IN THE COURT OF APPEALS OF IOWA

No. 7-182 / 05-2004
Filed August 8, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID LOREN BOLL,
Defendant-Appellant.

Appeal from the Iowa District Court for Delaware County, Monica L. Ackley, Alan L. Pearson, and Lawrence H. Fautsch, Judges.

David Loren Boll appeals from his convictions for several drug-related charges. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis D. Hendrickson, Assistant State Appellate Defender, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas W. Andrews, Assistant Attorney General, and John Bernau, County Attorney, for appellee.

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

VAITHESWARAN, J.

Items used in the manufacture of methamphetamine were discovered in a ditch in Delaware County. Officers set up surveillance of the site and subsequently apprehended David Boll.

A jury found Boll guilty of (1) possession of ethyl ether with intent to use the product to manufacture methamphetamine, (2) possession of anhydrous ammonia with intent to use the product to manufacture methamphetamine, (3) possession of lithium with intent to use the product to manufacture methamphetamine, (4) possession of pseudoephedrine with intent to use the product to manufacture methamphetamine, (5) unlawful possession or transportation of anhydrous ammonia, (6) possession of methamphetamine, and (7) interference with official acts. Iowa Code §§ 124.401(4)(b), (c), (d), (f); 124.401(5); 719.1(1) (2003).

On appeal, Boll argues through appellate counsel that (1) the district court should not have allowed the testimony of a State witness who was not identified until "the trial was well underway" and (2) trial counsel provided ineffective assistance in several respects. In two pro se filings, Boll raises several additional challenges to the judgment and sentences.

I. Testimony of State Witness.

Boll first contends the district court should not have admitted the testimony of a State witness who was not identified until trial. Our review of this issue is for an abuse of discretion. *State v. LeGrand*, 501 N.W.2d 59, 62 (Iowa Ct. App. 1993).

Resolution of this issue is governed by Iowa Rule of Criminal Procedure 2.19(3), which states:

> *Failure to give notice.* If the prosecuting attorney does not give notice to the defendant of all prosecution witnesses (except rebuttal witnesses) at least ten days before trial, the court may order the state to permit the discovery of such witnesses, grant a continuance, or enter such other order as it deems just under the circumstances. It may, if it finds that no less severe remedy is adequate to protect the defendant from undue prejudice, order the exclusion of the testimony of any such witnesses.

The key word in this rule is "may." Noncompliance with rule 2.19(3) does not necessarily require exclusion of witness testimony. *LeGrand*, 501 N.W.2d at 62.

There is no question the challenged witness was not identified until trial. However, the purpose behind the rule, which is to afford defense counsel an opportunity to prepare and adequately defend the charges, *id.,* was not circumvented.

One of the State's early witnesses attempted to testify about a contested element of the fifth count, the unlawful possession or transportation of anhydrous ammonia.[1] Defense counsel objected based on a lack of foundation. The district court sustained the objection. In light of this ruling, the State asked to call a previously unlisted witness, Donald Quint, to testify about the proper transport of anhydrous ammonia. Defense counsel again objected, this time based on the late designation. The district court offered counsel a twenty-minute continuance to take the witness's deposition. The State and defense agreed that the State, instead, would make an offer of proof outside the presence of the jury. At the

[1] The jury instructions identified the element as follows: "The Defendant possessed the anhydrous ammonia in a container or receptacle which was not authorized by the Secretary of Agriculture to hold anhydrous ammonia."

conclusion of the proffer, defense counsel renewed his objection based on the timeliness of the designation and also objected based on a lack of foundation. The district court allowed Quint to testify before the jury.

As defense counsel was aware, the State was seeking to substitute a witness for the witness whose testimony was excluded. As counsel had the opportunity to question the substituted witness in advance of his testimony before the jury, we conclude the district court did not abuse its discretion in admitting the challenged testimony. *Id.* at 63. (finding no abuse of discretion under similar circumstances).

II. **Ineffective Assistance of Counsel.**

Boll contends trial counsel was ineffective in several respects. To establish an ineffective assistance of counsel claim a defendant must show (1) counsel failed to perform an essential duty, and (2) prejudice. *Strickland v. Washington,* 466 U.S. 668, 697, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Under the prejudice prong, a defendant must establish a reasonable probability that, but for counsel's claimed errors, the result of the proceeding would have been different. *Id*. at 695, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 696, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699. On our de novo review, we conclude that all of Boll's claims may be resolved on the prejudice prong.

