IN THE COURT OF APPEALS OF IOWA

No. 6-449 / 05-1007
Filed July 26, 2006

MARK ELLIS MAESCHEN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Marion County, Darrell Goodhue, Judge.

Applicant appeals the district court's denial of his request for postconviction relief from his convictions for conspiracy to manufacture methamphetamine and possession of a precursor. **AFFIRMED.**

Alfredo Parrish and Brandon Brown of Parrish, Kruidenier, Moss, Dunn, Boles, Gribble & Cook, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, and Terry Rachels, County Attorney, for appellee.

Considered by Mahan, P.J., and Eisenhauer, J., and Robinson, S.J.*

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

ROBINSON, S.J.

I. Background Facts & Proceedings

Mark Maeschen was convicted of conspiracy to manufacture methamphetamine, possession of methamphetamine, and conspiracy to possess a precursor with the intent to manufacture methamphetamine. The State alleged that Maeschen entered into an agreement with Troy McPhee to manufacture methamphetamine. Maeschen was discovered at an anhydrous ammonia plant at night, with items which could be used to steal anhydrous. McPhee was waiting at Maeschen's farm with other items which could be used to manufacture methamphetamine.

McPhee was subpoenaed to testify at Maeschen's criminal trial, and was expected to testify about the plan to manufacture methamphetamine. McPhee failed to appear when summoned. The State completed its case without his testimony. Maeschen testified that he had gone to the anhydrous plant with the intention of stealing anhydrous. He testified he changed his mind, and was leaving when he was arrested. The jury found Maeschen guilty of the crimes outlined above.

In a motion for a new trial, Maeschen alleged that during closing arguments, Ronald F. Walker, a local attorney, had asked an assistant county attorney, Marc Wallace, why McPhee did not testify, and Wallace stated McPhee had changed his story. Walker sent defense counsel a letter about this conversation. The district court denied the motion for new trial. We affirmed

Maeschen's convictions on appeal.[1] *State v. Maeschen*, No. 02-0028 (Iowa Ct. App. Apr. 30, 2003).

Maeschen filed an application for postconviction relief, claiming he received ineffective assistance based on counsel's failure to: (1) suppress his pretrial statements; (2) disclose a plea offer; (3) advise him of the consequences of testifying; (4) call an expert relative to the amount of methamphetamine; and (5) request an adverse inference instruction. Maeschen also claimed the prosecutor engaged in misconduct by failing to disclose exculpatory evidence that McPhee had changed his testimony. The district court denied the claims for postconviction relief, finding Maeschen had not shown that he received ineffective assistance of counsel. The court concluded that Maeschen had not shown that McPhee's testimony would be exculpatory.

Maeschen filed a motion for reconsideration and/or motion to supplement the record. He asked the court to reconsider its ruling with respect to his claims of ineffective assistance of counsel based on the failure to obtain an expert to testify to the amount of methamphetamine that could have been manufactured. He also asked the court to allow him to supplement the record with evidence and testimony from McPhee. The district court denied the motion.

Maeschen filed a motion to reopen the record, or a motion for new trial. In the motion, Maeschen alleged that a private investigator had located McPhee, who was willing to testify that no conspiracy existed. The district court denied the

---

[1] On appeal, Maeschen claimed the State withheld exculpatory evidence that McPhee had changed his testimony. We found Maeschen's bald assertion that McPhee changed his story was insufficient to support the required finding that McPhee's testimony would have been favorable to his defense. State v.*Maeschen*, No. 02-0028 (Iowa Ct. App. Apr. 30, 2003).

motion. Maeschen then filed an application to make an offer of proof. Before the district court could rule on this application, however, Maeschen filed a notice of appeal.

II. Ineffective Assistance

Our review of an allegation of ineffective assistance of counsel is de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, an applicant must show (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied applicant a fair trial. *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006).

A. Pretrial Statements

Maeschen contends he received ineffective assistance because his trial counsel did not file a motion to suppress his pretrial statements. At the postconviction hearing Maeschen testified officers told him, "You work with us, and it will – it will help you out down the road." He also stated the officers told him that his cooperation would be in his best interest. The officer who interviewed Maeschen at the time of his arrest specifically stated that he was not a person who could promise anything. Trial counsel testified he reviewed the record, and did not think there were valid grounds to file a motion to suppress.

