IN THE COURT OF APPEALS OF IOWA

No. 2-966 / 12-0086
Filed January 24, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LUPE CERDA, a/k/a
MARVIN GONZALEZ,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

Lupe Cerda appeals his conviction for possession with intent to deliver and conspiracy. **AFFIRMED.**

Eric Parrish of Parrish, Kruidenier, Dunn, Boles, Gribble, Parrish, Gentry & Fisher, L.L.P., Des Moines, for appellant.

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

Considered by Potterfield, P.J., and Danilson and Tabor, JJ.

TABOR, J.

A jury convicted Lupe Cerda of possession with intent to deliver more than five but less than fifty grams of methamphetamine and conspiracy to deliver the controlled substance. The court merged the conspiracy count into the possession-with-intent conviction and entered judgment. Cerda filed an appeal raising two issues: (1) did the district court err in admitting into evidence a Utah uniform citation issued to him for marijuana possession, and (2) did the court err in allowing the State to proceed with a conspiracy charge despite the dismissal of that complaint following a preliminary hearing.

After reviewing the record, we find any error in the admission of the uniform citation did not affect Cerda's substantive rights. We also decline to grant relief based on the district court's denial of Cerda's motion to dismiss premised on Iowa Rule of Criminal Procedure 2.2(4)(e).

I. Background Facts and Proceedings

On March 14, 2010, Polk County narcotics officers received information from a confidential informant that he could buy two ounces of methamphetamine from a dealer he knew as Alex. The informant arranged to meet his dealer at a K-Mart parking lot on the east side of Des Moines. The informant told the officers the dealer would arrive in a small tan car with a blue trunk lid. While waiting with a detective in an unmarked car, the informant saw a metallic-colored Nissan Maxima with a dark trunk pull into the parking lot; the informant identified the passenger as his dealer.

Detective Tom Griffiths directed the informant to call his dealer to feign concern about a marked police car patrolling the K-Mart lot. The informant suggested to the dealer they should rendezvous at a nearby grocery store parking lot to avoid detection. After the informant's call, the Nissan left the parking lot, soon followed by narcotics officers in unmarked cars. The narcotics officers radioed for a marked patrol car to initiate a traffic stop based on a faulty taillight on the Nissan.

The Nissan's driver did not honor the patrol car's initial signals to stop, leading law enforcement on a rather low-speed chase through the east side of Des Moines. As the Nissan eventually came to a stop on the bridge over Four Mile Creek, the passenger—later identified by officers as Lupe Cerda—jumped out of the car and scaled a concrete barrier between the street and the sidewalk. Officer could see Cerda was holding a bag containing "a white crystal-type substance" which sprinkled onto the ground as he fled. As he ran from the officers, Cerda threw the bag over his head and into the middle of the creek. The police ordered Cerda to stop; he complied and was taken into custody. The officers also arrested Cerda's cousin David Carmenatte, who was driving the Nissan.

Four Mile Creek was running at flood stage, making it impossible for the officers to retrieve the bag. But the officers did find a trail of crystallized powder left by Cerda as he fled from the passenger seat inside the Nissan. The officers scraped together as much of the spilled methamphetamine as they could, recovering a total of 4.78 grams from the interior of the Nissan and from the

pavement outside the passenger door. Detective Griffith described their difficulty in saving any more of the substance known by drug dealers as "crystal meth" or "ice":

> It was tough to recover a lot of it because it had rained recently. It was also melting. It was an early spring day. We had been getting a lot of rain prior to that day . . . there is a lot of wet ground with sand from the winter months. And if you spill or pour or drop methamphetamine on sand, it sometimes is hard to distinguish from the sand. It also dissolves.

From inside the car, the officers also seized some documents and undeveloped photographs in an effort to identify the occupants and their connection with the Nissan and the methamphetamine.

On March 15, 2010, Detective Griffiths signed preliminary complaints against Cerda for possessing more than seven grams of a crystal substance which field tested positive for methamphetamine, conspiracy to distribute the substance, and a tax stamp violation. The district court held a preliminary hearing on March 24, 2010. After the hearing, the court dismissed the conspiracy complaint but scheduled arraignment on the remaining charges.

On April 12, 2010, the State prepared a three-count trial information charging Cerda and Carmenatte with conspiracy to deliver methamphetamine, possession with intent to deliver, and eluding. The prosecuting attorney attached minutes of testimony to the information, which was signed by a district court judge. The State amended the information on April 11, 2011, charging Cerda with conspiracy to deliver a controlled substance, in violation of Iowa Code section 124.401(1)(b)(7) (2009), and possession with intent to deliver a controlled substance, under the same code section.

