IN THE COURT OF APPEALS OF IOWA

No. 7-132 / 06-0301
Filed June 13, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DENNIS JOSEPH SCHOFIELD,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Don C. Nickerson, Judge.

Defendant-appellant appeals from the judgment and sentences entered after his convictions for nineteen crimes. **AFFIRMED.**

Patricia Reynolds, Acting State Appellate Defender, and David Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard Bennett, Assistant Attorney General, John P. Sarcone, County Attorney, and Dan Voogt and Stephanie Cox, Assistant County Attorneys, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Eisenhauer, JJ.

EISENHAUER, J.

Defendant-appellant Dennis Schofield appeals from the judgment and sentences entered after his convictions for nineteen crimes. Schofield raises three claims: (1) the district court erred in not severing two marijuana-related charges from the other charges, (2) the district court erred in admitting irrelevant and unfairly prejudicial evidence in violation of Iowa Rules of Evidence 5.401, 5.403 and 5.404(*b*), and (3) he was denied the effective assistance of counsel.

BACKGROUND FACTS AND PROCEEDINGS

On May 10, 2005, the Mid-Iowa Narcotics Enforcement Task Force attempted a reverse sting by arranging a sale of approximately two pounds of clear methamphetamine, known as ice, to Lee M. Castillo. Dennis Schofield was brought into the deal by Castillo to supply the $15,000 purchase money. The sale took place in a second-floor room at Heartland Inn in Des Moines. While the drug transaction was occurring, the arrest team, comprised of six officers, waited in a nearby room. After the deal was completed, Schofield and Castillo left the room with Castillo carrying the methamphetamine in a black bag.

As they entered the hallway, the arrest team emerged from its room. Officer Rehberg led the team, carrying a large bulletproof shield for protection. Officer Glenn followed him closely, and other officers came after her in a line. Five officers, including Officer Rehberg and Officer Glenn, were wearing black raid vests bearing the word “police” on the right chest and on the back. One officer did not wear the vest, but had a police badge around his neck. Both Rehberg and Glenn, with their weapons drawn, yelled, “Police! Get Down! Police! Get Down!” Schofield immediately took off for the stairs. Upon reaching

the landing where the flight of stairs turned, Schofield noticed Officer Federsen, who was leading another team of officers, coming up from the stairwell. This team of officers was all wearing plain clothes. Schofield was carrying a revolver with him. He pulled the revolver and fired twice at Federsen. One bullet struck Federsen in the hand, and Federsen fell on the steps. The officers following Federsen retreated down the steps and out of the hotel door.

Officer Rehberg, upon hearing Schofield fire, opened fire at Schofield. Schofield turned and shot up the stairs at Rehberg, ultimately hitting him in the leg. Officer Glenn suffered a grazing wound to her leg during the shooting. After Schofield fired all six shots in his revolver, he ran outside the hotel. The officers waiting outside the hotel started firing at Schofield. Surrounded, Schofield eventually dropped his weapon and surrendered to the approaching officers. He was arrested and taken to the hospital for treatment of his wounds.

Following the arrest of Schofield, police officers obtained a search warrant and searched Schofield's residence. Officers found various sums of money, other weapons, drugs, and approximately two pounds of marijuana during the search.

On June 21, 2005, the State filed a multi-count trial information, charging Schofield with nineteen counts of offenses, including conspiracy to deliver methamphetamine, possession of methamphetamine with intent to deliver, failure to possess a tax stamp for the methamphetamine, attempt to commit murder (ten counts), willful injury (three counts), carrying weapons, possession of marijuana with intent to deliver, and failure to possess a tax stamp for the marijuana. Schofield pled not guilty to all charges.

On November 7, 2005, Schofield moved to sever the counts for possession of marijuana with intent to deliver and failure to possess a tax stamp for the marijuana from the other charges. On November 14, 2005, Schofield filed a motion in limine seeking to prohibit the State from introducing evidence of defendant's other charges and bad acts. The district court denied both motions.

At trial Schofield claimed self-defense. The jury returned its verdicts and found Schofield guilty as charged on fifteen counts. On the other four counts of attempt to commit murder, the jury found Schofield guilty of the lesser included offense of assault. Schofield filed a motion for new trial. The motion was argued prior to sentencing, and the district court denied the motion. Schofield was sentenced to serve various consecutive terms of imprisonment totaling two hundred years with mandatory minimum sentences of over one hundred years. Schofield appeals.

ISSUE I: SEVERANCE OF THE TRIAL.

