IN THE COURT OF APPEALS OF IOWA

No. 8-011 / 07-0098
Filed May 14, 2008

BOBBY ROBEY,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble, Judge.

Applicant appeals following the district court's denial of his application for postconviction relief. **AFFIRMED.**

Robert Montgomery of Parrish, Kruidenier, Dunn, Boles, Gribble, Cook, Parrish, Gentry & Fisher, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney General, John P. Sarcone, County Attorney, and Stephan Bayens, Assistant County Attorney, for appellee State.

Heard by Vogel, P.J., and Zimmer and Baker, JJ.

ZIMMER, J.

Bobby Robey appeals following the district court's denial of his application for postconviction relief. He claims his trial counsel provided him ineffective assistance in (1) not requesting a jury instruction providing that an accomplice's testimony must be corroborated in order to support a conviction and (2) not objecting to the jury instruction on aiding and abetting. We affirm the judgment of the district court.

I. Background Facts and Proceedings.

On September 30, 2000, Deputy Tom Griffiths observed that the driver in a passing vehicle was not wearing his seatbelt. The deputy followed the vehicle into a parking lot of a warehouse trucking business. The driver, Scott Russell, and his passenger, Robey, got out of the car as soon as it stopped. Russell stayed by the car while Robey went between a shed and a large truck in a weeded area. The deputy ordered both individuals to get back into the vehicle and asked Russell for his driver's license and proof of insurance. After learning that Russell's insurance was expired, the deputy took Russell back to his patrol car and left Robey in the passenger seat of Russell's vehicle.

Deputy Griffiths obtained Russell's consent to search his vehicle. Upon approaching the car, he saw a black "bank or pencil bag" with a plastic bag hanging out of it on the floor of the car. He also observed "some drug paraphernalia . . . in the front seat of the car and on the floorboard." The vehicle had a "big wide flip-down ashtray just to the right of the steering wheel" with a "big open tray-type space underneath [the] dash." The deputy discovered a large quantity of methamphetamine to the right of the ashtray underneath the

dashboard on the passenger side of the car. He found a smaller amount of methamphetamine and some marijuana in an "Indian coin purse" to the left of the ashtray underneath the dashboard. The deputy also discovered what he described as a "black planner" lying on the ground underneath the car on the passenger side. There was some methamphetamine, drug paraphernalia, and an electronic digital scale inside of the planner. He found $1527 in cash in Robey's pants pocket.

Russell and Robey were charged in a joint trial information with conspiracy to deliver methamphetamine in violation of Iowa Code section 124.401(1)(b)(7) (1999), possession of methamphetamine with intent to deliver in violation of section 124.401(1)(b)(7), failure to possess a tax stamp in violation of sections 453B.3 and 453B.12, and possession of marijuana in violation of section 124.401(5). Prior to trial, Russell agreed to testify against Robey. Russell thereafter pled guilty to failure to possess a tax stamp and possession of marijuana, and the State dismissed the remaining charges against him.

On the morning of the jury trial, the State filed an amended trial information against Robey. The amended trial information sought a habitual offender enhancement and alleged Robey either committed or aided and abetted in the commission of possession of methamphetamine with intent to deliver, failure to possess a tax stamp, and possession of marijuana.[1]

At trial Russell testified that the small amount of methamphetamine and marijuana in the Indian coin purse was his. He bought the methamphetamine from Robey the night before they were stopped by Deputy Griffiths. Russell

[1] The conspiracy charge was not included in the amended trial information.

testified that when they were sitting in his car waiting for the deputy to come back, Robey told him "he had three ounces of methamphetamine and not to let the police officer search the vehicle." Russell hid his Indian coin purse underneath the dashboard, and Robey asked him if there was somewhere in the car where he could hide his drugs. Before Russell could respond, the deputy came back and took him to the patrol car. Russell testified that he had seen the black planner that was discovered on the ground underneath the passenger side of the car in Robey's possession on prior occasions. He alleged that he had purchased methamphetamine from Robey fifteen to twenty times before this incident.

