FILED
OCT 25 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed October 25, 1983
vs.	)	3-208
MELVIN OLONZO ADAMS,	)	67972 and 67973
Defendant-Appellant.	)	

Appeal from Polk District Court, Joel D. Novak, Judge.

Defendant appeals from his consecutive sentences for two counts of third-degree theft by deception in violation of Iowa Code section 714.1(3)(1981). AFFIRMED.

Kermit Dunahoo, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General, and Roxann M. Ryan, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Schlegel, Hayden, and Sackett, JJ.

OXBERGER, C.J.

The defendant appeals from his consecutive sentences for two counts of third-degree theft by deception in violation of Iowa Code section 714.1(3). The defendant claims that the two sentences for the two counts of theft by deception from two persons arising out of the same transaction constitutes illegal double punishment. The State claims in part that the defendant is actually challenging his guilty plea and that such an issue was not properly preserved for the appeal. We affirm.

The defendant was charged in the trial information with committing theft in the third degree against Jerry Robinson. Subsequently, on May 26, 1981, the defendant was charged with first-degree robbery against Robert Schultz and Carmena Taylor on April 9, 1981. The robbery case was set for trial prior to the theft case. The robbery case ended in a mistrial. Subsequently, the defendant agreed to plead guilty to two counts of theft in the third degree in the robbery case if the court would accept the State's motion to amend the information to charge those crimes rather than robbery. The defendant also agreed to plead guilty to the separate theft charge. The State indicated its recommendation that the three sentences run consecutively. The defendant pleaded guilty to all three thefts. In response to the court's inquiry the defendant indicated that he understood that he could be imprisoned for a period of up to two years and fined $5,000 on each charge and that all of the sentences could run consecutively. He indicated that he entered the pleas voluntarily. Accordingly, the court imposed a two-year sentence for each of the thefts with the sentences to run consecutively.

On March 16, 1982, the defendant filed a pro se motion for correction or modification of sentence in which the defendant asserted that the two counts of theft in the case originally brought as a robbery charge arose from the same

incident. The defendant moved the court to change the two counts of theft to one count only with the two sentences reduced to one and that the sentence run concurrently with the sentence imposed on the separate theft incident.

The trial court entered an order denying the motion to correct sentence. In regard to the imposition of two sentences for two thefts charged in the robbery case, the court concluded that since theft by deception was charged, there were two separate and distinct thefts for which two sentences could properly be imposed. The defendant appeals from that order.

I. Double Punishment

When issues of violations of basic constitutional safeguards are made, an appellate court is required to make an independent evaluation of the totality of the circumstances. State v. Cullison, 227 N.W.2d 121, 126 (Iowa 1975). Adams relies exclusively on State v. Sampson, 157 Iowa 257, 138 N.W. 473 (Iowa 1912), for the proposition that "theft of several articles at one and the same time and place, and by one and the same act, constitutes but one indivisible crime, even though the articles belong to different owners." Id. at 260, 138 N.W. at 474. He argues that the facts in Sampson are no different from the facts in his case. We believe Adams' reliance on Sampson is misplaced. In Sampson the defendant shared a room with two other persons. When the roommates were asleep, the defendant arose and took a watch and purse and then departed. In the case at bar, there had been a face-to-face confrontation with two separate victims at the same time and property taken separately and personally from each victim.

Therefore, we find the better rule to be:

> if accused... is convicted on several counts of an indictment, and each count is for a separate and distinct offense, a separate sentence may be pronounced on each

> count, and the court may pronounce separate and distinct sentences which are cumulative, and are to run consecutively. This is true, even though the several offenses were committed in the course of a single transaction.

State v. Criswell, 242 N.W.2d 259, 260 (Iowa 1976). Adams voluntarily pleaded guilty to two counts of theft. He testified that he deceived Mr. Schulz into giving him $180 and then he deceived Ms. Taylor into doing the same. Separate offenses can be carved out of a single incident if each of the offenses requires proof of a different element. Criswell at 261. At a minimum, proof of deception against two different individuals was involved. Therefore, we find two separate and distinct offenses arose and as such the sentences imposed were proper.

Adams also contends that although he voluntarily pleaded guilty to two counts of theft, he never agreed to be sentenced on two counts of theft. We find no merit in that contention. Even assuming arguendo that he is correct, we find he has waived any rights he may have had concerning an alleged double punishment. Double punishment, like double jeopardy, is a personal privilege which may be waived. State v. Birkestrand, 239 N.W.2d 353, 363 (Iowa 1976). The following colloquy illustrates this finding:

> THE COURT: Mr. Adams, in Criminal Number 18250 you are charged with the amended charge of theft in the third degree in Counts I and II which is a violation of Chapter 714 of the Iowa Code. How do you plead to that charge?
>
> THE DEFENDANT: Guilty.
>
> THE COURT: Now, this is an aggravated misdemeanor in Count I and Count II, therefore, the maximum punishment to which you are subjecting yourself by entering this plea of guilty could result in your being imprisoned for a period of up to two years and your being fined five thousand dollars and that's on each count so, in other words, as a practical matter you could be looking at four years and ten thousand dollars; do you understand that?

THE DEFENDANT: Yes. Excuse me for a minute.
THE COURT: Yes.
THE DEFENDANT: Yes.
THE COURT: Do you have any questions? This is the time to ask them.
THE DEFENDANT: No.

We find the foregoing discussion plainly constitutes a waiver of any rights Adams may have had concerning double punishment. We therefore affirm the trial court's imposition of consecutive sentences.

II. Guilty Plea Challenge

We do not need to decide the issue of whether defendant was actually challenging his guilty plea and that such an issue was not properly preserved, as we have affirmed the trial court's ruling on other grounds.

AFFIRMED.