Among the nineteen charges, seventeen arose from the methamphetamine transaction and the gun battle at the Heartland Inn. The other two charges – possession of marijuana with intent to deliver and failure to possess a tax stamp for the marijuana – concerned controlled substance police officers found at Schofield's home after the gun battle. Schofield argues that the two marijuana-related charges should have been tried separately based on Iowa Rule of Criminal Procedural 2.6(1).

We review the district court's refusal to sever multiple charges for abuse of discretion. *State v. Query*, 594 N.W.2d 438, 443 (Iowa App. 1999). In reviewing the district court's decision, we balance any unfair prejudice that may result from

a joint trial against the State's interest in judicial economy. *State v. Delaney*, 526 N.W.2d 170, 175 (Iowa App. 1994). The burden of proof rests with the defendant. *Id*.

Iowa Rule of Criminal Procedure 2.6(1) permits joinder of counts where they arise out of the same transaction or occurrence, or where they are part of a common scheme or plan. "As a general rule, if the counts neither arise out of the same transaction or occurrence nor are part of a common scheme or plan, separate trials would be called for." *State v. Geier*, 484 N.W.2d 167, 172 (Iowa 1992). Schofield argues the two marijuana-related charges and the other seventeen charges clearly did not arise from the same occurrence. Neither do they meet the "common scheme or plan" test. Therefore, they should have been separated for trial.

We do not find the district court abused its discretion in refusing to sever the charges because we do not find the prejudicial effects resulting from the joint trial overweighed the value of judicial economy. The two marijuana-related charges involved many of the same officers and witnesses with the other seventeen counts. It would be burdensome to have them in court and give the same testimony twice in two separate trials. On the other hand, the prejudicial effects resulting from the joint trial were minimal. Schofield alleges that combining the last two counts with the other counts led the jury to think of him as a drug dealer who deserves punishment and undermined his justification defense to the murder charges. It is true the evidence proffered to prove the marijuana-related charges suggested Schofield was a drug dealer. However, even without this evidence, jury would have reached the same conclusion based on the

overwhelming evidence regarding the other seventeen charges. At trial, Schofield admitted, explicitly or implicitly, that he was an experienced drug dealer. He testified that he was sometimes called Bill because "in the drug game, you want to stay anonymous." When the prosecutor asked him whether the purpose of purchasing the methamphetamine was to sell it, he answered: "Yes." The prosecutor then asked: "Because you are a drug dealer?" He again answered: "Yes." Schofield's own testimony was sufficient to establish his drug dealer status. The fact that police found marijuana in his house was merely cumulative, and did not create additional prejudicial effects.

In addition, we do not find the argument that the two marijuana-related charges undermined the jury's consideration of his defense of justification to be persuasive. At trial, Schofield argued he did not realize the people surrounding him were police officers. He stated that several police officers yelled at the same time, and he could not tell what they were saying. He also stated that everything happened so fast, and he did not have chance to see the word "police" on the officers' vests. Schofield claimed that he thought they were being robbed, and he opened fire to defend himself. However, there was clear evidence undermining the credibility of this statement. The police informant testified that he heard the officers identify themselves. Schofield's co-defendant, Castillo, also testified that he immediately realized they were confronted by police officers. The jury simply did not believe Schofield's self-defense justification.

ISSUE II: ADMISSIBILITY OF EVIDENCE.

Before trial, Schofield filed a motion in limine seeking to exclude the exhibits and testimony concerning three items of evidence: (1) evidence about

Schofield's cell phone with screen saver stating "Live Better, Deal Drugs" and "Kill a Man;" (2) evidence about Schofield's assault on Michael Tejeda, the police informant who set up the methamphetamine transaction at Heartland Inn, while in jail awaiting trial; and (3) evidence about photo albums found in Schofield's home showing Schofield posing with large amount of cash and weapons. The district court tentatively allowed the evidence after a pretrial hearing. On appeal, Schofield claims the evidence was irrelevant and unfairly prejudicial in violation of Iowa Rules of Evidence 5.401, 5.403 and 5.404(b). He claims the State introduced the evidence mainly to show the jury that he had chosen a life of a drug dealer, and he had no remorse to his crime; therefore, anything he testified to defend himself should be disbelieved.

As a preliminary issue, we must first decide whether the error was preserved for appeal. If a district court's ruling is dispositive on the issue of admissibility of the evidence, it is considered final, and no further objection is necessary. *State v. Miller*, 229 N.W.2d 762, 768 (Iowa 1975). Otherwise, the party who challenges the evidence must make proper objection at trial in order to preserve the claim for appeal.

