IN THE COURT OF APPEALS OF IOWA

No. 7-137 / 06-0535
Filed April 11, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRADLEY LEE WINTERS,
Defendant-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, James M. Drew, Judge.

Bradley L. Winters appeals his conviction and sentence for possession of marijuana. **AFFIRMED.**

Bradley Winters, Des Moines, pro se.

Colin C. Murphy of Fitzsimmons & Vervaecke Law Firm, P.L.C., Mason City, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, and Paul L. Martin, County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

MAHAN, J.

Bradley L. Winters appeals his conviction for possession of marijuana in violation of Iowa Code section 124.401(5) (2005). On appeal, Winters argues the district court erred by denying his motion to suppress, denying his motion for new trial, and sentencing him as a habitual offender. He also claims there was insufficient evidence to convict him of possession of marijuana and the sentence was illegal under the double jeopardy clause. We affirm.

I. Background Facts and Proceedings

On September 25, 2005, at approximately 3:30 a.m., Mason City police officers received a call reporting a possible car accident. Officers discovered a parked car blocking one lane of traffic on a two-lane street. They approached the car and found a woman in the passenger seat and Winters in the driver's seat. Winters was tilted toward the center of the car and appeared to be asleep. The keys to the vehicle were not in the ignition. There was an open container of alcohol in the console between Winters and his female companion, and the vehicle smelled of alcohol. Winters was groggy and slow to respond to questioning, but definitively said "no" on two occasions when asked whether he would be willing to perform field sobriety tests.

Winters was placed under arrest for operating a vehicle while intoxicated (OWI), hand-cuffed, and searched. The officers found a rolled cigarette containing a green, leafy substance in a cigarette box in his shirt pocket. The cigarette later tested positive for marijuana. During the course of the search, Winters passed out on the hood of the police car. The officers were unable to revive him, so he was transported to the hospital by ambulance. While at the

hospital, the officers requested a blood test which revealed that his blood alcohol level was below the legal limit.

Winters was charged with possession of a controlled substance, third or subsequent offense, a class "D" felony. Because he had multiple prior felony convictions, he was charged as a habitual felony offender under Iowa Code section 902.8.[1]

Prior to trial, Winters filed a motion to suppress evidence of the marijuana arguing it was "illegally obtained by the police as the consequence of an illegal search." The court denied the motion, finding the arrest was proper.

A jury found Winters guilty on January 11, 2006, for possession of marijuana. Winters did not stipulate to his prior convictions for sentencing enhancement. Two weeks later, a jury found him guilty as a habitual offender, and he was sentenced to an indeterminate sentence of fifteen years. The district court denied Winters' motion in arrest of judgment and motion for a new trial.

II. Probable Cause for Arrest

On appeal, Winters claims the district court erred in denying his motion to suppress because there was no probable cause to believe he was, or had been, operating the vehicle while intoxicated. Because Winters' motion to suppress was based on alleged constitutional violations, our review of that ruling is de novo. *State v. Freeman,* 705 N.W.2d 293, 298 (Iowa 2005).

According to Iowa Code section 804.7(3), an officer may make an arrest without a warrant "where the peace officer has reasonable ground for believing that an indictable public offense has been committed and has reasonable ground

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[1] He was not ultimately charged with OWI.

for believing that the person to be arrested has committed it." The "reasonable ground" standard within the Code is the same as probable cause. *Freeman,* 705 N.W.2d at 298. In other words, in order to be valid, a warrantless arrest must be supported by probable cause. *State v. Ceron,* 573 N.W.2d 587, 592 (Iowa 1997). Probable cause exists when the totality of the circumstances known to the arresting officer would lead a reasonable, prudent person to believe both that a crime is being or has been committed and that the arrestee is committing or has committed it. *Freeman,* 705 N.W.2d at 298. In determining whether probable cause is present, the court must consider all of the evidence available to the officer, regardless of whether each component would support probable cause on its own. *Ceron,* 573 N.W.2d at 592. The facts supporting probable cause need not be strong enough to sustain a conviction, but must rise above mere suspicion. *Id.*

At the time Winters was arrested for OWI the officers knew: (1) the car was parked at an awkward angle blocking one lane of traffic on a two-lane street; (2) Winters was sitting in the driver's seat and was asleep; (3) there was an open container of alcohol in the console next to Winters; (4) the car smelled of alcohol; and (5) Winters was "groggy," going in and out of consciousness, and slow to respond to questions.

