IN THE COURT OF APPEALS OF IOWA

No. 8-928 / 08-0448
Filed January 22, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LARRY PERRY,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Donna L. Paulsen, Judge.

Defendant appeals from his conviction for conspiracy to distribute crack cocaine, possession with intent to deliver crack cocaine, and failure to possess a tax stamp. **AFFIRMED.**

Angela Campbell of Dickey & Campbell Law Firm, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas Tauber, Assistant Attorney General, John P. Sarcone, County Attorney, and Stephanie Cox, Assistant County Attorney, for appellee.

Considered by Miller, P.J., and Vaitheswaran and Potterfield, JJ.

POTTERFIELD, J.

I. Background Facts and Proceedings

On August 30, 2007, police officers obtained a warrant to search Cecil Watson's residence and person. Watson was not at home when officers arrived to search his residence. Later that day, officers received a tip that Watson would be driving to CiCi's Pizza and waited for him in unmarked vehicles. When Watson pulled into the parking lot, officers blocked in the vehicle driven by Watson and converged on the vehicle to execute the warrant.[1] Several officers removed Watson from the car, handcuffed him, and searched him.

Officers also approached the passenger side of the car where Larry Perry was seated. When an officer ordered Perry to show his hands, Perry raised his right hand but refused to show his left hand. Lieutenant Eric Nation testified that he saw Perry throw a baggie containing a white substance onto the empty driver's seat vacated by Watson. This baggie was later found to contain a 29.18 gram rock of crack cocaine. After officers removed Perry from the vehicle, they found another baggie containing 1.69 grams of crack cocaine on the left side of the passenger seat, near the area Perry's hand was located when he refused to show it. Officers found a third baggie containing 5.66 grams of crack cocaine inside a brown paper sack on the driver's seat. Officers found no money, drug paraphernalia, or other indicia of drug involvement on Perry's person. The amount of cocaine found in the vehicle was consistent with drug dealing, as it was an amount greater than would be held for personal use. No tax stamps were affixed to the crack cocaine.

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[1] The vehicle did not belong to Watson. It was registered to David Cap.

While officers searched the vehicle, they left Perry and Watson alone in the back seat of a patrol car with a video camera that, unbeknownst to them, was recording their conversation. Perry and Watson discussed the story they would tell police and tried to identify the person who had notified the police of their location. The recording primarily consists of Perry talking and Watson mumbling in agreement.

The State charged both Perry and Watson with conspiracy to deliver crack cocaine in excess of ten grams in violation of Iowa Code section 124.401(1)(b)(3) (2005); possession of crack cocaine with intent to deliver in violation of Iowa Code section 124.401(1)(b)(3); and failure to possess a tax stamp in violation of Iowa Code sections 453B.3 and 453B.12.

Watson and Perry's joint trial was scheduled for December 5, 2007. It was not until November 29, 2007, that the prosecutor learned of the existence of the videotape from the patrol car. At a hearing held on December 4, 2007, the State asked to continue the trial due to its recent discovery of this tape. Perry personally resisted the motion to continue, but his attorney did not. The court granted the motion to continue the trial until January 7, 2008, a date within the speedy trial period.

On December 10, 2007, Perry filed a pro se motion to suppress all items seized from the vehicle at the time of his arrest. He asserted that his constitutional rights were violated when the officers searched the vehicle without consent or probable cause. An evidentiary hearing took place on January 4, 2008, and the motion was denied.

Perry's counsel also made a motion to sever Perry's trial from Watson's trial, based on the State's intention to introduce into evidence the videotape containing the voices of both defendants incriminating each other. Perry personally resisted this motion in open court in a colloquy in which he acknowledged that his counsel believed a severance was in his best interest. The court never explicitly issued a ruling denying the severance, but Perry and Watson were tried jointly.

Perry and Watson were both convicted of all three charges against them. Neither defendant testified. Perry now appeals, arguing the district court erred in: (1) granting the State's motion to continue for the purpose of allowing the videotape into evidence; (2) admitting the videotape into evidence; (3) refusing to sever Perry's trial from Watson's trial; and (4) denying Perry's motion to suppress.

II. Motion to Continue

We review the district court's ruling on the motion to continue for an abuse of discretion. *State v. Wright*, 274 N.W.2d 307, 310 (Iowa 1979). "An abuse of discretion occurs when the trial court 'exercises its discretion on grounds clearly untenable or to an extent clearly unreasonable.'" *State v. Henderson*, 696 N.W.2d 5, 10 (Iowa 2005).

While Perry personally wanted to resist the motion to continue the trial, his attorney disagreed, contending additional time was needed to allow him and Perry to discuss the late-discovered incriminating tape. It is clear from the record that Perry's attorney acquiesced in the State's motion to continue. His attorney acknowledged, "Mr. Perry is upset with me regarding wanting to continue the

case." Perry is bound by his attorney's acquiescence in the State's motion to continue. "Ordinarily, except for such basic decisions as to whether to plead guilty, waive a jury, or testify in his or her own behalf, the accused is bound by the tactical or strategic decisions made by counsel . . . ." *Sims v. State*, 295 N.W.2d 420, 425 (Iowa 1980).

This court decides only issues that were raised and decided by the district court. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). Because Perry's counsel acquiesced in the State's motion to continue, error was not preserved, and we do not consider the claim on appeal. In any event, the continuance allowed Perry and his counsel to file and litigate Perry's motion to suppress and his counsel's motion to sever. It further allowed Perry an opportunity to listen to his statements on the videotape and to adjust his defense at trial.

III. Admission of Videotape into Evidence

We review hearsay claims for errors at law. *State v. Newell*, 710 N.W.2d 6, 18 (Iowa 2006).

