the pack. In the pack in addition to drugs were a scale, a cell phone and an organizer with names and telephone numbers. Defendant also admitted she had purchased drugs from Scott that he took from the fanny pack.

Defendant contends this evidence fails to support a finding that (1) she was

in possession of the drugs; and (2) she had the intent to deliver the drugs.

[redacted] address defendant's contention that there is not substantial evidence to support finding she was in possession of the drugs. In *State v. Reeves*, 209 N.W.2d 18, 23 (Iowa 1973), the Iowa court in addressing the proof necessary for a possession of controlled substance charge said:

> [W] here the accused has not been in exclusive possession of the premises but only in joint possession, knowledge of the presence of the substances on the premises and the ability to maintain control over them by the accused will not be inferred but must be established by proof. Such proof may consist either of evidence establishing actual knowledge by the accused, or evidence of incriminating statements or circumstances from which a jury might lawfully infer knowledge by the accused of the presence of the substances on the premises.

Reeves, 209 N.W.2d at 23.

There is substantial evidence supporting the charge of possession. Scott's testimony supported a finding that defendant had knowledge of the presence and location of the drugs. The fanny pack was in such close proximity to the defendant she had to ability to control it.

The issue of whether the evidence supports a finding of intent to deliver is a more difficult question. Because it is difficult to prove intent by direct evidence, proof of intent usually consists of circumstantial evidence and the inferences that can be drawn from that evidence. *State v. Adams*, 554 N.W.2d 686, 692 (Iowa 1996). The requirement of proof beyond a reasonable doubt is satisfied if it is more likely than not that the inference of intent is true. *State v. Finnel*, 515 N.W.2d 41, 432 (Iowa 1994). Intent may be inferred from the quantity of the drugs. *Adams*, 554 N.W.2d at 692. The jury's finding of intent is supported by substantial evidence. There was a substantial amount of methamphetamine in the fanny pack.

Scott testified that defendant knew there was a substantial amount of the drug in the pack[redacted] stated that she had purchased drugs that Scott had kept in the pack[redacted] could have logically inferred intent from these circumstances.

The state had also argued that the fact defendant and Scott had the same type of electronic organizers was evidence of her intent to deliver. We have not considered the organizer evidence on that issue.

Defendant also contends that her conviction is not supported by the weight of the evidence. In *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998) the Iowa court said, "We therefore hold that 'contrary to . . . the evidence' in rule 23(2)(b)(6) means 'contrary to the weight of the evidence' as defined in *Tibbs v. Florida*, 457 U.S. 31, 102 S. Ct. 2211, 72 L. Ed. 2d 652 (1982)". The court stated further,

> Tibbs explained the difference between the weight of the evidence and the sufficiency of the evidence this way: [A] conviction rests upon insufficient evidence when, even after viewing the evidence in the light most favorable to the prosecution, no rational fact finder could have found the defendant guilty beyond a reasonable doubt. A reversal based on the weight of the evidence, on the other hand, draws the appellate court into questions of credibility. The "weight of the evidence" refers to "determination [by] the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other."

Ellis. at 37-38, *Tibbs*, 102 S. Ct. at 2216, 72 L. Ed. 2d at 658.

The defendant contends that district court did not consider the weight of the evidence, rather the district court in its ruling focused only on the sufficiency of the evidence.

In denying defendant's motions for directed verdict and new trial, after stating the evidence was sufficient to have submitted the case to the jury, the judge commented, "A jury had a right to believe whoever they wanted to believe on the

evidence submitted." Defendant correctly argued that the trial court did not address the weight of the evidence. We filed a limited remand directing the trial court to consider and rule on that issue. On remand the trial court said, "The greater weight of the evidence, considering the credibility of the witnesses, supports the verdict rendered." The trial court accordingly overruled the defendant's motion for new trial. Trial courts have wide discretion in deciding motions for new trial. *Ellis*, 578 N.W.2d at 659; *State v. LaDouceur*, 366 N.W.2d 174, 178 (Iowa 1985). The district court did not abuse its discretion in overruling defendant's motion.

Defendant next challenges her sentence. Our scope of review of a district court's decision regarding sentencing is for an abuse of discretion or for defects in the sentencing procedure. *State v. Cason*, 532 N.W.2d 755, 756 (Iowa 1995). No abuse of discretion will be found unless the defendant shows that such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id.* Further, the result must reflect "not the exercise of reason but rather of passion or bias". *State v. Fink*, 320 N.W.2d 632, 634 (Iowa 1982).

A trial court is required to state on the record its reasons for selecting the particular sentence. Iowa R. Crim. P. 22(3)(d). The explanation does not need to be detailed, but enough must be provided to permit review of the trial court's discretionary action. *State v. Delaney*, 526 N.W.2d 170, 178 (Iowa App. 1994). A sentencing court's statement of its reasons satisfies the rule if it recites reasons sufficient to demonstrate the exercise of discretion and indicates those concerns which motivated the court to select the particular sentence which it imposed. *State v. Garrow*, 480 N.W.2d 256, 259 (Iowa 1992). It is not required to give its reasons for rejecting particular sentencing options. *State v. Thomas*, 547 N.W.2d 223, 225

(Iowa 1996). Sentencing decisions of the district court are cloaked with a strong presumption in their favor. *Id.* In order to overcome the presumption the district court properly exercised its discretion, there must be an affirmative showing the sentencing court relied on improper evidence. *See State v. Sailor,* 587 N.W.2d 756, 762 (Iowa 1998).

At the sentencing hearing the judge gave the reasons for his decision as follows:

> Primarily, in consideration of the facts and circumstances of this particular case and in consideration of your prior criminal record concerning the accommodation drug abuse or drug sentence involved in 1994, the continuing drug problems including a review of the addendum which was received from Des Moines General Hospital Gateway and received on January 4, 1999, the Court feels that that sentence is fair and reasonable and appropriate . . .

We find no abuse of discretion or consideration of improper factors in the reasons for the sentence given. The district court's decision was not unreasonable. Defendant's prior record of prior drug related offenses and history of substance abuse are appropriate factors for consideration in sentencing decisions. *See State v. Pappas,* 337 N.W.2d 490, 493 (Iowa 1983) (discussion of factors for consideration of suspended sentence).

AFFIRMED.