

IN THE COURT OF APPEALS OF IOWA

No. 6-372 / 05-1184
Filed May 24, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOSE DIARTE MARTINEZ,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, D. J. Stovall and Artis Reis, Judges.

Defendant appeals from the denial of his motion to correct an illegal sentence. **AFFIRMED.**

Cathleen Siebrecht of Seibrecht & Seibrecht Law Firm, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, John P. Sarcone, County Attorney, and Gary W. Kendell and Daniel C. Voogt, Assistant County Attorneys, for appellee.

Considered by Mahan, P.J., and Hecht and Eisenhauer, JJ.

MAHAN, P.J.

In May 2000 a jury found Jose Diarte Martinez guilty of conspiracy to possess more than five kilograms of methamphetamine with the intent to deliver and conspiracy to deliver more than five kilograms of methamphetamine. See Iowa Code § 124.401(1)(a)(2)(d) (1999). The district court imposed a term of imprisonment not to exceed fifty years on each charge and ordered the terms to be served concurrently.

Martinez appealed, challenging the sufficiency of the evidence and claiming trial counsel was ineffective for failing to object to the admission of hearsay statements from a nontestifying coconspirator and for failing to request a jury instruction on mere association. This court affirmed the convictions. *State v. Martinez*, No. 00-1288 (Iowa Ct. App. May 15, 2002).

In May 2005 Martinez filed a pro se motion to correct an illegal sentence, arguing that both conspiracy counts should have merged at sentencing because they were based on the same conduct. The State resisted. The district court overruled the motion. Martinez appeals, arguing (1) the district court imposed an illegal sentence by failing to merge his convictions, in violation of the Double Jeopardy Clause of the Fifth Amendment and (2) he received ineffective assistance of counsel in violation of the Sixth Amendment due to trial counsel's failure to raise the double jeopardy issue. The State contends Martinez has failed to preserve error.

We assume without deciding that Martinez has preserved error on the constitutional issues he raises, and review de novo. *State v. Biddle*, 652 N.W.2d 191, 200 (Iowa 2002). We conclude Martinez's arguments are without merit.

Conspiracy to deliver methamphetamine does not require proof of a possession element. See *State v. Welch*, 507 N.W.2d 580, 582 (Iowa 1993) (citing *State v. Grady*, 215 N.W.2d 213, 214 (Iowa 1974)) (“[W]e have previously held that delivery does not require possession.”). Thus, conspiracy to possess methamphetamine with intent to deliver contains an element not essential to prove conspiracy to deliver methamphetamine—possession. In other words, it is possible to commit one offense without committing the other. See *State v. Daniels*, 588 N.W.2d 682, 684 (Iowa 1998) (applying the “legal elements” test to determine included offenses). Therefore, Martinez may be punished separately for the two offenses.¹ We conclude the double jeopardy issue Martinez raises is without merit. It necessarily follows that his trial counsel was not ineffective. *State v. Hochmuth*, 585 234, 238 (Iowa 1998) (counsel not ineffective for failing to pursue a meritless issue).

The district court correctly overruled Martinez’s motion to correct an illegal sentence.

AFFIRMED.

¹ This is not a case in which the substantive crimes and conspiracy to commit the same substantive crimes must merge. Cf. *State v. Williams*, 305 N.W.2d 428, 434 (Iowa 1981).