

IN THE COURT OF APPEALS OF IOWA

No. 1-595 / 10-1116
Filed September 8, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SPENCER LEE HORAK,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Bruce Zager,
Judge.

Defendant appeals seeking dismissal of his convictions for drug-related
offenses. **AFFIRMED IN PART AND REVERSED IN PART.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich,
Assistant Appellate Defender, for appellant.

Spencer Horak, Coralville, pro se.

Thomas J. Miller, Attorney General, Benjamin M. Parrott, Assistant
Attorney General, Thomas J. Ferguson, County Attorney, and Brad P. Walz,
Assistant County Attorney, for appellee.

Considered by Eisenhauer, P.J., and Doyle and Mullins, JJ.

EISENHAUER, P.J.

Spencer Horak appeals from his guilty plea for conspiracy to manufacture methamphetamine and the jury's guilty verdicts for possession of methamphetamine and possession of lithium with intent to manufacture methamphetamine. Horak argues the evidence is insufficient to support his convictions. Additionally, Horak contends his counsel was ineffective because no factual basis exists for his plea of guilty. We affirm in part and reverse in part.

I. Background Facts and Proceedings.

Around 2:00 a.m. on January 28, 2010, LaPorte City Police Officer Nissen observed a Chevy Blazer towing a trailer with no functioning taillights. The Blazer was travelling near the wooded Cedar Valley Nature Trail. Next to the trail and near where the stop occurred is a business with tanks of anhydrous ammonia. Officer Nissen activated his lights and stopped the Blazer.

As Officer Nissen approached the driver's side of the vehicle, his initial observation was the two occupants "reaching down in the floorboard direction of the vehicle." Several times, Officer Nissen instructed the driver, Matthew Lensch, and his passenger, Horak, "to keep their hands on the dash" or "to keep their hands in front." Lensch did not possess a valid driver's license, and the vehicle and the trailer were not registered to Lensch or Horak.

Officer Nissen asked what the two men were doing, and Lensch did not directly respond and appeared to be "very fidgety, nervous, [and] overly talkative." Eventually, Lensch stated they were working for a Cedar Rapids snow removal business. The trailer held two snow-blowers. Later, Officer Nissen

attempted to confirm the existence of the snow removal business, but failed to locate a company under the name Lensch provided.

Due to Lensch's suspended driver's license, Officer Nissen asked him to exit the vehicle. As Lensch exited, Officer Nissen observed a handgun (later determined to be an air pellet gun) in the driver's side door. Officer Nissen called for backup, ordered Lensch to the ground, and ordered Horak to place his hands on the dash. Officer Nissen asked Horak if he possessed any weapons, and Horak stated he possessed a knife or two.

Black Hawk County Sheriff Deputies Chase and Hinz arrived, and two knives were seized from Horak. Lensch was detained in Officer Nissen's car, and Horak was placed in Deputy Chase's car.

Deputies Chase and Hinz searched the Blazer. Deputy Chase found plastic tubing with attached brass adapters of the type that attach to an anhydrous ammonia tank to drain out the ammonia. The tubing was located in plain view on the passenger floorboard, the passenger area where Horak had been sitting. The hose and adapter combination was more sophisticated than others used to steal anhydrous ammonia and showed "bluing" and other markings suggesting "it at one point contained anhydrous ammonia."

Deputy Hinz discovered a small plastic bag containing suspected (and later confirmed) powder-type methamphetamine in plain view and wedged between the driver's seat and the center console. A glass pipe and a pen tube consistent with smoking/snorting methamphetamine were in plain view in the open portion of the center console. The glass pipe showed a residue.

In plain view in the middle of the back floorboard, “just underneath the back passenger [bench] seat” was a peeled lithium battery stripped of its lithium. The battery was within reach of both passenger Horak and driver Lensch. Officer Nissen found four additional, unaltered lithium batteries inside two flashlights in the Blazer.

The closed portion of the center console held a cloth bag containing thirteen small plastic bags—similar to the bag containing the seized methamphetamine and similar to plastic bags commonly used to hold methamphetamine. Also in the closed portion of the center console were several black plastic gas caps with brass fittings. These caps are useful in draining anhydrous ammonia from a tank.

Lensch asked Officer Nissen to retrieve his inhaler from the Blazer. The inhaler was located by the center console next to the location of the plastic bag containing methamphetamine.

Before leaving the area to transport Horak to the Black Hawk County Jail, Deputy Chase observed Horak moving around in his police car. Based on his movements, Deputy Chase suspected Horak possessed contraband. After Horak was transferred to jail, Deputy Chase searched the backseat of his car and found shards (twenty to thirty pieces) of a glass pipe with a burnt area “consistent with the glass pipe that’s used to smoke [methamphetamine].”