Also on April 11, 2011, Cerda filed a motion to dismiss the conspiracy count based on the order following the preliminary hearing dismissing that charge for lack of probable cause under Iowa Rule of Criminal Procedure 2.2(4)(e). The State resisted the motion to dismiss, arguing that it could proceed on its properly filed trial information. The State did proceed on both counts, but the April 2011 prosecution ended in mistrial.

Retrial commenced on July 25, 2011. The jury returned guilty verdicts on both counts. At sentencing, the court merged the two offenses and entered judgment on the possession-with-intent conviction. Cerda received an indeterminate twenty-five year prison term. He now appeals.

II. Scope and Standards of Review

We review the court's ruling on Cerda's evidentiary claim for an abuse of discretion. *See State v. Harrington*, 800 N.W.2d 46, 48 (Iowa 2011). The court abuses its discretion by admitting evidence "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Parker*, 747 N.W.2d 196, 203 (Iowa 2008). "A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law." *Id.*

We review an order denying a motion to dismiss for legal error. *Harden v. State*, 434 N.W.2d 881, 883 (Iowa 1989). In this case, the court's ruling on Cerda's motion to dismiss depended upon its interpretation of rule 2.2(4)(e). Appellate courts review the construction of a rule's language for correction of errors of law. *City of Sioux City v. Freese*, 611 N.W.2d 777, 779 (Iowa 2000).

We are not bound by the district court's interpretation. *State v. Tong*, 805 N.W.2d 599, 601 (Iowa 2011).

III. Analysis

A. Admission of Uniform Citation

As his first assignment of error, Cerda contends the district court prejudiced his defense by admitting into evidence a uniform citation issued to him in the state of Utah for possession of marijuana. The State argues Cerda did not preserve error on his objection to the citation—at least not based on Iowa Rules of Evidence 5.403 and 5.404(b)—as urged on appeal. Cerda asserts he preserved error both by filing a motion in limine to exclude evidence of prior criminal conduct, citing the applicable rules of evidence, and by objecting on relevance grounds before admission of the challenged exhibit.

Before the first trial, Cerda filed a motion in limine seeking to exclude the following: "Any prior convictions of Defendant and the wrongs and/or acts accompanying those convictions. This evidence is inadmissible under Iowa Rules of Evidence 5.401, 5.403, 5.404(b) and 5.609." Cerda claims on appeal that a hearing was held on his limine motion shortly after April 11, 2011, and the court "unequivocally sustained" the paragraph concerning prior convictions. In his appellate brief, Cerda does not identify where in the record this ruling was entered, and it does not appear that transcripts from the mistrial are included in the record for this appeal. Accordingly, we are unable to find error was preserved by the court's ruling on the motion in limine. *See* Iowa R. App. P. 6.903(2)(g)(1) (requiring appellant's brief to include statement addressing how

issue was preserved for review with references to places in the record where the issue was raised and decided); *see also State v. Chance*, 175 N.W.2d 125, 125 (Iowa 1970) (finding appeal should be dismissed when record before appellate court was insufficient to allow review).

During the retrial, Detective Griffiths testified that after the traffic stop on March 14, 2010, he seized several items of identification from inside the Nissan: "There was undeveloped pictures, which I had developed in case there was any evidence in the pictures, and there is also some money orders, some other documents with people's names, and things of that nature." The State offered these items together into evidence as Exhibit 5. Defense counsel stated he had "an objection to at least one of the items" contained in the exhibit. Before admitting Exhibit 5, the court heard argument from counsel outside the presence of the jury. Defense counsel first objected to the relevance of the photograph.

As the court continued to examine the items included in the exhibit, it stated: "We have talked about the envelope. There is a uniform citation from the State of Utah in here with the name Lupe Cerda on it. I understand the relevance of that one." The court and the parties then moved on to discuss the remaining items in the envelope.

The district court's statement that it understood the relevance of the uniform citation indicated the judge considered Cerda's objection under rules 5.401 and 5.402. *See Lamasters v. State*, 821 N.W.2d 856, 864 (Iowa 2012). We also find Cerda's trial objection sufficient to raise the issue of the probative value of the citation in relation to the purpose for which it was offered under rule

5.403. *See State v. Sallis*, 574 N.W.2d 15, 17 (Iowa 1998). But Cerda's general relevancy objection did not preserve error on Cerda's appellate argument alleging the citation constituted improper evidence of prior bad acts under rule 5.404(b). *See State v. Mulvany*, 603 N.W.2d 630, 633 (Iowa Ct. App. 1999).

