IN THE COURT OF APPEALS OF IOWA

No. 2-222 / 10-1515
Filed June 27, 2012

MARK JOSEPH LOUVIERE,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Richard D. Stochl, Judge.

Petitioner seeks postconviction relief for his convictions, based on his guilty plea, to two counts of possession of methamphetamine with intent to deliver, with a firearm enhancement. **AFFIRMED.**

Richard E. H. Phelps of Phelps Law Office, Mingo, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brad Walz and Kim Griffith, Assistant County Attorneys, for appellee State.

Considered by Eisenhauer, C.J., Potterfield, J., and Huitink, S.J.* Bower, J., takes no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

HUITINK, S.J.

I. Background Facts & Proceedings.

The postconviction record in this case contains the following facts: Mark Louviere, a physician, was the subject of an investigation by the Tri-County Drug Task Force. On April 3, 2007, officers searched Louviere's home in Waterloo, Iowa, and found several firearms and ammunition in a cabinet above a roll-top desk in a home office. One weapon, a Ruger .22 caliber rifle, was found hanging on the wall in the office. In a boot inside the garage, which was not attached to the house, officers found more than five grams of methamphetamine. Also, Louviere was house-sitting for a neighbor, and after getting permission from the neighbor, officers found more than five kilograms of methamphetamine in a duffle bag in a basement closet. The duffle bag had a tag with Louviere's name on it and contained several of his business cards.

During the search a woman, M.S., came to the home asking to speak to Louviere. She told officers she had seen quantities of methamphetamine in the home. She also stated she had seen Louviere counting money in his home office. Louviere admitted to officers that he used methamphetamine and that he was involved in the sale of methamphetamine, with several sales occurring from his home. Louviere's home was within 1000 feet of a public park.

Louviere was charged with Count I, conspiracy to possess a controlled substance with intent to deliver, or possession with intent to deliver, involving more than five kilograms of methamphetamine within 1000 feet of a public park and while in the immediate possession or control of a firearm, in violation of Iowa Code sections 124.401(1)(a), (e), and 124.401A (2007); Count II, conspiracy to

possess a controlled substance with intent to deliver, or possession with intent to deliver, involving more than five grams of methamphetamine within 1000 feet of a public park and while in the immediate possession or control of a firearm, in violation of sections 124.401(1)(b), (e), and 124.401A; and Count III, failure to affix a drug tax stamp, in violation of section 453B.12.

Louviere entered into a plea agreement that provided: (1) he would plead guilty to the offenses as charged; (2) on Count I, he would be sentenced to one hundred years in prison, with the one-third mandatory minimum reduced by another one-third;[1] (3) on Count II, he would be sentenced to fifty years in prison, with the one-third mandatory minimum reduced by one-third; (4) on Count III, he would be sentenced to five years in prison; (5) the sentences would run concurrently; (6) Louviere would continue to assist law enforcement, even after sentencing; (7) the case would not be referred for federal prosecution; and (8) the court could retain jurisdiction for one year, however, "[t]he State makes no agreement to file any motions for reduction of the Defendant's mandatory minimum sentence and the Defendant acknowledges that the State is the only party that may make such a motion."[2]

At the plea hearing, Louviere answered in the affirmative when asked if he admitted to the elements of the crime, including the immediate possession or

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[1] For a conviction under section 124.401(1)(a) or (b) involving methamphetamine, where a defendant pleads guilty, "the court may, at its discretion, reduce the mandatory minimum sentence by up to one-third." Iowa Code § 901.10(2).

[2] Section 901.10(2) provides:

> If the defendant additionally cooperates in the prosecution of other persons involved in the sale or use of controlled substances, and if the prosecutor requests an additional reduction in the defendant's sentence because of such cooperation, the court may grant a further reduction in the defendant's mandatory minimum sentence, up to one-half of the remaining mandatory minimum sentence.

control of a firearm. The district court accepted the plea agreement. On August 28, 2007, Louviere was sentenced under the terms of the plea agreement. He did not appeal his convictions.

On August 22, 2008, Louviere filed a motion for reconsideration of sentence. The State resisted the motion. The State asserted it would not agree to file a motion seeking a reduction of Louviere's sentence based on substantial assistance to the State. *See* Iowa Code § 910.10(2) (providing the prosecutor may request an additional reduction of a defendant's sentence for cooperation). On January 20, 2009, the district court denied the request for reconsideration of sentence.