Later the same day a LaPorte City municipal worker, Mr. Brown, drove by the area of the stop while making his daily work trip to the sewer plant. Brown observed two LP tanks by the gazebo along the Cedar Valley Nature Trail. The tanks were the kind used for gas barbeque grills. The tanks were not covered by

snow or debris and were standing upright in plain sight. Brown had not noticed the LP tanks before. Black straps were attached to the tanks.

At trial, Nissen testified:

Q. Are you familiar with what ice methamphetamine is or imported methamphetamine? A. Yes.

Q. Does this [seized] methamphetamine . . . have the appearance of anhydrous, lithium, local methamphetamine, or ice-type methamphetamine that you see imported from western or southwestern states? A. Local.

Q. Officer Nissen, are you aware of anything—any other reason to peel a battery like that other than to obtain the lithium strip from that battery for the manufacture of methamphetamine? A. No, I'm not.

Black Hawk County Sheriff's Deputy Herkelman testified he had investigated hundreds of methamphetamine cases and had experience dismantling meth labs. Deputy Herkelman explained: (1) methamphetamine is manufactured in Black Hawk County using the lithium reduction method; (2) the various tasks necessary to this method of manufacture are often split among multiple conspirators in multiple locations; and (3) two of the ingredients used in the local manufacturing process are lithium—often strips peeled out of lithium batteries—and anhydrous ammonia.

Deputy Herkelman opined: (1) the texture and appearance of the seized methamphetamine is consistent with the lithium reduction method; (2) the peeling of the battery found in the backseat area is consistent with methamphetamine manufacturing; (3) the glass pipe seized is consistent with methamphetamine use; and (4) the plastic bags seized are the type of "containers [used] for the sale of narcotics."

Further, Deputy Herkelman testified the hose, attached brass fittings, and separate caps were assembled after purchase for a specific purpose—“to steal or acquire anhydrous ammonia.” The hose and fittings showed signs of previous use with anhydrous ammonia. Deputy Herkelman explained the specific LP tanks found by municipal worker Brown are of the type commonly used to steal anhydrous ammonia and the addition of straps to the tanks allows the tanks to be carried like a backpack.

Based on his undercover experience, Deputy Herkelman opined manufacturing methamphetamine is a clandestine operation and those involved are characterized by paranoia and do not trust outsiders who are not involved in the manufacturing process. Specifically:

I've seen several times where the cook was being accompanied by somebody. . . . I can't think of a single case I've ever investigated where a person just accompanied and was not partaking in some manner, helping steal the anhydrous, helping or receiving some profit But never have I seen somebody that's completely oblivious to what's going on.

Q. And just using your . . . experience, would there be a reason just to bring someone along who had nothing to do with the manufacturing process if you're going out to steal anhydrous or to strip lithium batteries just to have them along for no reason whatsoever, from your experience. A. I can't think of a reason for that, no, sir.

. . . .
A. Of the drug users in the world, I would say that methamphetamine users are probably the most paranoid people on the planet.

The jury returned guilty verdicts on all three counts. After the guilty verdicts but before the enhancement stage, the district court reviewed the jury instructions, concluded the Count I conspiracy to manufacture methamphetamine

instructions contained error on the intent element, and declared a mistrial on Count I.

Subsequently, Horak agreed to enter an *Alford* plea to conspiracy to manufacture methamphetamine in exchange for the State: (1) refraining from seeking habitual felon and second offender enhancements; and (2) agreeing to concurrent sentencing on all three crimes (ten years) instead of consecutive sentencing (sixteen years). See *North Carolina v. Alford*, 400 U.S. 25, 37-38, 91 S. Ct. 160, 167-68, 27 L. Ed. 2d 162, 171-72 (1970). The court sentenced Horak in accordance with the plea agreement and this appeal followed.

II. Insufficient Evidence—Conspiracy to Manufacture Methamphetamine.

Horak argues the court erred in denying his motion for acquittal on Count I because the evidence was insufficient to support the crime. We find no merit to this claim. The district court declared a mistrial and set aside the jury's verdict on Count I. Horak then pled guilty to Count I. The plea/sentencing colloquy reveals the court advised Horak of his right to file a motion in arrest of judgment and he waived that right on the record. "A defendant seeking to challenge a guilty plea must do so by motion in arrest of judgment. Failure to do so precludes the right to assert the challenge on appeal." *State v. Antenucci*, 608, N.W.2d 19, 19 (Iowa 2000) (citations omitted). Horak waived the error he now asserts. See *id.*

III. Insufficient Evidence—Jury Verdicts.

Horak argues the evidence is insufficient to prove he had possession or knowledge of either methamphetamine or lithium and is insufficient to prove his intent to manufacture methamphetamine. Specifically, Horak claims:

Neither the vehicle nor the trailer, in the instant case, belonged to [Horak]. The evidence clearly established that Patty Meyer was the owner of the vehicle and that Billy Meyer was the owner of the trailer. There is no testimony that [Horak] had any knowledge of or exercised any control over any of the inculpatory items, with the possible exception of the shards found in the back seat of the patrol car.