The jury found Robey guilty of possession of methamphetamine with intent to deliver and failure to possess a tax stamp. They found him not guilty of possession of marijuana. Robey filed a direct appeal, which our supreme court dismissed as frivolous.

Robey then filed an application for postconviction relief. He alleged his trial counsel was ineffective because she did not request a jury instruction on corroboration of accomplice testimony. A hearing was held on Robey's postconviction relief application on June 1, 2006. At the hearing, the State argued that an accomplice instruction was not necessary because Russell was not Robey's accomplice. In so arguing, the State asserted that although the case was presented to the jury under an alternative aiding and abetting theory, there was no evidence presented at trial to support that theory.

After the hearing, Robey filed a motion to amend his postconviction relief application, seeking to add an additional claim that his trial counsel was

ineffective because she did not object to the aiding and abetting jury instruction. The district court allowed the amendment and entered a ruling denying Robey's application for postconviction relief. Robey appeals, raising the same two ineffective-assistance-of-counsel claims that he asserted in the postconviction relief proceedings.

II. Scope and Standards of Review.

Postconviction proceedings are generally reviewed for correction of errors at law. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). However, when an applicant raises issues of constitutional dimension, such as ineffective assistance of counsel, our review is de novo. *Id.*

III. Discussion.

In order to succeed on a claim of ineffective assistance of counsel, Robey must prove by a preponderance of evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *Ledezma*, 626 N.W.2d at 142. Under the first element, we measure counsel's performance against the standard of a reasonably competent practitioner. *Ledezma*, 626 N.W.2d at 142. In doing so, we begin "with the presumption that the attorney performed his duties in a competent manner." *State v. Maxwell*, 743 N.W.2d 185, 196 (Iowa 2008).

Prejudice is shown by a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceedings. *State v. Carillo,* 597 N.W.2d 497, 500 (Iowa 1999).

However, if the claim lacks the necessary prejudice, we can decide the case on the prejudice prong of the test without deciding whether the attorney performed deficiently. *Maxwell*, 743 N.W.2d at 196.

A. Failure to Request Accomplice Jury Instruction

Robey first claims that his trial counsel provided him ineffective assistance because she did not request the court to give Iowa Uniform Criminal Jury Instruction 200.4 regarding corroboration of an accomplice's testimony. This instruction is based on Iowa Rule of Criminal Procedure 2.21(3), which provides:

> A conviction cannot be had upon the testimony of an accomplice or a solicited person, unless corroborated by other evidence which shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

In its postconviction relief ruling, the district court determined Russell was Robey's accomplice as a matter of law. *See State v. Douglas*, 675 N.W.2d 567, 571 (Iowa 2004) ("An accomplice is a person who 'could be charged with and convicted of the specific offense for which an accused is on trial.'" (citation omitted)). The State does not dispute this finding in its argument on appeal. Instead, it argues Robey cannot establish that he was prejudiced by his trial counsel's decision to not request the instruction. We agree.

The record reveals ample corroboration of Russell's testimony that the majority of the drugs found in his vehicle belonged to Robey. Corroborative evidence may be direct or circumstantial. *State v. Bugely*, 562 N.W.2d 173, 176 (Iowa 1997). It need not be strong or confirm each material fact of the accomplice's testimony. *State v. Brown*, 397 N.W.2d 689, 695 (Iowa 1986). Evidence asserted as corroborative of an accomplice's testimony will be

sufficient "if that evidence corroborates some material aspect of the accomplice's testimony tending to connect defendant to the commission of the crime and thereby supports the credibility of the accomplice." *Id.* at 694-95.

In this case, Deputy Griffiths testified that he discovered a large quantity of methamphetamine under the dashboard of Russell's vehicle on the passenger side where Robey was sitting. Detective Skinner from the narcotics task force testified that the department of criminal investigation's lab report showed the methamphetamine found by the deputy weighed approximately 83.8 grams or three ounces, which is a quantity consistent with "[s]omebody that sells methamphetamine." The deputy testified that Robey had an opportunity to hide the drugs under the passenger side dashboard when he took Russell back to the patrol car.

