

**IN THE COURT OF APPEALS OF IOWA**

No. 2-048 / 10-0902  
Filed February 15, 2012

**WALTER HOSKINS IV,**  
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Black Hawk County, Jon C. Fister,  
Judge.

Walter Hoskins appeals a district court's ruling denying his application for  
postconviction relief. **AFFIRMED.**

Clemens A. Erdahl of Nidey, Wenzel, Erdahl, Tindal & Fisher, P.L.C.,  
Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney  
General, Thomas J. Ferguson, County Attorney, and Kimberly A. Griffith,  
Assistant County Attorney, for appellee State.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ. Tabor, J., takes  
no part.

**VOGEL, P.J.**

Walter Hoskins appeals a district court's ruling denying his application for postconviction relief. We find Hoskins's appellate counsel was not ineffective because sufficient evidence supported charges on theories of conspiracy and constructive possession of illegal drugs, and Hoskins failed to prove he was prejudiced by the jury instructions on conspiracy and constructive possession. We therefore affirm.

**I. Background Facts and Proceedings**

This matter comes before us as an application for postconviction relief. On direct appeal, this court summarized the facts as follows:

On the evening of July 4, 2006, Waterloo police officers noticed Walter Hoskins IV and his cousin, Daytron Wise, in front of their grandmother's house shooting off fireworks.[] Officers Matt McGeough and Steve Bose went to the home due to this illegal activity and because there were outstanding arrest warrants for both men. Hoskins and Wise were arrested. A search incident to arrest revealed Hoskins had \$174 in cash, Wise had \$210, and both men had cell phones on them. As they were being placed in the back of a patrol car, Hoskins yelled at the officers not to go in the house because his grandmother, Alberta Hoskins, was sleeping.

The officers knocked on the door, and then knocked on windows in an effort to alert whomever was inside that they were taking Hoskins and Wise to the police station, but no one responded. The officers then went around the outside of the house attempting to rouse someone when Officer Bose saw baggies stuffed inside a detached drain pipe. He pulled out the baggies and saw several of them had corners that were missing. There was no mud or debris on the baggies. The corners of baggies are often used as packaging for illegal drugs.

The officers gathered up the fireworks in the yard and on the porch as evidence for a fireworks violation charge. From the porch, Officer McGeough smelled the distinct and strong odor of marijuana. The door of the house was open, but the screen door was closed. Through the screen door Officer McGeough saw a box of fireworks just inside the door. He opened the door to collect the fireworks, and saw two baggies of marijuana and a baggie of crack

cocaine in a planter beside the door. The officers seized the illegal drugs.

While the officers were present, Alberta returned home. Hoskins told her not to let anyone inside the home, and she refused the officers' request to search the home. The officers had activated a recorder in the patrol car, and one of the men said, "they haven't found it yet." Hoskins had previous felony convictions for drug-dealing in 2004. In April and May of 2006, Officer McGeough had received information of drug dealing by Hoskins in Waterloo.

Sergeant Mark Meyer of the Tri-County Drug Task Force prepared an application for a search warrant of the house. A judge signed the search warrant. A search was conducted on July 5, 2006, which revealed large quantities of crack cocaine and marijuana, scales, cell phones, and baggies with torn corners.

*State v. Hoskins*, No. 07-0677 (Iowa Ct. App. Apr. 30, 2008).

On July 17, 2006, Hoskins was charged by trial information with possession of a controlled substance (cocaine) with intent to deliver, second offense, in violation of Iowa Code sections 124.401(1)(a) and 124.411 (2006); failure to affix a drug tax stamp in violation of Iowa Code section 453B.12; and possession of a controlled substance (marijuana), second offense, in violation of Iowa Code sections 124.401(1)(d) and 124.411.

A suppression hearing was held and the district court determined evidence of the illegal drugs in the planter should be suppressed, but evidence seized under the search warrant was admissible. Hoskins also filed a motion in limine, seeking to exclude the statement, "[T]hey haven't found it yet"—which he claimed referred to the drugs in the planter. The district court denied the motion in limine, stating the jury could determine what finding "it" meant.

After a jury trial, Hoskins was found guilty of all counts. On direct appeal, this court vacated a ten-dollar DARE surcharge and affirmed the two remaining issues—a motion to suppress and a motion in limine—and found no ineffective

assistance of trial counsel. *State v. Hoskins*, No. 07-0677 (Iowa Ct. App. Apr. 30, 2008).

