IN THE COURT OF APPEALS OF IOWA

No. 2-1057 / 11-1833
Filed January 9, 2013

CECIL WATSON,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Polk County, Robert J. Blink, Judge.

Cecil Watson seeks postconviction relief from his convictions for conspiracy to distribute crack cocaine, possession with intent to deliver crack cocaine, and failure to possess a tax stamp. **AFFIRMED.**

Steven E. Clarke of Pargulski, Hauser & Clarke, P.L.C., Des Moines, for appellant.

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

Considered by Doyle, P.J., and Mullins and Bower, JJ.

DOYLE, P.J.

Cecil Watson seeks postconviction relief (PCR) from his convictions for conspiracy to distribute crack cocaine, possession with intent to deliver crack cocaine, and failure to possess a tax stamp. We affirm.

***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 money, drug paraphernalia, or other indicia of drug involvement on Perry'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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[1] The vehicle did not belong to Watson. It was registered to David Cap.

> 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.

State v. Perry, No. 08-0488, 2009 WL 139536, at *1 (Iowa Ct. App. Jan. 22, 2009).

After a joint trial to a jury, Watson and Perry were convicted as charged. In sentencing Watson, the district court imposed twenty-five-year sentences on the conspiracy and possession convictions, merged the sentences, and imposed a concurrent five-year sentence on the failure to possess tax stamp conviction. On direct appeal, this court vacated Watson's conviction for conspiracy, affirmed his possession and tax stamp convictions, and preserved for PCR his ineffective-assistance-of-counsel claims. *State v. Watson*, No. 08-0339, 2009 WL 1492690, at *4 (Iowa Ct. App. May 29, 2009).

Watson filed an application for PCR, claiming he received ineffective assistance of counsel in numerous respects. The district court dismissed Watson's application, finding no ineffective assistance on the part of Watson's counsel in regard to failed efforts to exclude the videotape, failure to move to suppress evidence obtained in the search, and failure to request a "proper" instruction on constructive possession. The court also concluded Watson's pro se claims were without merit.

Watson now appeals.

II. Scope and Standards of Review.

We review claims of ineffective assistance of counsel de novo. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012). To establish a claim of ineffective assistance of counsel, an applicant must show (1) the attorney failed to perform an essential duty and (2) prejudice resulted to the extent it denied applicant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008). "In determining whether an attorney failed in performance of an essential duty, we avoid second-guessing reasonable trial strategy." *Everett v. State*, 789 N.W.2d 151, 158 (Iowa 2010). We presume counsel is competent, and miscalculated trial strategies and mere mistakes in judgment normally do not rise to the level of ineffective assistance. *Millam v. State*, 745 N.W.2d 719, 721 (Iowa 2008). In order to show prejudice, an applicant must show that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Madsen*, 813 N.W.2d 714, 727 (Iowa 2012).

III. Discussion.

A. Videotape.

For the first time on appeal, Watson asserts his trial counsel were ineffective in failing to move to exclude the videotape pursuant to Iowa Rule of Criminal Procedure 2.14(6)(c) as a sanction for the State's failure to disclose the existence of the tape in a timely fashion. "We do not review issues that have not been raised or decided by the district court." *State v. Dewitt*, 811 N.W.2d 460, 467 (Iowa 2012). Nevertheless, in the interest of judicial economy, we elect to bypass the error preservation issue as we find the claim asserted on appeal without merit.

Watson and Perry's joint trial was scheduled to begin on Wednesday, December 5, 2007. On Thursday, November 29, 2007, the State's case agent examined the evidence in preparation for trial and discovered a patrol car recording of Watson and Perry's conversation, which had been placed with the evidence, rather than the case file. The prosecutor immediately notified the respective defense counsel for Watson and Perry. The prosecutor received the recording on Friday, November 30, and asked that copies be made for the defense. On Monday, December 3, defense counsel received and reviewed copies of the recording but were not able to play them for Watson or Perry. On Tuesday, December 4, the State filed a notice of additional witnesses, stating its intent to call Polk County Deputy Sheriff Brian Johns to establish the foundation for the admission of the recording.

