IN THE COURT OF APPEALS OF IOWA

No. 8-012 / 07-0126
Filed May 14, 2008

JOSEPH M. STEPHEN,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Carla T. Shemmel, Judge.

Applicant appeals a ruling denying his application for postconviction relief.

AFFIRMED.

Jesse A. Macro, Jr., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, John P. Sarcone, County Attorney, and Robert DiBlasi, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Huitink and Mahan, JJ.

SACKETT, C.J.

Joseph M. Stephen appeals a ruling denying his application for postconviction relief. He contends that his trial attorney was ineffective in certain respects. We affirm.

Stephen was convicted of manufacturing a controlled substance, in violation of Iowa Code section 124.401(1)(b)(7) (2001), possession with the intent to deliver a controlled substance, in violation of section 124.401(1)(b)(7), failure to affix a drug tax stamp, in violation of sections 453B.3 and 453B.12, and possession of precursors (ether and lithium) with the intent to manufacture, in violation of section 124.401(4)(c) and (f). He appealed to this court and his convictions were affirmed. On June 2, 2005, Stephen filed an application for postconviction relief claiming his trial attorney was ineffective in a number of ways. The district court granted Stephen relief on his conviction for failure to affix a drug tax stamp but denied relief on all other claims. Some were dismissed on summary judgment and the balance of his claims were dismissed after a hearing.

I. BACKGROUND.

In *State v. Stephen*, No. 03-0811 (Iowa Ct. App. Aug. 26, 2004), we found the following facts which we reiterate here. On June 23, 2002, Polk County Sheriff's Deputy Keith Romp stopped a truck driven by Stephen. After approaching the truck and noticing a chemical odor and a LP gas tank in the back, Romp handcuffed Stephen and placed him in the patrol car. A subsequent search of the truck turned up the following items: caffeine in powder form, brass valves, plastic baggies, paper towels, a note with writings about money, a Roundup sprayer, wire cutters, a gas can, a black cylinder with a "blued" valve, a

container with residue, a red funnel with residue, clear tubing, shop vacuum filters, eight bottles of starter fluid, a coffee grinder, Morton salt containers, two 100 gram weights, a business card with the notation "Bucket Beaters Local Number 8," a funnel with a filter, a jug with a clear liquid, a plastic spatula, lithium batteries, a paper with a map, and a wooden spoon. In one of the buckets, officers discovered "sludge," which was later found to contain ten grams of methamphetamine. The paper towels, which were later sent to a lab, contained traces of methamphetamine, pseudoephedrine, and guiafenesin. In addition, two containers held a residue with traces indicative of the methamphetamine making process.

Based on this discovery, on July 24, 2002, the State charged Stephen with manufacture of methamphetamine (Count I), possession with intent to deliver methamphetamine (Count II), failure to affix a drug tax stamp (Count III), possession of the precursor anhydrous ammonia with intent to deliver (Count IV), and possession of the precursor ether with intent to deliver (Count V). On November 26, 2002, the State filed a notice of intent not to prosecute, noting that Stephen had stipulated to parole violations and would return to prison. The State then dismissed the case without prejudice.

On January 30, 2003, the State refiled the five counts against Stephen. On April 7, 2003, just prior to trial, the State moved to amend the trial information, which the court granted. The amendment changed Count IV from possession of the precursor anhydrous ammonia to possession of the precursor lithium.

Following the trial, the jury returned a verdict finding Stephen guilty as charged. The court sentenced him to a term of incarceration not to exceed

twenty-five years on Counts I and II, and five years on Counts III, IV, and V. The court ordered the sentences to be served concurrently. It also originally granted him credit for time served, including the time he served in jail on a different case. On May 20, 2003, Stephen filed a notice of appeal. On October 20, 2003, the court entered an order regarding credit for time served. We affirmed and further review was denied.

On appeal Stephen contends his trial counsel was ineffective in (1) not objecting to an amendment to the trial information, (2) failing to exclude a juror and (3) not calling additional officers as witnesses at a suppression hearing. He also contends the district court erred in dismissing certain claims on summary judgment.

