IN THE COURT OF APPEALS OF IOWA

No. 6-314 / 05-1024
Filed June 14, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BENJAMIN ANDREW DAMM,
Defendant-Appellant.

Appeal from the Iowa District Court for Bremer County, Paul W. Riffel, Judge.

Benjamin Andrew Damm appeals his convictions for possession of methamphetamine with intent to deliver, manufacture of methamphetamine, conspiracy to manufacture methamphetamine, and possession of anhydrous ammonia, ephedrine, and lithium as drug precursors with the intent to use them to manufacture methamphetamine. **AFFIRMED.**

Robert G. Rehkemper of Gourley & Rehkemper, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Kasey E. Wadding, County Attorney, and Bryan Barker, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Huitink and Miller, JJ.

MILLER, J.

Benjamin Andrew Damm appeals his convictions for possession of methamphetamine with intent to deliver, manufacture of methamphetamine, conspiracy to manufacture methamphetamine, and possession of anhydrous ammonia, ephedrine, and lithium as drug precursors with the intent to use them to manufacture methamphetamine. He contends the trial court erred in denying his motion to suppress and that his trial counsel was ineffective. We affirm his convictions and preserve his ineffective assistance claim for a possible postconviction proceeding.

I. BACKGROUND FACTS AND PROCEEDINGS.

On the morning of April 22, 2004, Gary Snyder of rural Bremer County heard a vehicle with a loud engine or muffler in the area near his pine grove south of his residence. He heard the vehicle make a brief stop on the gravel road next to his grove. He observed the vehicle, a dark-colored, extended-cab pickup truck, speed away in an easterly direction spinning in the gravel as it took off.[1] Minutes later he heard and saw the same vehicle return, slow down, and stop again for a few seconds approximately where it had stopped before. Snyder testified he thought he heard a door shut both the first and second times the vehicle was there, but was not certain. He then saw the truck take off again, speed up, and head toward an intersection in a westerly direction. Snyder then went into his pine grove to investigate and smelled anhydrous ammonia, which drew his attention to a pine tree where he found a maroon or burgundy cloth covering something. Under the cloth he found a gallon jar containing what he

[1] Snyder at various times described the truck as either dark blue, dark green, or dark colored.

believed to be anhydrous ammonia. Snyder knew this substance was associated with the manufacture of methamphetamine so he called the Bremer County Sheriff's Department.

Bremer County Deputy Sheriff Terry Dehmlow responded to Snyder's call. He arrived approximately fifteen to twenty minutes after Snyder called the sheriff's department. Upon Dehmlow's arrival, Snyder told the deputy about what he had observed and what he had discovered in his grove. The two then went to the pine grove together so Deputy Dehmlow could examine the jar himself. After viewing the jar Dehmlow also believed it contained anhydrous ammonia. They returned to Snyder's house to further discuss the situation and so Dehmlow could complete his report. While there they heard a vehicle approach, stop for a very brief time in the vicinity of the grove near where the vehicle had stopped before, and then accelerate again. Snyder told Dehmlow that it sounded like the same vehicle he had heard earlier. Deputy Dehmlow decided to get into his squad car and pursue the vehicle to see if it fit Snyder's description of the one that had been there earlier.

Dehmlow exited the driveway, turned south and went a short distance to the intersection, and turned east to pursue the vehicle they had heard. He could see a vehicle some distance in front of him but could not tell what type it was. As he got closer and the vehicle turned north Dehmlow could see it was a dark-colored, extended-cab pickup, which matched Snyder's earlier description. Eventually the truck turned back west and Dehmlow turned on his emergency lights and stopped the truck. The vehicle was not speeding and did not commit any traffic violations while Deputy Dehmlow was following it.

