IN THE COURT OF APPEALS OF IOWA

No. 3-443 / 12-1558
Filed July 24, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARK ALAN HOLZHAUSER,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Christopher L. McDonald, Judge.

Mark Holzhauser appeals his convictions and sentences following a jury's verdict finding him guilty of possession of methamphetamine, failure to affix a drug tax stamp, and possession of marijuana. **AFFIRMED.**

Angela Campbell of Dickey & Campbell Law Firm, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, John Sarcone, County Attorney, and Andrea Petrovich, Assistant County Attorney, for appellee.

Heard by Potterfield, P.J., and Danilson and Mullins, JJ.

DANILSON, J.

Mark Holzhauser appeals his convictions following a jury's verdicts finding him guilty of possession of methamphetamine, failure to affix a drug tax stamp, and possession of marijuana. On appeal, he asserts the district court abused its discretion when denying each of his two motions to substitute counsel. He also maintains he received ineffective assistance of counsel at trial. We find Holzhauser waived any error in respect to the district court's ruling on the first motion for failing to provide a record of the proceedings. We also conclude the trial court did not abuse its discretion in denying the second belated motion to substitute counsel. Finally, we conclude that Holzhauser's counsel did not provide ineffective assistance at trial. We affirm.

I. Background Facts.

In March 2012, officers executed a search warrant for Holzhauser's residence. When searching his person, they found two bags of methamphetamine and three bags of marijuana in his pocket. Holzhauser received *Miranda*[1] warnings and agreed to speak with officers. During questioning, Holzhauser first denied the recovered drugs were his. He later admitted he obtained the drugs when a friend left them in a hotel room after being arrested.

The drugs were then taken to and analyzed by the Division of Criminal Investigations (DCI) lab. According to the report on file, each of the bags of suspected methamphetamine was tested and weighed; the substance in each

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[1] *See Miranda v. Arizona*, 384 U.S. 436, 473-76 (1966).

was confirmed to be methamphetamine. One bag weighed 6.78 grams and the other 4.46 grams.

On May 9, 2012, Holzhauser filed a motion for new counsel. A week later, the court held a hearing on the issue and denied his motion for "the reasons stated on the record." No record of this hearing has been provided. On June 25, 2012, at the beginning of trial, Holzhauser filed another motion for new counsel. The court again denied the motion. The jury found Holzhauser guilty of possession of methamphetamine, failure to affix a drug tax stamp, and possession of marijuana. He now appeals.

II. Standard of Review.

We review denials of a motion to substitute counsel for an abuse of discretion. *State v. Lopez*, 633 N.W.2d 774, 778 (Iowa 2001). An abuse of discretion will only be found when "the court exercised the discretion on grounds or for reasons clearly untenable or to an extent unreasonable." *Id*.

We review claims for ineffective assistance of counsel de novo. *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006).

III. Discussion.

A. Request for New Counsel.

1. First Motion: May 9, 2012.

Holzhauser filed his initial motion for new counsel pro se. The district court held a hearing to consider his request and denied it. The court's written order states the "motion is denied for the reasons stated on the record." However, Holzhauser has failed to provide any record of the hearing in question.

Since we have nothing to review, any error relating to the request has been waived. *State v. Mudra*, 532 N.W.2d 765, 767 (Iowa 1995) ("It is defendant's obligation to provide this court with a record affirmatively disclosing the error relied upon. We conclude that by . . . failing to provide such a record, [the appellant] has waived error on his claim.").

2. Second Motion: June 25, 2012.

Holzhauser filed his second motion for new counsel on June 25, 2012, the morning trial began.[2] The court engaged in a colloquy with Holzhauser to learn the reasons for his request. Holzhauser stated he had requested that depositions be taken but none were done; had been told to waive his rights to a preliminary hearing; had paid to have a drug evaluation completed, but had not been moved to a rehabilitation facility; and had wanted the confiscated drugs to be reweighed.

