IN THE COURT OF APPEALS OF IOWA

No. 6-1001 / 04-1194
Filed January 31, 2007

DOUGLAS ARTHUR JOHNSON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Warren County, Dale B. Hagen, Judge.

Douglas Johnson appeals from the denial of his application for postconviction relief. **AFFIRMED.**

Douglas Arthur Johnson, Anamosa, pro se.

Richard Hollis, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Richard Bennett, Assistant Attorney General, Gary Kendell, County Attorney, and Douglas A. Eicholz, Assistant County Attorney, for appellee.

Heard by Zimmer, P.J., and Miller and Baker, JJ.

BAKER, J.

Douglas Johnson appeals from the denial of his application for postconviction relief. We affirm.

Background Facts and Proceedings.

We affirmed Johnson's convictions on direct appeal in *State v. Johnson*, No. 00-1826 (Iowa Ct. App. Jan. 28, 2002). We recounted the background facts and proceedings as follows:

> On May 22, 2000, the State charged Douglas Johnson with conspiracy to manufacture methamphetamine, conspiracy to possess anhydrous ammonia with intent to manufacture methamphetamine, and trespass with intent to steal anhydrous ammonia. The State initially jointly charged Johnson with his wife Nancy and his brother Duane. Nancy later entered a guilty plea and agreed to testify against Johnson. Duane also pled guilty but did not testify in this matter.
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> From the facts adduced at trial, the jury could have found the following. On April 1, 2000, Nancy witnessed Johnson talking to Bill Jones, a person she knew sold and had been arrested for manufacturing methamphetamine. She observed Jones hand Johnson a cooler but did not hear any of their conversation. Shortly after Jones left, Johnson asked Duane if he could use his car to drive to Warren County. Duane and Nancy then drove Johnson to a rural area near Indianola and stopped adjacent to a field that contained an anhydrous ammonia tank. Around that time, Chris Barr was traveling on Highway S-23 near Indianola when he observed a car containing three people stop along the side of the road. One man, later identified as Douglas Johnson, exited and walked towards an anhydrous ammonia tank while carrying a black bag. Barr then called 911 and informed the police of what he was witnessing. Johnson, however, noticed Barr watching him and attempted to hide in the grass and crawl behind some hay bales.
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> Police later stopped the vehicle Barr had observed and found Nancy and Duane to be inside. Nancy and Duane identified Johnson as the man Barr had seen exit their vehicle and approach the anhydrous ammonia tank. Police officers later went back to the field and discovered a black plastic sack containing a plastic thermos jug and a pair of weather work gloves hidden near the anhydrous tank. Based on this information, officers arrested Johnson.

> Following the subsequent trial, the jury found Johnson guilty of conspiracy to manufacture methamphetamine and conspiracy to possess anhydrous ammonia with intent to manufacture methamphetamine. The court sentenced him to an indeterminate term of incarceration of ten years on the first count and an indeterminate term of five years on the second count, to be served consecutively. Johnson appeals from the convictions.

Id. In that direct appeal, we rejected claims that the evidence was insufficient to support the convictions and that the charges should have merged. We also preserved for a possible postconviction relief application several claims of ineffective assistance of counsel.

On June 18, 2002, Johnson filed a pro se application seeking postconviction relief. After counsel was appointed, counsel filed an amended and substituted application. There was no evidentiary hearing held on Johnson's postconviction claims; rather, the claims were submitted to the court on the record before it. The court later issued a ruling denying all of Johnson's postconviction claims. Johnson appeals from this ruling.

Scope and Standards of Review.

Postconviction proceedings are reviewed for errors of law. *Rhiner v. State*, 703 N.W.2d 174, 176 (Iowa 2005). When a postconviction relief application raises an issue of constitutional scope, such as ineffective assistance of counsel in violation of the Sixth Amendment, our review is de novo. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994). In order to succeed on a claim of ineffective assistance of counsel, a defendant must prove (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Prejudice is shown by a reasonable probability that, but for counsel's errors, the

result of the proceeding would have been different. *State v. Atwood*, 602 N.W.2d 775, 784 (Iowa 1999). Counsel is not ineffective for failing to raise an issue with no merit, *State v. Wills*, 696 N.W.2d 20, 24 (Iowa 2005), and the failure to prove either a breach of an essential duty or prejudice is fatal to an ineffective assistance of counsel claim. *State v. Liddell*, 672 N.W.2d 805, 809 (Iowa 2003).

On appeal, Johnson asserts some nineteen separate arguments. For purposes of flow and brevity, we will combine our discussions of some of these arguments below.

Marital Privilege.