On September 24, 2008, Hoskins filed a pro se application for postconviction relief. His application was supplemented by his attorney, Dawn Wilson. The application came on for hearing on May 13 and 14, 2010, after which the district court denied Hoskins's application. Hoskins appeals.

## **II. Standard of Review**

We review ineffective-assistance-of-counsel claims de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). In asserting an ineffective-assistance-of-counsel claim, Hoskins must establish (1) his counsel failed to perform an essential duty and (2) prejudice resulted from such failure. See *State v. Utter*, 803 N.W.2d 647, 652 (Iowa 2011) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)). Both elements must be proved by a preponderance of the evidence. *Id.* The claim fails if either of the two elements is lacking. *State v. Braggs*, 784 N.W.2d 31, 34 (Iowa 2010). "We judge ineffective assistance of appellate counsel claims against the same two-pronged test utilized for ineffective assistance of trial counsel claims." *Ledezma*, 626 N.W.2d at 141.

Our review of sufficiency-of-the-evidence claims is for correction of errors at law. *State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011).

We will uphold a verdict if it is supported by substantial evidence. When a rational fact finder is convinced by the evidence that the defendant is guilty beyond a reasonable doubt, the evidence is substantial. The evidence is reviewed in the light most favorable to the State, and all of the evidence presented at trial, not just evidence that supports the verdict, is considered.

*Id.* (internal citation and quotation marks omitted).

We review challenges to jury instructions for correction of errors at law. *State v. Heemstra*, 721 N.W.2d 549, 553 (Iowa 2006).

### **III. Sufficiency of the Evidence**

Hoskins asserts appellate counsel was ineffective for failing to raise a sufficiency-of-the-evidence claim on direct appeal, as it relates to the State proving conspiracy or constructive possession. While we review the evidence in the light most favorable to the State, “it is the ‘State’s burden to prove every fact necessary to constitute the crime with which the defendant is charged, and the evidence presented must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture.” See *Brubaker*, 805 N.W.2d at 171 (quoting *State v. Kemp*, 688 N.W.2d 785, 789 (Iowa 2004)).

#### **A. Conspiracy—Law**

Hoskins was convicted of possession of a controlled substance (cocaine) with intent to deliver and possession of a controlled substance (marijuana) with intent to deliver, in violation of Iowa Code section 124.401(1).

Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with the intent to manufacture or deliver, a controlled substance, a counterfeit substance, or a simulated controlled substance, *or to act with, enter into a common scheme or design with, or conspire with one or more other persons to manufacture, deliver, or possess with the intent to manufacture or deliver a controlled substance, a counterfeit substance, or a simulated controlled substance.*

Iowa Code § 124.401(1) (emphasis added). Our supreme court has recognized, “Since a conspiracy is by nature clandestine, it will often rest upon circumstantial evidence and inferences drawn from that evidence.” *State v. Corsi*, 636 N.W.2d

215, 219 (Iowa 2004). It has further held that an agreement that amounts to a conspiracy, “need not be formal or express, but may be a tacit understanding; the agreement may be inherent in and inferred from the circumstances, especially declarations, acts, and conduct of the alleged conspirators.” *State v. Casady*, 597 N.W.2d 801, 805 (Iowa 1999). We consider “all legitimate inferences arising reasonably and fairly from the evidence to support a verdict of conspiracy.” *Corsi*, 636 N.W.2d at 219.

### **B. Constructive Possession—Law**

A person has constructive possession of a controlled substance when the person “has knowledge of the presence of the controlled substance and has authority or right to maintain control of it.” *State v. Maxwell*, 743 N.W.2d 185, 193 (Iowa 2008). “Constructive possession is recognized by inferences,” but “cannot rest simply on proximity to the controlled substance.” *Id.* at 193–94 (internal citation omitted).

When a person has not been in exclusive possession of the premises where the drugs were located, several factors are considered when determining whether the person had constructive possession of the controlled substance. These factors include: (1) incriminating statements made by the person; (2) incriminating actions of the person upon the police’s discovery of a controlled substance among or near the person’s personal belongings; (3) the person’s fingerprints on the packages containing the controlled substance; and (4) any other circumstances linking the person to the controlled substance. . . . Even if some factors are present, the court is still required to determine whether all the facts and circumstances create a reasonable inference that the person knew of the presence of the controlled substance and had control and dominion over it.

*Id.* at 194 (internal citation omitted).