Defense counsel responded to each concern. Trial counsel stated she had strategically chosen not to take depositions because, as a rule, the Polk County Attorney's Office refuses to offer any plea agreement once the defendant begins depositions. Also, she did not consider Holzhauser's case to be complex and had determined depositions were unnecessary after reviewing the minutes of testimony. In regard to the preliminary hearing, counsel had spoken with Holzhauser about his version of the events surrounding the execution of the search warrant and his arrest. After speaking with him and going over the

[2] The motion was apparently filed with the court on June 25, 2012, but it was not filed with the clerk until June 28, 2012. We also note that it was subscribed and sworn to before a notary on June 24, 2012.

preliminary complaint, they discussed whether it was in his best interest to waive the preliminary hearing. Following the discussion, the defendant chose to sign the waiver. In response to his complaint about paying for a drug evaluation, counsel explained Polk County requires it of each person being held on a drug charge. Furthermore, counsel had, as necessitated by the charges, spoken to the county attorney to request that Holzhauser be moved to an in-patient drug rehabilitation facility. The request had been denied. Finally, counsel denied having received any earlier request from Holzhauser to have the confiscated drugs reweighed until the morning of the trial

"The Sixth Amendment right to counsel does not guarantee 'a meaningful relationship between an accused and his counsel.'" *Lopez*, 633 N.W.2d at 778 (citing *Morris v. Slappy*, 461 U.S. 1, 14 (1983)). Rather, in cases where a defendant is represented by a court-appointed attorney and requests substitute counsel, the defendant must present "sufficient cause to justify replacement" to the court. *State v. Tejada*, 677 N.W.2d 744, 749 (Iowa 2004). "Sufficient cause includes a conflict of interest, irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant." *Id*. at 749-50. Furthermore, when deciding a motion to substitute counsel, the district court must balance the defendant's rights with the public's interest in the "prompt and efficient administration of justice." *State v. Webb*, 516 N.W.2d 824, 828 (Iowa 1994).

In this case, the district court engaged in a meaningful colloquy with Holzhauser, which provided him the opportunity to show sufficient cause for

substitution of counsel. Although he presented a laundry list of concerns, none of them indicated a conflict of interest. His complaints only exhibited a difference of opinion regarding how he and his counsel believed his case should be handled, but the court found the concerns involved "decisions made by [his] counsel," which were "strategic decisions to be exercised" at counsel's discretion. And even though Holzhauser had rejected the offered plea agreement against counsel's recommendation, counsel had "performed very competently on [his] behalf." The court had reason to believe communication had not completely broken down between Holzhauser and counsel. It was counsel who had provided the court with Holzhauser's second motion for new counsel. Also, during the hearing, counsel described having several meetings with Holzhauser where they had "addressed the elements of the offenses, the potential punishments, [and] what the State's witnesses [were] going to say." Holzhauser neither denied the meetings occurred nor disagreed with counsel's characterization of them.

Allowing Holzhauser to substitute counsel on the morning the trial was to begin would have undoubtedly disrupted and delayed the judicial process. New counsel would have had to be named and given time to become properly acquainted with the case; a new trial date would have had to be set. "Trial court discretion is often accorded where, because of proximity to the trial process, the trial court is in as good or better position than the appellate court to make a determination in accordance with demands of justice." *State v. Gartin*, 271 N.W.2d 902, 910 (Iowa 1978).

Considering all of the factors above, the district court made a proper inquiry and did not abuse its discretion in denying Holzhauser's last-minute motion for new counsel.

B. Ineffective Assistance of Counsel.

1. Scope of Review.

Holzhauser asserts that counsel was ineffective during the trial for several reasons. Our review of ineffective-assistance-of-counsel claims is de novo. *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008). In order to maintain an ineffective-assistance-of-counsel claim, Holzhauser has the burden to prove, by a preponderance of the evidence, that both that his counsel's performance was deficient and that prejudice resulted from the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove that counsel's performance was deficient, Holzhauser must show "counsel's representation fell below an objective standard of reasonableness . . . under prevailing professional norms." *Id*. at 688. In doing so, he must overcome "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*. at 689. To prove that prejudice resulted from counsel's deficient performance, a defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694.

2. Preservation for Postconviction Relief Proceeding.

"The failure of trial counsel to preserve error at trial can support an ineffective assistance of counsel claim." *State v. Truesdell*, 679 N.W.2d 611,

615–16 (Iowa 2004). Ordinarily, ineffective-assistance-of-counsel claims are best resolved by postconviction proceedings to enable a complete record to be developed and afford trial counsel an opportunity to respond to the claim. *Bearse*, 748 N.W.2d at 214. In some instances, however, the appellate record can be adequate to address the claim on direct appeal. *Berryhill v. State*, 603 N.W.2d 243, 246 (Iowa 1999). When the record is adequate, the appellate court should decide the claim on direct appeal. *See State v. Rubinson*, 602 N.W.2d 558, 563 (Iowa 1999). "Preserving ineffective assistance of counsel claims that can be resolved on direct appeal wastes time and resources." *Truesdell*, 679 N.W.2d at 616.

