IN THE COURT OF APPEALS OF IOWA

No. 7-325 / 06-1149
Filed June 13, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KYLE DUANE NEWMAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Plymouth County, Robert J. Dull, District Associate Judge.

Defendant appeals his conviction for possession of marijuana. **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Greta Truman and Jason Shaw, Assistant Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney General, Darin J. Raymond, County Attorney, and Amy Oetken, Assistant County Attorney, for appellee.

Considered by Mahan, P.J., and Eisenhauer and Baker, JJ.

MAHAN, P.J.

Defendant-appellant Kyle Duane Newman appeals his conviction for possession of marijuana. On appeal, Newman claims there was insufficient evidence to support the conviction. He also claims he received ineffective assistance of counsel in two regards: (1) his trial counsel failed to ensure the jury waiver substantially complied with Iowa Rule of Criminal Procedure 2.17(1) and (2) his trial counsel failed to bring a proper motion for judgment of acquittal.

I. Backgrounds Facts and Proceedings

On November 2, 2005, Newman was charged with possession of marijuana and gathering where controlled substances are used in violation of sections 124.401(5) and 124.407 of the Iowa Code (2005). Six weeks later, Newman signed a written waiver of jury trial.

The case came for a bench trial on April 18, 2006. Prior to the trial, the court entered into a very brief colloquy regarding the jury waiver. The court found Newman guilty of possession of marijuana and not guilty of promoting a gathering where marijuana would be used. Newman was sentenced to a term of incarceration of thirty days, all but two of which were suspended.

II. Ineffective Assistance

Newman claims his counsel was ineffective for failing to ensure the jury waiver substantially complied with Iowa Rule of Criminal Procedure 2.17(1) and the holding in *State v. Liddell*, 672 N.W.2d 805 (Iowa 2003). Specifically, he claims his trial counsel failed to perform an essential duty by not ensuring the waiver was knowingly, voluntarily, and intelligently made.

When there is an alleged denial of constitutional rights, such as an allegation of ineffective assistance of counsel, we evaluate the totality of the circumstances in a de novo review. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998). To prove trial counsel was ineffective, the defendant must show counsel failed to perform an essential duty and prejudice resulted from counsel's error. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *Id.* We prefer to leave ineffective-assistance-of-counsel claims for postconviction relief proceedings. *State v. DeCamp*, 622 N.W.2d 290, 296 (Iowa 2001). However, we will consider such claims on direct appeal if the record is sufficient. *Id.* The record in this case is adequate to decide this issue on direct appeal.

A jury trial is required unless a "defendant voluntarily and intelligently waives a jury trial in writing and on the record." Iowa R. Crim. P. 2.17(1). The court must personally address a defendant to ensure the waiver is voluntary, knowing, and intelligent. *Liddell*, 672 N.W.2d at 813.[1] To determine whether the waiver is knowing, voluntary, and intelligent, "a court should ascertain whether the defendant understands the difference between jury and non-jury trials, through an in-court colloquy." *Id.* In order to do draw out this distinction, the court suggested the trial court inform the defendant: (1) twelve members of the community compose a jury, (2) the defendant may take part in jury selection, (3) jury verdicts must be unanimous, (4) the court alone decides guilt or innocence if the defendant waives a jury trial, and (5) neither the court nor the

[1] *Liddell* partially overruled *State v. Lawrence*, 344 N.W.2d 227 (Iowa 1984), to require some in-court colloquy to ensure jury trial waivers are knowing, voluntary, and intelligent. *Liddell*, 672 N.W.2d. at 813-14.

prosecution will reward the defendant for waiving a jury trial. *Id.* at 813-14. The court clarified that this five-part inquiry is not "[a] 'black-letter' rule[ ] nor a 'checklist' by which all jury-trial waivers must be strictly judged." *Id.* at 814. Instead, "[s]ubstantial compliance is acceptable." *Id.*

In the present case, the colloquy between the court and Newman did not touch upon any of these factors. The following is the entire in court colloquy regarding the jury waiver:

> THE COURT: For purposes of the record, I do note there was a waiver of jury trial -- written waiver of jury trial filed December 19, 2005. It's signed by you and your attorney. Did you sign that, sir?
>
> THE DEFENDANT: YES.
>
> THE COURT: Do you agree with the contents of that document?
>
> THE DEFENDANT: Yes.