A pretrial conference was held that same day. The prosecutor noted it had received the patrol car recording "[o]n Friday of this past week" and had learned of the existence of the recording on Thursday. The prosecutor suggested it would be appropriate to continue the trial to allow defense counsel time to review the recording with Watson and Perry and consider how it would affect their defenses. The prosecutor stated the court could treat its suggestion as a motion to continue. Following the instructions of his client, Watson's counsel resisted the State's motion to continue and took the position the trial should take place the next day and that the videotape was inadmissible because "the possible witnesses haven't been made available prior to trial." Watson said he wanted to go to trial the next day as scheduled, even though he had not yet seen the videotape. He personally insisted the videotape was inadmissible

because law enforcement officers knew of the tape and "because they should have brought that before depositions. . . . They were supposed to bring everything, all proof, in those depositions." Perry's counsel argued for a continuance, while Perry personally opposed it.

The court continued the trial to January 7, 2008, the last day within the speedy trial deadline. The court stated:

> We want to make sure everybody has a chance to have a fair trial, both sides, and has sufficient time to prepare for this trial.
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> . . . .
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> I appreciate, Mr. Perry and Mr. Watson, that this is disappointing, but I think that's the fairest thing to do for everyone so that . . . everybody has a chance to fully prepare and resolve the case and be ready to go. I think it would be prejudicial to go ahead tomorrow with the new evidence without having the attorneys—and the defendants haven't even seen the tapes to make sure they aren't walking into a minefield—know what they're getting into and how they're going to address that tape with the jury. So I think that's the fairest thing for everybody.

On December 17, Watson fired his counsel and retained another. Watson's new counsel learned of the tape a few days after he was retained but did not actually receive a copy until around January 1. Since the tape did not show who was talking, counsel thought the best strategy would be to object to the tape at trial on a rule 5.403 basis and argue the tape was more prejudicial than probative and was confusing because the jury would have to speculate on who was talking.

At trial, Perry and Watson objected to the admission of the videotape, arguing it was hearsay, it would be unduly confusing to the jury, and its admission would violate their right to confrontation. The court characterized the argument as an untimely motion to suppress and refused to address it. The tape

was admitted into evidence and played for the jury. Watson claims on appeal his counsel were ineffective in failing to file a motion to exclude the tape under rule 2.14(6)(c).

Iowa Rule of Criminal Procedure 2.14(6)(c) provides:

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may upon timely application order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing any evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

Watson's first trial counsel filed a timely motion to produce all statements made by Watson and Perry, and for all video and audio tapes. Although not specifically referencing rule 2.14(6)(c), Watson's first trial counsel essentially made such a motion by attacking the tardiness of the tape's disclosure at the January 7 hearing. We therefore find Watson's counsel did not fail to perform an essential duty.

In any event, Watson cannot show prejudice resulted. Indeed, Watson acknowledges "it is difficult to see how [he] was prejudiced by the late production of the videotape." Even if we do not construe counsel's motion as a rule 2.14(6)(c) motion, it is clear from the record that had such a motion been made, the trial court would not have opted to exclude the tape. Instead, the trial court, for cogently expressed reasons, exercised its discretion under the rule in continuing the trial date to allow all parties adequate time to fully prepare for trial. Likewise, it would have been futile for Watson's second trial counsel to have made a rule 2.14(6)(c) motion to exclude the tape under these circumstances. We find there was no reasonable probability that the court would have granted

the motion. Counsel has no duty to raise a meritless argument. *State v*. *Braggs*, 784 N.W.2d 31, 35 (Iowa 2010).

