IN THE COURT OF APPEALS OF IOWA

No. 1-075 / 10-0373
Filed May 11, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RYAN STEWART TURNER,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Mark D. Cleve, Judge.

Ryan Turner appeals from his convictions of delivery of a controlled substance and tax stamp violation. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis D. Hendrickson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth Reynoldson, Assistant Attorney General, Michael Walton, County Attorney, and Kelly Cunningham, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ. Tabor, J., takes no part.

EISENHAUER, J.

Ryan Turner appeals from his convictions of delivery of a controlled substance and tax stamp violation. He contends his trial counsel was ineffective in failing to object to the jury instructions. Because he has failed to prove counsel breached an essential duty and that breach led to prejudice, we affirm.

The uncontroverted facts show Turner initiated phone calls to a confidential informant on August 19, 2008, to arrange the sale of one ounce of cocaine for $1000. Turner met with the informant and an undercover agent in Muscatine and, as a passenger in the agent's vehicle, directed them to an apartment in Davenport to effectuate the sale. Turner then accompanied the agent inside the apartment after telling the agent to bring a scale to weigh the cocaine. Once inside the apartment, the agent agreed to purchase a half ounce of cocaine for $500. Turner led the agent to the kitchen where another man handed the agent the cocaine. The agent paid Turner $500.

Turner was charged with delivery of a controlled substance and tax stamp violation. He filed a notice of a diminished responsibility defense. At trial, the jury was read the following charge:

> The said RYAN S. TURNER on or about the 19th day of August 2008, in the County of Scott, and State of Iowa: did unlawfully deliver a controlled substance, or act with, enter into a common scheme or design with, or conspire with one or more other persons to deliver a controlled substance, to wit: powder cocaine, in violation of Sections 124.401(1)(c)(2) [(2007)], 124.206(d) and 703.1 of the Code of Iowa.

The jury was then instructed as follows (Instruction 10):

> One of the elements the State must prove under Count I is that the defendant acted with specific intent. The lack of mental

> capacity to form a specific intent is known as "diminished responsibility."
>
> Evidence of "diminished responsibility" is permitted only as it bears on his capacity to form specific intent.
>
> "Diminished responsibility" does not mean the defendant was insane. A person may be sane and still not have the mental capacity to form an intent because of mental disease or disorder.
>
> The defendant does not have to prove "diminished responsibility;" rather, the burden is on the State to prove the defendant was able to, and did, form the specific intent required.

Jury instruction 12 reads:

> The State must prove both of the following elements of Delivery of a Schedule II Controlled Substance as charged in Count I of the Trial Information:
>
> 1. On or about the 19th day of August 2009, the Defendant delivered powder cocaine.
> 2. The Defendant knew that the substance he delivered was powder cocaine.
>
> If the State has proved both of these elements, the Defendant is guilty of Delivery of a Schedule II Controlled Substance under Count I. If the State has failed to prove either of the elements, the Defendant is not guilty of Delivery of a Schedule II Controlled Substance under Count I and you will then consider the charge of Possession of a Controlled Substance explained in Instruction No. 15.

Turner contends the jury instructions, when read together, allowed the jury to acquit him of delivery under a finding he lacked the ability to form specific intent while convicting him of conspiracy to deliver. He argues counsel was ineffective in failing to object to Instruction 12, claiming it should have included a definition of conspiracy.

We review claims of ineffective assistance of counsel de novo. *State v. McBride,* 625 N.W.2d 372, 373 (Iowa Ct. App. 2001). Ordinarily, we preserve ineffectiveness claims raised on direct appeal for postconviction relief to allow full development of the facts surrounding counsel's conduct. *Berryhill v. State*, 603

N.W.2d 243, 245 (Iowa 1999). "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *State v. Kirchner*, 600 N.W.2d 330, 335 (Iowa Ct. App. 1999). The record is sufficient in this case to decide the issue on direct appeal.

To establish an ineffective assistance of counsel claim a defendant must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999). The test of ineffective assistance of counsel focuses on whether counsel's performance was reasonably effective. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). A strong presumption exists that counsel's performance fell within the wide range of reasonable professional assistance. *Wemark*, 602 N.W.2d at 814. The defendant has the burden of proving both elements of his ineffective assistance claim by a preponderance of the evidence. *Ledezma v. State*, 626 N.W.2d 134, 145 (Iowa 2001). "However, both elements do not always need to be addressed. If the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney performed deficiently." *Id.* at 142.

We conclude Turner failed to prove prejudice. In order to prove the prejudice prong, a defendant must show a reasonable probability that but for counsel's alleged errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 695, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. The likelihood of a different result need not be more probable than not, but is must be substantial, not just conceivable. *Id.* at 693-94, 104 S. Ct. at 2067-68, 80 L. Ed.

2d at 697-98. Here, Turner contacted the informant to initiate the delivery, directed the agent to the apartment where the delivery took place, and acted as a go-between during the sale. Turner repeatedly expressed concern that the undercover agent was a member of law enforcement. Given the overwhelming evidence Turner had the specific intent to assist in delivery, we cannot find the result of the proceedings would have been different had Instruction 12 included the conspiracy language. Accordingly, we affirm.

AFFIRMED.