

IN THE COURT OF APPEALS OF IOWA

No. 9-523 / 08-0991
Filed August 6, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

STATE v. PEREZ,
Defendant-Appellant.

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

Jorge Martinez Perez appeals following conviction and sentence for possession of a controlled substance with intent to deliver and failure to possess a tax stamp. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Michael J. Walton, County Attorney, and Kelly Cunningham, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., Eisenhauer, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

HUITINK, S.J.

Jorge Martinez Perez appeals following conviction and sentence for possession of a controlled substance (more than 500 grams of powder cocaine) with intent to deliver and failure to possess a tax stamp. Perez argues the district court erred in failing to grant his motion in arrest of judgment when there was insufficient evidence to support his conviction on the drug possession charge. He further contends his trial counsel was ineffective in failing to request a limiting instruction regarding his involvement in an earlier controlled buy and in failing to request severance of his trial. We affirm.

I. Background Facts and Proceedings.

This case began when Davenport police officers learned that a Hispanic male driving a champagne-colored Chevrolet Silverado with California license plates was selling cocaine out of 524 North Lincoln Court, an older home that had been converted to four separate apartments. On February 2, 2008, officers conducted a traffic stop on the Silverado as it left the apartment building. The driver, Miguel Trujillo, matched the description of the drug dealer and the Silverado was registered in his name. A drug dog conducted an exterior sniff of the Silverado, but did not alert, and Trujillo was allowed to leave. Officers continued to survey the apartment building, but did not see the Silverado again after the stop.¹

Thereafter, officers developed a confidential informant to engage in a controlled buy and provide more information about the drug operation at the apartment building. On February 7, 2008, the confidential informant drove to the

¹ Officers later learned Trujillo began driving his girlfriend's vehicle after the stop.

apartment building to buy cocaine. Officers watched nearby from their vehicles as a male walked down the driveway from the apartment building, approached the confidential informant's vehicle, and sold the informant one-fourth ounce of cocaine for \$180 of the police department's serialized bills. In order to identify the seller, an undercover officer drove by and the two looked directly at each other. The officer later identified the seller as Jorge Perez.

After the drug deal, Perez walked back in the direction of the apartment building, but entered the building using the back entrance. In order to determine the apartment Perez had come from, several officers knocked on the doors of each apartment using the ruse that they were investigating recent car burglaries in the area. No one answered at apartments 1, 2, and 4. Trujillo answered the officers' knocks at apartment 3 and initially answered the officers' questions, but then went inside the apartment to get Perez to translate for him. The officers observed Trujillo was very nervous, his body was very shaky, and his voice was trembling, and that Perez seemed to be in a hurry and wanted to officers to leave as quickly as possible.

Based on Trujillo's and Perez's behavior, the officers believed there were drugs in the building. After reporting their findings, the officers returned to the apartment building ten to fifteen minutes later to secure the residence and obtain permission to search the apartment.² Trujillo and Perez allowed the officers into the apartment, and the officers immediately noticed a razor with apparent cocaine residue on the kitchen table. Trujillo and Perez, along with Trujillo's

² Due to the language barrier, the officers also secured a search warrant for the apartment building.

daughter and her boyfriend, Claudia Trujillo and Andres Garcia, were kept inside the apartment until a search warrant was obtained.

With the help of a drug dog, officers eventually discovered more than 500 grams of cocaine in various places inside and outside the apartment. Officers also found two digital scales and a razor blade with cocaine residue on them, and plastic bags, wrap, and a heat sealer consistent with that used to package the drugs found at the apartment. Among the occupants' personal property, the officers found multiple cell phones, and the memory of one contained several calls from the number the confidential informant had used to set up the earlier controlled buy. Officers seized \$612 in cash from Trujillo, \$160 in cash from Garcia, \$378 in cash from Claudia Trujillo, but no money from Perez. The officers did not uncover the \$180 in serialized bills used in the controlled buy earlier that evening.