The driver of the truck was identified as the defendant, Damm. Damm and his passenger, James Hasse, both wore burgundy shirts with a "Carpet King Carpet One" logo on them. Dehmlow told Damm he was investigating a trespass complaint concerning the area where Damm had just left. Damm stated he had just dropped off his other passenger, Dustin Lacey, in that area to pick up something out of the ditch. Dehmlow suggested he would follow Damm back to pick up Lacey. While speaking with Damm, Deputy Dehmlow noticed a slight smell of either ammonia or ether coming from Damm's vehicle. Meanwhile, Snyder had returned to a different section of his grove where he again detected a strong smell of ammonia and saw someone crawling on the ground at the edge of the grove. Snyder reported these observations to the sheriff's office which in turn informed Dehmlow what Snyder had seen.

Dehmlow followed behind Damm in his patrol car back to the grove to pick up Lacey. As they approached Snyder's grove Dehmlow observed an individual, later identified as Lacey, walking out of the grove and waving his hands. When Lacey saw the patrol car he turned to run back into the grove, but stopped when Dehmlow honked and yelled at him. After speaking with Lacey, Dehmlow returned to Damm's truck a second time and detected a stronger odor of what he thought to be ether coming from the vehicle.

Snyder, Dehmlow, and other officers returned to the grove a short time later. The gallon jar was gone from the place Snyder and Dehmlow had seen it earlier. In another location in the grove officers found a blue cooler containing a black plastic garbage bag which contained what appeared to be the same gallon jar wrapped in two maroon shirts. The shirts bore the same "Carpet King Carpet

One" logo as those worn by Damm and Hasse. The gallon jar smelled of anhydrous ammonia and contained a white powder, some of which was turning blue or black, indicating the chemical reaction which would produce methamphetamine was taking place. Later analysis showed the jar contained 154.9 grams of a white powdery substance containing methamphetamine.

Bremer County Deputy Sheriff Aaron Booth was called by Dehmlow to assist in the investigation at Snyder's grove. While there he and another officer detected a strong odor of ether from a toolbox in the bed of Damm's truck. They conducted a warrantless search of Damm's vehicle at the scene and discovered lithium strips, ephedrine, and a white powdery substance, which were seized during the search of the truck. Dehmlow arrested Damm, Hasse, and Lacey for conspiracy to manufacture methamphetamine. Damm was transported to the Bremer County Law Enforcement Center by another officer and verbally read the *Miranda* warnings while being transported.

Following his search of Damm's vehicle, Deputy Booth prepared an application for a search warrant for Damm's house. The application was approved and a search of the residence was executed. A red Pontiac registered to Damm was parked at the residence. Officers found a receipt in that car dated the previous day showing the purchase of two packages of pseudoephedrine tablets. They also found a roll of aluminum foil and two foil strips which appeared to have been used to smoke methamphetamine. The foil strips were found in the pockets of a coat in the car. In Damm's house officers found additional foil strips charred on one side with residue on the other, consistent with being used to smoke methamphetamine. In addition, $7500 in cash was found in the

residence, as was packaging which had contained lithium batteries. After Damm's truck was impounded and searched further, investigators found 15.6 grams of a white powdery substance which contained methamphetamine, a plastic measuring cup which contained pseudoephedrine residue, strips of lithium batteries, a plastic tube with a white powdery residue containing methamphetamine, and other items associated with the manufacturing, distribution, and use of methamphetamine.

At the law enforcement center Deputy Booth began to review with Damm a form stating Damm's *Miranda* rights and a phone waiver form. Damm stated he wanted to call an attorney but he did not have one. Booth then provided Damm with a list of local attorney's. At that point another deputy, Shane Hoff, entered the holding area and Booth advised Hoff that Damm was looking over the list and would be attempting to call an attorney.[2] Hoff asked Damm if he was ready to proceed and he agreed. Damm told Deputy Hoff he wanted to try to call attorney Lana Luhring. Hoff filled out the phone waiver form and had Damm sign it. He then attempted to call Luhring for Damm but she did not answer. Hoff asked if Damm wanted to leave a message and Damm said he did not. Hoff asked Damm if he wanted to call anyone else, and Damm asked to call his brother. Damm reached his brother and spoke to him for approximately five to ten minutes. Deputy Hoff testified he went through the entire *Miranda* form with Damm. After going through the form Hoff asked Damm if he would answer some questions. Damm responded that it would depend on what the questions were.