II. INEFFECTIVE ASSISTANCE OF COUNSEL.

Postconviction relief claims that concern the right to effective assistance of counsel are reviewed de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). We make our own evaluation of the totality of the circumstances under this standard. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998). The right to assistance of counsel, under the Sixth Amendment to the United States Constitution and article I, section 10 of the Iowa Constitution, guarantees "effective" assistance of counsel. *Powell v. Alabama*, 287 U.S. 45, 71, 53 S. Ct. 55, 65, 77 L. Ed. 158, 172 (1932); *State v. Kinkead*, 570 N.W.2d 97, 103 (Iowa 1997). To prove a claim of ineffective assistance of counsel, Stephen must show by a preponderance of the evidence that his trial counsel failed to perform an essential duty and prejudice resulted. *State v. Martin*, 704 N.W.2d 665, 669

(Iowa 2005). Stephen's ineffective assistance claim fails if he is unable to prove either element of this test. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997).

The resulting prejudice element of an ineffective assistance claim is satisfied if a reasonable probability exists that, "'but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Martin*, 704 N.W.2d at 669 (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

A. Failing to object to an amendment to trial information.

A claim of ineffective assistance of trial counsel for failure to object to an amendment to the trial information was raised on direct appeal. There we noted,

> Although trial counsel did object to the State's motion to amend the trial information on grounds of inadequate notice, Stephen now alleges counsel had a duty to object to the amendment as a violation of his right to a speedy indictment.

See Iowa R. Crim. P. 2.33(2)(*a*)[1] (providing that an indictment must be found within forty-five days of arrest). We noted while Stephen was originally arrested on June 23, 2002, the State filed the amendment approximately 288 days later. In Stephen's direct appeal we found the record insufficient to address the claim

[1] Iowa Rule of Criminal Procedure 2.33(2)(*a*) provides in applicable part:

> It is the public policy of the state of Iowa that criminal prosecutions be concluded at the earliest possible time consistent with a fair trial to both parties. . . .
>
> a. When an adult is arrested for the commission of a public offense . . . and an indictment is not found against the defendant within 45 days, the court must order the prosecution to be dismissed, unless good cause to the contrary is shown . . . .

and preserved this contention for a possible postconviction relief in order to allow trial counsel an opportunity to explain his conduct. *Stephen*, 690 N.W.2d at 699.

Stephen here makes a different objection to the amendment of the trial information. He contends his trial counsel was ineffective in not objecting under Iowa Rule of Criminal Procedure 2.4(8)(*a*)[2] to the State's amendment of the trial information that changed "possession of the precursor anhydrous ammonia" to "possession of the precursor lithium."

Stephen contends this charged him with an entirely new crime and it could not be changed by amendment. He argues anhydrous ammonia is a completely different material than lithium. His brief does not define the substances or discuss the differences in the two precursors except to point out they have different names.

The State, in response to Stephen's challenges, argues that a change from anhydrous ammonia to lithium does not constitute a new and different offense because Iowa Code section 124.401(4)[3] can be violated by the possession, with the intent to use the product to manufacture any controlled

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[2] Iowa Rule of Criminal Procedure 2.4(8)(*a*) states:

> The court may, on motion of the state, either before or during the trial, order the indictment amended so as to correct errors or omissions in matters of form or substance. Amendment is not allowed if substantial rights of the defendant are prejudiced by the amendment, or if a wholly new and different offense is charged.

[3] Iowa Code section 124.401(4) provides:

> 4. A person who possesses any product containing any of the following commits a class "D" felony, if the person possesses with the intent that the product be used to manufacture any controlled substance:
>
> . . . .
>
> d. Anhydrous ammonia.
>
> . . . .
>
> f. Lithium.

substance, of either substance. The State argues that the amendment merely alleged an alternative means of committing the crime and it did not amend to allege committing a different crime as possession of a precursor, whether anhydrous ammonia or lithium, is the same offense.

The State further argues that Stephen cannot show he was prejudiced because he was not surprised by the amendment, nor did it require him to change his theory of defense. The State also argues that his attorney strategically decided to object on another ground and his strategy was reasonable.

We agree with Stephen that anhydrous ammonia is a different substance than lithium. However, our agreement with his argument ends here. A trial information, like an indictment, may be amended to correct errors or omissions of form or substance, so long as a two-pronged test is satisfied: (1) substantial rights of the defendant are not prejudiced thereby, and (2) a wholly new or different offense is not charged. *State v. Berney*, 378 N.W.2d 915, 919 (Iowa 1985); *see also State v. Williams*, 328 N.W.2d 504, 505 (Iowa 1983).