Accordingly, we assume the State offered the uniform citation for a permissible purpose and examine only the question whether its probative value was substantially outweighed by the danger of unfair prejudice. At trial, the prosecutor argued the items in Exhibit 5 were admissible to show Cerda's connection to the Nissan and the controlled substance:

> This is a constructive possession case with regard to the methamphetamine found in the car and on the roadway. So [items that have someone's name or images on them] are the kind of factors the Court has looked at in the past in determining who possesses methamphetamine found not in their exclusive control in the car.

On appeal, the State acknowledges the probative value of the citation was "slight" given Carmanette's testimony he drove Cerda to the drug deal in the Nissan, the informant's testimony identifying Cerda as the passenger, and the officers' testimony that Cerda bailed out of the Nissan and was arrested after throwing a bag containing methamphetamine crystals into the creek. But the State goes on to argue the danger of unfair prejudice was not great either because the uniform citation involved only the possession of marijuana and did not indicate Cerda had been convicted of anything. In denying Cerda's motion for a new trial, the district court also highlighted the illegibility of the carbon copy

of the citations:[1] "I don't believe you can tell from looking at them what they are. I certainly could not discern that they were marijuana convictions, and I don't believe the jury could have either."

We understand the prosecution's desire to be thorough in its efforts to prove Cerda's dominion and control over the contraband when more than one person occupied the vehicle. *See generally State v. Cashen*, 666 N.W.2d 566, 572 (Iowa 2003) (listing factors to consider when determining constructive possession). But prosecutors must also exercise caution when offering evidence of unrelated drug crimes. *See generally State v. Liggins*, 524 N.W.2d 181, 188–89 (Iowa 1994) (finding admission of evidence showing cocaine delivery was inherently prejudicial).

In Cerda's case, we are not convinced that admission of Exhibit 5 including his uniform citation for marijuana possession substantially tipped the balance toward unfair prejudice. It is true the jury asked for and received permission to "pull out each piece of the exhibit" during its deliberations. But the citation was scarcely a centerpiece of the State's case. The prosecution did not mention the exhibit in its closing argument. The handwriting on the carbon copy of citation was difficult to read and did not establish that Cerda had been convicted of a drug offense. We cannot find on this record that the district court abused its discretion in allowing the uniform citation to be included in an exhibit of identification documents submitted to the jury.

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[1] Exhibit 5 also included a uniform citation issued to David Carmenatte.

Furthermore, even if the district court did abuse its discretion in admitting the uniform citation into evidence, we find any error was harmless under the standard set out in *State v. Parker*, 747 N.W.2d 196, 209 (Iowa 2008). When defendants claim nonconstitutional error occurred during trial, the test is whether their rights have been "injuriously affected by the error" or whether they "suffered a miscarriage of justice." *Parker*, 747 N.W.2d at 209 (citing Iowa Rule of Evidence 5.103(a)). In Cerda's case, admission of the citation could not be grounds for reversal, given the overwhelming evidence of his guilt, including the police video showing his flight from the Nissan, leaving a trail of methamphetamine crystals in his wake.

B. Dismissal based on Preliminary Hearing

In his second assignment of error, Cerda argues the district court erred in allowing the State to go forward with the conspiracy count of the trial information after the district associate judge presiding over the preliminary hearing did not find probable cause to support that criminal complaint.[2]

Cerda appeared for a preliminary hearing on March 24, 2010. Detective Griffiths was the only witness. After the hearing, the court found probable cause for the possession with intent and tax stamp complaints, but no probable cause

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[2] We note the sentencing court's view that Cerda's argument concerning dismissal was moot given the merger of the conspiracy conviction into the possession-with-intent conviction before judgment entry. While the State has not raised this ground for dismissal, we may consider questions of mootness on our own accord. *See Albia Light & Ry. Co. v. Gold Goose Coal & Mining Co.*, 176 N.W. 722, 723 (Iowa 1920) ("It is our duty on our own motion to refrain from determining moot questions."). In this case, we opt to reach the merits of the dismissal question despite the possibility that merger rendered it moot. *See Rush v. Ray*, 332 N.W.2d 325, 326 (Iowa 1983) (explaining mootness is question of restraint, not of power to consider issue).

to believe Cerda committed a conspiracy. On April 12, 2010, the State filed a trial information formally charging Cerda with both the possession-with-intent and conspiracy counts. The attached minutes outlined the expected testimony of several members of the narcotics task force and a state criminalist. The trial information was signed by a district court judge, who found "the minutes of evidence if unexplained, would warrant a conviction by the trial jury."

Almost one year later, Cerda filed a motion to dismiss the conspiracy count of the trial information based on the dismissal of the conspiracy complaint after the preliminary hearing. The motion alleged that rule 2.2(4)(e) did not "authorize continued use of a dismissed charge by the filing of a trial information."