Having acknowledged the lack of prejudice, Watson argues exclusion is the appropriate sanction for the late disclosure of the tape. In support of his argument he cites *State v*. *Cline*, 617 N.W.2d 277 (Iowa 2000), *overruled on other grounds by State v*. *Turner*, 630 N.W.2d 601, 606 (Iowa 2001). In *Cline*, the warrantless search of the defendant violated his rights under the Fourth Amendment of the United States Constitution and his article 1, section 8 rights under the Iowa Constitution because there was no probable cause for the search. *See* 617 N.W.2d at 293. The Iowa Supreme Court recognized that under federal law suppression of the evidence may not have been required under the good faith exception, but "no comparable exception to the exclusionary rule exists in Iowa." *Id.* The court concluded the exclusionary rule applied to the evidence discovered in the search of her person. *See id.*

Cline is distinguishable from Watson's case because *Cline* involved the remedy for a constitutional violation. Its holding is not applicable here, as Watson's complaint involves the remedy for a discovery sanction. Rule 2.14(6)(c) provides several remedies for failure to comply: permit the discovery or inspection; grant a continuance; prohibit the party from introducing the non-disclosed evidence; or such order as the court deems just under the circumstances. Remedies under this rule are discretionary in nature, and a court will be reversed only if it abuses its discretion. *State v*. *Brown*, 397 N.W.2d 689, 698 (Iowa 1986). Exclusion of evidence is not the only option available. *Id.* "Rather, in exercising its discretion, trial court should consider: (1) the

circumstances surrounding the violation; (2) the prejudice, if any, resulting from the violation; (3) the feasibility of curing any prejudice; and (4) any other relevant consideration." *Id.* Here, the violation was the result of an oversight, and the district court cured any prejudice by granting a continuance. The district court acted appropriately and did not abuse its discretion. We therefore find no merit in Watson's claim of ineffective assistance of counsel for failure to file a motion to exclude the videotape.

B. Evidence Obtained as a Result of Search.

Watson asserts his trial counsel were ineffective in failing to file a motion to suppress evidence obtained as a result of the search of his person and car. We find no merit to the claim.

Officers validly stopped the vehicle driven by Watson pursuant to a warrant authorizing them to search Watson's person. However, the search warrant did not authorize a search of the car driven by Watson. A search conducted without a valid search warrant is per se unreasonable unless an exception to the search warrant requirement applies. *State v. Hoskins*, 711 N.W.2d 720, 726 (Iowa 2006). One such exception provides that a search can be executed without a warrant if evidence is in plain view. *State v. McGrane*, 733 N.W.2d 671, 680 (Iowa 2007). Multiple officers testified that drugs were in plain view inside the car. Lieutenant Nation testified to seeing baggies containing drugs on both the passenger's and driver's seats. Officer Richardson testified to seeing drugs sitting on the seats of the car. Officer Haase testified that he saw two baggies of crack cocaine through the open door. Because the evidence was

in plain view, the officers' search of the vehicle did not violate Watson's constitutional rights.

For these reasons, we find that a motion to suppress would have been fruitless. Watson's trial counsel had no duty to file a meritless motion. *See Braggs*, 784 N.W.2d at 35. Because Watson has failed to show counsel failed to perform an essential duty, we find his claim for ineffective assistance of counsel must fail as it relates to the search.

C. Pro Se Claims.

Watson asserts several pro se claims on appeal. We address them in turn.

1. Lab Report.

At trial, a Division of Criminal Investigation's (DCI) lab report was admitted into evidence without objection. The report found the substances seized from the car Watson was driving to be crack cocaine. In the PCR court, Watson asserted his counsel was ineffective in failing to object to the report. He argued that under *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the admission of such a report violated his Sixth Amendment right to confrontation. He specifically referenced the case and its citation at the hearing. The transcript of the hearing shows the court "made a note of it." In denying Watson's pro se claims as being "without merit," the court made no reference to *Melendez-Diaz*. On appeal, Watson argues the PCR court abused its discretion in not considering the case law he submitted at the hearing. Watson's reliance on *Melendez-Diaz* is misplaced and his argument fatally flawed.