A reasonable and prudent person could believe he had committed the crime of driving while intoxicated. We conclude these facts, taken together, rise above mere suspicion and provide probable cause for Winters' arrest. *See State v. Hopkins,* 576 N.W.2d 374, 377-78 (Iowa 1998) (stating that evidence may fail to prove that an intoxicated defendant was in the process of operating a motor

vehicle when authorities found him or her; nevertheless, circumstantial evidence may establish that defendant had operated while intoxicated when driving to the location where the vehicle was parked). Therefore, we find the district court properly denied his motion to suppress.

III. Sufficiency of the Evidence

Winters claimed the court erred in denying his motion for new trial because there was not sufficient evidence to support the jury's conclusion that he knowingly possessed marijuana. We review sufficiency-of-the-evidence challenges for correction of errors at law. *Id.* at 377.

A jury's finding of guilt is binding on appeal if supported by substantial evidence. *Id.* Substantial evidence is such evidence as could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. *Id.* In determining whether substantial evidence exists, the record is viewed in the light most favorable to the State. *Id.*

Unlawful possession of a controlled substance requires proof that the defendant: (1) exercised dominion and control over the contraband, (2) had knowledge of its presence, and (3) had knowledge that the material was a controlled substance. *State v. Reeves,* 209 N.W.2d 18, 21 (Iowa 1973). Winters does not specifically challenge the sufficiency of the evidence for any specific element, instead he points to several items in the record and conclusively states these "numerous inconsistencies cannot be resolved so favorably on behalf of the State." These "numerous inconsistencies" consist of the following: (1) only one officer smelled alcohol in the vehicle; (2) one officer described the open container as a bottle while the other said it was a can; (3) a police videotape of

the incident had been erased; (4) there were allegedly chain of evidence problems relating to the marijuana; and (5) the cigarette package within which the marijuana was discovered was thrown away and not logged into evidence. Winters claims the totality of these inconsistencies raises serious and legitimate issues regarding the officers' trustworthiness.

The inconsistencies raised by Winters go to the credibility of the police officers, not to whether there was sufficient evidence for conviction. When the evidence is in conflict, the fact finder may resolve the conflict in accordance with its own views on the credibility of the witnesses. *Id.* We find there was substantial evidence to prove the marijuana was found in the pocket of his shirt. The possession of the marijuana, on his person, in a format ready to be used, is sufficient evidence to support the three elements for conviction. *See State v. Parrish*, 502 N.W.2d 1, 3 (Iowa 1993) (stating knowledge of presence and knowledge of its nature can be inferred from dominion and control).

The question for this court is not whether we would have found Winters guilty beyond a reasonable doubt. It is whether, having entrusted questions of weight and credibility to the jury, and viewing the evidence in the light most favorable to the State, a reasonable trier of fact could have found Winters guilty beyond a reasonable doubt. Under the record in this case, we must answer this question in the affirmative. Therefore, we find the district court did not err in denying Winters' motion for a new trial.

IV. Prosecutorial Misconduct

At trial Winters presented deposition testimony from Adam Torres. In this deposition testimony, Torres admits placing the marijuana in a cigarette package

and placing this package on the seat of Winters' car. Winters contends the county attorney committed prosecutorial misconduct in closing arguments when he repeatedly made statements beginning with the phrase "if we are to believe anything Mr. Torres has to say . . . ."

The initial requirement for a due process claim based on prosecutorial misconduct is proof of misconduct. *State v. Piper,* 663 N.W.2d 894, 913 (Iowa 2003). The second required element is proof the misconduct resulted in prejudice to such an extent that the defendant was deprived of a fair trial. *Id.* Trial courts have broad discretion in ruling on claims of prosecutorial misconduct. *State v. Thornton,* 498 N.W.2d 670, 676 (Iowa 1993). Therefore, we review a district court's ruling on a motion for mistrial based on prosecutorial misconduct for abuse of discretion. *Id.*

"Iowa follows the rule that it is improper for a prosecutor to call the defendant a liar, to state the defendant is lying, or to make similar disparaging comments." *State v. Graves,* 668 N.W.2d 860, 876 (Iowa 2003). However, a prosecutor is still free to craft an argument that includes reasonable inferences based on the evidence and, when a case turns on which of two conflicting stories is true, to argue certain testimony is not believable. *Id.* "The key point is that counsel is precluded from using argument to vouch personally as to a defendant's guilt or a witness's credibility." *Id.* at 874.

After our review of the prosecutor's statements, we agree with the district court's conclusion that there was no prosecutorial misconduct because the arguments were based on reasonable inferences and not inflammatory. The

county attorney did not brand Torres a liar; he merely argued his testimony was not believable.