The written waiver also did not touch upon any of the five inquiries. The written waiver states, in pertinent part:

> 1. I realize that I have a right by virtue of the Constitution of the United States and of the Constitution of the State of Iowa to a trial by jury.
>
> 2. I realized that the above case shall be tried to a jury unless I voluntarily and intelligently waive a jury trial in writing and on the record within thirty (30) days after my arraignment or within ten (10) days after the completion of discovery in this case, but not later then ten (10) days prior to the date set for trial.
>
> 3. I realized that I may waive a jury trial after the times described above have run if the prosecuting attorney consents to the waiver.
>
> 4. I realize that I may <u>not</u> withdraw a voluntary and knowing waiver of trial by jury as a matter of right, but the Court, in its discretion, may permit withdrawal of the wavier prior to the commencement of the trial.
>
> 5. I have been fully advised of my statutory and Constitutional rights to a trial by jury and the ramifications of waiving the same by my attorney.
>
> 6. I waive my right to have this case tried by jury and agree that it may be tried to the Court.

The waiver also contained a signature line for Newman's trial counsel stating the following: "I have discussed the matters referred to in this pleading with my client, the Defendant, and acknowledge that he/she executes the same knowingly, intelligently, and voluntarily."

The State contends this written waiver, as referenced by the trial court, constitutes substantial compliance. We disagree. The court has the duty to determine whether the waiver was made knowingly, intelligently, and voluntarily. *See id.* at 813 ("In conducting an in-court colloquy, it is important to recognize the ultimate standard to be complied with is whether the waiver is knowing, voluntary, and intelligent. To this end, *a court* should ascertain whether the defendant understands the difference between jury and non-jury trials, through an in-court colloquy." (emphasis added)). This duty is not abrogated by an attorney attesting, prior to the in-court colloquy, that the waiver was made knowingly, intelligently, and voluntarily. In total, neither the in-court colloquy nor the written waiver ensured a voluntary and intelligent waiver. This constitutes a failure to comply with the requirements of rule 2.17(1), and therefore is a breach of an essential duty.

Newman does not allege that he suffered any actual prejudice from counsel's failure of duty, but relies instead upon our supreme court's decision in *State v. Stallings*, 658 N.W.2d 106, 112 (Iowa 2003), for the proposition that counsel's failure to ensure compliance with rule 2.17(1) constitutes a "structural defect" giving rise to a presumption of prejudice. In *Stallings*, the Iowa Supreme Court reasoned that, "[b]ecause the right to a jury trial is so fundamental to our justice system, we conclude this is one of those rare cases of a 'structural' defect

in which prejudice is presumed." *Id.* The State asks us to reverse, limit, or modify *Stallings* in order to eliminate this presumption of prejudice. As recently noted by our supreme court, the denial of the right to a jury trial is one of "only a handful of 'important' constitutional rights that are fundamental to our justice system" and therefore one of the rare instances we presume prejudice. *State v. Straw*, 709 N.W.2d 128, 138 n.4 (Iowa 2006) (citing *Stallings*, 658 N.W.2d at 112). In light of our supreme court's recent decision citing *Stallings* and restating the importance of this right, we find the State's arguments to eliminate this presumption unpersuasive.

Due to our holding on this issue, we do not address Newman's other claim of ineffective assistance of counsel and find no need to address whether the conviction was supported by substantial evidence. We reverse Newman's conviction and remand for further proceedings in accordance with this opinion.

REVERSED AND REMANDED.