

IN THE COURT OF APPEALS OF IOWA

No. 2-653 / 10-1138
Filed September 6, 2012

DARNELL L. THEROITH,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

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

Applicant appeals the district court order denying his request for postconviction relief from his convictions. **AFFIRMED.**

John J. Bishop, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly Griffith, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., Mullins, J., and Huitink, S.J.*

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

HUITINK, S.J.**I. Background Facts & Proceedings.**

On February 2, 2004, the Tri-County Drug Task Force executed a search warrant on a residence in Waterloo, Iowa, where Darnell Theroith lived with his girlfriend. The officers asked Theroith if there was anything in the home that was listed on the search warrant. Theroith responded that in his bedroom there was a quantity of crack cocaine in a tennis shoe and a gun in his bed between the box spring and mattress. Officers discovered 16.9 grams of crack cocaine and the firearm where Theroith had said they would be. The crack cocaine and firearm were about three to four feet away from each other. Theroith told officers the gun was "his guy's," and officers assumed this meant it belonged to a friend of Theroith.

Theroith was charged with possession of a controlled substance (cocaine base) with intent to deliver while in the immediate possession or control of a firearm, in violation of Iowa Code section 124.401(1)(b), (e) (2003); failure to affix a drug tax stamp, in violation of section 453B.12; and possession of a controlled substance (marijuana), in violation of section 124.401(5). After a jury trial, he was found guilty of the charges.

Due to the firearm enhancement, Theroith was sentenced to a term of imprisonment not to exceed fifty years on the charge of possession of a controlled substance (cocaine base) with intent to deliver, five years on the charge of failure to affix a drug tax stamp, and thirty days in jail for possession of marijuana, all to be served concurrently. Theroith's convictions were affirmed on

appeal. See *State v. Theroith*, No. 04-1814, 2005 WL 3478102, at *3 (Iowa Ct. App. Dec. 21, 2005).

Theroith filed an application seeking postconviction relief, claiming he received ineffective assistance of counsel. He claimed defense counsel did not adequately investigate Everette Richardson, who he claimed was the true owner of the gun. He also claims there was insufficient evidence in the record to support the firearm enhancement.

At the postconviction hearing, Theroith testified he told his defense counsel he wanted to have Richardson testify in his criminal case. He stated his defense counsel met with Richardson and they had discussed the case. Theroith testified he felt if they put Richardson on the stand he might admit it was his gun, although he recognized Richardson did not want to admit this. Theroith stated he had seen Richardson with the gun earlier on the day the search of his home was conducted. He also testified he was not aware Richardson had put the firearm under his mattress and the officers were untruthful when they stated he had told them where the firearm was located.

Concerning Richardson, defense counsel testified, "I had no confidence in this guy, to tell the truth." Defense counsel stated he informed Theroith there was a difference between ownership of the gun and possession. He stated the officers were going to testify that Theroith had possession, or at least constructive possession, of the gun. He also stated that Richardson's testimony would not have made any difference to the case "and could have made it worse."

The district court denied the application for postconviction relief. The court found defense counsel clearly did investigate Richardson and found his

testimony would not have been of assistance to Theroith. The court concluded defense counsel used reasonable professional judgment in not calling Richardson to testify, and thus, Theroith had failed to show he received ineffective assistance of counsel. The court also determined there was sufficient evidence in the record to support the firearm enhancement. The court found Theroith was not credible in his testimony that he did not remember telling the officers where the firearm was located. Theroith appeals the decision of the district court denying his request for postconviction relief.

II. Standard of Review.

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, an applicant must show (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied applicant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008). Absent evidence to the contrary, we assume the attorney's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995).

III. Ineffective Assistance.

A. Theroith contends he received ineffective assistance because his defense counsel failed to investigate Richardson or call him as a witness. He contends Richardson's testimony would have been helpful on the issue of whether he had immediate possession or control of a firearm. Theroith believes Richardson could have testified that he placed the firearm under the mattress in Theroith's bedroom. Theroith states he never had immediate possession of the

firearm. Furthermore, he asserts his defense counsel did not recognize the difference between constructive possession and immediate possession of a firearm.

