IN THE COURT OF APPEALS OF IOWA

No. 2-743 / 11-1961
Filed September 6, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARCUS DEPRIEST GULLY,
Defendant-Appellant.

Appeal from the Iowa District Court for Webster County, Gary L. McMinimee (trial) and Thomas J. Bice (sentencing), Judges.

A defendant appeals challenging the sufficiency of the evidence and the district court's imposition of the DARE surcharge. **AFFIRMED IN PART AND VACATED IN PART.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Matthew Oetker, Assistant Attorney General, Ricki Osborn, County Attorney, and Cori Kuhn Coleman, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Danilson and Mullins, JJ.

VOGEL, P.J.

Following a jury trial, Marcus Gully was found guilty of introducing a controlled substance into a detention facility, in violation of Iowa Code section 719.8 (2011), and possession of marijuana, in violation of Iowa Code section 124.401(5). He appeals from his convictions asserting there was insufficient evidence to prove he knowingly introduced a controlled substance into a detention facility and the district court imposed an illegal sentence by ordering him to pay the ten-dollar DARE surcharge on that same conviction. For the reasons stated herein, we find there was sufficient evidence and therefore affirm the conviction, but vacate the ten-dollar DARE surcharge imposed.

On February 17, 2011, law enforcement was called to a local bar in Fort Dodge and encountered Gully who was being loud, very aggressive, and showed signs of intoxication. Prior to arresting Gully, the officer on the scene attempted to call a cab for Gully so he could freely leave the area. The arrest followed Gully's refusal of a cab and continued aggressive behavior. He was transported to the law enforcement center for booking, where a pat-down search was conducted. Gully was advised a more thorough search would be conducted at the jail and was told of the consequence of bringing a controlled substance into the jail. During the search at the jail, the officer observed a white piece of plastic in Gully's belly button. Gully quickly grabbed the item and swallowed it before the officer could ascertain what it was. Gully admitted it was "weed." The officer continued the search and found marijuana in Gully's pants pocket. The officer placed the marijuana on the table and continued the search. Gully reached for

the marijuana and again attempted to swallow it but was stopped by the officer. Gully again confirmed the substance was "weed."

Gully was convicted by a jury of the crimes of introducing a controlled substance into a detention facility and possession of a controlled substance. He was sentenced on November 7, 2011, and in addition to other penalties, the court imposed a ten-dollar DARE surcharge on the conviction of introducing a controlled substance into a detention facility.

Gully asserts there was insufficient evidence to prove he knowingly introduced a controlled substance into the detention facility. He asserts given his intoxicated mental state, it is just as likely he simply forgot he had the marijuana on him. He also asserts because he was involuntarily transported to jail he was merely a "passive participant" with no general intent. He argues to require him to confess to his possession of marijuana, in order to avoid the possibility of an additional charge, violates his Fifth Amendment right to remain silent.

We review sufficiency of the evidence claims for correction of errors at law. *State v*. *Turner*, 630 N.W.2d 601, 610 (Iowa 2001). We will uphold the jury verdict if it is supported by substantial evidence, which means evidence that would convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt. *Id.* We view all the evidence in the light most favorable to the State. *Id.*

We note the crime of introducing a controlled substance into a detention facility is a general intent crime, and therefore, intoxication is no defense. *See State v*. *Canas*, 597 N.W.2d 488, 496 (Iowa 1999) *abrogated on other grounds by Turner*, 630 N.W.2d at 606 n.2; *State v*. *Caldwell*, 385 N.W.2d 553, 557 (Iowa

1986) ("Voluntary intoxication may not, however, reduce a charge when the crime does not require a specific intent."). The crime does not require proof of an intent to do any further act or achieve some additional consequence other than the prohibited conduct. *Canas*, 597 N.W.2d at 496. In this case there was sufficient evidence of Gully's general intent to introduce a controlled substance into the detention facility. It is undisputed that he possessed the marijuana and was in a detention facility. He acknowledged the substance was marijuana and also attempted to destroy the substance on two occasions to prevent law enforcement from seizing the substance. We find the State offered sufficient evidence to prove the intent required for this crime.

Gully's claims—being involuntarily transported to jail negates the volition required for the crime and requiring him to admit to possessing marijuana violates his right to remain silent—have been addressed and rejected by the supreme court in *Canas*. *See id.* at 496–97. There, the defendant was arrested and transported to jail where he was found to be in possession of two packages of methamphetamine. *Id.* at 491–92. The court held Canas "had the option of disclosing the presence of the drugs concealed on his person before he entered the jail and became guilty of the additional offense of introducing controlled substances into a detention facility." *Id.* at 496. Thus, the supreme court concluded there can be no claim that his actions were not voluntary. *Id*.

In addition, the court rejected Canas's Fifth Amendment claim stating: "The criminal process includes many situations which require a defendant to make difficult judgments regarding which course to follow. Sometimes the choices faced by a defendant may have the effect of discouraging the exercise of

constitutional rights but that does not mean such choices are prohibited." *Id.* (internal citations omitted). Requiring a defendant to choose between avoiding the commission of one crime and incriminating himself on another charge does not "engender a constitutional transgression." *Id.* at 497. We therefore reject Gully's claim that he did not have the requisite intent to commit the offense of introducing a controlled substance into a detention facility.

However, we do find the court entered an illegal sentence by imposing the ten-dollar DARE surcharge on this offense. The DARE surcharge is to be imposed on all crimes that arise out of a "violation of an offense provided for in chapter 321J or chapter 124, division IV." Iowa Code § 911.2(1). The crime of introducing a controlled substance into a detention facility does not arise out of chapter 321J or chapter 124, division IV, but out of chapter 719. Because the imposition of this surcharge to this offense was not authorized by statute, it is illegal. We therefore vacate that part of Gully's sentence. *See State v. Rodriguez*, 804 N.W.2d 844, 854 (Iowa 2011) (vacating only the part of the sentence that imposed an illegal surcharge).

AFFIRMED IN PART AND VACATED IN PART.