A defendant's statements may be suppressed if they were induced by force, threats, promises, or other improper inducements. *State v. McCoy*, 692 N.W.2d 6, 27 (Iowa 2005). The district court determined, "there is no factual basis for finding that any promise was made which would render the applicant's statements at the time of the arrest subject to a motion to suppress." We agree

with the district court's conclusion that Maeschen has failed to show that his statements were induced by improper promises of leniency. An officer may tell a defendant it is better to tell the truth without crossing the line between admissible and inadmissible statements. *Id.* at 28. We find Maeschen has failed to show he received ineffective assistance due to counsel's decision not to file a motion to suppress.

On appeal, Maeschen also states that he was *heavily* under the influence of methamphetamine when he was arrested. This issue was not addressed by the district court, as the court stated, "There is no other factor brought to the Court's attention which would render the applicant's statements at the time of the arrest as being involuntary or the product of duress." Because his issue has not been preserved, we do not consider it on appeal. *See State v. Jefferson*, 574 N.W.2d 268, 278 (Iowa 1997) (noting that an issue which has not been presented to and passed upon by the district court cannot be raised on appeal).

B. Plea Offer

Maeschen claims his trial counsel failed to disclose all plea offers from the State to him. Maeschen and his wife testified at the postconviction hearing that they had not been apprised of all of the plea offers. Ineffective assistance may arise when an attorney fails to tell a defendant that the prosecution has offered a plea to a lesser offense. *See State v. Kraus*, 397 N.W.2d 671, 673-74 (Iowa 1986).

Trial counsel testified he discussed all plea offers with Maeschen. He stated Maeschen rejected the offers because he did not want to spend any time

in jail. The district court found trial counsel had discussed the plea offers with Maeschen. We determine Maeschen has failed to show he received ineffective assistance due to trial counsel's failure to present him with all plea offers from the State.

C. Testifying at Trial

Maeschen asserts he received ineffective assistance because his trial counsel did not fully advise him of the consequences of testifying in his own defense. He states that because McPhee did not testify, the only evidence of the conspiracy came from his own testimony. At the postconviction hearing trial counsel testified he and Maeschen made a joint decision that Maeschen would testify. He stated Maeschen wanted to tell his story, and trial counsel believed it would be the best strategy for Maeschen to explain what he had been doing at the anhydrous plant. Trial counsel stated he believed Maeschen, and thought the jurors would believe him too.

A criminal defendant has a constitutional right to testify in his or her own defense. *State v. Reynolds*, 670 N.W.2d 405, 411 (Iowa 2003). The decision of whether or not to testify is for the defendant, not defense counsel to make. *Ledezma v. State*, 626 N.W.2d 134, 146 (Iowa 2001). Defense counsel should offer advice to enable defendant to make a well-informed decision. *Reynolds*, 670 N.W.2d at 411.

The district court found that trial counsel made a strategic decision to advise Maeschen to testify and tell his version of events. Maeschen agreed and wanted to testify. Generally, we will not second-guess reasonable trial strategy.

State v. Wissing, 528 N.W.2d 561, 564 (Iowa 1995). We note the circumstantial evidence that Maeschen was apprehended at an anhydrous plant while McPhee waited at his farm with other ingredients for manufacturing methamphetamine pointed to a conspiracy.[2] Trial counsel made a valid strategic decision to have Maeschen attempt to explain his participation in these events. We find Maeschen has failed to show he received ineffective assistance on this ground.

D. Quantity of Methamphetamine

Maeschen was convicted of conspiracy to manufacture more than five grams of methamphetamine, which is a class B felony under Iowa Code section 124.401(1)(b) (2001). If five or less grams of methamphetamine could have been manufactured, then Maeschen would have been guilty of only a class C felony, under section 124.401(1)(c). Maeschen contends his trial counsel should have done more to dispute the amount of methamphetamine which could have been produced by the precursors found in his and McPhee's possession. At the postconviction hearing Maeschen presented the report of Dr. Robert M. Moriarty, which indicated the State failed to show with scientific certainty the amount of methamphetamine which could be produced.

The district court found Dr. Moriarty's opinion was not germane because it presumed the State needed to show an amount of pure methamphetamine. Section 124.401(1)(b) requires the State to show five or more grams of methamphetamine, or any compound, mixture, or preparation containing any

[2] An agreement to form a conspiracy does not need to be formal and express. *State v. Speicher*, 625 N.W.2d 738, 742 (Iowa 2001). An agreement may be inferred from the circumstances of the case. *Id.* Thus, the evidence of a conspiracy was not negated simply because McPhee did not testify.

quantity or detectable amount of the drug. *See State v. Royer*, 632 N.W.2d 905, 908 (Iowa 2001). The State properly presented expert testimony at the criminal trial of the expected yield from certain precursor chemicals. *See State v. Casady*, 597 N.W.2d 801, 807 (Iowa 1999). We find Maeschen failed to show he received ineffective assistance due to counsel's failure to dispute the amount of methamphetamine which could have been produced in this case.

