IN THE COURT OF APPEALS OF IOWA

No. 2-171 / 11-0777
Filed May 23, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KEVIN JOSEPH KONVALINKA,
Defendant-Appellant.

Appeal from the Iowa District Court for Webster County, Joel E. Swanson (trial) and Kurt L. Wilke (sentencing), Judges.

Kevin Konvalinka appeals the judgment and sentence entered upon jury verdicts finding him guilty of possession of methamphetamine enhanced as a habitual offender, felony eluding enhanced as a habitual offender, operating while intoxicated, and driving while license suspended. **CONVICTIONS AFFIRMED; SENTENCE AFFIRMED IN PART AND VACATED IN PART, AND REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Ricki N. Osborn, County Attorney, and Cori Kuhn Coleman and Jordan Brackey, Assistant County Attorneys, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

MULLINS, J.

Kevin Konvalinka appeals the judgment and sentence entered upon jury verdicts finding him guilty of possession of methamphetamine enhanced as a habitual offender, felony eluding enhanced as a habitual offender, operating while intoxicated, and driving while license suspended. *See* Iowa Code §§ 124.401(5), 321.279(3)(b), 321J.2(1), 902.8 (2009). Konvalinka challenges the sufficiency of the evidence supporting his possession and eluding convictions. He further asserts his trial counsel provided ineffective assistance by failing to request a jury instruction on "possession" and by failing to suppress, redact, or object to portions of a video of him at the police station after he was arrested. Konvalinka also argues the district court erred in certain sentencing aspects. For the reasons stated herein, we affirm Konvalinka's convictions, preserve the claim regarding the admission of the video for possible postconviction relief proceedings, and affirm and vacate parts of Konvalinka's sentence and remand for resentencing.

I. Background Facts and Proceedings.

Based upon the evidence presented at trial, the jury could have found the following: On August 20, 2010, the police dispatch broadcasted a report that a blue minivan was driving erratically heading westbound on County Road D18/10th Avenue near Fort Dodge. Deputy Tony Walter of the Webster County Sheriff's Office first saw the vehicle as it approached a stop sign at the intersection of 10th Avenue and North 32nd Street. Deputy Walter observed the driver, later identified as Konvalinka, reach over and put on his seat belt. Deputy

Walter, who was driving a marked police vehicle, activated his lights and siren to initiate a traffic stop.

Konvalinka drove away at a high rate of speed, and Deputy Walter pursued. Deputy Walter testified that he reached seventy miles per hour as he sped to catch up to Konvalinka. Deputy Walter stated that at this speed, he “was gaining on him a little bit” and thus estimated Konvalinka to be travelling at approximately sixty miles per hour. The speed limit in the area was twenty-five miles per hour. Deputy Walter testified that he observed Konvalinka pass vehicles and swerve in and out of his lane, but did not see Konvalinka throw anything out of the vehicle.

Captain Robert Thode of the Fort Dodge Police Department was traveling eastbound on 10th Avenue in response to the dispatch when he was advised that the vehicle had taken off. When Captain Thode was near Knollcrest Drive, he observed Konvalinka’s vehicle crest the hill in front of him at a high rate of speed. Captain Thode testified that he estimated Konvalinka’s speed to be about sixty miles per hour. With lights and sirens activated, Captain Thode used his marked patrol car to partially block the westbound lane. Konvalinka swerved onto the shoulder to pass Captain Thode’s vehicle and proceed west on 10th Avenue. Captain Thode also did not observe Konvalinka throw anything from the vehicle. After Konvalinka passed Captain Thode, he began to slow his vehicle.

Officer Joelyn Johnson of the Fort Dodge Police Department was also responding to the call, traveling eastbound on 10th Avenue. After passing North 29th Street, Officer Johnson parked her vehicle in the eastbound lane, with lights

activated. Officer Johnson observed the blue minivan as it approached, and estimated Konvalinka to be travelling "at least ten miles per hour over the speed limit."

Konvalinka stopped his vehicle shortly after passing Officer Johnson's vehicle just before reaching 29th Street. Because of the relatively short duration of the chase and the other vehicles on the road, Deputy Walter testified that he was unable to "pace" Konvalinka's vehicle or verify speed with radar. Captain Thode was also unable to verify speed with radar because his vehicle was not equipped with it. Deputy Walter, Captain Thode, and Officer Johnson all testified that they have never written a speeding ticket on visual approximation nor did they write Konvalinka a ticket for speeding.