[2] Both Deputy Booth's and Deputy Hoff's contact with Damm occurred after they returned from assisting in the execution of the search warrant on Damm's residence and vehicle.

Deputy Hoff then proceeded to question Damm regarding his role in the alleged conspiracy to manufacture methamphetamine, Damm answered the questions, and Hoff later testified at trial as to the substance of that questioning.

The State charged Damm, by trial information, with: possession with intent to deliver methamphetamine, manufacturing methamphetamine, and conspiracy to manufacture methamphetamine, all in violation of Iowa Code section 124.401(1)(b)(7) (2003); and possession of anhydrous ammonia, pseudoephedrine, and lithium as precursors to be used in the manufacture of methamphetamine, in violation of sections 124.401(4)(d), (b), and (f) respectively.

Damm filed a motion to suppress, and following a hearing the district court denied the motion. The motion contended, in relevant part, that the stop of Damm's vehicle violated his right under the Fourth Amendment to the United States Constitution to be free from unreasonable search and seizure. He further contended police officers violated his rights when they "continued" questioning him after he had requested to contact an attorney and that his willingness to answer the officers' questions was not a valid waiver of his right to counsel.[3]

The district court denied the motion, concluding that Deputy Dehmlow had probable cause to stop Damm's vehicle for investigatory purposes. The court found,

> Deputy Dehmlow was investigating a complaint involving trespassing and the manufacture of methamphetamine. [Damm's] vehicle closely matched the vehicle described to Dehmlow by

[3] Although Damm also argued in his suppression motion that the subsequent search of his pickup and resulting search warrant were unconstitutional, on appeal he only challenges the propriety of the stop of his pickup and his interrogation, and thus these other issues are not before this court on appeal.

> Snyder which he had observed in the vicinity of his pine grove on three separate occasions within approximately one hour of Deputy Dehmlow stopping the vehicle. At the time he stopped the vehicle, Deputy Dehmlow had previously observed what appeared to have been a working methamphetamine laboratory of recent origin located in Snyder's grove.

The court further concluded that Damm was advised of his *Miranda* rights by the arresting officers on at least two separate occasions and thereafter he knowingly and voluntarily elected to answer questions posed by the officers, thus implicitly concluding that the questioning after he attempted to call an attorney did not violate his constitutional rights. The case proceeded to jury trial and Damm was found guilty as charged. He was sentenced to an indeterminate term of imprisonment not to exceed twenty-five years with a mandatory one-third minimum.

Damm appeals his convictions, contending the trial court erred in denying his motion to suppress. More specifically, he argues both that Deputy Dehmlow did not have sufficient reasonable suspicion of criminal activity to justify the investigatory stop of his vehicle and that Deputy Hoff's questioning of him after he requested an attorney violated his federal constitutional rights. He also claims he received ineffective assistance of counsel.

II. MERITS.

A. Motion to Suppress.

1. Vehicle stop.

Damm's challenge to that part of the district court's adverse ruling on his motion to suppress regarding Dehmlow's investigatory stop of his vehicle is based on his constitutional right to be free from an unreasonable seizure, as

guaranteed by the Fourth Amendment to the United States Constitution.[4] We review this alleged constitutional violation de novo in light of the totality of the circumstances as shown by the entire record. *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001). "We give deference to the district court's fact findings due to its opportunity to assess the credibility of witnesses, but we are not bound by those findings." *Id*. In our review of the district court's ruling on a motion to suppress we consider both the evidence presented during the suppression hearing and that introduced at trial. *State v. Jackson*, 542 N.W.2d 842, 844 (Iowa 1996).