E. Adverse Inference Instruction

Maeschen claims his trial counsel should have requested an adverse inference instruction. He asserts that because McPhee was expected to testify at the criminal trial, but then did not, an inference may be drawn that his testimony would have been favorable to Maeschen. A defendant is entitled to an instruction allowing a negative inference to be drawn from the State's failure to call a witness only when there is "some factual basis in the record independent of the failure itself that would tend to support such an inference." *State v. Wagner*, 410 N.W.2d 207, 211 (Iowa 1987). If the possibility that a witness would have testified adversely to the State is purely speculative, the request for such an instruction is properly denied. *Id.* at 212.

The prosecuting attorney, Ryan Ellis, testified he intended to call McPhee to testify at the criminal trial, but McPhee did not appear. He testified he never received any information that McPhee had changed his testimony. Neither Maeschen nor the State called McPhee to testify at the postconviction hearing. Maeschen has failed to show the State deliberately failed to call McPhee as a witness, or that had McPhee testified, his testimony would have been favorable

to the defense. We find Maeschen has failed to show he received ineffective assistance due to counsel's failure to request an adverse inference instruction. If such a request had been made, it would have been denied. Defense counsel does not have a duty to make a meritless motion. *State v. Rice*, 543 N.W.2d 884, 888 (Iowa 1996).

III. Prosecutorial Misconduct

A. Maeschen contends his fourteenth amendment right to exculpatory evidence was violated when the State failed to disclose that McPhee was not going to testify. He asserts the State violated the rule established by *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 214, 218 (1963), that the suppression of material evidence by the State violates due process. We already addressed this issue in the direct appeal, where we determined Maeschen had failed to show a violation of the *Brady* rule. *State v. Maeschen*, No. 02-0028 (Iowa Ct. App. Apr. 30, 2003).

B. Maeschen asserts the State failed to disclose evidence under the mandatory discovery rule found in Iowa Rule of Criminal Procedure 2.14(2)(*a*)(2), which provides that the State must disclose any statements of a co-defendant which it intends to offer at trial. The district court found there was no evidence the State had any information McPhee would testify differently than that which was set out in the minutes of evidence.

We first note that rule 2.14(2)(*a*)(2) applies, "[w]hen two or more defendants are jointly charged . . . ." Here, Maeschen and McPhee were not charged in the same trial information, and were not co-defendants. However,

even if the rule applied, there is no evidence the State withheld any statements made by McPhee. The prosecutor's testimony at the postconviction hearing showed he had no information that McPhee had changed his testimony and he was surprised that McPhee did not appear to testify.

IV. Post-Trial Motions

A. Maeschen filed two post-trial motions seeking to supplement the record. Maeschen states the district court should have permitted him to supplement the record with McPhee's testimony. The district court has broad discretion on the issue of whether to reopen the record. *In re J.R.H.*, 358 N.W.2d 311, 318 (Iowa 1984). A party must show due diligence was used to secure the evidence in a timely fashion. *State v. Jefferson*, 545 N.W.2d 248, 250 (Iowa 1996).

The district court determined:

> The purpose of the postconviction relief hearing was to allow the applicant to produce evidence that McPhee would have provided exculpatory evidence. The applicant was represented by counsel and failed to produce such evidence by the testimony of McPhee or by any other witness. If such evidence is available, it should have been produced at that hearing. The applicant had ample time to produce the alleged "exculpatory evidence," but none was forthcoming.

In ruling on the second motion, the district court stated, "The Application is not supported by an affidavit from McPhee and is nothing more than a naked assertion as to what McPhee might state."

We agree with the district court's conclusions. Maeschen has not stated any reason why McPhee was not called at the postconviction hearing. Maeschen had the opportunity to call McPhee as a witness at that hearing, but

failed to do so. We find the district court did not abuse its discretion by refusing to reopen the record to permit McPhee's testimony.

B. Finally, Maeschen asserts the district court abused its discretion by not granting his motion to make an offer of proof. The district court never ruled upon this motion prior to Maeschen's filing of a notice of appeal. By filing an appeal prior to the district court's ruling on the motion, Maeschen has waived this issue on appeal. *See IBP, Inc. v. Al-Gharib*, 604 N.W.2d 621, 628 (Iowa 2000) (noting that when a party who has filed a post-trial motion appeals before there is a ruling on the motion, the party is deemed to have waived and abandoned the motion).

We affirm the district court's decision denying Maeschen's request for postconviction relief.

AFFIRMED.