IN THE COURT OF APPEALS OF IOWA

No. 1-258 / 10-0643
Filed May 25, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TERRY LEE HARRIS,
Defendant-Appellant.

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

The defendant appeals his convictions for drug-related offenses, claiming the identity of a confidential informant should have been revealed to him. **AFFIRMED.**

Nicholas J. Einwalter of Benzoni Law Office, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, John P. Sarcone, County Attorney, and Mark Taylor, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Doyle and Danilson, JJ. Tabor, J., takes no part.

DOYLE, J.

The question we must answer in this appeal is whether the State was required to disclose to the defendant, Terry Harris, the identity of a confidential informant involved in a controlled drug buy. Information learned during the buy was used by police to secure a warrant to search Harris's residence. That search revealed a large cache of money, drugs, and related paraphernalia. Harris was charged with and found guilty of possession of crack cocaine with intent to deliver, failure to possess a tax stamp, and possession of marijuana. We affirm his convictions.

I. Background Facts and Proceedings.

On November 6, 2009, police executed a search warrant at Harris's residence. They found $1065 in cash in Harris's front left pocket, $335 in his front right pocket, $93 in his left back pocket, and $872 in his back right pocket. 4.43 grams of crack cocaine was discovered on top of Harris's bedroom dresser, along with a mirror and a digital scale with cocaine residue. Another $361 in cash was found inside the dresser, as was a pill bottle containing 1.43 grams of marijuana. More cash was found on the floor of the bedroom. Harris had two cell phones charging in his bedroom and a police scanner. Underneath the sink in the kitchen, police found paraphernalia used to smoke crack cocaine. A second digital scale was found on top of the kitchen cupboards.

Harris told a police officer the money in his front left pocket was from selling drugs. He also admitted the drugs in the residence were his. Harris was arrested and charged by trial information with possession of crack cocaine with intent to deliver, failure to possess a tax stamp, and possession of marijuana.

On the morning of Harris's jury trial, the trial court considered Harris's request for a new attorney. Harris was unhappy with his court-appointed counsel because she refused to file a motion to suppress. He told the court,

> I want to know how they got a warrant to get in my house. And if they got a warrant from a confidential informant to say I sold him some drugs, I didn't sell him any drugs. And I want him to be here so I can tell to his face that he's lying. . . . And on the Sixth Amendment, I have a right to face my accusers.

Defense counsel stated she had reviewed the search warrant with Harris and advised him there were no grounds for a motion to suppress. The court denied Harris's request for new counsel and proceeded to consider defense counsel's motion in limine, which sought to prohibit the State from mentioning any "alleged controlled buys or that the defendant was in possession of money connected to a controlled buy." The State agreed not to get into that evidence unless the defense opened the door.

Testimony during the State's case-in-chief was accordingly limited to what was discovered by police during their search of Harris's residence on November 6 and Harris's admissions to the officers about his involvement in drug dealing. An officer also explained how the large amount of cash (over $2800) and drugs found in Harris's residence, along with the scales, mirror, cell phones, and police scanner were consistent with drug dealing.

After the State rested, the parties met with the trial court outside the presence of the jury. Defense counsel sought clarification on the motion in limine, stating:

> My understanding from the court's ruling yesterday is that if my client attempts, or any witnesses on my client's behalf attempts, to explain how he came to be in possession of nearly $3000, the court

> has ruled that the State can then get into the fact that he allegedly had buy money in his possession; is that correct?

The court agreed, stating, "If your client testifies that none of the money in his possession on the date in question came from dealing drugs, then I am going to let the State get into controlled buys." Harris's attorney then raised a concern about "getting into this uncharged conduct with an alleged informant who hasn't been named that we cannot confront, which we have a right to confront according to the Sixth Amendment." The court dismissed that concern.

Harris took the stand to testify in his own defense. He testified he was a drug user, not a drug dealer. He denied having told the police the money in his front left pocket was from selling drugs. Instead, he stated the money was given to him by friends after his sister's death so that he could buy her a headstone. Three women testified on Harris's behalf, two of whom were unemployed and had prior criminal convictions for theft and forgery. The other witness was Harris's estranged wife. All three claimed they gave Harris large sums of money in the months preceding his arrest.

In rebuttal, the State recalled a police officer to the stand. He testified that on November 4, 2009, he gave $100 in marked bills to a confidential informant. He described watching the informant walk to Harris's residence and return minutes later with crack cocaine. He testified that during his search of Harris's residence two days later he found a five dollar bill from the controlled drug buy and explained how he was able to identify that money.

The jury returned a verdict finding Harris guilty as charged. Harris appeals. He claims allowing the officer "to testify without the testimony of the

confidential informant, a material witness, violated [his] Sixth Amendment right to confront his accuser." He additionally claims his trial counsel was ineffective for not trying to learn the informant's identity through a pretrial motion to compel disclosure or a motion to suppress.

II. Scope of Review.

Because the challenges involved in this appeal rest on constitutional grounds,[1] we conduct a de novo review. *See Everett v. State*, 789 N.W.2d 151, 158 (Iowa 2010); *State v. Robertson*, 494 N.W.2d 718, 722 (Iowa 1993).