Perry argues that the videotape was inadmissible hearsay. Iowa Rules of Evidence define hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 5.801(*c*). Generally, hearsay is not admissible unless it fits within one of several recognized hearsay exceptions. Iowa R. Evid. 5.802. However, a party's own statement offered against that party is not hearsay. Iowa R. Evid. 5.801(*d*)(2)(A). The vast majority of the statements made on the videotape were made by Perry. Thus, almost the entire videotape is not hearsay and is admissible.

The very few statements that Watson made on the videotape are hearsay. We believe the district court erred in admitting the tape into evidence; however, we find that the admission was harmless. The statements made by Watson on the videotape merely repeated information already stated by Perry. Thus, the admission of this hearsay evidence at trial was harmless. *See Miller v. Bonar*, 337 N.W.2d 523, 528 (Iowa 1983).

IV. Motion to Sever Trial

We review Perry's claim regarding the motion to sever for an abuse of discretion. *State v. Leutfaimany*, 585 N.W.2d 200, 203 (Iowa 1998). To show an abuse of discretion, Perry must show sufficient prejudice to constitute denial of a fair trial. *Id.* To the extent that Perry's claim involves constitutional rights, our review is de novo. *Id.*

Perry claims that his defense conflicted with Watson's because each party's asserted defense was that the crack cocaine belonged to the other party. "It is well established . . . that the mere presence of conflict, antagonism or hostility among defendants or the desire of one to exculpate himself by inculpating another are insufficient grounds to require separate trials." *State v. Snodgrass*, 346 N.W.2d 472, 475 (Iowa 1984). In order for a defendant to show prejudice that prevents a fair trial, the defendants' defenses must "conflict to the point of being irreconcilable and mutually exclusive." *Id.* This is the case when "the jury, in order to believe the core of testimony offered on behalf of [one] defendant, must necessarily disbelieve the testimony offered on behalf of [a] co-defendant." *Id.* (quoting U*nited States v. Berkowitz*, 662 F.2d 1127, 1134 (5th Cir. 1981)). When two defenses are irreconcilable, severance of the trial is

necessary to prevent a situation where the jury will infer that both defendants are guilty simply because of the conflict between their defenses. *Id.* However, a defendant "is not entitled to a severance where a 'common core' of defense exists." *State v. Sauls*, 356 N.W.2d 516, 519 (Iowa 1984).

Both Watson and Perry's counsel elicited testimony regarding the fact that the car belonged to someone else, insinuating that the drugs may have already been in the car. Perry's attorney told the jury that the State could not prove its case "for Mr. Perry or for Mr. Watson." A review of the trial transcript reveals that the defendants' defenses were not mutually exclusive. The core of Watson's defense seems to be that the drugs could have been in the car when it was loaned to him, the police did not fingerprint the baggies, and no drugs or drug paraphernalia was found on Watson's person. These defenses were all reconcilable with Perry's defense. Although Perry argued the lack of evidence for both defendants, he also emphasized that Watson was the target of the investigation and the subject named in the search warrant. Perry was able to take advantage of Watson's defense and was further benefitted by portraying Watson as the perpetrator. Watson's defense did not prejudice Perry and did not deny him a fair trial.

Perry also argues the United States Supreme Court's decision that a non-testifying codefendant's (Watson's) confession incriminating the other defendant is barred by the confrontation clause from admission into evidence at their joint trial. *Bruton v. U.S.*, 391 U.S. 123, 135-36, 88 S. Ct. 1620, 1627-28, 20 L. Ed. 2d 476, 484-85 (1968). The Confrontation Clause states that in all criminal prosecutions, "the accused shall enjoy the right . . . to be confronted with

witnesses against him." U.S. Const. amend VI (*emphasis added*). However, a non-testifying defendant is only a "witness" within the meaning of the Confrontation Clause when the admitted statements are testimonial in nature. *Davis v. Washington*, 47 U.S. 813, 821, 126 S. Ct. 2266, 2273, 165 L. Ed. 2d 224, 237 (2006). Watson's statements on the videotape are not testimonial. Accordingly, Perry's Sixth Amendment rights and *Bruton* are not at issue.

V. Motion to Suppress Evidence

Because Perry's appeal on the motion to suppress involves constitutional errors, we review that claim de novo. *State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1998).

Perry filed a motion to suppress arguing that none of the evidence obtained from the search of the vehicle in which he was the passenger should be admitted at his trial. He asserted that the search and seizure was a violation of his Fourth Amendment rights.

Officers validly stopped the vehicle driven by Watson pursuant to a warrant authorizing them to search Watson's person. However, the search warrant did not authorize a search of the vehicle driven by Watson. A search conducted without a valid search warrant is per se unreasonable unless an exception to the search warrant requirement applies. *State v. Hoskins*, 711 N.W.2d 720, 726 (Iowa 2006). One such exception provides that a search can be executed without a warrant if evidence is in plain view. *State v. McGrane*, 733 N.W.2d 671, 680 (Iowa 2007). Multiple officers testified that drugs were in plain view inside the car. Lieutenant Nation testified to seeing baggies containing drugs on both the passenger and driver's seats. Officer Richardson testified to

seeing drugs sitting on the seats of the car. Officer Haase testified that he saw two baggies of crack cocaine through the open door. Because the evidence was in plain view, the officers' search of the vehicle did not violate Perry's constitutional rights.

VI. Conclusion

Because Perry's attorney acquiesced in the State's motion to continue, he did not preserve error on that claim. The district court properly admitted the videotape into evidence; Perry's statements were not hearsay under Iowa Rules of Evidence, rule 5.801(*d*)(2)(A); and Watson's statements were harmless error. The district court did not err in refusing to sever Perry and Watson's trial as their defenses were reconcilable. The district court properly denied Perry's motion to suppress.

AFFIRMED.