On February 15, 2008, Perez was charged with possession of a controlled substance with intent to deliver and failure to affix a drug tax stamp. Trujillo, Garcia, and Claudia Trujillo were similarly charged.³ Perez pleaded not guilty and demanded his right to a speedy trial. Prior to trial, Perez filed a motion in limine seeking to exclude evidence regarding any prior criminal record or acts and hearsay statements. He also joined codefendant Garcia's motion in limine to exclude evidence of the earlier controlled buy. The district court granted Perez's motion with respect to the hearsay statements, but did not rule on the remainder of the motions.

³ The court later dismissed charges against Garcia and Claudia Trujillo.

Following a jury trial, Perez was convicted as charged.⁴ Thereafter, Perez filed a motion in arrest of judgment or for a new trial, raising a number of evidentiary and procedural arguments. The court denied his motion and sentenced Perez to an indeterminate term of imprisonment not to exceed fifty years for the drug charge and up to five years on the tax stamp charge, to be run concurrently. Perez now appeals.

II. Scope and Standard of Review.

We conduct a de novo review of alleged constitutional violations. *State v. Decker*, 744 N.W.2d 346 (Iowa 2008). We therefore conduct a de novo review of ineffective assistance of counsel claims. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). Unless the record on direct appeal is adequate to address these issues, a claim of ineffective assistance of counsel is generally preserved for postconviction proceedings. *State v. Barse*, 748 N.W.2d 211, 214 (Iowa 2008).

In all other matters, we review the court's actions for corrections of errors at law. Iowa R. App. P. 6.4; *State v. Keeton*, 710 N.W.2d 531, 532 (Iowa 2006). In reviewing challenges to the sufficiency of the evidence supporting a guilty verdict, we consider all of the evidence in the record in the light most favorable to the State and make all reasonable inferences that may fairly be drawn from the evidence. *Keeton*, 710 N.W.2d at 532. A jury's verdict is binding on appeal if it is supported by substantial evidence. Evidence is substantial when a reasonable mind would recognize it sufficient to reach the same findings. *State v. Moorehead*, 699 N.W.2d 667, 671 (Iowa 2005).

⁴ The jury also found Trujillo convicted as charged. Trujillo has appealed his conviction and sentence. His appeal is currently before our court in *State v. Trujillo*, No. 08-1073.

III. Merits.

A. Sufficiency of the Evidence.

The jury was instructed that the State had to establish the following in order to prove Perez possessed cocaine with intent to deliver:

1. On or about the 8th day of February, 2008, the defendant knowingly possessed powder cocaine.
2. The defendant knew that the substance possessed was powder cocaine.
3. The defendant possessed the substance with the specific intent to deliver the controlled substance.

The jury was further instructed they could convict Perez either as the principal or as an aider and abettor. Perez contends there was insufficient evidence to prove that he had possession of the drugs in question, or to prove that he aided and abetted anyone in doing so.

Because no drugs were found on Perez's person, the State had to prove Perez had constructive possession of the drugs. Possession is constructive when the defendant has knowledge of the presence of the controlled substance and the authority or right to maintain control over it. See *State v. Carter*, 696 N.W.2d 31, 38 (Iowa 2005); *State v. Bash*, 670 N.W.2d 135, 138 (Iowa 2003). The peculiar facts of each case determine whether the defendant had constructive possession of the controlled substance. *State v. Webb*, 648 N.W.2d 72, 79 (Iowa 2002). "Constructive possession cannot rest on mere proximity to the controlled substance." *Carter*, 696 N.W.2d 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.

Bash, 670 N.W.2d at 139. We consider a number of factors in determining whether a defendant had constructive possession, including: (1) the defendant's incriminating statements, (2) the defendant's incriminating actions upon the police's discovery of drugs among or near the defendant's personal belongings, (3) the defendant's fingerprints on packages containing drugs, and (4) any other circumstances linking the defendant to the drugs. *State v. Kemp*, 688 N.W.2d 785, 789 (Iowa 2004).