III. The Informer's Privilege.

"The State is privileged to withhold the identity of a person who furnishes information relating to violations of the law." *Robertson*, 494 N.W.2d at 722. There are compelling reasons for recognizing this privilege, primary among them the interest in maintaining the flow of information essential to law enforcement. *Id.* "To be weighed against the informer's privilege, however, is the defendant's right to prepare and present a meaningful defense." *Id.* at 723. The defendant

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[1] Harris's Confrontation Clause claim is brought under the federal constitution only. He does not indicate whether the ineffective-assistance-of-counsel claim is similarly limited to the federal constitution, or whether it involves the state constitution as well. As our supreme court recently stated in *King v. State*, ___ N.W.2d ___, ___ (Iowa 2011):

> When there are parallel constitutional provisions in the federal and state constitutions and a party does not indicate the specific constitutional basis, we regard both federal and state constitutional claims as preserved, but consider the substantive standards under the Iowa Constitution to be the same as those developed by the United States Supreme Court under the Federal Constitution. Even in these cases in which no substantive distinction had been made between state and federal constitutional provisions, we reserve the right to apply the principles differently under the state constitution compared to its federal counterpart.

(Internal citations omitted); *see also State v. Ochoa*, 792 N.W.2d 260, 266 (Iowa 2010) (rejecting "lockstep" approach to interpretation of state constitutional provisions).

bears the burden of showing why disclosure of the informant's identity is necessary. *Id.* Circumstances that are considered in balancing the State's interest in the privilege against the defendant's need for the informant's identity are: "(1) the nature of the offense charged, (2) defenses raised, and (3) potential significance of an informer's testimony." *Id.*

Paramount among these considerations is "whether the informant was a witness or participant in the crime for which the defendant is charged." *Id.* If the informant was "present at the scene of the crime, or a participant to it, such person is no longer merely an *informant* but a *witness* whose identity must ordinarily be divulged." *State v. Byrd*, 448 N.W.2d 29, 31 (Iowa 1989) (citing *Roviaro v. United States*, 353 U.S. 53, 64, 77 S. Ct. 623, 630, 1 L. Ed. 2d 639, 647 (1957)). But even if the informant is a witness or participant in the crime, "mere speculation that the informant may be helpful in preparing the defendant's defense is not enough to overcome the public interest in protection of the informant." *Robertson*, 494 N.W.2d at 723. And a defendant has no right "to confront an informant who does not, directly or indirectly, give any evidence at trial." *Byrd*, 448 N.W.2d at 31.

With these principles in mind, we consider Harris's claims, which arise in two contexts: (1) pretrial disclosure of the informant's identity under an ineffective-assistance-of-counsel rubric and (2) disclosure at trial. We begin with the disclosure sought at trial.

A. Disclosure at Trial.

Harris argues that the confidential informant participated in the alleged crime and, therefore, his identity should have been divulged to him after an officer testified about the controlled-drug buy. *See id.*

First and foremost, the record reveals no evidence the informant was a witness or participant to the crimes Harris was charged with. *See id.*; *State v. Luter*, 346 N.W.2d 802, 810 (Iowa 1984), *superseded by statute*, Iowa Code § 808.3. The trial information specified the crimes with which Harris was charged occurred on November 6, 2009, after a search of Harris's residence resulted in the discovery of a large amount of money, drugs, and items associated with drug sales. The controlled drug buy that occurred two days before the search did not form any part of the State's case against Harris, that is until Harris denied the money in his possession came from drug sales. The State had a police officer relate only the bare essentials of the drug buy in order to rebut Harris's denial.

Along those same lines, we observe no out-of-court statements from the informant inculpating Harris were introduced, or even alluded to. The officer simply described what he observed of the informant's actions on November 4 and explained how he was able to tell a five dollar bill in Harris's possession came from the buy money given to the informer. Like the defendant in *Byrd*, Harris "was simply caught with the goods." 448 N.W.2d at 32. And, as mentioned earlier, a defendant has no right "to confront an informant who does not, directly or indirectly, give any evidence at trial." *Id.* at 31; *see also State v. Wagner*, 410 N.W.2d 207, 213 (Iowa 1987) ("The right of confrontation guarantees a criminal defendant the right to face and cross-examine those who

testify against him or her. It does not require the State to produce witnesses who do not testify at trial." (internal citation omitted)).