### **C. Analysis**

Upon reviewing the record, we agree with the postconviction court's dismissal of Hoskins's claims that appellate counsel was ineffective as we find sufficient evidence supported the verdict on theories of conspiracy and constructive possession. As Hoskins was being placed in the police car, he yelled at the officers not to go in the house because his grandmother, Alberta Hoskins, was sleeping. When Hoskins was seated in the back of the squad car and Alberta returned home, officers recalled Hoskins "screaming" and "yelling" at her not to let anyone in the house, and to lock the door. There were also recorded conversations from the back of the police car, where one of the men said, "they haven't found it yet"—which Hoskins claimed in an overruled motion in limine, was a statement regarding the illegal drugs in the planter.

Police obtained a search warrant and searched Alberta's house, located at 439 Adams Street in Waterloo in the early morning hours of July 5, 2006. While searching the house, officers seized a great deal of the evidence from a bedroom in the northwest corner of the house. On the floor in the bedroom, officers—with the assistance of a dog—found a clear plastic bag with marijuana in it, on top of a wooden box.

Officers also encountered a large, green, plastic storage tote. Inside the storage tote, officers discovered a shoebox. The shoebox contained several clear plastic bags, filled with large, white chunks of a substance—crack cocaine. Among the items underneath the shoebox in the storage tote were a gun holster, a gold and black plastic bag with "quite a number of bullets and a box of ammunition," and a plastic glove. There was also a pair of plastic gloves on the

bedroom floor. Officer McGeough stated the plastic gloves were significant because they are worn to keep fingerprints from getting on material. He also characterized the gun holster and bullets as common among people with large quantities of narcotics.

Two safes were found in the room. On an end table were a cell phone and a razor blade. Officer Matt McGeough testified that “[a]fter the crack has been hardened into chunks, [drug dealers] frequently use razor blades to kind of chip away and cut away the dosage units.” Several more cell phones were found during the search. Officer Mark Meyer testified that cell phones are very transient in the crack cocaine business and it is common to see several different cell phones when people are dealing a quantity of drugs similar to this case.

A box protruding from a laundry basket also contained a large amount of clear plastic bags; at least two more boxes of clear plastic bags were found on the floor. Officer McGeough described the amount of clear plastic bags that were found as a “large amount.” Officer Meyer described the quantity of baggies as “huge,” adding, “I think there were more plastic baggies with the corners missing in this case than I have seen in almost any other [case] I have worked on and I have worked on a lot.” Two small digital scales were found on an end table in the bedroom, with a much larger one found in a shoebox. Officer McGeough explained the scales were significant because when larger amounts of crack cocaine are found, scales are used to weigh out the larger quantities into smaller units to package and sell. Officers also found three bottles of supplements, which Officer McGeough explained, “are used to cut with the cocaine once it’s being cooked up to turn into crack.”



Officers also found a box from “Inner Security Products,” sent to “Walter Hoskins” at the 439 Adams Street address. Inner Security Products sells body armor and bullet-proof vests. A bullet-proof vest was found in the northwest bedroom by the closet. It was noted by Officer McGeough that finding bullet-proof vests or body armor is consistent with the quantity of narcotics and ammunition found in cases such as this one. In a second blue storage tote, officers found another cell phone.

In addition to the drug paraphernalia, officers found letters, documents, and paperwork belonging to Hoskins and Wise in the house. On the bed in the same northwest bedroom where the marijuana, crack cocaine, and drug paraphernalia were found, was a letter from the City of Waterloo, dated June 16, 2006, and addressed to “Walter Hoskins IV.” The letter was addressed to 221 Cutler Street, Waterloo. A Nextel cell phone invoice for Wise, dated October 12, 2005, was found lying on top of clothes in a laundry basket. Under the letter was an envelope addressed to Wise at 439 Adams Street, postmarked September 24, 2005. Among the items listed in the Waterloo Police Department’s “Property Tag Summary Report” are miscellaneous letters and papers belonging to Hoskins, which were found in the northwest bedroom. Additional documents belonging to Hoskins and Wise were found in the kitchen. Hoskins’s grandmother, Alberta, testified that on occasion, Hoskins and Wise stayed overnight at the house.

Hoskins suggests two other individuals were linked to the green tub found in the bedroom at 439 Adams Street, because the identification cards of two other individual were found in the bedroom—one in a backpack and one between

the mattress and box spring of the bed. However, no other identifying information relating to these two individuals was found in the house. Hoskins also suggests Dontrell Hoskins was linked to a duffel bag containing marijuana, as bus tickets with Dontrell's name on them, from Atlanta, Chicago, and Nashville, were found in the bag.

