IN THE COURT OF APPEALS OF IOWA

No. 2-258 / 11-0845
Filed April 25, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

GERALD DUYUAN JOHNSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble, Judge.

Defendant appeals from his conviction on drug-related charges. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David A. Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, John P. Sarcone, County Attorney, and Stephan K. Bayens, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

EISENHAUER, C.J.

Gerald Johnson appeals from his conviction of possession of a controlled substance and possession of a controlled substance with intent to deliver. He contends his attorney was ineffective in not raising "appropriate grounds" in his objection to the admission of an exhibit—a CD containing a recording of a phone call Johnson made while in jail. We affirm.

I. Background Facts and Proceedings.

During a routine traffic stop of Johnson's vehicle, police found what appeared to be illegal drugs. Police arrested Johnson and put him in the back of the patrol car. Johnson told the officer he could tell police where he bought his drugs. As the officer drove Johnson to meet with a narcotics officer, Johnson showed him the location of his supplier and described the apartment where she lived.

The State charged Johnson with possession of a controlled substance and possession of a controlled substance with intent to deliver. While Johnson was in jail awaiting trial, he made a telephone call. The call was recorded.

During the arresting officer's testimony at trial, the State offered a CD of the recorded conversation. Johnson's attorney objected—asserting the exhibit was beyond the scope of cross-examination. During a discussion outside the jury's presence, the State contended the CD of the telephone call was not beyond the scope of cross-examination because the officer's credibility had been challenged on cross-examination and the telephone call corroborated the officer's testimony. The court overruled the objection.

The jury found Johnson guilty of both charges. The court sentenced Johnson to concurrent prison terms not to exceed ten years and ordered him to pay fines, surcharges, costs, and attorney fees. Johnson appealed.

II. Scope and Standards of Review.

Ineffective-assistance-of-counsel claims are reviewed de novo. *State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011). To establish an ineffective-assistance-of-counsel claim, a defendant must prove by a preponderance of the evidence: (1) trial counsel failed to perform an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). A defendant may raise an ineffective-assistance claim on direct appeal if there are reasonable grounds to believe the record is adequate to address the claim. Iowa Code § 814.7(2) (2009). However, ineffective-assistance-of-counsel claims are normally considered in postconviction relief proceedings. *State v. Soboroff*, 798 N.W.2d 1, 8 (Iowa 2011). This is to allow development of an adequate record and to allow the attorney charged to respond to the defendant's claims. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). "Preserving ineffective-assistance-of-counsel claims that can be resolved on direct appeal wastes time and resources." *State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004).

III. Discussion.

Johnson contends his attorney was ineffective in not objecting "on appropriate grounds" to the admission of the CD of the recorded telephone call. He asserts his attorney should have objected on the grounds the State failed to establish an adequate foundation for the exhibit and the writing on the CD was

hearsay. The State responds neither objection would have been successful in keeping the exhibit out because another listed witness, an officer who worked for the sheriff's office, could provide the proper foundation, the writing on the CD falls within the business record exception to hearsay, and the writing was cumulative to other evidence.

"We begin with the presumption that the attorney performed competently" and "avoid second-guessing and hindsight." *Ledezma v. State*, 626 N.W.2d 134, 143 (Iowa 2001) (citations omitted). "We will not find counsel incompetent for failing to pursue a meritless issue." *Brubaker*, 805 N.W.2d at 171.

If an objection based on inadequate foundation had been raised, the State would have been required to offer "evidence sufficient to support a finding that the matter in question is what its proponent claims." Iowa R. Evid. 5.901(*a*). One way that can be done is through the "[t]estimony of witness with knowledge. Testimony that a matter is what it is claimed to be." Iowa R. Evid. 5.901(*b*)(1). The minutes of testimony for Lt. J. Wilkinson, a police officer for the sheriff's office, provided he would testify about phone call recording procedures, including "mechanisms to identify the caller," the procedures for recording, and how "the measures to ensure the identity of the caller were followed in this particular case." In addition, the officer who arrested Johnson testified he recognized Johnson's voice as the caller on the recording. The State could have overcome any lack-of-foundation objection to the CD. Johnson's attorney was not ineffective in failing to object based on lack of foundation.

Concerning the writing on the CD, Johnson contends his attorney should have objected to it on hearsay grounds. The writing identified the contents of the

CD. As noted above, the arresting officer identified the voice of the caller on the CD as Johnson. Lt. Wilkinson could have provided evidence the CD was a recording of a telephone call by Johnson made from the jail. Even if Johnson's attorney had objected to the writing as hearsay and the court had excluded the writing, the same evidence could have been admitted through the testimony of the two officers. A hearsay objection would not have changed the evidence available to the jury. Johnson's attorney was not ineffective in failing to make a hearsay objection to the writing on the CD.

Having concluded Johnson's attorney was not ineffective in the particulars raised on appeal, we affirm.

AFFIRMED.

Bower, J., concurs; Danilson, J., concurs specially.

DANILSON, J. (concurring specially)

I concur in all respects except to write that although I would agree counsel was ineffective for failing to object to the CD, State's exhibit 5, for lack of foundation, Johnson was not prejudiced by the admission of the recording. The CD recording was simply cumulative evidence repeating the testimony of Officer Carney and what Johnson admitted to the officer while at the scene.