Louviere filed an application for postconviction relief on April 6, 2009. He claimed he received illegal sentences on Counts I and II because there was insufficient evidence to support the firearm enhancement. He also claimed his plea was involuntary because defense counsel led him to believe his sentence would be reduced on a motion for reconsideration. Louviere additionally claimed he received ineffective assistance because defense counsel permitted him to plead guilty to the charges with a firearm enhancement when there was insufficient evidence he was in the immediate possession or control of a firearm.

After a hearing, the district court entered an order on August 13, 2010, which determined Louviere failed to show his plea was involuntary. The court determined, however, there was not a proper factual basis to enhance his sentence under section 124.401(1)(e) for the immediate possession or control of a firearm. The court set a further hearing to give the State the opportunity to

present additional evidence to establish a factual basis. The State filed a motion to reconsider, which was denied by the district court.[3]

At the hearing the State submitted additional minutes of evidence. In a ruling on July 8, 2011, the court determined that in its first review of the minutes it had overlooked the testimony of M.S. that she had "observed Louviere counting money and conducting drug-related business within the home office of his residence where the firearms are located." The court concluded that because there was evidence Louviere was in the same room with drugs, drug money, and guns, there was a sufficient factual basis for the firearm enhancement. Louviere appeals the district court decision denying his petition for postconviction relief.

II. Firearm Enhancement.

Louviere contends he received an illegal sentence because there is no factual basis in the record to support a firearm enhancement.[4] He points out that the search of his home did not reveal any illegal drugs in the home office area where the firearms were found. He states there were no firearms in his garage, where methamphetamine was found. Also, no firearms were found in his neighbor's basement, where a larger amount of methamphetamine was found. He asserts there is insufficient evidence he was in the immediate possession or control of a firearm while participating in the crime of conspiracy to possess, or possession of, methamphetamine with intent to deliver. We review a claim of an

[3] The motion to reconsider was not timely. The district court determined there was good cause for the late filing of the motion to reconsider and addressed the motion on the merits.

[4] An illegal sentence may be corrected at any time. Iowa R. Crim. P. 2.24(5). On appeal, the State argues the firearm enhancement is an element of the crime and the rule that an illegal sentence may be corrected at any time should not apply. This argument was not raised before the district court, and therefore, we will not address it on appeal. *See State v. Jefferson*, 574 N.W.2d 268, 278 (Iowa 1997).

illegal sentence for the correction of errors at law. *Tindell v. State*, 629 N.W.2d 357, 359 (Iowa 2001).

Section 124.401(1)(e) provides, "A person in the immediate possession or control of a firearm while participating in a violation of this subsection shall be sentenced to two times the term otherwise imposed by law, and no such judgment, sentence, or part thereof shall be deferred or suspended." This section "is a penalty-enhancing provision for use in conjunction with drug possession, distribution and manufacturing offenses." *State v. Eickelberg*, 574 N.W.2d 1, 3 (Iowa 1997).

As used in section 124.401(1)(e), "immediate possession" means actual possession, which is "'direct physical control of something on or around [one's] person.'" *Id.* (citation omitted). "Immediate control" means "that the firearm be in such close proximity to the defendant as to enable him to claim immediate dominion over the firearm." *Id*. at 4. Immediate control is the same as direct control. *State v. Engle*, 590 N.W.2d 549, 552 (Iowa Ct. App. 1998). To establish either immediate possession or immediate control, there must be evidence the defendant had knowledge of the presence of the firearm. *State v. McDowell*, 622 N.W.2d 305, 307 (Iowa 2001).

In order for the firearm enhancement found in section 124.401(1)(e) to apply, there must be evidence the defendant was in immediate possession or control of a firearm while participating in an offense charged under section 124.401(1). *Eickelberg*, 574 N.W.2d at 5. In *Eickelberg*, the defendants were charged with growing marijuana in their home, and evidence that the defendants were in close proximity to a bedroom closet where weapons were found was

sufficient for the firearm enhancement to apply. 574 N.W.2d at 6. In *Engle*, the defendant was charged with drug-related offenses under section 124.401(1), and the defendant was near a closet where a loaded .22 revolver was found, making the firearm enhancement applicable. 590 N.W.2d at 552.

We conclude there is sufficient evidence in the record to support the application of the firearm enhancement found in section 124.401(1)(e) in this case.[5] The testimony of M.S. showed Louviere had quantities of methamphetamine in his house. M.S. also stated she had seen Louviere counting large amounts of money in his home office, which is where the firearms were located. As noted above, one of the firearms, a .22 caliber rifle, was hanging from the wall in the home office, where it was readily available to Louviere when he was in that room. Counting proceeds from drug sales could be considered part of a conspiracy to possess methamphetamine with intent to deliver, or possession of methamphetamine with intent to deliver, because the sales process includes collecting money from the sale of controlled substances. We also note Louviere admitted to officers that he had sold methamphetamine from his home.