After stopping, Konvalinka was ordered out of the vehicle at gun point. Konvalinka complied and was arrested. Deputy Walter testified that Konvalinka was "very anxious and twitchy" and had very erratic behaviors and was moving around. Captain Thode also testified that Konvalinka was "a little jittery." Based on these observations, Deputy Walter and Captain Thode believed Konvalinka was under the influence of a narcotic. During an inventory search of Konvalinka's vehicle, police discovered a glass methamphetamine pipe and a marijuana pipe in a backpack in the rear cargo area of the van.

As Konvalinka was being placed under arrest, Brenda Goodner stopped her vehicle and informed Officer Johnson that she observed Konvalinka throw something out the window of his vehicle as he passed her. Goodner testified that she had been driving west on 10th Avenue near 31st Street when Konvalinka

passed her on the left, driving erratically and at a high rate of speed. Goodner testified that she observed Konvalinka “throw out numerous baggies and then an object I couldn’t identify.” Goodner testified that the item was small, white, and about the size of a deck of cards.

Officer Johnson accompanied Goodner back to the area where Goodner believed the items were discarded. Between North 31st Place and the entrance for a school parking lot, Officer Johnson discovered a cigarette box that contained a plastic bag with 0.17 grams of methamphetamine. Officer Johnson testified that the cigarette box was “in good condition, it wasn’t crushed, it didn’t appear to be weathered, [and] it didn’t appear to have spent any long duration outside.” In addition, Goodner returned to this area the next day and discovered a bag of marijuana along the side of the road. This bag was seized by Deputy Walter.

After she seized the methamphetamine, Officer Johnson returned to the scene of the stop, and transported Konvalinka to the Law Enforcement Center. A video of the events at the county jail was played for the jury without objection.

The video starts with Konvalinka making phone calls while seated in a booking room with his left hand handcuffed to the wall. When Konvalinka finishes his phone call, Officer Johnson reads him his *Miranda* rights. Konvalinka replies that he understands his rights and does not want to speak with her. Officer Johnson then reads Konvalinka an implied consent advisory. Konvalinka refuses to allow Officer Johnson to look into his eyes and questions why Officer Johnson is still speaking with him. Soon Deputy Walter enters the room and

Officer Johnson informs him that Konvalinka was asserting his rights and refused to show her his eyes.

Eventually Deputy Michael Kenyon, a drug recognition expert, enters the booking room and attempts to engage Konvalinka in conversation. Deputy Kenyon asks Konvalinka what is going on, stating he just got there, so fill him in. Konvalinka responds by stating the other officers in the room could probably do a better job. Deputy Kenyon says he was asking Konvalinka to do it. Konvalinka responds that he did not wish to speak about it. Deputy Kenyon then states that if Konvalinka was not going to talk about it, then he was not going to get his side of the story. Konvalinka remains silent.

Deputy Kenyon proceeds to ask Konvalinka questions about whether he had eaten, drank alcohol or water, where he worked, when he last slept and for how long, and if he took any medications or had any medical issues. Konvalinka states that he does not want to answer any of the questions, and that he had already signed a paper stating he did not want to answer any questions. Deputy Kenyon insists he answer since his questions were “medical questions” related to his ability to go to jail. Konvalinka states, “fair enough,” and answers the questions.

Deputy Kenyon requests Konvalinka submit to a breath test and a urine test, and to perform a drug recognition evaluation. Konvalinka questions how he would be charged if he refused testing. Deputy Kenyon responds that he did not know since he had not looked at his criminal history. Konvalinka then explains that he had previously been arrested and charged with operating while

intoxicated on two occasions. Deputy Kenyon informs Konvalinka that he was probably going to be charged with a third offense, and Konvalinka protests saying he had never been convicted. Konvalinka did not want to take any testing without knowing what he was going to be charged with. The officers eventually stated that this would be charged as a first offense. Konvalinka refuses all testing.

In addition to the video, Officer Johnson testified at trial that Konvalinka got a lot more fidgety, could not sit still, and messed with his hands and shorts a lot while at booking. Deputy Kenyon also observed that Konvalinka "couldn't keep still" and "was just fidgety." Deputy Kenyon testified that Konvalinka's movements were consistent with methamphetamine use. During cross-examination and closing argument, defense counsel used the video and the circumstances in the booking room, namely being in jail, handcuffed to the wall, being surrounded by three officers, and being interrogated repeatedly despite invoking his rights to argue Konvalinka's movements were more consistent with nervousness and anxiousness than drug use.

