

Filed 3/5/01 by Clerk of Supreme Court
IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2001 ND 42

State of North Dakota,

Plaintiff and Appellee

v.

Bret Loren Keeney,

Defendant and Appellant

No. 20000255

Appeal from the District Court of Burleigh County, South Central Judicial District, the Honorable Bruce B. Haskell, Judge.

AFFIRMED.

Per Curiam.

Rick L. Volk, Assistant State's Attorney, Courthouse, 514 E. Thayer, Bismarck, ND 58501, for plaintiff and appellee.

Michael R. Hoffman, 120 North 3rd Street, Ste. 100, P.O. Box 1056, Bismarck, ND 58502-1056, for defendant and appellant.

State v. Keeney

No. 20000255

Per Curiam.

[¶1] Bret Loren Keeney appeals from a criminal judgment after a jury found him guilty of the offense of Delivery of a Controlled Substance. The original Information indicated Keeney and a co-defendant willfully delivered methamphetamine “to another person.” After the co-defendant entered a guilty plea, the Information was amended to delete the co-defendant but added him as a witness available to testify against Keeney. The trial court denied Keeney’s request for jury instructions requiring the State to prove he delivered the controlled substance to a named individual other than the former co-defendant. Keeney acknowledged the evidence offered at the preliminary hearing supported the State’s allegation that he delivered to the former co-defendant. The trial court offered a continuance if Keeney was not prepared to proceed, but Keeney rejected this offer. Keeney asserts his subsequent prosecution and conviction for delivery to the former co-defendant, when the charge was for delivery “to another person,” constitutes a fatal variance in the offense charged because Keeney alleges he was defending against a different charge of delivery to the named individual. We conclude a new or different charge was not added to the Information when the State added the former co-defendant as a witness. Delivery “to another person” can be interpreted as delivery to the former co-defendant, and Keeney had notice of the evidence supporting delivery to the former co-defendant. Keeney failed to request a bill of particulars to clarify the charge. Therefore, we summarily affirm the judgment under N.D.R.App.P. 35.1(a)(3).

[¶2] Gerald W. VandeWalle, C.J.
Carol Ronning Kapsner
Dale V. Sandstrom
William A. Neumann
Mary Muehlen Maring