Arguments I and II on appeal concern trial counsel's alleged failure to properly object and argue the existence of the marital privilege prior to testimony by Johnson's wife, Nancy. Arguments IX and X concern trial and appellate counsel's alleged failing regarding Deputy Timothy Cook's testimony, which Johnson claims was covered by the marital privilege. The privilege for marital communications is recognized in Iowa by statute. Iowa Code section 622.9 (1999) provides:

> Neither husband nor wife can be examined in any case as to any communication made by the one to the other while married, nor shall they, after the marriage relation ceases, be permitted to reveal in testimony any such communication made while the marriage subsisted.

This privilege is not absolute. *Id*. There are both common law and legislative exceptions. *Id*. *See also State v. Klindt*, 389 N.W.2d 670, 675-76 (Iowa 1986). This privilege does not attach to testimony by third persons or when the communications between the spouses occurred in the presence of a third person. *State v. Pepples*, 250 N.W.2d 390, 394 (Iowa 1977). Yet statutes

creating privileges are to be liberally construed. *State v. Bedell,* 193 N.W.2d 121, 124 (Iowa 1971).

Upon our de novo review of the examples of Nancy's testimony cited by Johnson which allegedly violated his marital privilege, we conclude trial counsel did not fail in an essential duty to object to them. We first find that certain statements made by Nancy were not "communications" between herself and Johnson in that the assertions made therein could have been gained from sources independent of a conversation with her husband. As the postconviction court appropriately noted, the

> facts and observations known to Nancy suffice to provide her with knowledge of the purpose of her trip to Warren County. Therefore, her testimony regarding the purpose of [Johnson's] trip to Warren County was not an examination of the contents of a marital communication, but merely an inquiry into her opinion of the purpose of the trip.

Second, the remainder of the examples were indeed testimony regarding communications with Johnson, but they were made while a third-party, namely Duane, was present. As such, they were an exception to the rule establishing the privilege. The State urges that even if we conclude the marital privilege was violated by Nancy's testimony, then we should recognize an exception to the privilege "when the communication concerns a conspiracy, or other criminal activity, in which the spouses jointly participated." Due to our ruling on this issue, we need not address this request.

With regard to Deputy Cook's testimony, we similarly find no breach of duty. In particular, Johnson complains of Cook's testimony that Nancy had told him it was "her understanding defendant had intended to steal anhydrous

ammonia." The marital privilege does not apply to conversations between a spouse and a police officer who is conducting a criminal investigation. *State v. McPhillips*, 580 N.W.2d 748, 755 (Iowa 1998).

Nancy's Testimony Regarding Bill Jones.

In divisions III and IV of his appellate brief, Johnson references Nancy's testimony concerning Bill Jones. He asserts trial counsel was ineffective in failing to object to this testimony and that direct appeal counsel was ineffective in failing to properly raise this issue. At the criminal trial, Nancy first testified that after Johnson and Jones met, Johnson displayed a jug or cooler and that they then traveled to Warren County to steal anhydrous ammonia. She further testified that Jones sold methamphetamine, because she had purchased it form in that past, and that she knew "Jones had been arrested for manufacturing." The postconviction court initially determined that Nancy's statement as to Jones being a manufacturer was not based on "personal knowledge," *see* Iowa R. Evid. 5.602 ("A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."), but it further concluded that Johnson could not have been prejudiced by this testimony.

We first note it is clear that because Nancy had purchased methamphetamine from Jones in the past, she indeed possessed personal knowledge that Jones was a seller of methamphetamine. Furthermore, in a deposition taken prior to the postconviction proceedings Nancy stated that Johnson had purchased drugs from Jones mere days prior to the crime in question. She also testified in that deposition that she had overheard Jones tell

"quite a few people" that he manufactured the drug. Consequently, we conclude there is no reasonable likelihood of a different result had counsel objected to this testimony by Nancy.

Merger.

In divisions V and VI of its appellate brief, Johnson claims both defense counsel and appellate counsel were ineffective for failing to adequately deal with the argument that his two conspiracy charges should have merged. In our direct appeal opinion, we concluded that because sufficient evidence supported that two separate conspiracies existed, his merger argument must fail. *See State v. Walker*, 610 N.W.2d 524, 527 (Iowa 2000) (rejecting the defendant's contention two charges should have merged where the record supported a factual basis for two separate crimes).

"A person is barred from relitigating in a postconviction proceeding any ground which was finally adjudicated on direct appeal." *Armento v. Baughman*, 290 N.W.2d 11, 12 (Iowa 1980); *Snyder v. State*, 262 N.W.2d 574, 578 (Iowa 1978). Accordingly, as all of the essential elements of this merger argument were disposed of on appeal, it is not subject to relitigation in postconviction proceedings. *LeGrand v. State,* 540 N.W.2d 667, 669 (Iowa Ct. App. 1995). We affirm the postconviction court's rejection of this ground.

Jury Instructions.