Among Holzhauser's claims of ineffective assistance of counsel is the claim that his counsel failed to move for a judgment of acquittal on the basis of insufficiency of the evidence. As our supreme court has instructed, "[a] claim of ineffective assistance of trial counsel based on the failure of counsel to raise a claim of insufficient evidence to support a conviction is a matter that normally can be decided on direct appeal." *Id.* If the record fails to reveal substantial evidence to support the convictions, then counsel was ineffective for failing to properly raise the issue and prejudice resulted. *Id.* However, if the record reveals substantial evidence, then counsel's failure to raise the claim of error could not be prejudicial. *Id.* Regardless, Holzhauser's claim of ineffective assistance of counsel on this ground can and should be addressed on direct appeal.

Holzhauser makes various other claims of ineffective assistance of counsel related to the evidence of the weight of methamphetamine. We first note

that Holzhauser's counsel had an opportunity to address some of these claims at the hearing on his motion for new counsel held on the morning of the trial. We find the record is otherwise sufficient to address the claims.

3. Failure to Challenge Weight of the Recovered Drugs.

Holzhauser first contends he was denied effective assistance of counsel because his trial attorney failed to challenge the weight of the methamphetamine as listed on the DCI report; the reported weights were 6.78 and 4.46 grams (for a total of 11.24 grams). In support of his contention, Holzhauser claims the correctness of the reported weight was in question and the exact amount of the weight was essential because it directly impacts the charge of failure to affix a drug tax stamp.

Iowa law prohibits "a dealer distributing, offering to sell, or possessing taxable substances without affixing the appropriate stamps, labels, or other official indicia." Iowa Code § 453B.12 (2011). A dealer is defined as:

> Any person who ships, transports, or imports into this state or acquires, purchases, possess, manufactures, or produces in this state of any of the following:
>
> (1) Seven or more grams of a taxable substance other than marijuana . . . .

Id.

a. *Failure to Object to Lab Report*. Holzhauser contends counsel was deficient in allowing the DCI lab report to be admitted into evidence because the lab technician who signed the report was not present to testify. He relies on *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011). In *Bullcoming*, the United States Supreme Court held that the Confrontation Clause of the Sixth

Amendment requires the prosecution to offer a live witness who is competent to testify to the truth of the report's statements before introducing the report into evidence. 131 S. Ct. at 2709. However, the Court also recognized the validity of "notice and demand" procedures. *Id*. at 2718. Such procedures "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." *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 326 (2009). Iowa has such a notice and demand procedure: "A party or the party's attorney may request that an employee or technician testify in person at a criminal trial . . . on behalf of the state . . . by notifying the proper county attorney . . . at least ten days before the date of the criminal trial . . . ." Iowa Code § 691.2. Because Holzhauser had forfeited his right to confront the lab technician by failing to request that a technician testify, the lab report was admissible at the time of trial and counsel was not ineffective in failing to object to the State's offer of the report into evidence.

b. *Failure to Give Notice to Require Technician to Testify and to Challenge the Weight of the Drugs*. Holzhauser also argues, in the alternative, that counsel performed deficiently by allowing him to forfeit his right to have the lab technician testify at trial. To succeed in this claim, he must prove counsel acted below prevailing professional norms. *See Strickland*, 466 U.S. at 687. In support of his contention, Holzhauser asserts that counsel should have required the lab technician to testify since there was a "shifting and increasing weight [of methamphetamine] attributed to" him. More specifically, the State's preliminary

complaint alleged he "possessed approximately seven grams of methamphetamine," while the lab report showed a net weight of 11.24 grams. Holzhauser also contends he "had notified counsel that same day that he contested the results of the lab report" and wanted the drugs weighed without the bags.

Contrary to Holzhauser's argument on appeal, during the hearing on the second motion for new counsel, trial counsel stated that Holzhauser had not made the request before trial, and Holzhauser did not dispute the assertion. If the request was made on the morning of the trial, the request came too late under section 691.2, which requires the party to notify the "proper county attorney . . . at least ten days before the date of the criminal trial."

Even if Holzhauser's request to his attorney permitted a timely notification to require the lab technician to testify, Holzhauser's claim fails. While it is true the preliminary complaint stated the weight of the confiscated methamphetamine was "approximately seven grams" and the DCI report logged a weight over four grams more, the State is not bound by the allegations in the preliminary complaint. Criminal complaints and trial informations serve separate functions. *State v. Petersen*, 678 N.W. 2d 611, 613 (Iowa 2004). When an arrest is made without a warrant, the grounds for the arrest are to be stated to the magistrate by complaint. Iowa Code § 804.22. The purpose of the preliminary complaint is to determine the legality of the defendant's detention. *Petersen*, 678 at 614 (concluding that a defect "in the complaint stage of the proceedings does not affect the merits of the charge, but only affects the legality of the detention of the

accused to answer the charge prior to the filing of the [trial] information"). The allegations in the preliminary complaint are not binding on the State as even if the complaint is dismissed and the defendant is discharged from custody, the State may still initiate the same offense against the defendant by filing a trial information. Iowa R. Crim. P. 2.2(4)(e). Thus, although the initial allegations in the preliminary complaint may serve as a basis upon which to cross-examine the State's witnesses, the State is not held to or bound by those allegations.

