

**IN THE COURT OF APPEALS OF IOWA**

No. 3-496 / 12-0183  
Filed July 24, 2013

**JOSHUA TYLER MITCHELL,**  
Applicant-Appellant,

**vs.**

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

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Appeal from the Iowa District Court for Marion County, Martha L. Mertz,  
Judge.

Applicant appeals the district court decision denying his request for  
postconviction relief from his conviction for conspiracy to manufacture  
methamphetamine. **AFFIRMED.**

Jeffrey Lipman of Lipman Law Firm, P.C., Des Moines, and Thomas Hurd,  
Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sharon Hall, Assistant Attorney  
General, and Ed Bull, County Attorney, for appellee State.

Considered by Vogel, P.J., Bower, J., and Mahan, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

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

On November 3, 2007, Joshua Mitchell was a passenger in a vehicle that was stopped because it only had one headlight. The driver did not have proof of insurance, and a deputy sheriff determined the vehicle should be impounded. As part of that process, officers removed items from the vehicle. The contents of the vehicle included Coleman fuel, Heet, paper towels, a coffee maker, Mason jars, tubing, a gravel vacuum cleaner, acetone, MSM tablets, small plastic bags, and matches.<sup>1</sup> These items may be used in the manufacture of methamphetamine.

The driver, Violet Mitchell (Mitchell's aunt), stated Mitchell had asked her and the other passenger of the vehicle, Pam Goemaat, to purchase some of the items. Mitchell told an officer he was building an aquarium at home. Mitchell was charged with conspiracy to manufacture a controlled substance (methamphetamine), in violation of Iowa Code section 124.401(1)(b)(7) (2007).

The case proceeded to a jury trial with evidence as outlined above. Ricky Maples and Christina Thomas testified they had an agreement with Mitchell to provide him with pseudoephedrine in exchange for methamphetamine. Thomas testified Mitchell told her, "he needed the pills to make the product, to make the meth." Pharmacy records showed Maples and Thomas had purchased pseudoephedrine on multiple occasions. They testified that within a few days of delivering the pseudoephedrine to Mitchell they would receive methamphetamine from him.

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<sup>1</sup> A receipt showed Mitchell had purchased the paper towels, Coleman fuel, Heet, MSM tablets, acetone, and plastic bags. In addition, Marion County Deputy Sheriff Brad Sedlock had observed Mitchell in a Wal-Mart checkout lane with these articles.

A jury found Mitchell guilty of conspiracy to manufacture more than five grams of methamphetamine. He was sentenced to a term of imprisonment not to exceed twenty-five years. He appealed his conviction, but the appeal was dismissed as frivolous under Iowa Rule of Appellate Procedure 6.1005.

On April 21, 2010, Mitchell filed an application for postconviction relief, claiming he received ineffective assistance of counsel at his criminal trial. After a hearing, the district court denied Mitchell's request for postconviction relief. The court determined defense counsel had strategic reasons for not objecting to certain evidence. Furthermore, the court found that even if defense counsel had breached an essential duty, Mitchell could not show he was prejudiced due to the State's very strong case against him. Mitchell now appeals the denial of his application for postconviction relief.

## **II. Standard of Review.**

We review claims of ineffective assistance of counsel de novo. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012). 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). "In determining whether an attorney failed in performance of an essential duty, we avoid second-guessing reasonable trial strategy." *Everett v. State*, 789 N.W.2d 151, 158 (Iowa 2010). In order to show prejudice, an applicant must show that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Madsen*, 813 N.W.2d 714, 727 (Iowa 2012). We may consider the

prejudice prong of a claim of ineffective assistance of counsel first. *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001).

### **III. Ineffective Assistance.**

**A.** During the criminal trial, Maples testified Violet told him Mitchell was making methamphetamine. Defense counsel objected on hearsay grounds, and the objection was sustained. Defense counsel, however, did not request Maples's statement be stricken from the record. Mitchell claims he received ineffective assistance because defense counsel did not seek to strike this hearsay testimony.

We consider the prejudice prong first. *See Ledezma*, 626 N.W.2d at 142. We determine Mitchell has not shown he was prejudiced by Maples's hearsay statement. There was overwhelming physical and testimonial evidence in the record that Mitchell was involved in a conspiracy to manufacture methamphetamine.

**B.** During the criminal trial, there were four references by law enforcement officials that Mitchell refused to answer questions. He contends in this postconviction action that he received ineffective assistance because defense counsel did not object to these statements that he had exercised his right to remain silent under the Fifth Amendment.

Defense counsel testified he did not object for strategic reasons. He stated that due to Mitchell's criminal history, Mitchell decided not to testify at the criminal trial. Defense counsel stated that in order to get in the statement Mitchell did make—that the items he purchased were common items and he was using them to build a fish tank—he did not object.

“Strategic decisions made after [a] ‘thorough investigation of law and facts relevant to plausible options are virtually unchallengeable.’” *State v. Fountain*, 786 N.W.2d 260, 266 (Iowa 2010) (citation omitted). We conclude Mitchell has not shown his defense counsel breached an essential duty. Defense counsel made a well-thought-out and balanced strategic decision not to object to statements that Mitchell had declined to answer questions by officers in order to get in evidence he did not believe he could present in any other way.

Furthermore, even if defense counsel had breached an essential duty, Mitchell has not shown the result of the proceeding would have been different. As noted by the district court, the State had a very strong case that Mitchell was involved in a conspiracy to manufacture methamphetamine. Not only was there evidence Mitchell had purchased items used in the manufacture of methamphetamine, there was evidence he had asked the two other people in the vehicle with him to purchase items used in the manufacture of the controlled substance. In addition, Maples and Thomas testified they had purchased an ingredient in methamphetamine, pseudoephedrine, provided it to Mitchell, and in return received methamphetamine.

**C.** Finally, Mitchell contends he received ineffective assistance because defense counsel did not object to questions by the prosecutor that he believes requested a speculative answer. In particular, he disputes a question to Thomas asking why Mitchell purchased Red Devil lye.

We first note the question itself could be answered yes or no and does not request a speculative answer. The prosecutor asked further questions and elicited testimony that Mitchell never told Thomas why he wanted the lye.

Defense counsel testified he did not object to much of the testimony by Maples and Thomas because he wanted to discredit them as drug users and people knowledgeable about the manufacture of methamphetamine.

We conclude Mitchell has not shown he received ineffective assistance due to defense counsel's failure to object to the question and answer above. Moreover, in view of the other evidence presented in the case, we do not believe Mitchell was prejudiced by this question or answer.

We conclude Mitchell has failed to show he received ineffective assistance of counsel. We affirm the decision of the district court denying Mitchell's request for postconviction relief.

**AFFIRMED.**