IN THE COURT OF APPEALS OF IOWA

No. 8-062 / 07-0038
Filed February 27, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARCUS TERRILL HESTER,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, J. Hobart Darbyshire, Judge.

Defendant appeals his conviction and sentence for possession with intent to deliver marijuana and driving while barred. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Michael J. Walton, Acting County Attorney, and Kelly Cunningham, Assistant County Attorney, for appellee.

Considered by Mahan, P.J., and Eisenhauer and Baker, JJ.

BAKER, J.

Marcus Hester appeals from his conviction and sentence for possession with intent to deliver marijuana and driving while barred. He contends (1) his trial counsel rendered ineffective assistance in failing to object to certain evidence, (2) the State failed to prove he was mailed a notice that he was barred from driving, and (3) the district court failed to exercise its discretion in sentencing. We reject the ineffective assistance claim because Hester failed to prove prejudice. We remand for dismissal of the driving while barred charge and for resentencing.

I. Background and Facts

On the evening of August 9, 2006, Davenport Police Officer Joshua Stocking encountered a vehicle driven by Marcus Hester. The vehicle did not have its rear license plate illuminated. Officer Stocking pursued the vehicle. When Officer Stocking activated his emergency lights, Hester did not respond. When Officer Stocking activated his siren, Hester continued until he was able to turn onto a street and pull over.

After pulling over, Hester immediately exited the vehicle and ran. Officer Stocking chased him for approximately a quarter of a mile until Hester fell down. The officer placed Hester in handcuffs, patted him down, and searched his pockets. He located a green digital scale in Hester's pants pocket, which field-tested positive for cocaine. Officer Stocking also searched the area of the chase and found a clear plastic baggie containing 33.20 grams of marijuana. He searched the vehicle and found marijuana residue on the floor and a corner of a plastic baggie between the front seats. Hester was transported to the Scott County jail. He had a cell phone and $117.25 cash in his possession.

On August 21, 2006, the State charged Hester with possession of marijuana with intent to deliver in violation of Iowa Code section 124.401(1)(d)(2005) and driving while barred in violation of section 321.561. A jury trial commenced on October 30, 2006. At trial, Officer Kevin Smull, who had been involved in the investigation, testified that he associates scales with the distribution of drugs that are sold by weight and that, under the totality of the circumstances, he associated the weight of the marijuana (approximately four grams more than an ounce) with distribution. The jury found Hester guilty of both charges.[1] On the first charge, Hester was sentenced to a term of incarceration not to exceed five years to be served consecutively to a term for a parole violation, a $1000 fine, and a revocation of his driving privileges. On the driving while barred charge, Hester was sentenced to a term of incarceration not to exceed two years concurrent with the other charge and a $625 fine.

II. Merits

Hester appeals, claiming (1) the State failed to prove the Iowa Department of Transportation (DOT) had mailed him a notice of barment, (2) his trial counsel provided ineffective assistance by failing to object to Officer Smull's testimony of an uncharged bad act, and (3) the district court failed to exercise its discretion when it imposed his sentence.

A. Proof of Notice of Barment

Hester challenges the sufficiency of the evidence that the DOT mailed him notice that he was barred from driving. He contends the State failed to prove the

[1] Hester was also convicted of simple misdemeanor interference with official acts in violation of section 719.1, which is not a subject of this appeal.

DOT mailed the notice. Therefore, he argues, the district court should have granted his motion for judgment of acquittal on the driving while barred charge. We review sufficiency of the evidence challenges for correction of errors at law. *State v. Buenaventura*, 660 N.W.2d 38, 48 (Iowa 2003).

It is the ultimate burden of the State to prove every fact necessary to constitute the crime with which the accused is charged. *State v. Gibbs*, 239 N.W.2d 866, 867 (Iowa 1976). Pursuant to Iowa Code section 321.561, it is unlawful for a habitual offender to operate a motor vehicle unless they have been granted a temporary restricted license.

A driver's knowledge of barment is not an element of a section 321.561 offense. *State v. Carmer*, 465 N.W.2d 303, 304 (Iowa Ct. App. 1990). However, the recent case of *State v. Green*, 722 N.W.2d 650 (Iowa 2006), holds that, where the DOT is required to give notice, failure to prove the DOT mailed the notice precludes a driver's conviction for driving while suspended or barred. Proof that the DOT in fact mailed a notice of barment to the defendant may be accomplished by testimony to support its claim of mailing or an affidavit of mailing. *Green*, 722 N.W.2d at 652. Neither occurred here.

The State concedes that notice is required and that there was no evidence of mailing, but argues that Hester waived error on this issue because his defense counsel in closing argument conceded that Hester was guilty of this charge, and that he did so as a tactical decision to deflect attention from the other charges. This concession, the State argues, is "tantamount to a confession of guilt or a guilty plea," and a guilty plea waives all defenses. Given the court's ruling on the motion for acquittal, counsel cannot be faulted for admitting liability and seeking

to use the lesser charge as a trial tactic. Further, Hester's trial counsel's concession that Hester was guilty of driving while barred is not the equivalent of a guilty plea. "A plea must be voluntarily and intelligently made," and the court must comply with Iowa Rule of Criminal Procedure 2.8(2)(b). *State v. Higginbotham*, 351 N.W.2d 513, 514 (Iowa 1984). Hester's counsel's closing argument concession meets neither of these requirements.

The State concedes that, if the merits of this issue are reached, we should find the district court erred in not dismissing the driving while barred charge. We agree and remand for dismissal of the charge.