The record contains substantial evidence that Perez had constructive possession of the cocaine found in and around the apartment building. Perez brought one-fourth ounce of cocaine out of the apartment building and sold it to the police department's confidential informant. Perez was present in the apartment building when officers searched the home later in the day. In speaking with officers upon the officer's arrival at Trujillo's apartment, Perez seemed to be in a hurry and wanted the officers to leave as quickly as possible. Thereafter, officers found more than 500 grams of cocaine in various places inside and outside the apartment. Officers also found plastic bags, wrap, and a heat sealer consistent with that used to package the drugs found at the apartment; two digital scales and a razor blade with cocaine residue on them; and a cell phone containing the number the confidential informant had used to set up the earlier controlled buy.

Perez's exercise of control over the cocaine in making the sale to the confidential informant demonstrated his ability to exercise control over the cocaine in and around the apartment building. He was not merely a passive

observer in the drug operation, but rather, an active participant. After considering all of the factors listed above, we conclude substantial evidence supported the jury's verdict that Perez was guilty as a principal. Accordingly, we affirm as to this issue.

Alternatively, we find substantial evidence supports the finding that Perez was guilty as an aider and abettor.⁵ To support a conviction based on the theory of aiding and abetting, the record must show Perez assented to or lent countenance and approval to the criminal act either by active participation or by encouraging in some manner prior to the time of its commission. *State v. Smith*, 739 N.W.2d 289, 293 (Iowa 2007). While mere presence at the scene of a crime by itself is insufficient to prove aiding and abetting, it "need not be shown by direct proof. It may be inferred from circumstantial evidence including presence, companionship and conduct before and after the offense is committed." *Fryer v. State*, 325 N.W.2d 400, 406 (Iowa 1982).

Officers observed Perez exit Trujillo's apartment building with drugs on his person, sell \$180 worth of cocaine to the confidential informant, and reenter the apartment building through the back entrance. Perez handled the drugs and "not only lent countenance and approval to the delivery of a controlled substance, he made the transaction possible." *State v. Allen*, 633 N.W.2d 752, 757 (Iowa 2001). When officers arrived to search Trujillo's apartment later that evening, Perez was present in the home. Officers uncovered cocaine, a razor blade and

⁵ Perez alleges the theory of aiding and abetting was not properly submitted to the jury. We find this argument to be without merit. As jury instruction no. 12 stated, "All persons involved in the commission of a crime, whether they directly commit the crime or knowingly 'aid and abet' its commission, shall be treated the same way."

digital scale with cocaine residue, and other tools and materials used for drug packaging in and around the apartment building. We conclude the record contains substantial evidence that Perez had constructive possession of cocaine as an aider and abettor. We affirm as to this issue.

B. Ineffective Assistance of Counsel.

Perez argues his counsel was ineffective (1) in failing to request a limiting instruction regarding his involvement in an earlier controlled buy and (2) in failing to request severance of his trial.⁶ To establish a claim of ineffective assistance of counsel, a defendant must prove (1) counsel failed to perform an essential duty and (2) prejudice resulted to the extent it denied the defendant a fair trial. *Maxwell*, 743 N.W.2d at 195. Ordinarily, we preserve ineffective assistance of counsel claims for postconviction proceedings to allow the facts to be developed and give the allegedly ineffective attorney an opportunity to explain his or her conduct, strategies, and tactical decisions. See *Bearse*, 748 N.W.2d at 214; *State v. DeCamp*, 622 N.W.2d 290, 296 (Iowa 2001). We conclude the record here is inadequate to address Perez's claims. We therefore preserve the claims for possible postconviction relief proceedings.

IV. Conclusion.

We affirm Perez's conviction and sentence and preserve his claims of ineffective assistance of counsel for a possible postconviction proceeding.

AFFIRMED.

⁶ Perez raises this second ineffective assistance of counsel claim in his pro se brief. The other arguments Perez raises in his pro se brief are the same as those submitted by his counsel and addressed by this court.