In *Melendez-Diaz*, the prosecution submitted three "certificates of analysis" showing the results of forensic analysis by a state laboratory of substances seized from the defendant. 557 U.S. at 308. The Court, in construing the Confrontation Clause under the Sixth Amendment of the United States Constitution, held:

> The analysts' affidavits were testimonial statements, and the analysts were "witnesses" for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had prior opportunity to cross-examine them, petitioner was entitled to "'be confronted with'" the analysts at trial.

Id. at 311 (citing *Crawford v*. *Washington*, 541 U.S. 36, 54 (2004)). However, it does not necessarily follow, as Watson suggests, that his trial counsel was ineffective in failing to object to the DCI report and in failing to require the actual presence of the lab technician at trial. *Melendez-Diaz* goes on to state: "Many States have already adopted the constitutional rule we announce today, while many others permit the defendant to assert (or forfeit by silence) his Confrontation Clause right after receiving notice of the prosecution's intent to use a forensic analyst's report." *Id.* at 325-26. Iowa has adopted such a statute.

Iowa Code section 691.2 provides, in part, that a party or the party's attorney may request that an employee or technician of the criminalistics laboratory testify in person at a criminal trial by notifying the county attorney at least ten days before trial. Approving such statutes, *Melendez-Diaz* recognizes the "defendant *always* has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the *time* within which he must do so." 557 U.S. at 327. It is readily apparent Watson failed to take section

691.2 into account. With no timely section 691.2 request, Watson forfeited his Confrontation Clause right concerning the DCI report, and therefore, his attorneys could not have made a meritorious objection at trial to the report on Confrontation Clause grounds. As noted above, trial counsel has no duty to raise an issue that has no merit. *See Braggs*, 784 N.W.2d at 35. We therefore find Watson's underlying ineffective-assistance-of-counsel claim on this issue to be wholly without merit.

Furthermore, even had Watson asserted an ineffective-assistance-of-counsel claim based on his counsel's failure to timely make a section 691.2 request, his claim would fail. Had such a request been timely made, the State undoubtedly would have had the DCI technician testify at trial. So, at the end of the day, it is apparent that Watson's attorneys could not keep the DCI report from the jury on a Confrontation Clause grounds basis.

Finally, Watson's criticism of the PCR court's failure to cite *Melendez-Diaz* in its ruling is unwarranted. After taking *Melendez-Diaz* into consideration in our own analysis, we reached the same conclusion as the PCR court: Watson's claim has no merit. We find no reason to believe the PCR court failed to fully consider Watson's arguments, *Melendez-Diaz*, and other relevant law. Moreover, in view of the applicability of Iowa Code section 691.2, we see no need for the PCR court to have cited to *Melendez-Diaz* in its ruling. Lastly, a court is under no compulsion to cite to law suggested by a party. Assuming the standard of review is for abuse of discretion, we find none.

2. Constructive Possession Instruction.

Watson also argues pro se that his counsel was ineffective in failing to object to the constructive possession instruction submitted to the jury. The instruction stated:

> The word "possession" includes actual as well as constructive possession, and also sole as well as joint possession.
>
> A person who has direct physical control of something on or around his person is in actual possession of it.
>
> A person who is not in actual possession, but who has knowledge of the presence of something and has the authority or right to maintain control of it either alone or together with someone else, is in constructive possession of it.
>
> If one person alone has possession of something, possession is sole. If two or more persons share possession, possession is joint.

The instruction mirrors Iowa Criminal Jury Instruction 200.47 as it existed prior to its July 2005 revision.[2] On appeal, Watson does not explain why the instruction is erroneous nor does he offer any suggestion as to how it should have been corrected. Even for a pro se brief, this is inadequate.

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[2] Iowa Criminal Jury Instruction 200.47, as revised in July 2005, reads:

> The law recognizes several kinds of possession. A person may have actual possession or constructive possession. A person may have sole or joint possession.
>
> A person who has direct physical control over a thing on [his] [her] person is in actual possession of it.
>
> A person who, although not in actual possession, has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is in constructive possession of it. A person's mere presence at a place where a thing is found or in proximity to the thing is not enough to support a conclusion that the person possessed the thing.
>
> If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.
>
> Whenever the word "possession" has been used in these instructions, it includes actual as well as constructive possession and sole as well a joint possession.