> The Fourth Amendment to the United States Constitution provides:
>
> > The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Evidence obtained in violation of this provision is inadmissible in a prosecution, no matter how relevant or probative the evidence may be. *State v. Manna*, 534 N.W.2d 642, 643-44 (Iowa 1995). Warrantless searches and seizures are per se unreasonable unless they fall within one of the carefully drawn exceptions to the warrant requirement. *State v. Kinkead,* 570 N.W.2d 97, 100 (Iowa 1997).

> One of the well-established exceptions to the warrant requirement is that formulated in *Terry v. Ohio*, which allows an officer to stop an individual or vehicle for investigatory purposes based on a reasonable suspicion, supported by specific and articulable facts, that a criminal act has occurred or is occurring.

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[4] The rights guaranteed in the Fourth Amendment apply to the states through the Fourteenth Amendment. *Mapp v. Ohio,* 367 U.S. 643, 655-81 S. Ct. 1684, 1694, 6 L. Ed. 2d 1081, 1090 (1961).

Id. (citing *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968)).

> To justify an investigatory stop, the officer must be able to point to specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant that intrusion. In determining the reasonableness of the particular search or seizure, the court judges the facts against an objective standard: would the facts available to the officer at the moment of the seizure or the search warrant a man of reasonable caution in the belief that the action taken was appropriate?
>
> In short, an investigatory stop of a vehicle is constitutionally permissible only if the officer who has made the stop has specific and articulable cause to reasonably believe criminal activity is afoot. Circumstances raising mere suspicion or curiosity are not enough. The officer must be able to articulate more than an inchoate and unparticularized suspicion or hunch of criminal activity.

State v. Kreps, 650 N.W.2d 636, 641 (Iowa 2002) (internal citations and quotations omitted).

> Whether reasonable suspicion exists for an investigatory stop must be determined in light of the totality of the circumstances confronting a police officer, including all information available to the officer at the time the decision to stop is made. The circumstances under which the officer acted must be viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training.
>
> The evidence justifying the stop need not rise to the level of probable cause. An officer may make an investigatory stop with considerably less than proof of wrongdoing by a preponderance of the evidence.

Id. at 642 (internal citations and quotations omitted).

As set forth above, at the time Deputy Dehmlow stopped Damm's truck he was investigating two specific crimes which appeared to be related, trespass and manufacture of methamphetamine. Dehmlow also had reason to believe the crimes had been committed recently. The jar containing the suspected

anhydrous ammonia and the shirt that was wrapped around it were not weathered or soiled. Snyder had just recently heard and seen the same vehicle twice within approximately ten minutes in the same general area by his grove. Both times Snyder heard the vehicle slow down and perhaps stop, and he thought he heard a vehicle door shut on both of the two occasions. Snyder then heard the same distinctive vehicle a third time while Deputy Dehmlow was at his residence, approximately thirty minutes later, at which time Dehmlow proceeded after the vehicle. The vehicle Dehmlow followed and stopped matched the description and sound Snyder had given him of the truck which had been near Snyder's grove twice shortly before. These facts taken together gave Deputy Dehmlow reasonable suspicion to believe criminal activity was afoot and that the occupants of the truck he stopped were involved in those criminal activities. Accordingly, Dehmlow's stop of Damm's truck was justified. The district court did not err in denying this part of Damm's motion to suppress.

2. Interrogation.

Damm next contends Deputy Hoff's interrogation of him after he had invoked his right to counsel violated the Fifth, Sixth, and Fourteen Amendments to the United States Constitution and thus the district court erred in denying his request to suppress all statements he made to the deputy after this invocation. We review this constitutional issue de novo. *See State v. Evans*, 495 N.W.2d 760, 762 (Iowa 1993).

The Fifth and Fourteenth Amendments to the United States Constitution require police to clearly inform a suspect of the right to counsel during a custodial interrogation. *United States v. Miranda*, 384 U.S. 436, 469-70, 86 S. Ct. 1602,

1625-26, 16 L. Ed. 2d 694, 722 (1966). "[T]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege." *Id.* at 469, 86 S. Ct. 1625, 16 L. Ed. 2d at 721. If a suspect receives the *Miranda* warnings and

> expresse[s] his desire to deal with the police only through counsel, [he] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Edwards v. Arizona, 451 U.S. 477, 484-85, 101 S. Ct. 1880, 1885, 68 L. Ed. 2d 378, 386 (1981).