Deputy Griffiths also discovered a black planner containing an electronic digital scale, methamphetamine, and drug paraphernalia on the ground underneath the passenger side of the vehicle. The deputy testified that Russell could not have put the planner there because he "had visual contact with [him] the whole time." He believed Robey placed the planner underneath the car "when he jumped out of the car at first." Finally, the deputy testified that Robey had a bundle of cash totaling $1527 in his pants pocket. Detective Skinner testified that drug dealers typically have large amounts of cash in their possession.

Based on the evidence supporting Robey's guilt, including that which corroborates Russell's testimony, there is no reasonable probability that, but for Robey's counsel's failure to ask the court to give an instruction on corroboration

of accomplice testimony, the result of the proceedings would have been different. We accordingly find Robey is unable to establish prejudice.

B. *Failure to Object to Aiding and Abetting Jury Instruction.*

Robey next claims his trial counsel provided ineffective assistance because she did not object to the jury instruction on aiding and abetting. The State alleged in its amended trial information against Robey that he either committed or aided and abetted in the commission of the crimes he was charged with. The jury was therefore instructed,

> All persons involved in the commission of a crime, whether they directly commit the crime or knowingly "aid and abet" its commission, shall be treated the same way.
>
> "Aid and abet" means to knowingly approve and agree to the commission of a crime, either by active participation in it or by knowingly advising or encouraging the act in some way before or when it is committed. . . . Mere nearness to, or presence at, the scene of the crime, without more evidence, is not "aiding and abetting." Likewise, mere knowledge of the crime is not enough to prove "aiding and abetting."

Robey contends the district court should not have given the aiding and abetting instruction when no evidence existed to support it. *See Maxwell*, 743 N.W.2d at 196. However, even if we assume trial counsel failed to perform an essential duty when she did not object to the instruction,[2] we do not believe Robey has established the prejudice prong of *Strickland*.

Robey relies on *State v. Mays*, 204 N.W.2d 862, 865 (Iowa 1973), in arguing "that an instruction submitting an issue unsubstantiated by evidence is generally prejudicial." As our supreme court determined in *Maxwell*, "[t]his reliance is misplaced because . . . *Mays* relate[s] to a defendant challenging jury

[2] Robey's trial counsel testified at the postconviction relief hearing that there was a tactical reason for her decision to not object to the instruction.

instructions on direct appeal." *Maxwell*, 743 N.W.2d at 196. Here, as in *Maxwell*, Robey is challenging the jury instruction through an ineffective-assistance-of-counsel claim.

"[I]neffective-assistance-of-counsel claims based on failure to preserve error are not to be reviewed on the basis of whether the claimed error would have required reversal if it had been preserved at trial." *Id.* Instead, Robey must show a breach of an essential duty and prejudice. *Id.* Thus, in the context of an ineffective-assistance-of-counsel claim, "[w]hen the submission of a superfluous jury instruction does not give rise to a reasonable probability the outcome of the proceeding would have been different had counsel not erred . . . no prejudice results." *Id.* at 197. In addition, "when there is no suggestion the instruction contradicts another instruction or misstates the law there cannot be a showing of prejudice for purposes of an ineffective-assistance-of-counsel claim." *Id.*

Robey has not shown how the outcome of the proceeding would have been different had the aiding and abetting jury instruction not been submitted to the jury. Nor has he suggested that the aiding and abetting instruction contradicted another instruction or misstated the law. Instead, he simply argues that prejudice should be presumed under *Mays*. That argument was clearly rejected by the court in *Maxwell*. *Id.* at 196-97. We therefore conclude Robey did not establish he was prejudiced by the submission of the aiding and abetting jury instruction.

IV. Conclusion

We find Robey did not establish he was prejudiced by his trial counsel's failure to request a jury instruction regarding corroboration of an accomplice's

testimony. Nor did he establish he was prejudiced by his counsel's failure to object to an instruction on aiding and abetting. We therefore reject his ineffective-assistance-of-counsel claims. The judgment of the district court denying his application for postconviction relief is accordingly affirmed.

AFFIRMED.