B. Ineffective Assistance of Counsel

Hester next contends his trial counsel provided ineffective assistance by failing to object to Officer Smull's testimony that traces of cocaine were found on the scale seized from Hester. Because a criminal defendant's right to reasonably effective assistance of trial counsel is derived from the Sixth Amendment of the United States Constitution, we review ineffective assistance claims de novo. *State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005).

When an ineffective assistance claim is raised on direct appeal, "the court may decide the record is adequate to decide the claim or may choose to preserve the claim for determination" under postconviction relief procedures. Iowa Code § 814.7(3). Because the trial record is often inadequate to allow us to resolve the claim, we frequently preserve an ineffective assistance claim for possible postconviction proceedings to enable a complete record to be developed. *State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004). "We will not, however, preserve a defendant's ineffective-assistance-of-counsel claim and we

will affirm the defendant's conviction on direct appeal if the appellate record shows as a matter of law the defendant cannot prevail on such a claim." *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006) (citing *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003)). Here, we find the record is adequate to resolve Hester's ineffective assistance claim.

To establish that his trial counsel rendered ineffective assistance, Hester must prove both that his counsel failed to perform an essential duty and that prejudice resulted. *State v. Simmons*, 714 N.W.2d 264, 276 (Iowa 2006). To prove the first prong, Hester must overcome a strong presumption that his counsel performed in a competent manner. *See State v. Doggett*, 687 N.W.2d 97, 100 (Iowa 2004). To show prejudice, Hester must prove "a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000) (citing *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984)).

At trial, Officer Smull testified that he found traces of cocaine on the scale seized from Hester. Hester contends this prior bad-act evidence is irrelevant and unfairly prejudicial, and his trial counsel had a duty to object.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." Iowa R. Evid. 5.404(b). For prior bad-acts evidence to be admissible, the State must establish the evidence is "relevant and material to a *legitimate* issue in the case other than a general propensity to commit wrongful acts." *State v. Sullivan*, 679 N.W.2d 19, 25 (Iowa 2004) (citations omitted). "Evidence is

relevant when it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *State v. Plaster*, 424 N.W.2d 226, 229 (Iowa 1988) (quoting Iowa R. Evid. 5.401). If the evidence is relevant, the trial court "must then decide whether the evidence's probative value is substantially outweighed by the danger of unfair prejudice." *Id.* (citations omitted).

"Evidence of other offenses should never be admitted when the other offense is committed wholly independent of the one for which the defendant is on trial." *State v. Liggins*, 524 N.W.2d 181, 188 (Iowa 1994) (citation omitted). In circumstances where bad-acts evidence is relevant to the likelihood the defendant committed the crime for which he is charged, however, the evidence may be admitted. *State v. Crawley*, 633 N.W.2d 802, 807-08 (Iowa 2001). "There must be some connection between the crimes." *State v. Wright*, 191 N.W.2d 638, 641 (Iowa 1971); *see also Liggins*, 524 N.W.2d at 188. In this case, the issue at trial was whether Hester was a marijuana dealer or simply a user. The existence of traces of cocaine on the scale is relevant to whether Hester was involved in the sale of drugs. Further, we find the evidence's probative value is not "substantially outweighed by the danger of unfair prejudice." Iowa R. Evid. 5.403. Even if Hester's trial counsel had objected, the trial court would not have abused its discretion in admitting the evidence. Accordingly, Hester failed to prove the prejudice prong of the ineffective assistance test. Because Hester failed to prove that prong, we need not consider the essential duty prong. *See State v. Tejeda*, 677 N.W.2d 744, 754 (Iowa 2004).

C. Failure to Exercise Discretion

Hester also contends that the district court failed to exercise its discretion in its imposition of his sentence. We review sentencing decisions for errors at law. Iowa. R. App. R. 6.4. Because a district court's sentencing decisions "are cloaked with a strong presumption in their favor," they will be disturbed only upon a showing of an abuse of discretion. *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996).

The district court ordered the sentence for possession of marijuana with intent to deliver to be served consecutively to the term imposed on a parole violation. At Hester's sentencing hearing, the court stated the sentence

> has to be consecutive in my opinion to the sentencing on which your parole will be revoked, and that is pursuant to 908.10 of the Iowa Code . . . . The sentence under Count I will be consecutive to the parole revocation which is mandatory under 908.10.

Pursuant to Iowa Code section 908.10, a "new sentence of imprisonment for conviction of a felony shall be served consecutively with the term imposed for the parole violation, unless a concurrent term of imprisonment is ordered by the court." The court clearly has discretion under 908.10 to order a concurrent term.

We reject the State's argument that the district court used the phrase "has to be consecutive" in a "colloquial, non-legally-mandatory sense." The court went on to state that the sentence "will be consecutive to the parole revocation which is mandatory under 908.10." We find the record demonstrates a failure of the district court to exercise its discretion.

Where a sentence is not mandatory, the district court must demonstrate it has exercised its discretion in determining what sentence to impose. *Thomas*,

547 N.W.2d at 225. Where a court is granted discretion by law and fails to exercise it because it mistakenly believes it has no discretion, we remand for resentencing. *State v. Lee*, 561 N.W.2d 353, 354 (Iowa 1997). In this case, it appears the district court erroneously believed it had no discretion in sentencing Hester for a consecutive term. Therefore, we vacate that portion of Hester's sentence and remand for resentencing, where the district court shall exercise its discretion in selecting a consecutive or concurrent sentence.

III. Conclusion

Hester's counsel did not provide ineffective assistance in failing to object to testimony regarding the presence of cocaine on the scale. Because the State failed to prove that the notice of barment was mailed to Hester, we remand for dismissal of the driving while barred charge. Because the district court erroneously believed it had no discretion in sentencing Hester to a consecutive term, we vacate that portion of Hester's sentence and remand for resentencing.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.