IN THE COURT OF APPEALS OF IOWA

No. 6-371 / 05-1175
Filed July 12, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

STEVEN ANDREW COSPER,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Joel Novak, Judge.

Steven Andrew Cosper appeals from his convictions and sentences for possession of methamphetamine with intent to deliver, failure to affix a drug tax stamp, possession of marijuana, and possession of cocaine. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Robert Ranschau, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, and John Sarcone, County Attorney, for appellee.

Considered by Vogel, P.J., and Zimmer and Vaitheswaran, JJ.

ZIMMER, J.

Steven Andrew Cosper appeals from his convictions following a jury trial for possession of five grams or less of methamphetamine with intent to deliver, failure to affix a drug tax stamp, possession of marijuana, and possession of cocaine in violation of Iowa Code sections 124.401(1)(c)(6), 453B.3, 453B.12, and 124.401(5) (2005). Cosper contends his trial counsel was ineffective for failing to file a motion for new trial arguing the weight of the evidence failed to support his conviction of possession with intent to deliver. He also claims the district court violated his right of allocution by failing to ask his attorney for a sentencing recommendation. We affirm.

I. Background Facts & Proceedings

On February 24, 2005, Patrol Sergeant Matt Logsdon stopped a vehicle in Urbandale because the occupants of the front seat were not wearing seat belts. While making the stop, Officer Logsdon witnessed the occupants of the vehicle making furtive gestures toward the floorboard. The officer approached the car. Cosper was seated in the front passenger seat of the vehicle. Inside the vehicle, Logsdon found a green pouch on the front passenger floorboard that contained approximately twenty grams of methamphetamine, one-half gram of cocaine, and three grams of marijuana. Logsdon also found a glass drug pipe, seven hypodermic needles, the tops of two plastic Ziploc bags, a black-handled razor, razor blades, a pocket knife, a ledger with nicknames and weight increments, a note with a name and telephone number, a bottle containing three pieces of

paper and cards, and a digital scale.[1] The officer found an Altoids tin with magnets attached to it on Cosper's person.[2]

While still at the scene of the stop, Cosper admitted to Officer Logsdon the drugs and drug paraphernalia recovered from the car belonged to him.[3] Cosper told Officer Logsdon he had purchased the methamphetamine for $1100 and sold the drug in "teeners" (one-sixteenth ounce) for $110 to support his methamphetamine addiction. At the time of his arrest, Cosper had been unemployed since the preceding October or November.

The State filed a trial information charging Cosper with possession of more than five grams of methamphetamine with the intent to deliver, a drug tax stamp violation, possession of marijuana, and possession of cocaine. At his jury trial, Cosper admitted he had sold methamphetamine in the past, but claimed he was no longer dealing drugs. He claimed all the methamphetamine in his possession was intended for his personal use. Cosper maintained he would have used the twenty grams of methamphetamine in a few days, and he claimed he used the scale and razor to measure his own doses. He testified he purchased the methamphetamine by using various schemes to defraud other people. Cosper called Gabriele Twohey, a substance abuse counselor, as a witness. Twohey testified Cosper told her he used methamphetamine heavily.

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[1] The papers said "Wetback ¼," "Blair ½," "Todd R," and "ask for Jim."

[2] The State presented testimony at trial that tins similar to the tin found on Cosper are often used to conceal controlled substances underneath vehicles.

[3] Another police officer at the scene overheard Cosper tell the three other occupants of the vehicle, "I'm not going to let you guys go down for this. It's mine. I'm a grownup. I'll take the wrap [sic]."

The jury found Cosper guilty of possession of five grams or less of methamphetamine with intent to deliver, failure to affix a drug tax stamp, possession of marijuana, and possession of cocaine. The district court sentenced Cosper on count I to a thirty-year term of imprisonment. The court sentenced Cosper on counts II, III, and IV to concurrent fifteen-year terms of imprisonment to be served consecutively with the thirty-year term. Each offense was enhanced due to Cosper's status as a habitual offender. Cosper now appeals.

II. Ineffective Assistance of Counsel

Cosper claims his trial counsel was ineffective for failing to file a motion for new trial arguing the weight of the evidence failed to support his conviction of possession with intent to deliver.

We review ineffective assistance of counsel claims de novo. *State v. Oetken*, 613 N.W.2d 679, 683 (Iowa 2000). Generally, we preserve defendants' ineffective assistance claims for postconviction relief. *Kellogg v. State*, 288 N.W.2d 561, 563 (Iowa 1980). However, we will resolve these claims on direct appeal when the record adequately presents the issues. *State v. Miranda*, 672 N.W.2d 753, 758 (Iowa 2003). We find the record in this case sufficient to address Cosper's ineffective assistance claim on direct appeal.

