IN THE COURT OF APPEALS OF IOWA

No. 8-667 / 07-1915
Filed September 17, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

VICTOR JUNIOR SMITH,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Mary E. Howes, trial, and J. Hobart Darbyshire, sentencing, Judges.

Defendant appeals his conviction and sentence for delivery of crack cocaine contending he received ineffective assistance of counsel and the court erroneously imposed a sentence enhancement. **AFFIRMED IN PART, VACATED IN PART, AND REMANDED.**

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

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Michael Walton, County Attorney, and Kelly G. Cunningham, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Miller and Potterfield, JJ.

SACKETT, C.J.

Defendant, Victor Junior Smith, appeals his conviction and sentence for delivery of crack cocaine, a schedule II controlled substance, in violation of Iowa Code sections 124.401(1)(c)(3) and 124.206(2)(d) (2007). He contends he received ineffective assistance of counsel at trial and his due process rights were violated at sentencing. We affirm defendant's conviction, vacate his sentence, and remand for resentencing.

I. BACKGROUND.

On the evening of June 26, 2007, two Davenport police officers observed what they believed was a drug transaction after witnessing defendant talking, inspecting currency, and appearing to make an exchange with a woman. The defendant and woman separated and began walking away after noticing the officers. After approaching the woman, the officers recovered five rocks of crack cocaine, each worth approximately twenty dollars. Shortly thereafter, defendant was again spotted in the area with a companion. Officers recovered five twenty dollar bills that defendant asked the companion to hold for him.

Defendant was charged by trial information with delivery of a controlled substance and he was convicted on September 25, 2007, following a jury trial. At the sentencing hearing on October 16, 2007, the attorneys and the court reviewed defendant's extensive history of drug offenses. Although both attorneys argued defendant could not be sentenced as a habitual offender under Iowa Code section 124.411(1) because this section was not charged in the trial information, the court determined it had discretion to triple the sentence under

the statute and sentenced defendant to thirty years of confinement.[1] Defendant appeals, claiming he received ineffective assistance of counsel when his attorney did not request an instruction on possession of a controlled substance as a lesser included offense of the delivery charge. He also argues his due process rights were violated when the court tripled his sentence under Iowa Code section 124.411.

II. SCOPE OF REVIEW.

Ineffective assistance of counsel claims concern a defendant's Sixth Amendment right to counsel, and therefore our review of this issue is de novo. *State v. Scalise*, 660 N.W.2d 58, 61 (Iowa 2003). Under this review, we evaluate counsel's conduct considering the totality of the circumstances. *State v. Lane*, 743 N.W.2d 178, 181 (Iowa 2007). We generally preserve these claims for postconviction relief proceedings to allow for more inquiry into the circumstances surrounding counsel's conduct. *Scalise*, 660 N.W.2d at 62. Yet we will address the merits of the claim if the record is adequate. *State v. Liddell*, 672 N.W.2d 805, 809 (Iowa 2003). In this instance the record is sufficient to resolve defendant's claim. Defendant's other claim alleging error in sentencing implicates his constitutional right to due process and will also be reviewed de novo. *See State v. Mitchell*, 670 N.W.2d 416, 418 (Iowa 2003) ("A claim of

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[1] Iowa Code Section 124.411(1) provides,

> 1. Any person convicted of a second or subsequent offense under this chapter, may be punished by imprisonment for a period not to exceed three times the term otherwise authorized, or fined not more than three times the amount otherwise authorized, or punished by both such imprisonment and fine.

vindictiveness in sentencing implicates constitutional guarantees of due process, making our review of that issue de novo.")

III. INEFFECTIVE ASSISTANCE OF COUNSEL.

Defendant first argues the jury should have been instructed that possession of a controlled substance is a lesser included offense of delivery of a controlled substance. Defendant contends he received ineffective assistance of counsel because his attorney did not request the court to submit this lesser included offense instruction to the jury. To prevail on this claim, defendant must prove "his counsel failed to perform an essential duty and prejudice resulted." *State v. Ondayog*, 722 N.W.2d 778, 784 (Iowa 2006). We may dispose of the claim if the defendant fails to establish either requirement. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997).

"To prove the first prong, defendant must overcome the presumption that counsel was competent and show that counsel's performance was not within the range of normal competency." *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). In evaluating counsel's performance we are mindful that counsel has no duty to raise an issue without merit and competent performance does not demand an attorney anticipate changes in the law. *Millam v. State*, 745 N.W.2d 719, 721-22 (Iowa 2008); *State v. Williams*, 695 N.W.2d 23, 30 (Iowa 2005). If "the merit of a particular issue is not clear from Iowa law, the test 'is whether a normally competent attorney would have concluded that the question . . . was not worth raising." *Millam*, 745 N.W.2d at 722 (quoting *State v. Graves*, 668 N.W.2d 860, 881 (Iowa 2003)).