On September 22, 2010, the State charged Konvalinka by trial information with possession of methamphetamine enhanced as a habitual offender, eluding enhanced as a habitual offender, operating while intoxicated, and driving while license revoked or suspended. Konvalinka pled not guilty, and the matter proceeded to trial on April 5 and 6, 2011. During deliberations, the jury requested to watch the video again. The jury found Konvalinka guilty as

charged. A subsequent trial was then held, where the jury determined Konvalinka was a habitual offender.

On May 2, 2011, the district court sentenced Konvalinka. On the possession charge, the district court ordered Konvalinka to be incarcerated for a term not to exceed fifteen years, waived the fine and surcharge, assessed DARE and Law Enforcement Initiative surcharges, and revoked his driver's license or operating privileges for 180 days. On the eluding charge, Konvalinka was sentenced to fifteen years incarceration, the fine and surcharges were waived, and a DARE surcharge was assessed. On the operating while intoxicated charge, Konvalinka was sentenced to one year incarceration, a $1250 fine, a thirty-five percent surcharge, a DARE surcharge, and the Iowa Department of Transportation was directed to revoke his license or operating privileges for 180 days. On the driving while under suspension charge, Konvalinka was sentenced to one year incarceration, a $1000 fine, a thirty-five percent surcharge, and extended the driver's license suspension that was in effect at the time of the offense. The court ordered all sentences of incarceration to run concurrently. Konvalinka was also ordered to reimburse the State for court-appointed attorney fees in the amount of $3463. Konvalinka appeals his convictions and sentence.

II. Sufficiency of the Evidence.

We review challenges to the sufficiency of the evidence for the correction of errors at law, and will uphold a jury's verdict if it is supported by substantial evidence. *State v. Soboroff*, 798 N.W.2d 1, 5 (Iowa 2011). Substantial evidence is evidence that would convince a rational trier of fact the defendant guilty

beyond a reasonable doubt. *Id.* The evidence is examined in the light most favorable to the State, including all legitimate inferences and presumptions which may be fairly and reasonably deduced from the record. *Id.* We consider all the evidence presented, not just that of an inculpatory nature. *State v. Lambert*, 612 N.W.2d 810, 813 (Iowa 2000). Evidence that only raises suspicion, speculation, or conjecture is not substantial. *Id.*

A. Possession of Methamphetamine. Konvalinka argues that the record lacks substantial evidence to prove he possessed methamphetamine. Possession can be actual or constructive. *State v. Maxwell*, 743 N.W.2d 185, 193 (Iowa 2008). Possession is actual when the controlled substance is found on the defendant's person, and 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. *State v. Carter*, 696 N.W.2d 31, 38 (Iowa 2005). In determining constructive possession, we look to the following factors:

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

Maxwell, 743 N.W.2d at 194. Even if some factors are present, we must ultimately determine whether all the facts and circumstances create a reasonable inference that the person knew of the presence of the controlled substance and had control and dominion over it. *Id.*

> Evidence that an accused threw a recognizable object, coupled with the finding of such object in the area where it could have

> landed, will support an inference that the accused had possession of the object thrown.

28A C.J.S. *Drugs and Narcotics* § 370, at 31 (2008); *see also State v. Hobbs*, 252 Iowa 432, 434-35, 107 N.W.2d 238, 239 (1961) (throwing burglary tools from a vehicle during police chase showed "apparent possession").

Upon our review, we find there is substantial evidence supporting the jury's determination that Konvalinka possessed the methamphetamine. Konvalinka was the sole occupant of the vehicle. When Deputy Walter activated his lights and siren, Konvalinka sped away and attempted to evade him. As Konvalinka sped past Goodner, Goodner observed a small, white object about the size of a deck of cards being thrown from the vehicle. Although the officers did not see anything being thrown from Konvalinka's vehicle, Captain Thode and Officer Johnson were not yet on the scene and Deputy Walter was accelerating to catch-up to Konvalinka. Konvalinka stopped his vehicle voluntarily shortly thereafter. It is reasonable to conclude that Konvalinka stopped soon after because he had discarded what prompted him to flee in the first place. After Konvalinka was stopped, Goodner immediately escorted Officer Johnson back to the area where she saw objects being thrown from Konvalinka's vehicle. Officer Johnson discovered a cigarette package matching Goodner's general description in the ditch along the road with methamphetamine inside. The cigarette package was in good condition and did not appear weathered. A methamphetamine pipe was also discovered in Konvalinka's vehicle. Based on the foregoing facts and circumstances, the jury could make the reasonable inference that Konvalinka exercised dominion and control over the methamphetamine when he threw it

from his vehicle. *See State v. Vance*, 790 N.W.2d 775, 784 (Iowa 2010) (holding "[a]lthough the [drugs were] not found on [the defendant's] person at the time of the stop, substantial evidence supports the jury's finding that at one time [the defendant] had actual possession of the [drugs]."). We find the State provided sufficient evidence to sustain Konvalinka's conviction for possession of methamphetamine.