We review for correction of errors at law. *State v. Leckington*, 713 N.W.2d 208, 212-13 (Iowa 2006). We apply a deferential standard and review the evidence in the light most favorable to the State. *Id.* at 213. No purpose would be served by restating the evidence described in detail above. Substantial evidence supports Horak's conviction for possession of methamphetamine. The evidence, however, is insufficient to prove possession of lithium with intent to manufacture methamphetamine. The only lithium found was in the batteries in the flashlights. The other battery in the truck had been stripped of its lithium.

IV. Ineffective Assistance of Counsel—Guilty Plea to Conspiracy.

Horak argues his counsel was ineffective because no factual basis exists for his plea of guilty to conspiracy to manufacture methamphetamine. Horak cannot directly challenge his guilty plea because he waived his time to file a motion in arrest of judgment contesting the plea. See Iowa R. Crim. P. 2.24(3)(a). An exception is allowed if the failure to preserve error is a result of ineffective assistance of counsel. *State v. Philo*, 697 N.W.2d 481, 485 (Iowa 2005). Our review of ineffective assistance of counsel claims is de novo. *Id.* “Although claims of ineffective assistance of counsel are generally preserved for postconviction relief proceedings, we will consider such claims on direct appeal where the record is adequate.” *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008) (quoting *State v. Horness*, 600 N.W.2d 294, 297 (Iowa 1999)). We find the

record sufficient to review Horak's ineffective-assistance-of-counsel claim on direct appeal.

To prevail, Horak must show his attorney failed to perform an essential duty and prejudice resulted. See *State v. Fannon*, 799 N.W.2d 515, 519 (Iowa 2011). Failure to perform an essential duty occurs when counsel's performance falls below the normal range of competence; however, we presume counsel "performed within the normal range of competence." See *id.* To establish prejudice, Horak must show counsel's "deficit performance so prejudiced him as to give rise to the reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." See *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). Horak has the burden to prove by a preponderance of the evidence that counsel was ineffective. See *id.*

The court informed Horak of his trial and constitutional rights and the possible sentencing consequences of his plea. Next:

[THE COURT]: At this time, I do need to determine that there is, in fact, a factual basis which exists for your plea. . . .

To me the Alford plea basically means that while you're not necessarily admitting committing each and every essential element of the crime as charged, you have concluded in discussing his matter with your attorney, also in reviewing all the minutes of testimony . . . also you do now have the benefit of having a complete trial on this issue as well, that you have now concluded that a reasonable fact finder hearing all the evidence that would be presented at the time of any trial could conclude that you are guilty beyond a reasonable doubt of each and every essential element of the crime as charged. Is that your understanding as well?

[HORAK]: Yes, it is.

[THE COURT]: All right. The Court, then, will make the following findings: [Horak] has voluntarily entered into this plea, [Horak] fully understands the various rights that he is giving up by this plea, and [Horak] fully understands all of the possible consequences of his plea this afternoon. [Horak] has concluded

that his interests require an entry of a guilty plea on the record, based upon the evidence presented does contain strong evidence of his actual guilt. Likewise, [Horak] has concluded, in discussing this matter with his attorney, that he has nothing to gain by going to trial and much to gain by the entry of his guilty plea, that being . . . that the State has agreed to forgo the second offender and habitual offender status under Count I as well as under Count III, the second offender and habitual offender status enhancements that would apply to Count III as well.

We have set out the substantial evidence supporting the jury verdict for possession of methamphetamine and after our review of the record, we conclude a factual basis exists for Horak's guilty plea. Horak's counsel has no duty to raise a meritless issue and, accordingly, was not ineffective. See *State v. Carroll*, 767 N.W.2d 638, 645 (Iowa 2009).

V. Summary

We affirm the convictions for conspiracy to manufacture methamphetamine and possession of methamphetamine and reverse the conviction for possession of lithium with intent to manufacture methamphetamine. We remand for dismissal of the possession of lithium charge.

AFFIRMED IN PART AND REVERSED IN PART.