Even if the informant had witnessed or participated in the crime, that mere fact alone does not entitle Harris to knowledge of the informant's identity, as he seems to suggest. *See State v. Sheffey*, 243 N.W.2d 555, 559 (Iowa 1976) ("Although the informant's physical presence at the scene of the alleged crime is of significance, it is not sufficient, standing alone, to hold him a participant and thus affect the nondisclosure privilege."). "Disclosure of privileged information concerning evidence or witnesses is not available for the mere asking. Some foundation, that is some initial showing, must be made before" disclosure is required. *Id.* Harris has not made that showing here. He did not assert any defense of "entrapment, misidentification, or alibi," which may in some cases make disclosure of an informant's identity "especially material." *Byrd*, 448 N.W.2d at 31. Nor did he allege the informant was nonexistent or gave false information. *See Luter*, 346 N.W.2d at 811 (noting the "principal argument in opposition to the informant privilege is the possibility of police perjury—perhaps an informant may not even exist"). "Mere speculation an informer may be helpful is not enough to carry the burden and overcome the public interest in the protection of the informer." *Sheffey*, 243 N.W.2d at 559.

These same considerations, along with the overwhelming evidence against Harris, govern resolution of his next claim, which places an even greater burden on the defendant to show a need for disclosure. *See Luter*, 346 N.W.2d at 810 (recognizing a significant distinction between participation in the events giving rise to the current criminal charges versus participation in actions that

constitute incidents recited in the information provided for search warrants); *see also Robertson*, 494 N.W.2d at 723 ("When the question of an informant's credibility arises in a motion to suppress evidence obtained from a search pursuant to a warrant, and a judicial officer has passed on veracity and probable cause, the defendant's interests in disclosure are less compelling.").

B. Pretrial Disclosure.

In order to show his trial counsel was ineffective for failing to learn the informant's identity through a pretrial motion to compel disclosure or a motion to suppress,[2] Harris must prove trial counsel breached an essential duty and prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). The claim may be resolved on either ground if the record is adequate to do so on direct appeal. *Id.*; *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010). We believe the record is adequate to resolve the claim under the second prong.

In order to prove prejudice resulted from counsel's breach, the defendant must show a reasonable probability that without counsel's errors, the result would have been different. *King v. State*, ___ N.W.2d ___, ___ (Iowa 2011). "The likelihood of a different result need not be more probable than not, but it must be substantial, not just conceivable." *Id.* Where the evidence of guilt is overwhelming, we will find no prejudice. *See Strickland*, 466 U.S. at 696, 104

[2] Harris does not appear to argue a motion to suppress would have actually been successful in suppressing the evidence seized from his residence due to some defect in the warrant or lack of probable cause. Instead, he asserts a "motion to suppress would have been another opportunity to attempt to learn the identity of the confidential informant, and without the alleged confidential informant, there would have been no basis for the search warrant." We will accordingly analyze Harris's motion to suppress claim in that manner—as a vehicle for learning the identity of the informant.

S. Ct. at 2069, 80 L. Ed. 2d at 699 ("[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.").

The evidence of Harris's guilt was overwhelming. He was found in his residence with 4.43 grams of crack cocaine, 1.43 grams of marijuana, over $2800 in cash, two digital scales, two cell phones, a police scanner, and a mirror with cocaine residue. A police officer with the narcotics unit testified that all of these items showed Harris was a drug dealer rather than just a drug user. He explained drug users typically buy much smaller quantities of drugs, testifying a "typical dosage unit [of crack] is .2 grams. Four grams would be approximately 20 dosage units. From my training and experience, crack cocaine users do not purchase larger amounts of crack cocaine, such as 4 grams, for personal use." Harris confirmed he normally purchased only a unit or two of crack cocaine at a time.

The officer further testified it was uncommon to find personal drug users with digital scales. He stated scales are typically used by dealers to weigh the drugs to be sold. And he testified that mirrors, such as the one discovered in Harris's apartment, are often used by dealers "as a cutting surface for when they are dividing larger amounts of crack cocaine into smaller amounts for sale." Finally, the officer noted the large amount of cash found in Harris's apartment was evidence of drug dealing, especially considering Harris's lack of employment. Harris, in fact, told the officer that he was involved in selling crack and the money in his front left pocket came from his drug sales, though at trial, he denied having made those statements.

It is difficult to see how learning the identity of the informant through a motion to compel or a motion to suppress would have resulted in a different outcome given the evidence. Harris nevertheless argues "the confidential informant was the sole State's witness to the purported sale of 'crack' cocaine inside Mr. Harris's apartment." But, as stated in the preceding section, Harris was not charged with selling drugs to the informant on November 4, 2009. Instead, he was charged on the basis of the items seized from his residence two days later. The informant was thus not a witness to or a participant in the crimes with which Harris was charged. *See Byrd*, 448 N.W.2d at 31. We again observe no reference to the informant was made until after Harris testified. And when the informant was mentioned, the officer simply described what he observed of the informant's actions.

Though we are deciding Harris's ineffective-assistance claim on the prejudice prong, we note as an aside that trial counsel would have had no duty to file a meritless motion to compel or motion to suppress as part of a "fishing expedition" for information that may have been helpful in the preparation of his defense. *Robertson*, 494 N.W.2d at 724. This is a result our supreme court has "repeatedly declined to permit." *Id.*

For the foregoing reasons, we deny Harris's claims that he was entitled to learn the identity of a confidential informant used by the police in a controlled-drug buy that was not the basis of the charges against Harris. We accordingly affirm his convictions.

AFFIRMED.