IN THE COURT OF APPEALS OF IOWA

No. 9-215 / 08-0339
Filed May 29, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CECIL WATSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Donna L. Paulsen, Judge.

Cecil Watson appeals from his conviction for conspiracy to distribute crack cocaine, possession with intent to deliver crack cocaine, and failure to possess a tax stamp. **AFFIRMED IN PART AND VACATED IN PART.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, John P. Sarcone, County Attorney, and Stephanie Cox, Assistant County Attorney, for appellee.

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

POTTERFIELD, J.

I. Background Facts and Proceedings

This court has already established the facts relevant to this case in its opinion regarding the appeal of Watson's alleged co-conspirator, Larry Perry:

> On August 30, 2007, police officers obtained a warrant to search Cecil Watson's residence and person. Watson was not at home when officers arrived to search his residence. Later that day, officers received a tip that Watson would be driving to CiCi's Pizza and waited for him in unmarked vehicles. When Watson pulled into the parking lot, officers blocked in the vehicle driven by Watson and converged on the vehicle to execute the warrant.[1] Several officers removed Watson from the car, handcuffed him, and searched him.
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> Officers also approached the passenger side of the car where Larry Perry was seated. When an officer ordered Perry to show his hands, Perry raised his right hand but refused to show his left hand. Lieutenant Eric Nation testified that he saw Perry throw a baggie containing a white substance onto the empty driver's seat vacated by Watson. This baggie was later found to contain a 29.18 gram rock of crack cocaine. After officers removed Perry from the vehicle, they found another baggie containing 1.69 grams of crack cocaine on the left side of the passenger seat, near the area Perry's hand was located when he refused to show it. Officers found a third baggie containing 5.66 grams of crack cocaine inside a brown paper sack on the driver's seat. Officers found no [drugs] . . . on [Watson's] person. The amount of cocaine found in the vehicle was consistent with drug dealing, as it was an amount greater than would be held for personal use. No tax stamps were affixed to the crack cocaine.
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> While officers searched the vehicle, they left Perry and Watson alone in the back seat of a patrol car with a video camera that, unbeknownst to them, was recording their conversation. Perry and Watson discussed the story they would tell police and tried to identify the person who had notified the police of their location. The recording primarily consists of Perry talking and Watson mumbling in agreement.
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> The State charged both Perry and Watson with conspiracy to deliver crack cocaine in excess of ten grams in violation of Iowa Code section 124.401(1)(b)(3) (2005); possession of crack cocaine with intent to deliver in violation of Iowa Code section 124.401(1)(b)(3); and failure to possess a tax stamp in violation of Iowa Code sections 453B.3 and 453B.12 . . . .

[1] The vehicle did not belong to Watson. It was registered to David Cap.

> Perry and Watson were both convicted of all three charges against them. Neither defendant testified.

State v. Perry, No. 08-0448 (Iowa Ct. App. Jan. 22, 2009).

Watson now appeals, arguing: (1) the district court erred in refusing to give his proposed instruction directing jurors not to consider the videotape of his and Perry's conversation in determining whether Watson was guilty of conspiracy; (2) he was denied effective assistance of counsel by his counsel's failure to submit a timely motion to exclude the videotape and to object to prior bad acts evidence; (3) the evidence was insufficient to support any of his convictions; and (4) the district court erred in adjudging him guilty of both conspiracy to deliver and possession with intent to deliver controlled substances.

II. Merger of Felony Counts

We review matters of statutory interpretation for errors at law. Iowa R. App. P. 6.4. Watson argues that the district court erred in failing to merge the conspiracy and possession charges. Iowa Code section 706.4 prohibits separate convictions for both a public offense and conspiracy to commit the same offense. *See State v. Maghee*, 573 N.W.2d 1, 7 (Iowa 1997). We agree with Watson that the district court should have entered judgment only on the verdict of possession with intent to deliver.[2] We therefore vacate Watson's conviction for conspiracy.

III. Jury Instruction

At trial, Watson requested the following jury instruction, "The State has submitted an audiotape of the defendants into evidence. You must not consider any testimony offered in the audiotape to determine the elements of the

[2] The State also agrees that the district court erred in failing to merge the offenses.

conspiracy to deliver a controlled substance . . . ." The district court ruled that the proposed instruction was not a correct statement of the law.

We review the refusal to give a requested instruction for correction of errors at law. *State v. Martinez*, 679 N.W.2d 620, 623 (Iowa 2004). "As long as a requested instruction correctly states the law, has application to the case, and is not stated elsewhere in the instructions, the court must give the requested instruction." *State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa 1996). Error in refusing to give a jury instruction does not merit reversal unless the error is prejudicial to the defendant. *Id.*

We need not evaluate the jury instruction at issue because Watson cannot prove prejudice. We determined that the conspiracy charge should merge into the possession with intent to deliver charge and vacated Watson's conviction for conspiracy. Thus, Watson was not prejudiced by any possible error.