Holzhauser also wanted the methamphetamine weighed without the bags. However, the DCI lab report explicitly refers to the "net weight" of the substances. "Net" weight refers to the weight "remaining after certain deductions or allowances have been made, as for expenses, weight of containers, or waste considerations." David B. Guralnik, *New World Dictionary* 955 (2nd ed. 1974).

Holzhauser also argues that the lab report was inaccurate because an officer at trial testified the weight of the methamphetamine at the scene was "approximately ten grams," while the lab report showed a total net weight of slightly over eleven grams. Yet all that was required to convict Holzhauser of failure to affix a drug tax stamp was a finding that he was in possession of seven grams or more of methamphetamine. Iowa Code § 453B.1(3)(a).

In this case the evidence clearly establishes that the weight of the controlled substance was in excess of ten grams and that weight did not include the weight of the bag in which the drugs were found. Holzhauser has failed to allege how a technician's testimony would have changed the result. He has thus failed to establish any prejudice resulting from counsel's claimed error.

Accordingly, counsel's assistance was not ineffective for failure to challenge the weight of the confiscated methamphetamine or by failing to have the lab technician personally testify.

4. Failure to Challenge Sufficiency of Evidence.

Holzhauser further contends he was provided with ineffective assistance because counsel should have moved for judgment of acquittal on the drug tax stamp violation, claiming the evidence presented by the State was insufficient to sustain his conviction. Holzhauser cannot show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. In order to do so, he would have to prove with reasonable probability the district court would have granted the motion for judgment of acquittal.

Our review of claims of insufficient evidence to support a conviction is for correction of errors at law. Iowa R. App. P. 6.907; *State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011). A jury's findings of guilt are binding on appeal if supported by substantial evidence. *State v. Enderle*, 745 N.W.2d 438, 443 (Iowa 2007). Substantial evidence exists to support a verdict when the record reveals evidence that could convince a rational trier of fact a defendant is guilty beyond a reasonable doubt. *Brubaker*, 805 N.W.2d at 171. In making this determination, we consider all of the evidence in the record in the light most favorable to the verdict and make all reasonable inferences that may fairly be drawn from the evidence. *Id.* "However, it is the State's 'burden to prove every fact necessary to constitute the crime with which the defendant is charged, and the evidence

presented must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture.'" *Id.* (quoting *State v. Kemp*, 688 N.W.2d 785, 789 (Iowa 2004)).

Trial counsel is not required to raise an issue that has no merit. *See State v. Graves*, 668 N.W.2d 860, 882 (Iowa 2003). The State presented an official lab report and officers' testimony that at least ten grams of methamphetamine had been confiscated from Holzhauser's person. Holzhauser admitted to the officers at the time it was confiscated that the substance was his and that it was, in fact, methamphetamine. Furthermore, there was no evidence that a state tax stamp was affixed to the substance. There is not a reasonable probability that the district court would have granted the motion for judgment of acquittal.

Counsel was not ineffective in failing to move for judgment of acquittal on the tax stamp violation.

5. Failure to File Post-Trial Motions.

Holzhausen did not recite what specific post-trial motions he believes should have been filed by his attorney. We decline to speculate. As a general rule, "we will not speculate on the arguments [appellant] might have made and then search for legal authority and comb the record for facts to support such arguments." *Hyler v. Garner*, 548 N.W.2d 864, 876 (Iowa 1996). In most cases the appellant's "random mention of an issue, without analysis, argument or supporting authority is insufficient to prompt an appellate court's consideration." *State v. Mann*, 602 N.W.2d 785, 788 n.1 (Iowa 1999); *Soo Line R.R. v. Iowa*

Dep't of Transp., 521 N.W.2d 685, 691 (Iowa 1994). Any issues related to post-trial motions shall be preserved for postconviction relief.

6. Conclusion.

Holzhauser failed to meet his burden of proving counsel's performance was deficient and that prejudice resulted. We find that counsel did not provide ineffective assistance. Therefore, we affirm the convictions and sentences entered by the district court.

AFFIRMED.