

JUN 30 1968

CLERK SUPREME COURT

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Defendants appeal their convictions for delivery of a controlled substance, heroin, with intent to profit, in violation of § 204.40(1), The Code 1975. **AFFIRMED.**

AFFIRMED.

Heard by Allbee, C. J., Donielson, Snell, and Oxberger, JJ.; Carter, J., takes no part.

DONIELSON, J.

In this consolidated appeal following convictions for delivery of a controlled substance, heroin, with intent to profit, in violation of § 204.401(1), The Code 1975, defendants Dennis Dellaca and Daniel Barr contend that the evidence is insufficient to support the jury determination that the delivery was made for profit. We affirm.

The record reflects that since April, 1976, David O'Connor had been working with the Metropolitan Area Narcotics Squad (MANS) and had agreed to make purchases of narcotics for the Squad. In May of 1976, O'Connor was introduced to Dellaca by Barr, with whom O'Connor was acquainted. On May 29, 1976, O'Connor went to Barr's apartment and discussed with both defendants the possibility of purchasing some heroin which they had mentioned they had for sale. O'Connor left and contacted the MANS unit which furnished money for the sale and arranged surveillance. He then returned to the Barr residence and gave Barr \$70 as requested and Dellaca handed him two bindles of heroin. On August 13, 1976, defendants were charged by county attorney's information with the instant offense and a joint trial resulted in their convictions.

Initially, the State contends that defendants did not preserve error concerning the accommodation issue because they failed to request an accommodation hearing as required by § 204.410, The Code 1975. See *State v. Monroe*, 236 N.W.2d 24, 37 (Iowa 1975). Although defendants raised the issue of the sufficiency of evidence to support the jury verdict as it relates to accommodation during trial by way of motion for directed verdict, they did not request an accommodation hearing. Under § 204.410, The Code 1975, Acts 1971 (64 G.A.) ch. 148, § 10, as it existed prior to July 1, 1976, defendants were required to request a separate hearing in order to have the issue of accommodation adjudicated. *State v. Miller*, 241 N.W.2d 909, 910-911 (Iowa 1976); *State v. Still*, 208 N.W.2d 887, 894 (Iowa 1973). Failure to request an accommodation hearing prior to the time sentence was imposed was deemed a waiver of any right to the hearing. *State v. Everhart*, 243 N.W.2d 574, 575 (Iowa 1976). However, the amended version of § 204.410, Acts 1976 (66 G.A.) ch. 1245, ch. 4, § 231, which became effective July 1, 1976, abolished the bifurcated proceedings provided for under the earlier version of the statute.

The transaction giving rise to the charges in the instant case occurred on May 29, 1976 and the county attorney's information was filed on August 13, 1976. The 1976 amendment to § 204.410 became effective in the interim. Consequently, in order to resolve the preservation question, we must determine which version of the statute applies to this case.

Where the alleged offense giving rise to the charge occurs on or after July 1, 1976, the amended version of § 204.410 is applicable. *State v. Didley*, 264 N.W.2d 732, 733 (Iowa 1978). However, where the alleged offense occurs prior to that date, the old version controls. *State v. McDaniels*, ____ N.W.2d ____, slip op. at 9 (Iowa, filed May 17, 1978). Since the transaction in the instant case occurred on May 29, 1976, the earlier version of § 204.410 governs and defendants were required to request an accommodation hearing in order to preserve error. Since they did not do so, they cannot prevail here. However, because this case appears to have been tried under the amended statute we wish to comment upon the merits of the controversy.

Pursuant to the amendment to § 204.410, it was incumbent upon the State to offer evidence from which the jury could find the alleged delivery was made "for the purpose of making a profit" in order to convict defendants of the major offense. *State v. Didley*, *supra*, at 733; see *State v. York*, 256 N.W.2d 922, 926-927 (Iowa 1977); *State v. Metcalf*, 260 N.W.2d 857 (Iowa 1977). It was thus essential for the State to adduce substantial evidence from which the jury could find that defendants conducted the transaction with an intent to obtain "the excess of returns over expenditures." *State v. McNabb*, 241 N.W.2d 32, 35 (Iowa 1976).

The State's evidence showed a typical undercover purchase of heroin. O'Connor told defendants he was buying the heroin for someone else. He never exhibited any physical characteristics of being under the influence or in need of heroin when he arranged the purchase in question. When O'Connor bought the heroin, Dellaca told him that he had more heroin to sell, as well as cocaine.

Dellaca and Barr, both of whom had very expensive drug habits and were unemployed, mentioned to O'Connor several times that they had some heroin for sale. There was also some discussion between Dellaca and Barr concerning the renting of an apartment for the completion of big drug deals, with them securing a percentage of the profits.

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Although no direct evidence was introduced that defendants obtained "an excess of return over expenditures" in this transaction, substantial circumstantial evidence was adduced from which the jury could find that the State proved beyond a reasonable doubt that defendants carried out the transaction "for the purpose of making a profit" within the meaning of the statute. State v. Didley, supra. The judgment of the district court is affirmed.

AFFIRMED.