At trial, counsel failed to request that the court instruct the jury regarding accomplice testimony or on multiple counts. We first address Johnson's contention trial counsel was ineffective in failing to request an instruction providing that an accomplice's testimony must be corroborated in order to

support a conviction. *See* Iowa R. Crim. P. 2.21(3). The postconviction court rejected this argument, concluding that Johnson was not prejudiced by the lack of instruction in that "the jury could not find that the only witness against Johnson was an accomplice."

Iowa Uniform Criminal Jury Instruction 200.4 provides:

> A person cannot be convicted *only* by the testimony of an accomplice. The testimony of an accomplice must be corroborated by other evidence tending to connect the defendant with the crime. If you find (name of witness) is an accomplice, the defendant cannot be convicted only by that testimony.

(Emphasis added.) It is prejudicial error to fail to instruct even without request on the requirement of corroboration where the jury could find the only witness against the defendant was an accomplice. *State v. Anderson*, 38 N.W.2d 662, 665 (Iowa 1949); *see also State v. Larue*, 478 N.W.2d 880, 883 (Iowa Ct. App. 1991) ("The existence of corroborative evidence is a question of law while *the* sufficiency of that evidence ordinarily is a question of fact for the jury.").

First, we conclude, like the postconviction court, that Nancy was an accomplice. *See State v. Berney*, 378 N.W.2d 915, 917 (Iowa 1985) (noting an accomplice is a person who "could be charged with and convicted of the specific offense for which an accused is on trial."). However, considering this, we further conclude Nancy was not the *only* witness to testify against Johnson at trial, and that therefore the accomplice testimony instruction was not required. As the trial court appropriately noted, "the jury could not find that the only witness against Johnson was an accomplice." Chris Barr, who constitutes a separate witness, testified at trial that he observed Johnson leaving the car and heading toward the ditch and then to the anhydrous tank. Counsel thus did not breach an essential

duty in failing to request this instruction. Moreover, even if an accomplice instruction were required, Johnson was not prejudiced by the failure to give the instruction. There is no reason to believe the jury would have acquitted Johnson had this instruction been given. While Barr's testimony did not corroborate all of Nancy's testimony, it did corroborate critical portions of it. *See State v. Bugely*, 562 N.W.2d 173, 176 (Iowa 1997) (noting the corroborating evidence need only furnish some material factor connecting the defendant to the crime).

We next address the "multiple count instruction." Iowa Uniform Criminal Jury Instruction110.15 provides:

> The defendant has been charged with _____ counts. This is just a method for bringing each of the charges to trial. If you find the defendant innocent or guilty on any one of the _____ counts, you may not conclude guilt or innocence on the other(s). The defendant's innocence or guilt must be determined separately on each count.

We first assume, without deciding, that counsel breached an essential duty in failing to request this instruction. However, given that assumption, we conclude Johnson was not prejudiced by counsel's failure. The test for prejudice is whether "there was a reasonable probability that, but for counsel's unprofessional error[ ], the result of the proceeding would have been different." *Ledezma v. State*, 626 N.W.2d 134, 143 (Iowa 2001) (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. Here, separate marshalling instructions set out the instructions for each crime. Further, another instruction provided that the jury must consider all instructions and that

no one instruction provides all the applicable law. Thus, the jury was charged with considering both conspiracy charges separately.

Deposition.

Divisions XI, XII, and XII of Johnson's appellate brief relate to the testimony of his wife Nancy. He first maintains counsel was ineffective in failing to compel Nancy's attendance at a pretrial deposition and then for failing to move to strike her subsequent trial testimony. However, his underlying complaint appears to center on his claim that counsel's failures allowed Nancy to commit perjury during trial. We agree with the postconviction court that this claim must fail because, during a recess in his trial, Johnson's attorneys were, in fact, able to depose Nancy prior to her testimony.

Conspiracy to Manufacture.

In his pro se brief, Johnson alleges counsel provided ineffective assistance with regard to his conviction for conspiracy to manufacture methamphetamine, in violation of Iowa Code section 124.401(1)(c)(6), which criminalizes the conspiracy to manufacture *five grams or less* of methamphetamine. In particular, he maintains the State failed to present evidence of some precursor chemicals from which the finder of fact could have determined he had the capability to manufacture five or less grams of the drug. We conclude counsel breached no such duty. *State v. Casady*, 597 N.W.2d 801 (Iowa 1999), upon which Johnson relies, requires proof of potential yield on a charge of conspiracy to manufacture *more than five grams* of methamphetamine.

Conclusion.

We have addressed each argument presented both in appellate counsel's brief and in Johnson's pro se brief. Whether specifically addressed in this opinion, we find them to be without merit. Accordingly, we affirm the denial of Johnson's application for postconviction relief.

AFFIRMED.