

IN THE COURT OF APPEALS OF IOWA

No. 6-607 / 05-0888
Filed October 11, 2006

JAMES BOYD BROWN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Karen A. Romano and Scott D. Rosenberg, Judges.

A postconviction relief applicant appeals from the district court's denial of his application. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender and Martha J. Lucey, Assistant Appellate Defender, for applicant-appellant.

Thomas J. Miller, Attorney General, Mary E. Tabor, Assistant Attorney General, John P. Sarcone, County Attorney, and Joseph Weeg, Assistant County Attorney, for respondent-appellee.

Considered by Vogel, P.J., and Miller and Eisenhauer, JJ.

VOGEL, P.J.

James Brown appeals from the district court's order denying his application for postconviction relief. Because we conclude the district court correctly denied Brown's application for postconviction relief, we affirm.

I. Background Facts and Proceedings.

Brown's Des Moines residence was under investigation by narcotics enforcement officers in April and May 2001 following complaints about the strong smell of anhydrous ammonia emanating from his garage. Officers conducted a warrantless search of Brown's garage on May 18, 2001, when they noticed a strong smell of ether coming from the garage's air conditioner. Upon seeing empty ether containers, propane tanks, and marijuana inside the garage, the officers secured the premises and obtained a warrant to search both the garage and the house. The search yielded numerous items consistent with the manufacture of methamphetamine, as well as several firearms. Three firearms were located in a bedroom closet in the house, where a coffee filter and a coin roll both with a white, powdery substance and two straws were discovered nearby. The substance was later confirmed by a laboratory analysis to be methamphetamine residue. The minutes of testimony describe the firearms as located in the closet of the northeast bedroom, and the other items found in a dresser drawer in the east bedroom. Brown admitted in a statement to police to cooking methamphetamine every two-and-a-half to three weeks and acknowledged having finished product in the house for personal use.

In June 2001, Brown was charged with (1) manufacture of methamphetamine while in the immediate possession or control of a firearm

(second offense); (2) possession of methamphetamine with the intent to deliver while in immediate possession or control of a firearm (second offense); (3) three counts of dominion or control over a firearm while being a convicted felon; and (4) possession of marijuana. Following Brown's unsuccessful suppression motion and a waiver of his right to a jury trial, the case was tried to the court based upon a stipulation to the minutes of testimony. The district court found Brown guilty of all counts. Brown only challenged on direct appeal the warrantless search of his garage and the subsequent search by warrant of his house and garage. Our court affirmed Brown's convictions in February 2003. *State v. Brown*, No. 01-1932 (Iowa Ct. App. February 12, 2003).

Brown filed an application for postconviction relief in June 2004, raising four issues: (1) trial counsel failed to communicate a counter-plea offer; (2) trial counsel improperly raised the motion to suppress; (3) trial counsel failed to listen to Brown; and (4) trial counsel failed to have Brown present at depositions. Brown's appointed postconviction counsel filed a request for an evidentiary hearing in July 2004 but did not amend Brown's pro se application. Hearing was held in April 2005, after which the postconviction court denied the application. Brown appeals, arguing ineffective assistance of both appellate and postconviction relief counsel.

II. Scope of review.

Postconviction proceedings are reviewed for errors of law. *Rhiner v. State*, 703 N.W.2d 174, 176 (Iowa 2005). Issues of constitutional dimension, however, are reviewed de novo. *Id.* A claim of ineffective assistance of counsel requires a de novo review because the claim is derived from the Sixth

Amendment of the United States Constitution. *Bowman v. State*, 710 N.W.2d 200, 203 (Iowa 2006). In order to succeed on a claim of ineffective assistance of counsel, a defendant must prove (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Id.* Counsel is not ineffective for failing to raise an issue with no merit, *State v. Wills*, 696 N.W.2d 20, 24 (Iowa 2005), and the failure to prove either a breach of an essential duty or prejudice is fatal to an ineffective assistance of counsel claim. *State v. Liddell*, 672 N.W.2d 805, 809 (Iowa 2003).

III. Ineffective Assistance—Firearms Enhancements.

Brown argues on appeal that his appellate counsel and postconviction counsel were both ineffective for failing to challenge the sufficiency of the evidence regarding the firearms enhancements against him. He argues that the evidence stipulated to in the minutes of testimony is not sufficient to prove beyond a reasonable doubt the enhancement under Iowa Code section 124.401(1)(e) (1999) that he was either in possession of or had control over the guns when committing the drug offenses. Brown submits that the ineffectiveness of his appellate counsel and postconviction relief counsel are sufficient grounds to meet the exception to error preservation on this issue.

