

IN THE COURT OF APPEALS OF IOWA

No. 9-181 / 08-0010
Filed April 22, 2009

THOMAS DURON WHITE,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Scott County, Mark D. Cleve,
Judge.

Thomas White appeals from the district court's denial of his application for
postconviction relief. **AFFIRMED.**

Robert J. Phelps, Bettendorf, for appellant.

Thomas J. Miller, Attorney General, Linda Hines, Assistant Attorney
General, Michael J. Walton, County Attorney, and Kelly Cunningham, Assistant
County Attorney, for appellee State.

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

POTTERFIELD, J.**I. Background Facts and Proceedings**

In November 2001, Thomas White was charged with delivery of a controlled substance, possession of a controlled substance with intent to deliver, and violation of the drug tax stamp statute. All three charges arose out of an undercover operation conducted by the Davenport Police Department and the Metropolitan Enforcement Group. During this operation, police officers observed White making an apparent drug sale and sent in an undercover agent, Robert McNabb. McNabb bought a twenty dollar rock of crack cocaine from White. After the sale was complete, officers apprehended White. White had thirty-one individually packaged rocks of crack cocaine in his mouth.

The State submitted deposition testimony of McNabb and Corporal Jamie Brown, in addition to testimony of witnesses present at trial. White's counsel, Murray Bell, objected to a portion of Brown's deposition testimony in which Brown discussed whether the amount of crack cocaine seized from White was indicative of personal use or possession with intent to deliver.¹ The State presented exhibits 10A, 10B, and 11 as evidence that a twenty dollar bill found in White's pocket at the time of his arrest matched the serial number of prerecorded money used by McNabb. Bell objected to these three exhibits, which were identified during the depositions of Brown and McNabb.

Exhibit 10A is a photocopy of the evidence tag representing the twenty dollar bill seized from White. Bell made a chain of custody objection to this

¹ White asserted at trial that he possessed the thirty-one rocks of crack cocaine for personal use only, not for delivery.

evidence, arguing that Brown should have photocopied or photographed the twenty dollar bill. Brown testified that he had prepared this exhibit himself. Exhibit 10B is a data card prepared by Officer Jacobs representing the twenty dollar bill that Brown retrieved from White's pocket at the time of his arrest. Bell made a hearsay objection to exhibit 10B. Exhibit 11 is an Illinois State Police prerecorded money list prepared by McNabb which shows the serial number of the twenty dollar bill. Bell objected to this exhibit, arguing it was beyond the scope of the minutes and irrelevant.

On August 9, 2002, the district court found White guilty of possession of a controlled substance with intent to deliver and delivery of a controlled substance in violation of Iowa Code section 124.401(1)(c)(3) (2007).² The district court never specifically ruled upon Bell's objections to the admissibility of exhibits 10A, 10B, 11, or Brown's testimony as to whether the quantity and packaging of the crack cocaine indicated that White likely had the intention to deliver the substance rather than to keep it for personal use.

After the district court announced its judgment, White demanded that Bell withdraw from his representation. Bell considered himself immediately discharged and filed such a motion on August 16, 2002. Mark Fowler was subsequently appointed to represent White. Neither Bell nor Fowler filed any motion seeking to require the district court to address the objections Bell had lodged.

² The district court found White not guilty of the violation of the drug tax stamp statute because the State failed to prove White possessed ten or more dosage units of the drug. This charge is not at issue on appeal.

White appealed his conviction, arguing counsel were ineffective for failing to request that the district court rule upon objections made during the depositions of McNabb and Brown. This court preserved White's ineffective assistance claim for postconviction proceedings, agreeing with White that the district court did not rule on his objections.

White filed for postconviction relief. The postconviction district court heard this matter in two separate hearings and on December 3, 2007, denied postconviction relief. White appeals, arguing Bell and Fowler were constitutionally ineffective in failing to obtain a ruling from the district court regarding Bell's objections to exhibits 10A, 10B, 11, and Brown's deposition testimony.³

II. Standard of Review

Because White alleges a denial of constitutional rights, our review is de novo. *Bugley v. State*, 596 N.W.2d 893, 895 (Iowa 1999).

III. Ineffective Assistance of Counsel

In order to prove counsel were constitutionally ineffective, White must show: (1) counsel failed to perform an essential duty; and (2) prejudice resulted from that failure. *Taylor v. State*, 352 N.W.2d 683, 684 (Iowa 1984). In order to establish the first prong of the test, White must show that his counsel did not act as a "reasonably competent practitioner" would have. *State v. Simmons*, 714 N.W.2d 264, 276 (Iowa 2006). There is a strong presumption that counsel

³ White's claims that counsel were ineffective in failing to secure separate trials and in failing to raise hearsay objections to exhibits 10A and 11 are not at issue on appeal. We also decline to consider White's allegations of ineffective assistance by any attorneys other than Bell and Fowler.

performed competently. *Id.* To satisfy the second prong, White “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* If we can dispose of White’s claim under the prejudice prong, we need not evaluate counsel’s performance. *Id.*

We find that White cannot prove his claim of ineffective assistance by Bell and Fowler for failing to obtain a ruling on Bell’s objection to exhibits 10A, 10B, 11, and to Brown’s expert deposition testimony regarding whether the quantity of drugs suggested personal use or delivery. We agree with the postconviction district court that White was not prejudiced by counsel’s failure to obtain a ruling on these issues. The trial evidence was undisputed that White sold crack cocaine to McNabb. McNabb testified that he purchased a rock of crack cocaine from White, and a surveillance team observed this exchange. When he was arrested, White possessed thirty-one individually packaged rocks of cocaine. Thus, regardless of Brown’s testimony and documentary evidence that a twenty dollar bill had been passed from McNabb to White, the State had ample proof of White’s possession with intent to deliver and delivery of a controlled substance beyond a reasonable doubt. Because the evidence, excluding exhibits 10A, 10B, 11, and the disputed portion of Brown’s deposition, established White’s guilt beyond a reasonable doubt, White cannot show a reasonable probability that the result of the proceeding would have been different had counsel obtained a ruling on Bell’s objections. White has failed to prove prejudice and has therefore failed

to prove ineffective assistance of counsel.

AFFIRMED.