

IN THE COURT OF APPEALS OF IOWA

No. 6-446 / 05-0535
Filed August 23, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRYAN LEE JOHNSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

Defendant appeals his convictions for manufacturing a controlled substance and possession of a precursor. **AFFIRMED.**

Mark A. Milder of Correll, Sheerer, Benson, Engels, Galles & Demro, P.L.C., Cedar Falls, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brad P. Walz, Assistant County Attorney, for appellee.

Considered by Zimmer, P.J., and Vaitheswaran, J., and Nelson, S.J.*

*Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (2005).

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

Bryan Johnson was charged with Count I, manufacture of five grams or less of methamphetamine, in violation of Iowa Code section 124.401(1)(c) (2003), a class C felony, and Count II, possession of ether with intent to manufacture a controlled substance, in violation of section 124.401(4), a class D felony.

On November 15, 2004, Johnson was in the process of manufacturing methamphetamine in a shed behind his father's house when he was discovered by Evansdale police officers. In the shed officers found coffee filters with methamphetamine residue. They also found three glass jars of liquids that contained methamphetamine. The amount of methamphetamine, including that in its liquid form, exceeded five grams. If the liquids were dried, however, the total amount of pure methamphetamine was less than five grams.

The State amended Count I of the trial information to charge Johnson with manufacture of more than five grams of methamphetamine, in violation of section 124.401(1)(b), a class B felony. Johnson entered *Alford* pleas to the charges.¹ He was sentenced to a term of imprisonment not to exceed twenty-five years on Count I, subject to a one-third mandatory minimum, reduced by one-third for pleading guilty. He was sentenced to a term of imprisonment not to exceed five years on Count II, made concurrent to Count I. Johnson now appeals.

¹ In an *Alford* plea, a defendant acknowledges the evidence strongly negates the defendant's claim of innocence, and enters a guilty plea to avoid a harsher sentence. *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 167, 27 L. Ed. 2d 162, 171 (1970); *State v. Knight*, 701 N.W.2d 83, 85 (Iowa 2005).

II. Factual Basis

Johnson contends that he received ineffective assistance of counsel because his attorney permitted him to plead guilty to a violation of section 124.401(1)(b), when there was not a factual basis in the evidence to support a finding that he was manufacturing more than five grams of methamphetamine.² He states that when the liquids were dried, the total amount of pure methamphetamine taken from the shed weighed only 4.27 grams.

To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied defendant a fair trial. *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006). When an attorney permits a defendant to plead guilty to a crime for which there is no factual basis, there has been a breach of an essential duty and prejudice is presumed. *State v. Allen*, 708 N.W.2d 361, 368 (Iowa 2006).

Iowa Code section 124.401(1)(b)(7) does not require a finding that the defendant manufactured more than five grams of pure methamphetamine. *State v. Rivera*, 614 N.W.2d 581, 584 (Iowa Ct. App. 2000). The statute prohibits the manufacture of:

[m]ore than five grams but not more than five kilograms of methamphetamine, its salts, isomers, or salts of isomers, or analogs of methamphetamine, or any compound, mixture, or preparation which contains any quantity or detectable amount of methamphetamine, its salts, isomers, or salts of isomers, or analogs of methamphetamine.

² Generally, when a defendant claims ineffective assistance based on counsel's failure to object to the lack of a factual basis for a guilty plea, the claim may be considered on appeal despite the failure to file a motion in arrest of judgment. See *State v. Royer*, 632 N.W.2d 905, 909 (Iowa 2001).

Iowa Code § 124.401(1)(b)(7). See also *State v. Adney*, 639 N.W.2d 246, 252 (Iowa Ct. App. 2001) (noting the statute prohibits the manufacture of methamphetamine, or any compound, mixture, or preparation containing any quantity or detectable amount of the same).

In applying this statute, we have stated:

We find the statute is plain on its face and does include any compound or mixture which contains any quantity or detectable amount of methamphetamine. Despite Rivera's arguments to the contrary, the plain meaning of the statute clearly includes methamphetamine in a less-than-finished state. The statutory weight was, therefore, satisfied by including the weight of the liquid seized as it contained a detectable amount of methamphetamine.

Rivera, 614 N.W.2d at 584. The supreme court concurs with this interpretation of section 124.401(1)(b). *State v. Royer*, 632 N.W.2d 905, 908 (Iowa 2001).

During the manufacturing process, Johnson processed methamphetamine and a liquid. The liquid contained a detectable amount of methamphetamine, and so under section 124.401(1)(b), the total weight of the liquid was properly considered in determining whether Johnson manufactured more than five grams of methamphetamine or a compound, mixture, or preparation which contained methamphetamine. We find there was a factual basis in the evidence for Johnson's guilty plea to a violation of section 124.401(1)(b). We conclude Johnson has failed to show that he received ineffective assistance of counsel on this issue.

III. Guilty Plea

Johnson claims that he received ineffective assistance because his counsel did not advise him to plead guilty at the time of his arraignment to the

class C felony charged against him at that time. He asks to have this claim preserved for possible postconviction relief. The State agrees that this issue should be preserved. We determine the issue should be preserved. See *State v. Tate*, 710 N.W.2d 237, 241 (Iowa 2006).

We affirm Johnson's convictions.

AFFIRMED.