B. Eluding. Konvalinka also challenges the sufficiency of the evidence for his felony eluding conviction. Konvalinka contends that the uncorroborated opinion testimony or estimations of Deputy Walter and Captain Thode as to his speed does not constitute substantial evidence that he was exceeding the speed limit by twenty-five miles per hour. Konvalinka requests we remand so judgment can be entered on the lesser included offense of serious misdemeanor eluding. *Compare* Iowa Code § 321.279(1) (eluding as a serious misdemeanor), *with id.* § 321.279(3) (eluding as a class "D" felony).

The evidence presented by the State regarding excessive speed was the visual estimations made by Deputy Walter and Captain Thode. Both officers testified that they were unable to determine Konvalinka's speed using radar or by pacing his vehicle. However, Deputy Walter estimated that because he reached a top speed of seventy miles per hour and was only "gaining on him a little bit," that Konvalinka would have been travelling about sixty miles per hour. Captain Thode also testified that when Konvalinka's vehicle crested the hill before him that he estimated the vehicle's speed at approximately sixty miles per hour.

Deputy Walter and Captain Thode have been police officers for eight and twenty-eight years, respectively. Deputy Walter testified that he based his estimate on how fast he observed Konvalinka driving, how fast he was catching up to Konvalinka, and on his training estimating speed. Both Deputy Walter and Captain Thode testified that they have attended radar certification training. In order to become certified, the officers observed cars coming towards and away from them, and had to estimate the speed within five miles per hour.

We believe this testimony was sufficient to permit the jury to find that the element of the eluding involving excessive speed of twenty-five miles per hour had been established by the State. *See State v. Bedwell*, 417 N.W.2d 66, 70 (Iowa 1987) (finding sufficient evidence for felony eluding based upon an officer's testimony that the vehicle "was well in excess of sixty miles per hour [in a thirty-five mile per hour zone] and I was just keeping pace with him").

We further note that this holding is in line with several other jurisdictions that have determined that an officer's visual estimation of speed without any corroborating radar, other mechanical speed detector, or pacing of the vehicle may be sufficient to sustain a conviction where speed is an element of the offense. Much like our analysis, these jurisdictions make a case-specific inquiry into the officer's training and experience, the nature and extent of the opportunity which the officer had to view the moving vehicle, and the magnitude of the variance between the estimated speed and the speed limit. *Stone v. State*, 571 S.E.2d 488, 490 (Ga. Ct. App. 2002); *State v. Estes*, 223 P.3d 287, 290 (Idaho Ct. App. 2009); *People v. Hampton*, 422 N.E.2d 11, 13 (Ill. Ct. App. 1981); *State*

v. Ali, 679 N.W.2d 359, 368 (Minn. Ct. App. 2004); *State v. Kimes*, 234 S.W.3d 584, 589 (Mo. Ct. App. 2007); *People v. Olsen*, 239 N.E.2d 354, 354-55 (N.Y. 1968); *Barberton v. Jenney*, 929 N.E.2d 1047, 1051 (Ohio 2010). We find the State provided substantial evidence proving Konvalinka travelled at a speed greater than twenty-five miles per hour over the speed limit. Therefore, we affirm his conviction for felony eluding.

III. Ineffective Assistance of Counsel.

Konvalinka raises two claims of ineffective assistance of counsel. First, he claims his counsel should have requested a jury instruction defining "possession." Second, he contends his counsel should have moved to suppress, redact, or object to the admission of portions of the video from the county jail, which repeatedly shows him invoking his right to remain silent and mentions previous operating while intoxicated arrests. We review these claims de novo. *Maxwell*, 743 N.W.2d at 195.

To succeed on a claim of ineffective assistance of counsel, Konvalinka must show by a preponderance of the evidence: (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *State v. Rodriguez*, 804 N.W.2d 844, 848 (Iowa 2011). Failure to prove either element is fatal to the claim. *Lado v. State*, 804 N.W.2d 248, 251 (Iowa 2011).

Generally, we preserve these claims for postconviction relief proceedings. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). We do this so 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.

Id. However, if we determine the record is adequate, we may resolve the claims on direct appeal. *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010). We find the record is adequate in this case to address Konvalinka's jury instruction claim.