Section 124.401 defines fourteen different products which a person can be found guilty of possessing with the intent that the product be used to manufacture any controlled substance. Amending the trial information to change the product did not change the offense. *See State v. Williams*, 305 N.W.2d 428, 431 (Iowa 1981) (finding an amendment did not change the offense charged where the State added a second way to charge the offense); *see also Berney*, 378 N.W.2d at 919.

The question is whether, the second prong of the test for allowing amendments was satisfied, that is, was Stephen prejudiced. Because this is a postconviction proceeding the burden to show prejudice is on Stephen.

As the State points out, Stephen has failed to show how he was prejudiced by his counsel's failure to object to the amendment on the grounds urged. He makes no claim of surprise nor does he argue he was required to change his theory of defense. We affirm the district court on this issue.

B. Juror.

Stephen next contends that his attorney was ineffective in not seeking to exclude a juror who discovered the remains of a methamphetamine lab on his property. He contends the juror, a farmer, was a victim of sorts. The State contends that Stephen has not shown that the juror held a fixed opinion on the merits of the case or that he could not judge impartially the guilt or innocence of Stephen. The State further points out that Stephen's counsel considered rejecting the juror but did not strike him because the attorney disliked the other jurors more. The State argues that showed the attorney acted reasonably and that Stephen cannot demonstrate he was prejudiced by the presence of the juror on the jury panel because the evidence against Stephen was overwhelming. Again, while arguing this was ineffective assistance of counsel, Stephen fails to state how he was prejudiced here.

The district court noted Stephen's trial counsel testified he did not remember the juror expressing that he could not be fair, and absent evidence of a true bias, the exclusion of jurors was a part of trial strategy. The attorney's failure to exclude the juror Stephen complains of and exclusion of jurors about

whom the attorney was more concerned, was not ineffective assistance of counsel. We agree with the district court's conclusion and further find Stephen has made no showing of prejudice. We affirm on this issue.

C. Suppression hearing.

Stephen next contends his trial attorney was ineffective in not calling additional officers to testify at a suppression hearing to challenge the credibility of Deputy Keith Romp, the officer who conducted the stop that led to his arrest. Stephen contends that in its ruling in the State's favor on the suppression issue, the district court questioned the credibility of Romp. Stephen makes this argument without directing us to those places in the record where the statement he attributes to the suppression court was made, and without pointing to evidence from which one could infer Romp was not credible. Stephen argues only that "[i]f Deputy Romp's credibility was further called into question, it is likely that the court would have suppressed the evidence in question."

The only evidence at the suppression hearing was the testimony of Romp and a videotape of the stop. The postconviction court noted that the suppression court had serious questions about Romp's credibility in that he probably exaggerated the strength of the odor he smelled at the time of the stop and his testimony concerning his observation of the propane tank were inconsistent.

The postconviction court found the suppression court's notation of the weaknesses in Romp's testimony did not justify a finding that Stephen's trial counsel was ineffective in not calling other officers. The postconviction court noted that the suppression court based its suppression decision on the videotape of the stop as well as Romp's testimony. The court also found it was doubtful

that the other officers would have undermined Romp's testimony so as to change the conclusions reached in the suppression ruling. There is no evidence that the other officers would have contradicted Romp's testimony and we cannot surmise that they would. Stephen has made no showing of prejudice. To succeed on a claim of ineffective assistance of counsel the applicant must show a deficient performance and prejudice. *See Ledezma*, 626 N.W.2d at 141. Neither have been shown here and we affirm on this issue.

III. SUMMARY JUDGMENT.

Stephen's last challenge is to the district court's grant of partial summary judgment on several issues. He argues that "[a] review of the record illustrates that material facts exist and the motion in summary judgment, respectfully, should not have been granted." In postconviction relief actions, summary judgment should be granted "when there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Iowa R. Civ. P. 1.981; *Grissom v. State*, 572 N.W.2d 183, 184 (Iowa Ct. App. 1997). Stephen makes no reference to the specific rulings he challenges nor does he cite the facts in the record that would demonstrate there was a genuine issue of material fact. We affirm.

AFFIRMED.