IV. Ineffective Assistance of Counsel

Watson argues that his counsel was ineffective for failing to make a timely motion to exclude the videotape and for failing to object to prejudicial evidence of prior bad acts. Because Watson asserts a constitutional violation, we review the totality of the circumstances de novo. *Taylor v. State*, 352 N.W.2d 683, 684 (Iowa 1984).

In order to prove his counsel was ineffective, Watson must show that: (1) his counsel failed to perform an essential duty; and (2) prejudice resulted from that failure. *Id.* Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Tate*, 710 N.W.2d 237, 240 (Iowa 2006). We decline to decide the issue when the record is inadequate and instead "preserve

such claims for postconviction relief proceedings, where an adequate record of the claim can be developed and the attorney charged with providing ineffective assistance may have an opportunity to respond to defendant's claims." *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). Because the record is not fully developed, we preserve for possible postconviction relief Watson's ineffective assistance claims.

V. Insufficient Evidence

We review a challenge on the sufficiency of the evidence for errors at law. *State v. Button*, 622 N.W.2d 480, 483 (Iowa 2001). The State bears the burden of proving every element of the crime with which Watson is charged. *State v. Gibbs*, 239 N.W.2d 866, 867 (Iowa 1976). We consider all evidence in the light most favorable to the State, "including legitimate inferences and presumptions that fairly and reasonably may be deduced from the evidence in the record." *Button*, 622 N.W.2d at 483; *State v. Hoeck*, 547 N.W.2d 852, 859 (Iowa Ct. App. 1996). When the record contains substantial evidence, we are bound by the jury's findings. *Id.* Substantial evidence is evidence that could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. *State v. Robinson*, 288 N.W.2d 337, 339 (Iowa 1980). "Evidence that only raises suspicion, speculation or conjecture is not substantial." *State v. Lambert*, 612 N.W.2d 810, 813 (Iowa 2000).

The jury was instructed that to prove failure to possess a tax stamp, the State had to show Watson's knowing possession of seven or more grams of crack cocaine, which he knew was crack cocaine, to which he did not affix a tax stamp. To prove unlawful possession of a controlled substance, the State had to

prove Watson: (1) exercised dominion and control over the contraband; (2) had knowledge of its presence; and (3) had knowledge the material was a controlled substance. *State v. Carter*, 696 N.W.2d 31, 38 (Iowa 2005). Because no drugs were found on Watson's person, the State had to prove that Watson had constructive possession of the drugs. *Id.* at 38-39. "Constructive possession cannot rest on mere proximity to the controlled substance." *Id.* at 40.

> [T]he authority or right to maintain control includes something more than the "raw physical ability" to exercise control over the controlled substance. The defendant must have some proprietary interest or an immediate right to control or reduce the controlled substance to the defendant's possession.

State v. Bash, 670 N.W.2d 135, 139 (Iowa 2003).

Because Watson was not in exclusive possession of the car in which the crack cocaine was found, we are instructed to consider several factors in determining whether Watson had constructive possession. *Carter*, 696 N.W.2d at 39. Such factors include:

> (1) incriminating statements made by the accused, (2) incriminating actions of the accused upon the police's discovery of a controlled substance among or near the accused's personal belongings, (3) the accused's fingerprints on the packages containing the controlled substance, and (4) any other circumstances linking the accused to the controlled substance.

Id. Further, because the drugs were found in a vehicle, we may also consider the following factors:

> (1) was the contraband in plain view; (2) was it with the person's personal effects; (3) was it found on the same side of the car or immediately next to the person; (4) was the person the owner of the vehicle; and (5) was there suspicious activity by the person.

State v. Maxwell, 743 N.W.2d 185, 194 (Iowa 2008).

The record contains substantial evidence that Watson had constructive possession of the crack cocaine found in the car. Watson's admission that he was a crack user coupled with the glass pipe found in his pocket permit an inference that he possessed some of the crack found in the car. *See State v. Kemp*, 688 N.W.2d 785, 790 (Iowa 2004) (finding defendant's admitted ownership of rolling papers in a car owned by and most recently driven by him permitted a finding that defendant knew of the presence of drugs under the driver's seat and exercised dominion and control over them, though other people had access to the car). The officers found a baggie of crack cocaine on Watson's seat. The statements made by Watson on the videotape also support inferences that Watson had constructive possession of the crack cocaine in the car. The videotape establishes that it was Watson, not Perry, who arranged to meet a third party at the location where they were arrested. It was Watson who borrowed the car to facilitate the rendezvous. Further, the videotape supports the inference that Watson's purpose in going to that location was to complete a drug deal. Watson never expressed surprise or confusion when he was arrested, but attempted to fabricate a story to explain the presence of the drugs in the car. After considering all of the factors listed above, we conclude that substantial evidence supported the jury's verdicts.

AFFIRMED IN PART AND VACATED IN PART.