However, the suspect "must unambiguously request counsel." *Davis v. United States,* 512 U.S. 452, 459, 114 S. Ct. 2350, 2355, 129 L. Ed. 2d 362, 371 (1994). "[H]e must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Id.* However, the rule articulated in *Edwards* applies

> only when the suspect ha[s] *expressed* his wish for the particular sort of lawyerly assistance that is the subject of *Miranda*. It requires, at a minimum, some statement that can reasonably be construed to be an expression or a desire for the assistance of an attorney *in dealing with custodial interrogation by the police*.

McNeil v. Wisconsin, 501 U.S. 171, 178, 111 S. Ct. 2204, 2209, 115 L. Ed. 2d 158, 168-69 (1991) (internal quotation and citation omitted).

The State argues that Damm's words and actions were too ambiguous for Deputy Hoff to reasonably understand he was requesting an attorney to be present at the impending interrogation and thus could not constitute an invocation of the right to counsel within the meaning of *Miranda*. The State also

argues that even if his words and actions were sufficient to invoke the right to counsel Damm's statement that he would answer some questions, after receiving *Miranda* warnings twice, constituted an affirmative, limited waiver of his right. Finally, the State argues any error by the district court in admitting Damm's statements to Deputy Hoff was harmless beyond a reasonable doubt.

Passing the first two arguments made by the State, and assuming without so deciding that the district court erred in allowing the challenged statements, we conclude any such error was harmless. Most federal constitutional errors in the course of a criminal trial do not require reversal if the error is harmless. *State v. Peterson,* 663 N.W.2d 417, 430 (Iowa 2003) (citing *Arizona v. Fulminante*, 499 U.S. 279, 306, 111 S. Ct. 1246, 1263, 113 L. Ed. 2d 302, 329 (1991)). The erroneous admission of evidence in violation of a defendant's Fifth, Sixth, and Fourteenth Amendment rights is a constitutional error subject to harmless error analysis. *Id.* "The inquiry is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Id.* at 431 (internal quotation omitted). "To establish harmless error, the State must 'prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Id.* (quoting *Chapman v. California,* 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 2d 705, 710 (1967)).

Analyzing whether the State has met its burden of proof requires two steps. *Id.*

> The first step requires us to ask what evidence the jury actually considered in reaching its verdict. In doing this, we do not conduct a subjective inquiry into the jurors' minds.

> The second step requires us to weigh the probative force of that evidence against the probative force of the erroneously admitted evidence standing alone.

Id. (internal citations omitted).

> [W]e must ask whether the force of the evidence is so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same without the erroneously admitted evidence. Only when the effect of the erroneously admitted evidence is comparatively minimal to this degree can we say that there is no reasonable possibility that such evidence might have contributed to the conviction.

Id.

In addition to Deputy Hoff's testimony regarding the statements made to him during the challenged interrogation, the State presented evidence to the jury that Damm's truck, car, and home were full of evidence of methamphetamine manufacturing, use, and trafficking. This evidence had great probative force. The court's instructions to the jury allowed the jury to find Damm guilty either as a principal or as an aider and abettor. Thus, with the overwhelming physical evidence in the record a reasonable jury could find Damm guilty beyond a reasonable doubt, as either a principal or aider and abettor, whether the challenged statements he made to Deputy Hoff were also in evidence.

Next, we must weigh the probative force of the physical evidence against the probative force of the allegedly erroneously admitted evidence standing alone. Here, some of Damm's statements to Deputy Hoff tended to support the prosecution whereas others tended to support his defense. For example, Damm did admit he had previously used methamphetamine and he made apparently inconsistent statements as to how many times he had actually been in the grove on the day in question, both of which supported the prosecution's case.