On July 5, 2006, officers also conducted a search, pursuant to a warrant, of 1952 Newell Street in Waterloo, where Wise purportedly resided with his father. Clear plastic bags with missing corners were found on the floor in one of the rooms of the house. Several boxes of clear plastic bags—full and empty—were also found in a shoebox in the northeast corner of the basement. Other clear plastic bags and a razor blade were found in additional shoeboxes in the basement. One of the clear plastic bags was “jammed full of bags that [had] been used to package drugs.” Under the staircase in the basement was a green gun case, with a pump shot gun inside. While Officer Meyer relayed that no finished, packaged crack cocaine was found at 1952 Newell, there were razor blades, plates, drug residue, and a safe. He also described the amount of torn, clear plastic bags as a “very large amount.” In the living room closet, officers also found a large sum of cash in a pair of jeans; the jeans contained an ID belonging to Wise.

In light of all the evidence presented, we find the verdict returned by the jury—based on theories of both conspiracy and constructive possession—was supported by substantial evidence. The evidence seized from 439 Adams Street—large amounts of crack cocaine, large quantities of clear plastic bags, a razor, a gun holster, ammunition, a bullet-proof vest, numerous cell phones,

plastic gloves, two safes, three scales, mail and documents belonging to Hoskins and Wise—supports a legitimate inference that Hoskins and Wise entered into a “common scheme or design” with the intent to “manufacture or deliver a controlled substance.” Iowa Code § 124.401(1). Moreover, evidence seized at 1952 Newell Street further supported a legitimate inference of a conspiracy to manufacture or deliver a controlled substance. Based on these findings, we agree with the postconviction court that substantial evidence supported the jury returning a verdict based on the theory of conspiracy.

We also agree with the postconviction court that substantial evidence supported a theory of constructive possession such that appellate counsel was not ineffective in failing to raise a sufficiency-of-the-evidence argument on direct appeal. Statements yelled by Hoskins to his grandmother—warning her not to let the police in her house, the conversation regarding whether the police had found “it” yet—referring to the drugs in the planter, and the proximity of mail and documents belonging to Hoskins—including a box from an armor company addressed to Hoskins at 439 Adams Street, the recovered marijuana and crack cocaine, clear plastic bags, razor, gun holster, ammunition, bullet-proof vest, cell phones, plastic gloves, two safes, and three scales all support the finding of constructive possession.

As the evidence was sufficient to support a verdict under theories of conspiracy and constructive possession, Hoskins’s appellate counsel did not have a duty to raise a meritless issue and therefore, Hoskins’s ineffective-assistance-of-appellate-counsel claim must fail. See *State v. Dudley*, 766 N.W.2d 606, 620 (Iowa 2009) (“[C]ounsel has no duty to raise issues that have

no merit.”). Consequently, Hoskins’s argument that his appellate counsel was ineffective for failing to pursue these arguments must fail. We affirm on this issue.

#### **IV. Jury Instructions**

Hoskins also maintains appellate counsel was ineffective for failing to raise errors of the district court in instructing the jury on conspiracy and constructive possession.

Hoskins argues the conspiracy instructions were “fatally flawed” because the district court instructed the jurors that the “overt act” required to be proved by the State was possession of clear plastic bags. Trial counsel objected to the court giving any instruction on conspiracy, but not specifically as to the inclusion of the clear plastic bags as the overt act. The jurors returned verdicts on conspiracy against both Hoskins and Wise. Hoskins alleges his counsel on direct appeal breached an essential duty by not alleging specific error in the conspiracy instruction.

To establish prejudice, Hoskins must prove there was a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Lado v. State*, 804 N.W.2d 248, 251 (Iowa 2011). In his postconviction proceeding, Hoskins failed to prove by a preponderance of the evidence that the result of his appeal would have been different if we had disapproved of the jury instruction setting forth the possession of clear plastic bags as the “overt act” required for conspiracy. Hoskins was convicted on both constructive possession and conspiracy alternatives and the two convictions merged. As we explain below, we find no error in the district

court's decision to instruct on constructive possession and no error in the content of the instructions. Hoskins has failed to establish prejudice and we therefore affirm as to this issue.

Hoskins finally argues there was insufficient evidence to instruct on constructive possession. As noted above, there was substantial evidence to support he had constructive possession of illegal drugs. Hoskins's argument is therefore without merit, and appellate counsel did not have a duty to raise this meritless claim. *See Dudley*, 766 N.W.2d at 620 (stating counsel does not have a duty to raise a meritless claim).

We affirm the postconviction court on all issues.

**AFFIRMED.**