Pro se or not, parties to an appeal are expected to follow applicable rules. It has long been the rule that procedural rules apply equally to parties who are represented by counsel and to those who are not. Pro se parties receive no preferential treatment. *See Hays v. Hays*, 612 N.W.2d 817, 819 (Iowa Ct. App. 2000). "The law does not judge by two standards, one for lawyers and the other for lay persons. Rather, all are expected to act with equal competence. If lay persons choose to proceed pro se, they do so at their own risk." *Metro. Jacobson Dev. Venture v. Bd. of Review*, 476 N.W.2d 726, 729 (Iowa Ct. App. 1991). Although this may seem harsh to a pro se litigant, it is justified by the notion that appellate judges must not be cast in the role of advocates for a party who fails to comply with court rules and inadequately presents an appeal. *See State v. Piper*, 663 N.W.2d 894, 913-14 (Iowa 2003), *overruled on other grounds by State v. Hanes*, 790 N.W.2d 545, 551 (Iowa 2010).

"When a party, in an appellate brief, fails to state, argue, or cite to authority in support of an issue, the issue may be deemed waived." *State v. Adney*, 639 N.W.2d 246, 250 (Iowa Ct. App. 2001). A party's failure in a brief to cite authority in support of an issue may be deemed waiver of that issue. *See* Iowa R. App. P. 6.903(2)(g)(3) (stating the argument section shall include "[a]n argument containing the appellant's contentions and the reasons for them with citations to the authorities relied on and references to the pertinent parts of the record . . . [and f]ailure to cite authority in support of an issue may be deemed waiver of that issue"); *see also State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997); *Metro. Jacobson Dev. Venture*, 476 N.W.2d at 729. A random mention of an issue, without elaboration or supportive authority, is not sufficient to raise an

issue for review. *See EnviroGas, L.P. v. Cedar Rapids/Linn Cnty. Solid Waste Agency*, 641 N.W.2d 776, 785 (Iowa 2002) (citing *Soo Line R.R. v. Iowa Dep't of Transp.*, 521 N.W.2d 685, 689 (Iowa 1994)). We do not consider conclusory statements not supported by legal argument. *See, e.g.*, *Baker v. City of Iowa City*, 750 N.W.2d 93, 103 (Iowa 2008) (holding that a party's "conclusory contention" was waived where the party failed to support it with an argument and legal authorities); *Piper*, 663 N.W.2d at 913-14; *McCleeary v. Wirtz*, 222 N.W.2d 409, 417 (Iowa 1974) (holding that a "subject will not be considered" where a "random discussion" is not supported by a legal argument and citation to authority); *see also United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("[a] skeletal 'argument', really nothing more than an assertion, does not preserve a claim. . . . Judges are not like pigs, hunting for truffles buried in briefs."). Applying these precepts, we conclude Watson waived his claim concerning the instruction. *See State v. Root*, 801 N.W.2d 29, 30 n.1 (Iowa Ct. App. 2011) (finding defendant waived issues due to failure to follow trules of appellate procedure).

Even if we were to consider the arguments Watson made to the PCR court, but not to us, we would find no ineffective assistance of counsel regarding the possession instruction. On direct appeal, after considering and applying all relevant legal principles concerning constructive possession, this court concluded "[t]he record contains substantial evidence that Watson had constructive possession of the crack cocaine found in the car." *Watson*, 2009 WL 1492690 at *4. Watson cannot therefore show prejudice in his counsel's failure to object to the possession instruction.

3. Remaining Pro Se Claims.

Finally, upon our thorough de novo review of the record, we find the remainder of Watson's pro se appellate arguments to be without merit and do not address them.

IV. Conclusion.

For all the above reasons, we affirm the decision of the district court denying Watson's application for postconviction relief.

AFFIRMED.