We conclude Louviere has failed to show he received an illegal sentence due to the application of the firearm enhancement found in section 124.401(1)(e) in his case.

[5] The district court relied only on the evidence that was available at the time Louviere entered his guilty plea. In the supplemental evidence presented by the State, there was a statement from a witness, W.P., that he and Louviere would break up large packages of methamphetamine in the home office and weigh it. Additionally, a witness, D.M., stated he had purchased methamphetamine from Louviere at his home, and he had seen the .22 caliber rifle while he was there. There was also evidence that a drug-sniffing dog alerted to the smell of a controlled substance in the home office, indicating controlled substances had been in the home office.

III. Voluntariness of Plea.

Louviere claims his guilty plea was involuntary because his defense counsel represented to him that his sentence would be reduced on reconsideration. At the time he pled guilty he was subject to a mandatory minimum of twenty-two years. He claims he was led to believe that on reconsideration the mandatory minimum would be cut in half. *See* Iowa Code § 910.10(2) (providing the prosecutor may request an additional reduction of up to one-half of the mandatory minimum of a sentence based on the cooperation of a defendant in the prosecution of others). He asserts this expectation of a further reduction to the mandatory minimum in his sentence was a major factor in his decision to plead guilty.

Due process requires the defendant's guilty plea be made voluntarily and intelligently. *State v. Kress*, 636 N.W.2d 12, 21 (Iowa 2001). This requirement, "stems from the due process mandate that a waiver of constitutional rights, which is implicit in guilty pleas, must be made voluntarily." *State v. Fluhr*, 287 N.W.2d 857, 863 (Iowa 1980). "The defendant must have a full understanding of the consequences of a plea before constitutional rights can be waived knowingly and intelligently." *State v. Boone*, 298 N.W.2d 335, 337 (Iowa 1980). Our review of a challenge to the voluntariness of a guilty plea is reviewed de novo. *State v. Thomas*, 659 N.W.2d 217, 220 (Iowa 2003).

On this issue the district court found:

> While Louviere's counsel may have told him that a further reduction was possible, it is clear that the State never agreed to file an application for reduction based on substantial assistance. There is no mention in the plea colloquy of any agreement related to assistance. Additionally, there is no indication in the record that he

> had any information that would have been helpful enough to merit a reduction.
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> Louviere is an intelligent, educated man. While he clearly took the advice of his counsel, he knowingly and voluntarily pled guilty to Counts I, II and III.

We concur in the district court's conclusions. The evidence does not support Louviere's claim that he was misled into believing that the mandatory minimum for his sentences would be further reduced on a motion for reconsideration of sentence. The written memorandum of the plea agreement clearly provides that the State made no agreement to file a motion for a reduction of sentence, and under section 901.10(2), the State is the only party that could file a motion to reduce his sentence because of cooperation in the prosecution of others. Louviere has not shown that his guilty plea was not voluntary, knowing, and intelligent.

IV. Ineffective Assistance.

Louviere claims he received ineffective assistance because defense counsel failed to: (1) file a motion to suppress statements he made during a police interview; (2) file a motion to suppress the duffel bag found in the neighbor's basement; (3) conduct any discovery; (4) file any motions; (5) maintain contact Louviere; (6) explain immediate possession and control of a firearm; and (7) explain reconsideration of sentence. He also claims defense counsel advised him to accept the plea agreement so the case would not be referred for federal prosecution, and he now asserts there was little chance the case would have been referred for federal prosecution.

Claims of ineffective assistance of counsel are reviewed de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective

assistance of counsel, a petitioner must show (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied defendant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008).

"When complaining about the adequacy of an attorney's representation, it is not enough to simply claim that counsel should have done a better job." *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994). "The applicant must state the specific ways in which counsel's performance was inadequate and identify how competent representation probably would have changed the outcome." *Id*.; *see also State v. Schultzen*, 522 N.W.2d 833, 836 (Iowa 1994).

We have already discussed the issues of the firearm enhancement and the voluntariness of Louviere's guilty plea, and have denied those claims on the merits. As to Louviere's other claims of ineffective assistance of counsel, we conclude he has not sufficiently identified how counsel's performance was inadequate, or how other action by defense counsel would have changed the outcome of his case. We conclude Louviere has not established that he received ineffective assistance of counsel.

We affirm the decision of the district court denying Louviere's application for postconviction relief.

AFFIRMED.