Officers conducting surveillance of the ditch in which the drug-related items were found observed bursts of light in the darkness. As the light drew closer, they heard a person approaching, first by bicycle and then on foot. The

person, later identified as Boll, entered the ditch and headed to the items that were discovered earlier. The officers heard rustling, as though someone was digging through a bag. Boll came out of the ditch with a bag. He was wearing black chemical gloves.

The officers turned on their flashlights and identified themselves. Boll fled, but was soon apprehended. Found in the ditch were pseudoephedrine, anhydrous ammonia, lithium batteries, ether, starting fluid, coffee filters, glass jars, side cutters, epoxy glue, paper towels, and chemical gloves.

Officers went to the house in which Boll lived with his parents. During a consensual search of the home, they discovered a coffee filter with a white powder residue in Boll's bedroom. The filter tested positive for methamphetamine. An officer opined that "the person living or staying in that room was someone who uses methamphetamine."

In the garage, officers discovered several feet of plastic tubing, a cooler, glassware, a razor, plastic baggies, an aqua pump, a Coleman fuel can, a coffee pot, a two-liter pop bottle with tubing coming out of a hole in the top, a coffee grinder with white powdery residue, a one-pound container of salt, a one-gallon milk jug containing camping fuel and water, burnt tin foil, and the byproducts of methamphetamine manufacturing.

There was testimony about the steps for manufacturing methamphetamine using the anhydrous ammonia and lithium metal method and testimony that the items found in the ditch and the garage could, together, be used to complete the manufacturing process. Specifically, an officer stated that "the first two or three

steps [of the manufacturing process] were located at the ditch site . . . and the final stages, the items used to finish it, are all there in the garage."

With respect to Count V, Quint testified that a bucket in which anhydrous ammonia was found was "[a]bsolutely not" an approved or authorized vessel for the transportation or storage of that substance. He stated, "[y]ou've got to have a pressurized vessel, plaquarded (sic) accordingly, and that doesn't meet any of the qualifications for that."

Finally, with respect to the interference with official acts count, the State presented overwhelming and essentially undisputed evidence that the officers identified themselves as peace officers before Boll fled and yelled at him "to stop running."

In light of this overwhelming evidence, we conclude Boll could not prove his ineffective-assistance-of-counsel claims.

III. **Pro Se Claims.**

Boll, acting pro se, filed a "Reply Brief" and "Amended Reply Brief." Those briefs raise several additional issues, none of which were raised in appellate counsel's original brief.[2]

It is established that an appellant may not raise an argument for the first time in a reply brief. *State v. Schultz*, 245 N.W.2d 316, 318 (Iowa 1976). Although Boll filed the brief pro se, the brief must be judged by the same standard as a brief filed by an Iowa lawyer. *Cf. In re Estate of DeTar*, 572

[2] Boll raised a challenge to the sufficiency of the evidence, as did appellate counsel, but appellate counsel's argument was limited to Count V and was raised as an ineffective-assistance-of-counsel claim. Boll's pro se claim was primarily grounded in the distinction between actual and constructive possession, although he also raised factual discrepancies in the State's evidence.

N.W.2d 178, 180 (Iowa Ct. App. 1997). In light of these rules, we decline to consider the additional issues raised in the reply briefs.[3]

AFFIRMED.

[3] Among Boll's pro se arguments is an assertion that he was forced to proceed to sentencing without counsel. We recognize that the Sixth Amendment right to counsel extends to sentencing proceedings. *State v. Jones*, 238 N.W.2d 790, 792 (Iowa 1976). We also recognize that Boll did not waive this right. *Id.* (stating right is subject to a valid waiver). Finally, it is established that, if Boll's challenge were a challenge to the legality of his sentence, it could be raised at any time. *State v. Chadwick*, 586 N.W.2d 391, 393 (Iowa Ct. App. 1998). Boll's argument is not a challenge to the legality of his sentence but a claim grounded in the Sixth Amendment to the United States Constitution. *Id.* We have stated this type of claim must be timely raised. *Id.*