Brown does not dispute that “the evidence in the minutes of testimony is sufficient to prove that he had dominion and control over the weapons found within his residence.” However, he argues the evidence is insufficient to prove “immediate control” of the firearms while participating in the drug offenses.¹ Iowa Code section 124.401(1)(e) is a penalty-enhancement provision for use in

¹ The parties do not dispute that Brown was not in immediate possession of the firearms at the time of his arrest, as he was not initially home when the warrant was executed.

conjunction with drug possession, distribution and manufacturing offenses set forth in section 124.401(1). It provides:

A person in the immediate possession or control of a firearm while participating in a violation of this subsection shall be sentenced to two times the term otherwise imposed by law, and no such judgment, sentence, or part thereof shall be deferred or suspended.

Iowa Code § 124.401(1)(e). Our supreme court has interpreted this section, and particularly “immediate control,” as follows:

[W]e find that immediate control, as used in section 124.401(1)(e), is the same as direct control as defined in our prior cases. Thus, while immediate possession, as found in section 124.401(1)(e), may require the firearm to be located on the defendant’s person, immediate control necessitates only that the firearm be in such close proximity to the defendant as to enable him to claim immediate dominion over the firearm.

State v. Eickelberg, 574 N.W.2d 1, 4 (Iowa 1997).

The case for immediate control over a firearm should be evaluated on a case by case basis. In *Eickelberg*, the court concluded,

We agree with the district court’s finding that the guns found in the bedroom of the defendants’ home were in their immediate possession or control. The immediate control of the weapons in the bedroom closet was established by the testimony of the paramedics and police officer who were in the bedroom with Eickelberg and Mercer at the time of the initial response to the 911 call. The testimony given by the paramedics and the officers present in the home that evening varies with regard to the distance between the bed and the closet and the size of the bedroom. Testimony regarding the distance between the bed and the closet ranged from three to six feet. One officer testified he thought it would be possible to reach from the bed to the closet door, without even taking a step. The size of the bedroom was estimated between eight by eight feet to fourteen by fourteen feet. Testimony regarding whether the closet door was open or shut at the time both defendants were in the bedroom was inconclusive; the witnesses were not able to recall. While neither defendant had actual possession of the weapons while they were in the bedroom, they were “in such close proximity to the [weapons] as to claim immediate dominion over them.” All it would have taken for the

defendants to gain actual possession of the weapons was to take one or two large steps toward the closet.

Id. at 5 (citation omitted).

Such evidence as to the exact location of the firearms in relation to the illegal substances and paraphernalia is not as clear in Brown's case, nor was he present to be in close proximity to the firearms at the time of the search. However, there is evidence as to where the firearms were located and where the controlled substances were located. Although we do not have information on exactly how close these locations are, there is no dispute that the firearms and drugs and paraphernalia were all located in the same area in Brown's residence. Brown admitted that he had finished product of the methamphetamine in the house, where a coffee filter, two straws and coin roll all with traces of methamphetamine on them were found in the bedroom. Brown's argument on appeal misstates the record, in that the minutes of testimony² state the firearms were found in the northeast bedroom, not the northwest bedroom as Brown claims. The drugs and paraphernalia were found in the east bedroom in the top drawer of a dresser. It is unclear whether these are in fact two descriptions of the same bedroom, but at a minimum the firearms and illegal substances were thus found on the same side of the house as each other. From the photo of the house submitted at the suppression hearing, the residence appears to be a smaller home, and traversing between rooms on the

² The exhibit/evidence list from the Clandestine Laboratory Emergency Response Team of the Iowa Division of Narcotics Enforcement corroborates that the firearms were found in the northeast bedroom closet.

same side of the house would not take many steps. We also agree with the State's argument that the methamphetamine discovered in the coffee filter is circumstantial evidence that the manufacturing process was not limited to the garage, but spilled over into the house.

Therefore, we conclude that the evidence on the record substantially supports the district court's finding that Brown could have exercised immediate control and/or dominion over the firearms in the house while committing the methamphetamine manufacturing and possession offenses for purposes of the enhancements. As there was sufficient evidence on the record to support Brown's convictions with the firearm enhancements, his appellate and postconviction counsel had no duty to raise a meritless issue. *Wills*, 696 N.W.2d at 24. We affirm the dismissal of Brown's application for postconviction relief.

AFFIRMED.