However, the bulk of Hoff's testimony regarding what Damm had told him during the interrogation in question tended to support Damm's theory of defense, namely that it was his companions who used and manufactured methamphetamine and he was not aware of or involved in any of it. More specifically, he stated that he stopped at the grove to drop Lacey off but did not know what if anything Lacey had taken into the grove with him; he did not know where the contraband in his truck came from but it was Lacey who was riding in the back so he could have placed something in the toolbox; several people are in and out of his house and thus the drug paraphernalia found there could have belonged to any one of those individuals; the coat which contained the methamphetamine paraphernalia was not his; he had not been in the garage on the day when the officers detected the strong smell of anhydrous but Lacey and Hasse had been in there using starting fluid to try to start his van; and that he was aware that Lacey and Hasse either used or manufactured methamphetamine but not at Damm's house. All of these statements supported Damm's theory of defense and some of them in fact would not have been put before the jury if evidence of Damm's statements to Deputy Hoff had not been admitted.

The allegedly erroneously admitted statements were a mixed bag with the heaviest portion of the mixture weighing on the side supporting Damm's defense rather than the prosecution. Thus, the effect of the allegedly erroneously admitted evidence was so minimal when compared to the overwhelming amount of physical evidence before the jury that we can say there is no reasonable possibility that Damm's challenged statements might have contributed to his

conviction either as a principal or an aider and abettor. Accordingly, we conclude beyond a reasonable doubt that the verdict would have been the same without the admission of the allegedly erroneous evidence and thus error, if any, on the part of the trial court in allowing evidence of such statements was harmless beyond a reasonable doubt.

B. Ineffective Assistance of Counsel.

We review claims of ineffective assistance of counsel de novo. *State v. Martin,* 704 N.W.2d 665, 668 (Iowa 2005). To prove trial counsel was ineffective the defendant must show that counsel breached an essential duty and that prejudice resulted from counsel's error. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Griffin,* 691 N.W.2d 734, 736-37 (Iowa 2005).

Damm claims his trial counsel was ineffective for failing to object to testimony before the jury which he alleges improperly demonstrated him invoking his right to refuse consent to a search, his right to remain silent, and his right to counsel.

Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002); *State v. Kinkead*, 570 N.W.2d 97, 103 (Iowa 1997)). We prefer to leave ineffective-assistance-of-counsel claims for postconviction relief proceedings. *State v. Lopez*, 633 N.W.2d 774, 784 (Iowa 2001); *State v. Ceron*, 573 N.W.2d 587, 590 (Iowa 1997). "[W]e preserve such claims for postconviction relief proceedings, where an adequate record of the claim can be developed and the attorney

charged with providing ineffective assistance may have an opportunity to respond to defendant's claims." *Biddle,* 652 N.W.2d at 203.

As set forth above, Damm can only succeed on his ineffectiveness claims by establishing both that his counsel breached an essential duty and that prejudice resulted. *Griffin,* 691 N.W.2d at 736-37. No record has yet been made before the trial court on these issues. Trial counsel has not been given an opportunity to explain his actions and the trial court has not considered and ruled on the ineffectiveness claims. Under these circumstances, we pass the issue of ineffective assistance of counsel in this direct appeal and preserve it for a possible postconviction proceeding. *See State v. Bass*, 385 N.W.2d 243, 245 (Iowa 1986). Accordingly, we preserve Damm's specified claims set forth herein for a possible postconviction proceeding.

III. CONCLUSION.

Based on our de novo review of the record, and for the reasons set forth above, we conclude Deputy Dehmlow had reasonable suspicion that criminal activity was afoot and that the occupants of Damm's truck were involved in those criminal activities, and thus was justified in stopping Damm's vehicle. We further conclude any possible error by the trial court in allowing evidence of Damm's statements to Deputy Hoff was harmless. We preserve Damm's specified claims of ineffective assistance of counsel for a possible postconviction proceeding.

AFFIRMED.