V. Marijuana Possession as a Class "D" Felony

Winters filed a pro se motion to dismiss arguing possession of marijuana, third offense, was only an aggravated misdemeanor and not a class D felony. In support of this argument, Winters cited Iowa Code section 124.401(5) which provides, in pertinent part:

> It is unlawful for any person knowingly or intentionally to possess a controlled substance . . . . Any person who violates this subsection is guilty of a serious misdemeanor for a first offense. A person who commits a violation of this subsection and who has previously been convicted of violating this chapter or chapter 124A, 124B, or 453B is guilty of an aggravated misdemeanor. *A person who commits a violation of this subsection and has previously been convicted two or more times of violating this chapter or chapter 124A, 124B, or 453B is guilty of a class "D" felony.*
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> If the controlled substance is marijuana, the punishment shall be by imprisonment in the county jail for not more than six months or by a fine of not more than one thousand dollars, or by both such fine and imprisonment for a first offense. If the controlled substance is marijuana and the person has been previously convicted of a violation of this subsection in which the controlled substance was marijuana, the punishment shall be as provided in section 903.1, subsection 1, paragraph "*b*". *If the controlled substance is marijuana and the person has been previously convicted two or more times of a violation of this subsection in which the controlled substance was marijuana, the person is guilty of an aggravated misdemeanor.*

(Emphasis added.) Because Winters only possessed marijuana, he argued it was improper to charge him under the felony track for possession.

The district court rejected this argument, citing *State v. Cortez*, 617 N.W.2d 1 (Iowa 2000) as justification for the enhancement. In *Cortez*, the court concluded it would be absurd to treat a first-time marijuana offender under the second unnumbered paragraph in section 124.401(5) when the person had

previously been convicted of other drug offenses. *Id.* at 3. The supreme court held that "[o]nce a defendant is convicted of a single offense involving other illegal substances . . . all crimes committed prior or subsequent thereto could be used to enhance the offender's sentence under the stricter, felony track." *Id.* In light of Winters' numerous convictions for prior, non-marijuana drug offenses,[2] the court denied his motion to dismiss.

On appeal, Winters asks us to abandon precedent and overrule *Cortez* because it was "erroneously decided." We find Winters' argument to be without merit and choose not to overrule *Cortez*.[3]

VI. Double Jeopardy

In his pro se brief Winters claims the district court erred in sentencing him under the habitual offender statute because this was "double jeopardy" which was "clearly sentencing [him] for his priors and not the current or actual offense."

It is well established that the use of prior convictions to enhance punishment does not violate constitutional principles of double jeopardy. *State v. Tobin,* 333 N.W.2d 842, 845 (Iowa 1983) (citing *Spencer v. Texas,* 385 U.S. 554, 559-60, 87 S. Ct. 648, 651, 17 L. Ed. 2d 606, 611-12 (1967)); *State v. Popes*, 290 N.W.2d 926, 927 (Iowa 1980); *State v. Kramer*, 235 N.W.2d 114, 117 (Iowa 1975). As stated in *State v. Miller,* 606 N.W.2d 310, 312 (Iowa 2000), "[e]nhanced punishment is imposed only because, notwithstanding [the

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[2] Winters has a long history of criminal substance abuse. He was convicted of possession of marijuana in 1985 and 1995. He was convicted of possession of marijuana with intent to deliver in 1992. In 1998 he was twice convicted of possession of methamphetamine with intent to deliver.

[3] We also reject arguments set forth in Winters' pro se reply brief that attempt to distinguish *Cortez* from the current case.

defendant's] past record, and the lessons he should have learned from it, [the defendant] still did not get the point." When the court applies enhanced punishment, the defendant is not being prosecuted for his past offenses. *Id.* Instead, enhanced punishment is based on the defendant's conduct at the time of the defendant's latest offense. *Id.* Accordingly, we find the district court did not violate Winters' constitutional rights when factoring his prior convictions into its determination of his current sentence.

We have considered Winters' remaining arguments and find them to be without merit. The conviction and sentence are affirmed.

AFFIRMED.

Huitink, J., concurs; Sackett, C.J., concurs and writes separately.

SACKETT, C.J. (writing separately)

I concur with majority's well written opinion in all respects. I too would affirm. I write separately because I have concern about the prosecutor repeatedly making statements beginning with the phrase "if we are to believe anything Mr. Torres has to say. . . ." In this situation I do not find it to be prosecutorial misconduct. However I believe the phrase "if we are to believe anything [witness] has to say" is best excluded from a prosecutor's vocabulary as it can be taken as an inference that the prosecutor does not believe the witness.