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.” 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.” *State v. Eickelberg*, 574 N.W.2d 1, 3 (Iowa 1997) (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; *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.

The evidence clearly shows defense counsel investigated whether to call Richardson as a witness at the criminal trial. At the postconviction hearing, Theroith testified defense counsel met with Richardson and they had discussed the issue of ownership of the firearm. Theroith also testified Richardson did not

want to admit it was his gun, but he was hoping if put on the stand Richardson would testify it was his gun. Defense counsel testified, “I had no confidence in this guy, to tell the truth.” Despite Theroith’s hopes, if called, Richardson could possibly have testified that the gun belonged to Theroith. Defense counsel recognized there was a possibility Richardson’s testimony could have made things worse for Theroith. We agree with the district court’s assessment that defense counsel made a reasonable professional judgment by not calling Richardson.

Additionally, we agree with the district court’s conclusion that even if Richardson testified the weapon belonged to him, this testimony would not have been of assistance to Theroith. Section 124.401(1)(e) does not discuss ownership. Theroith’s arguments about ownership do not address the scope of the statute. Furthermore, there is a distinction between immediate possession and immediate control of a firearm. See *State v. Brown*, 612 N.W.2d 104, 111 (Iowa Ct. App. 2000). Theroith’s arguments about immediate possession of a firearm do not address the question of whether he had immediate control of the firearm.¹ For all of these reasons we conclude Theroith has not shown he received ineffective assistance due to defense counsel’s failure to investigate Richardson or call him as a witness.

B. Theroith contends he received ineffective assistance because postconviction counsel did not call Richardson to testify at the postconviction

¹ We note that in discussing section 124.401(1)(e), the Iowa Supreme Court has stated, “we have construed control as akin to constructive possession.” *Eickelberg*, 574 N.W.2d at 4. Thus, while immediate possession and constructive possession are not the same, immediate control, which is also mentioned in the statute, is akin to constructive possession.

hearing. Again, Theroith asserts Richardson could have testified he was the owner of the firearm involved in the case and Theroith was never in immediate possession of the firearm. As discussed above, even if Richardson had testified on these matters, it would not have been of any assistance to Theroith. A finding that Theroith did not own the gun, or was not in immediate possession of the gun, would still not address the issue of whether he was in immediate control of the firearm at the time he committed the offense of possession of a controlled substance (cocaine base) with intent to deliver, and thus be subject to the enhancement found in section 124.401(1)(e).

C. On appeal, Theroith contends he received ineffective assistance because his defense counsel failed to raise an argument by means of a posttrial motion that there was insufficient evidence to show he was in immediate possession of a firearm at the time of the offense. As noted above, however, there is a distinction between immediate possession and immediate control. See *id.* Thus, even if Theroith was not in immediate possession of a firearm, the statute could still apply.

The statute applies if a person has immediate control of a firearm. See Iowa Code § 124.401(1)(e). “[I]mmediate control necessitates only that the firearm be in such close proximity to defendant as to enable him to claim immediate dominion over the firearm.” *Engle*, 590 N.W.2d at 552. The firearm was found between the box spring and mattress of the bed in Theroith’s bedroom. The firearm was about three or four feet away from the crack cocaine also found in Theroith’s bedroom. Theroith informed the officers of where the firearm and crack cocaine could be located. The court did not find credible

Theroith's testimony at the postconviction hearing that he did not make this statement to officers.

We agree with the district court's conclusion that there was substantial evidence in the record to support the jury's finding Theroith was in the immediate possession or control of a firearm while committing the offense of possession of a controlled substance (cocaine base) with the intent to deliver. See *State v. Canada*, 212 N.W.2d 430, 433 (Iowa 1973) (finding handgun found between mattress and box springs of bed in defendant's hotel room was within the area of his immediate control). We find Theroith has not shown he received ineffective assistance due to defense counsel's failure to file a post-trial motion challenging the sufficiency of the evidence to show he was in immediate possession or control of a firearm at the time of the offense.

We affirm the decision of the district court denying Theroith's request for postconviction relief.

AFFIRMED.