Cell Phone Background: At the pretrial hearing, the district court allowed the evidence of text background on the cell phone by stating: "At this point, I'm going to allow the cell phone evidence to come into the record. Now, if at trial the foundation is not established for the cell phone, that will be a different issue." It is clear that the district court did not intend this decision to be final. The evidence could be excluded upon Schofield's objection if the State failed to establish the

foundation at trial. Since Schofield did not object to the evidence at trial, error was not preserved.

Schofield alternatively argues his counsel was ineffective for failing to properly object to this evidence. The record does not sufficiently reveal the circumstances of counsel's conduct for us to make determination at this time. We preserve the ineffective assistance of counsel claim for postconviction proceedings.

***Assault on Police Informant*:** A series of issues surrounding this evidence were discussed at the pretrial hearing, and some of them were not resolved. When the court inquired of the parties how the evidence was to be introduced without mentioning the inadmissible information, the State proposed that Schofield's counsel was free to ask the witness any question, and the State would object if at any point it believed the questions were unfair or irrelevant. After the parties reach this understanding, the district court allowed the evidence but cautioned the parties to keep the evidence tight, material and relevant.

We do not find the district court's in limine ruling on this issue excused Schofield from his duty to object at trial. The district court never made findings regarding the probative value and the prejudicial effects of this evidence at the pretrial hearing. The State clearly indicated it would object to the improper questions presented at trial. Logically, Schofield's counsel was expected to do the same. The district court would decide the admissibility of the evidence upon either party's objection. Schofield's counsel did not object to the evidence at trial, and the issue was not preserved. For the same reason we stated in relation to

the cell phone evidence, we preserve the ineffective assistant counsel claim on this evidence for postconviction proceedings.

Photo Album: Schofield objected to this evidence during the trial outside the jury's presence before the evidence was introduced to the jury. The court's ruling upon this objection was unequivocal regarding the admissibility. The claim on this evidence was therefore sufficiently preserved for appeal.

We review the district court's decision on the admissibility of evidence for abuse of discretion. *State v. Rodriquez*, 636 N.W.2d 234, 239 (Iowa 2001). An abuse of discretion occurs when the trial court exercises its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Maghee*, 573 N.W.2d 1, 5 (Iowa 1997). Even when the district court errs on the admissibility of evidence, we will not reverse a defendant's convictions unless the defendant can prove he was prejudiced by the error. Iowa R. Evid. 5.103(*a*). If similar evidence is overwhelmingly clear in the record, then the error is not prejudicial. *State v. Sullivan*, 679 N.W.2d 19, 29 (Iowa 2004).

Although the pictures did speak to Schofield's character, we do not find them unfairly prejudicial. There is overwhelming evidence in the record, including Schofield's own testimony, showing the traits of character the pictures were allegedly to prove. At trial, Schofield admitted that he was a drug dealer and a proud gun owner. In addition, the police officers found various sums of cash and weapons while searching Schofield's house. Pictures of the cash and weapons were admitted into evidence without objection. These pictures had essentially the same effect as the challenged photos in which Schofield posed

with cash and weapons. The photo albums are therefore merely cumulative evidence. Error, if any, in the admission of the evidence was harmless.

ISSUE III: INEFFECTIVE ASSISTANCE OF COUNSEL.

Schofield claims his trial counsel was ineffective for (1) failing to object to the consecutive sentences as cruel and unusual, (2) failing to object to the jury instructions, (3) failing to file a motion to sever in a timely manner, and (4) failing to object to the testimony regarding the comments he made at the hospital. We review claims of ineffective assistance of counsel de novo. *State v. McBride,* 625 N.W.2d 372, 373 (Iowa Ct. App. 2001). To succeed with a claim of ineffective assistance of counsel, a defendant typically must prove the following two elements: (1) counsel failed to perform an essential duty, and (2) defendant was prejudiced by counsel's error. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). There is an assumption that counsel's performance is competent. *Id.* 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694. The defendant must show that his counsel performed below the standard demanded of a reasonably competent attorney. *Id*. 466 U.S. at 687-8, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693. To show prejudice, the defendant must show that there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. Ineffectiveness claims raised on direct appeal are ordinarily preserved for postconviction relief to allow full development of the facts surrounding counsel's conduct. *Berryhill v. State,* 603 N.W.2d 243, 245 (Iowa 1999).