A. Jury Instruction on Possession. Defense counsel did not object to the omission of, nor did counsel request an instruction defining "possession." However, we conclude Konvalinka has failed to establish a reasonable probability exists that, had his attorney requested the possession instruction, the outcome of his trial could have been different. *State v. Barnes*, 791 N.W.2d 817, 825 (Iowa 2010). In this case, the jury either believed or disbelieved Goodner's testimony that the methamphetamine was thrown from Konvalinka's car. A jury instruction would not have changed this factual finding. Further, as already found, substantial evidence exists showing Konvalinka possessed the methamphetamine. Therefore, Konvalinka cannot show prejudice.

B. Admission of the Video. Defense counsel also allowed the State to play portions of the video of Konvalinka at the county jail during which Konvalinka repeatedly invoked his right to remain silent and mentioned previous operating while intoxicated arrests. The State does not challenge that the video contains statements that could have been suppressed or redacted, but contends trial counsel declined to object as part of a reasonable trial strategy.

> The fact that a particular decision was made for tactical reasons does not, however, automatically immunize the decisions from a Sixth Amendment challenge. That decision must still satisfy the ultimate test: whether under the entire record and totality of circumstances counsel performed competently.

State v. Ondayog, 722 N.W.2d 778, 786 (Iowa 2006) (quotations omitted). "Because '[i]mprovident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily amount to ineffective assistance of counsel,' postconviction proceedings are often necessary to discern the difference between improvident trial strategy and ineffective assistance." *Id.* (quoting *State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992)). We believe this issue should be preserved for possible postconviction relief proceedings where the record can be more fully developed.

IV. Sentencing.

Konvalinka also challenges three portions of his sentence. The court may correct an illegal sentence at any time. Iowa R. Crim. P. 2.24(5)(a). When the sentence imposed is beyond the court's authority, review is for errors at law. *State v. Morris*, 416 N.W.2d 688, 689 (Iowa 1987). A sentence not permitted by statute is void.[1] *State v. Ohnmacht*, 342 N.W.2d 838, 842 (Iowa 1983).

A. Attorney Fees. Konvalinka first contends he cannot be required to reimburse the State for his court-appointed attorney fees in an amount above the fee limitation. *See* Iowa Code §§ 13B.4(4)(a), 815.14; *State v. Dudley*, 766 N.W.2d 606, 621-23 (Iowa 2009). Konvalinka asserts that since the charge with the highest fee limitation was a class D felony, he only should have been ordered to reimburse $1200. Iowa Admin. Code r. 493-12.6(1). We agree. Therefore, we vacate this portion of his sentence and remand for resentencing.

---

[1] Although not raised by either party, the sentences as a habitual offender should not have included a fine, in the absence of a specific sentencing statute. Iowa Code § 902.9(3). Further, Iowa Code section 321J.2 is the only section that authorizes waiver of a portion of a fine.

B. License Revocation. Konvalinka also challenges the district court's revocation of his driving privileges for 180 days for his operating while intoxicated conviction pursuant to Iowa Code section 901.5(10). Section 901.5(10) only provides revocation for certain drug-related offenses, and not an operating while intoxicated conviction. *But see* Iowa Code § 321J.4 (allowing revocation for operating while intoxicated convictions). Because section 901.5(10) does not provide the district court authority for the sentence imposed, this portion of the sentence is also vacated and remanded.

C. DARE Surcharge. Konvalinka further challenges the district court's imposition of a ten dollar DARE surcharge on his felony eluding conviction under section 321.279. The statute that permits the imposition of a DARE surcharge provides in pertinent part:

> 1. In addition to any other surcharge, the court of clerk of the district court shall assess a drug abuse resistance education surcharge of ten dollars if a violation arises out of a violation of an offense provided for in chapter 321J or chapter 124, division IV.
> 2. In the event of multiple offenses, the surcharge shall be imposed for each applicable offense.

Iowa Code § 911.2.

Konvalinka's felony eluding conviction included the element, "The driver is in violation of section 321J or 124.401." *Id.* § 321.279(3)(b). Therefore, his eluding conviction arose out of a violation of one of the enumerated offenses that made the DARE surcharge applicable. We affirm this portion of the sentence.

V. Conclusion.

We affirm Konvalinka's convictions because they are supported by substantial evidence. We further reject his claim that his counsel provided

ineffective assistance by failing to request a jury instruction defining "possession," but preserve for possible postconviction relief proceedings his claim counsel should have suppressed, redacted, or objected to the video recorded at the county jail. In addition, we vacate and remand the attorney fee and license revocation portions of Konvalinka's sentence.

CONVICTIONS AFFIRMED; SENTENCE AFFIRMED IN PART AND VACATED IN PART, AND REMANDED FOR RESENTENCING.