Defendant argues his counsel should have requested the court to submit possession of a controlled substance as a lesser included offense of delivery. As defendant concedes, Iowa law on this issue is clear. In *State v. Grady*, 215 N.W.2d 213, 214 (Iowa 1974), the Supreme Court concluded possession was not a lesser included offense of delivery of a controlled substance. This holding has been reaffirmed in subsequent case law. *See State v. Spies*, 672 N.W.2d 792, 796-97 (Iowa 2003); *State v. Welch*, 507 N.W.2d 580, 582-83 (Iowa 1993); *State v. Kucera*, 244 N.W.2d 571, 573 (Iowa 1976). Defendant asks us to reconsider the *Grady* holding. However, "[w]e are not at liberty to overturn Iowa Supreme Court precedent." *State v. Hastings*, 466 N.W.2d 697, 700 (Iowa Ct. App. 1990). We therefore conclude defendant's counsel did not breach an essential duty by failing to request a jury instruction that defendant was not entitled to under well established case law.

IV. SENTENCE ENHANCEMENT.

Defendant also contends the district court's sentence enhancement under Iowa Code section 124.411(1) violates defendant's right to due process because the sentence enhancement was not pleaded in the trial information nor proved at trial. The sentence enhancement in section 124.411, which gives the court discretion to triple the sentence or fine for repeat offenders, was not listed in the trial information and a supplemental trial information was not filed. Both defendant and the State at sentencing expressed doubt that the statute could be applied since it was not alleged in the trial information nor proved with evidence of the prior convictions before sentencing. Nonetheless, the court imposed the enhancement concluding it had the discretion to apply the statute and it did not

need to be charged in the trial information. The court also did not require proof of the prior convictions since no one disputed defendant's identity or questioned the existence of previous convictions. On appeal the State and defendant urge this was error because principles of due process, our rules of criminal procedure, and case law require notice and a two-stage trial when a defendant faces enhanced penalties for prior convictions. They contend it is unlikely the court's procedure in this case comported with these guidelines.

We agree with the parties that the court erred in imposing the sentence enhancement when the habitual offender provision was not charged in the trial information or properly proved at trial. The Iowa Rules of Criminal Procedure provide in relevant part,

> If the offense charged is one for which the defendant, if convicted, will be subject by reason of the Code to an increased penalty because of prior convictions, the allegation of such convictions, if any, shall be contained in the indictment.[2]

Iowa R. Crim. P. 2.6(5). The procedure listed in rule 2.6(5) is designed in part to give defendant notice that he is being charged as a habitual offender. *State v. Oetken*, 613 N.W.2d 679, 687 (Iowa 2000); *State v. Robinson*, 165 N.W.2d 802, 804 (Iowa 1969). The rule extends the due process requirements demanded in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63, 147 L. Ed. 2d 435, 455 (2000), to increased sentences based on prior convictions. *State v. Trader*, 661 N.W.2d 154, 156 (Iowa 2003); *State v. Jacobs*, 644 N.W.2d 695, 699 n.1 (Iowa 2001).

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[2] "The term indictment embraces the trial information, and all provisions of law applying to prosecutions on indictments apply also to informations, except where otherwise provided for by statute or in these rules, or when the context requires otherwise." Iowa R. Crim. P. 2.5(5).

> [I]f the State intended to take advantage of the enhancement provision . . . , it was incumbent on it to amend the trial information to allege the prior offense and then either establish that offense at trial on a supplemental information or obtain a plea of guilty to an enhanced charge . . . .

Trader, 661 N.W.2d at 156.

When a defendant faces extra penalties for being a repeat offender, before applying those penalties, the State must also prove the prior convictions beyond a reasonable doubt at a second trial. *State v. Kukowski*, 704 N.W.2d 687, 691 (Iowa 2005). "Generally, the State must prove the prior convictions at the second trial by introducing certified records of the convictions, along with evidence that the defendant is the same person named in the convictions." *Id.* In addition, the State must prove the defendant was represented by counsel in the prior actions or knowingly waived this right. *Id.* Even if the defendant chooses to admit to prior convictions, "the court has a duty to conduct a further inquiry, similar to the colloquy required [for accepting guilty pleas], prior to sentencing to assure the affirmation is voluntary and intelligent." *Id.* at 692.

The State concedes the defendant was not advised by the trial information that the State planned to charge him as a repeat offender. Furthermore, the record does not show defendant affirmatively admitted the prior convictions or that the State proved the prior convictions through certified records. The State had a full and fair opportunity to plead and prove defendant's repeat offender status and it is not entitled to a second bite of the apple to cure this failure. *See State v. Gordon*, 732 N.W.2d 41, 44-45 (Iowa 2007) (prohibiting State from amending trial information on remand to charge defendant as habitual offender when record showed no reason why State was prevented from pleading and

proving the matter initially). We therefore conclude the district court erred in increasing defendant's sentence under section 124.411(1) when the State did not include this charge in the trial information and did not submit proof of defendant's prior convictions. We vacate defendant's sentence and remand for resentencing. We affirm defendant's conviction in all other respects.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.