Consecutive Sentences. Both the United States and Iowa constitutions prohibit punishments that inflict torture, or are so excessively severe that they are disproportionate to the offenses charged. *State v. Cronkhite,* 613 N.W.2d 664, 669 (Iowa 2000). In this case, the sentences on the nineteen counts, if all running consecutively, totaled 247 years and 120 days in prison. By running some of the sentences concurrently, the total number of years to be served was reduced to 200 years and 120 days. Because of various enhancements, Schofield had to serve 121.6 years in prison before he was eligible for parole or work release. On appeal, Schofield is not challenging the individual sentence he received on each count upon which he was convicted. Instead, he contends that the mandatory minimum sentence far exceeds his expected life span, and the sentences as imposed are cruel and unusual considering the fact that he did not kill anybody in the shooting. He alleges counsel breached an essential duty for failing to object to the sentences. The record on this issue is sufficient for us to make a determination at this time.

Imposition of consecutive sentences does not necessarily offend the cruel and unusual punishment rule even if the number of years to be served exceeds a defendant's expected life span. Our supreme court has stated that if a punishment "falls within the parameters of a statutorily prescribed penalty," it generally does not constitute cruel and unusual punishment. *Cronkhite* at 669. Iowa Code section 901.8 expressly authorizes the sentencing court to run sentences consecutively. The ultimate test for cruel and unusual punishment is whether the sentence is grossly disproportional to the crime.

We do not find this gross disproportion in the present case. When determining whether the counts should be served concurrently or consecutively, the district court considered many factors. Schofield committed nineteen serious offenses, and many of them showed his total disregard to the lives of the police officers. Moreover, Schofield showed no remorse for his conduct after being arrested, which casts doubts on the possibility of his rehabilitation. The district court also considered Schofield's age, as well as his prior criminal record. The district court made the sentencing decision after balancing these factors, and we do not find the sentences cruel and unusual. Counsel has no duty to raise a meritless objection; therefore, he did not breach an essential duty. *See State v. Griffin*, 691 N.W.2d 734, 737 (Iowa 2005).

Jury Instructions. Schofield challenges jury instructions nineteen and seventy-seven. Jury instruction nineteen reads as follows:

> If you find the shooting involved a third person, then the defendant's intent and state of mind are to be determined by his conduct toward the third person. The Defendant's guilt is to be determined upon the same basis as if the third person had been the intended target of the shooting.

Jury instruction seventy-seven reads as follows:

> Concerning element 3[1] in Instructions Nos. 43, 50, 53, 56, 59, 62, 65, 68, 71, and 74, even if the evidence proves the defendant's act could not have caused the death of any person, this element is established if the defendant intended to cause the death of some person by so acting.

Schofield argues that these two instructions, which attempted to encapsulate the concept of transferred intent, misstated the law. The record on

[1] Element 3 reads the same in each of the listed instructions: "When defendant acted, he specifically intended to cause the death of [the victim].

this issue is unclear. We do not know whether the challenged instructions had been modified and agreed upon after the discussion between both parties. We do not know whether counsel failed to object, and if so, why. We therefore preserve this issue for the postconviction relief proceedings.

Motion to Sever. Iowa Rule of Criminal Procedure 2.11(2)(*c*) requires a motion to sever charges be filed no later than forty days after arraignment. Trial counsel did not file this motion in a timely manner. Schofield argues that should we find the failure to file a timely motion to sever is sufficient, in itself, to affirm the district court's denial, then counsel's failure to file the motion timely constitutes a failure to perform an essential duty which prejudiced him.

Even though the motion was not filed timely, the district court considered the motion. A hearing was held and Schofield had the opportunity to present the merits of the motion. The district court overruled the motion not for procedural defects, but for substantive reasons. Similarly, we agree with the district court's decision to deny to the motion not because it was untimely, but because we find judicial economy overweighs the prejudice effects arising from the joint trial. Therefore, Schofield was not prejudiced because the court ruled on the merits of his motion to sever and we have considered the issue on direct appeal.

Statements Made in the Hospital. Two witnesses were called to testify about the statements Schofield made while undergoing treatment for his gunshot wounds. He made comments about his being a marksman and criticized the police officers' performance during the gunshots. He also stated, in discussing the fact that one officer had been wearing a Kevlar vest, that "Kevlar is for pussies." Schofield claims that the testimony regarding these statements was

inadmissible character evidence, and counsel should have objected to them. We preserve this claim for post conviction consideration.

SUMMARY.

We preserve for postconviction consideration the claims of ineffective assistance of counsel for failure to properly object to the following: the cell phone background, the evidence of the assault on the informant, the jury instructions and the statements to witnesses at the hospital. Otherwise we affirm the convictions.

AFFIRMED.