Iowa Rule of Criminal Procedure 2.2(4) governs preliminary hearings. At issue in this appeal is the following subdivision:

> *Discharge of defendant.* If from the evidence it appears that there is no probable cause to believe that an offense has been committed or that the defendant committed it, the magistrate shall dismiss the complaint and discharge the defendant. The discharge of the defendant shall not preclude the government from instituting a subsequent prosecution for the same offense.

Iowa R. Crim. P. 2.2(4)(e).

The State resisted Cerda's motion to dismiss, arguing that the purpose of a preliminary hearing is to ensure the legality of a defendant's detention and that the remedy for a violation at the probable-cause stage is the release of the defendant through the dismissal of the complaint. The State further argued that rule 2.2(4)(e) does not bar the State from preparing a trial information that includes the dismissed charge under the same case number. The district court denied the motion to dismiss.

On appeal, Cerda contends the State is "ignoring the dismissal" of the conspiracy complaint at the preliminary hearing by "relabel[ing] its dismissed complaint as a trial information." Cerda reasons that the language in rule 2.2(4)(e) allowing the State to institute a "subsequent prosecution for the same offense" concomitantly prevents the State from maintaining the same prosecution rejected at the preliminary hearing.

The State counters that "subsequent" does not necessarily mean "different" and that nothing in rule 2.2(4)(e) requires the prosecution to proceed under a different case number following the dismissal of a complaint at the preliminary hearing. The State suggests that even if a prosecution for the dismissed conspiracy charge had been initiated under a separate case number, because it arose from the same transaction as the possession-with-intent count, the two cases could have been consolidated for trial under rule 2.6(1).

The district court correctly denied Cerda's motion to dismiss the conspiracy count of the trial information. Cerda's interpretation of rule 2.2(4)(e) overemphasizes the reach of the district associate court's dismissal of the conspiracy complaint following the preliminary hearing. The dismissal of the conspiracy complaint—one of three charges pursued at the preliminary hearing—did not preclude the State from including the conspiracy charge in its subsequently filed trial information.

Criminal complaints and trial informations serve separate functions. *State v. Petersen*, 678 N.W.2d 611, 613 (Iowa 2004). When an arrest is made without a warrant, the grounds for the arrest are to be stated to the magistrate by

complaint. Iowa Code § 804.22. A preliminary hearing is required to determine the legality of detaining the accused before the State files a formal charge by trial information or grand jury indictment. *Petersen*, 678 N.W.2d at 613. If the preliminary hearing reveals no probable cause to believe the accused committed the offense alleged in the complaint, the court dismisses the complaint and discharges the defendant from custody. *Id*. (citing rule 2.2(4)(e)). In this case, Cerda was not discharged from custody after the preliminary hearing because the court found probable cause for the other complaints filed against him.[3]

The State can initiate a prosecution for an indictable offense by preparing a trial information for a judge's approval without first filing a complaint. *Id*. When the district court approves a trial information, it determines probable cause exists to detain the defendant to answer for those charges included in the information. *Id*. at 614. Accordingly, when the district court signed Cerda's trial information on April 12, 2010, it found probable cause to believe he conspired to deliver methamphetamine. *See* Iowa R. Crim. P. 2.5(4) ("If the judge or magistrate finds that the evidence contained in the information and the minutes of evidence, if unexplained, would warrant a conviction by the trial jury, the judge or magistrate shall approve the information which shall be promptly filed."). The district court was not barred from approving the conspiracy count of the trial information by the dismissal of the complaint following the preliminary hearing. "A violation in the complaint stage of the proceedings does not affect the merits of the charge, but

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[3] Before the preliminary hearing, Cerda was admitted to bail in the amount of $100,000 on the possession-with-intent complaint, $100,000 on the conspiracy complaint, and $5,000 on the tax stamp violation. After the preliminary hearing, the bond changed to a total of $105,000 for Cerda.

only affects the legality of the detention of the accused to answer the charge prior to the filing of the information." *Petersen*, 678 N.W.2d at 614.

We disagree with Cerda's assertion that the probable cause determination at the preliminary-hearing stage should act as a "filtering mechanism" to prevent further pursuit of the dismissed charge. The last sentence of rule 2.2(4)(e) allowed the State to present the trial information for a judge's approval, initiating a prosecution for the same offense charged in the dismissed complaint, so long as the district court properly found sufficient evidence in the minutes and information to support that count. Here, the State initiated a subsequent prosecution of Cerda's conspiracy offense despite the fact that the trial information joined the conspiracy charge with the possession-with-intent charge, which was approved at the preliminary hearing and carried the original felony case number. The language of rule 2.2(4)(e) did not require dismissal of the conspiracy count.

AFFIRMED.