Cosper must establish by a preponderance of evidence that his trial counsel was ineffective. *Ledezma v. State*, 626 N.W.2d 134, 145 (Iowa 2001). Cosper may prove his trial counsel ineffective by demonstrating: (1) counsel failed to perform an essential duty and (2) prejudice resulted from this omission. *State v. Miles*, 344 N.W.2d 231, 233-34 (Iowa 1984). To prove the first prong of

the test, Cosper "must overcome the presumption that counsel was competent and show that counsel's performance was not within the range of normal competency." *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). To prove the second prong, Cosper must demonstrate a reasonable probability that, but for counsel's errors, the result of the proceeding would have differed. *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987). If Cosper fails to prove either prong of the test, his ineffective assistance claim will fail. *State v. Scalise*, 660 N.W.2d 58, 62 (Iowa 2003).

Cosper contends the trial court would have granted him a new trial if his trial counsel had filed a motion for new trial arguing the weight of the evidence failed to support his conviction for possession with intent to deliver. The district court may grant a new trial if the jury's verdict is "contrary to law or evidence," and "contrary to evidence" means "contrary to the weight of the evidence." Iowa R. Crim. P. 2.24(2)(*b*)(6); *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). However, trial courts have been instructed to exercise their discretion in ruling on motions for new trial "carefully and sparingly." *Ellis*, 578 N.W.2d at 659. A new trial should be granted only in exceptional cases where the evidence preponderates heavily against the verdict. *Id.* When the evidence is nearly balanced or is such that different minds could fairly arrive at different conclusions, the district court should not disturb the jury's findings. *State v. Reeves*, 670 N.W.2d 199, 203 (Iowa 2003). Only if the court finds the verdict incorrect due to mistake, prejudice, or other cause, may it set aside that verdict and remand the question to a different jury. *Id.*

Based on the evidence presented at Cosper's trial, we conclude this is not an exceptional case where the evidence "preponderates heavily against the verdict." *Ellis*, 578 N.W.2d at 659. The evidence of Cosper's guilt was strong. Officer Logsdon testified Cosper admitted he was dealing methamphetamine. Cosper possessed twenty grams of methamphetamine, a ledger of sales, a scale, and the tops of Ziploc bags. This and other evidence was inconsistent with Cosper's claim that he possessed the drugs only for personal use. Furthermore, the jury obviously did not find Cosper's version of the events credible.

Cosper's trial counsel had no duty to make a meritless motion for new trial, and Cosper suffered no prejudice by counsel's failure to make such a motion. Therefore, we reject this assignment of error.

III. Right of Allocution

Cosper also claims the district court violated his right of allocution "by failing to ask his attorney for a sentencing recommendation."

Our scope of review of a district court's decision regarding sentencing is for an abuse of discretion or for defects in the sentencing procedure. *State v. Cason*, 532 N.W.2d 755, 756 (Iowa 1995). Iowa Rule of Criminal Procedure 2.23(3)(*d*) provides that prior to imposing sentence, "counsel for the defendant, and the defendant personally, shall be allowed to address the court where either wishes to make a statement in mitigation of punishment." The sentencing court is not required to use any specific language to satisfy a defendant's right of allocution, and substantial compliance with the rule is sufficient. *State v. Duckworth*, 597 N.W.2d 799, 800 (Iowa 1999).

At the sentencing hearing, the court asked Cosper's attorney if there were any corrections that needed to be made to the pre-sentence investigation. The court also asked Cosper's trial counsel if there was "any legal reason or legal cause as to why sentence cannot be passed." Counsel replied in the negative and explained he had reviewed the pre-sentence investigation report with Cosper and had no corrections to offer.[4] The sentencing judge then asked Cosper if he had anything he wished to say before the court imposed sentence. Cosper took advantage of the opportunity to speak and replied that he "would like to use [his] mulligan."[5] The sentencing court pointed out Cosper had used "a few mulligans before," and the court stated, "Okay. Anything else besides you want to use your mulligan?" Cosper said "No," and his attorney made no further comments.

We find the court substantially complied with the requirements of rule 2.23(3)(*d*). The record clearly shows Cosper was given an opportunity to speak personally in mitigation of punishment and took advantage of that opportunity.[6] As we have mentioned, before pronouncing sentence, the district court received assurances from Cosper's counsel that Cosper had reviewed the presentence report and "no additions, deletions, or corrections to the presentence report" were necessary. Cosper's attorney also informed the court that he knew of no legal reason why judgment and sentence should not be pronounced. Although the

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[4] The presentence report reveals Cosper has a lengthy criminal record dating back to 1983.

[5] A mulligan is defined as "a free shot sometimes awarded a golfer in a nontournament play when the preceding shot has been poorly played." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1485 (Philip B. Gove ed., Merriam-Webster Inc., 2002).

[6] If Cosper had not been personally invited to speak in mitigation of punishment, we would vacate his sentence and remand for resentencing. *See State v. Craig*, 562 N.W.2d 633, 637 (Iowa 1997).

court did not specifically ask counsel for a sentencing recommendation, nothing in the record suggests defense counsel was prevented from speaking if he wished to make any further comments. Although it might have been better for the court to ask the defendant's counsel if he had any further comments before sentencing was pronounced, we conclude the requirements of rule 2.23(3) were satisfied.

IV. Conclusion

We find Cosper's counsel was not ineffective for failing to file a motion for new trial. We further find the district court did not violate Cosper's right of allocution at his sentencing. Accordingly, we affirm the defendant's convictions.

AFFIRMED.