IN THE COURT OF APPEALS OF IOWA

No. 7-544 / 06-1454
Filed October 12, 2007

CHRISTOPHER K. MOYER,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Fremont County, James Heckerman, Judge.

Applicant appeals from the district court's dismissal of his postconviction relief claims. **AFFIRMED.**

Chad Primmer, Council Bluffs, for appellant.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney General, Margaret Askew Gregory, County Attorney, and Vicki Danley, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

SACKETT, C.J.

Applicant Christopher K. Moyer appeals the district court's dismissal of his petition for postconviction relief. Moyer asserts the district court erred in dismissing his claims that he received ineffective assistance of counsel when his trial counsel failed to: 1) object to the State's amendment of trial information less than two weeks before trial, 2) challenge the initial seizure of Moyer as an unreasonable search and seizure, 3) move for a mistrial after a juror expressed bias, 4) request a record be made during voir dire of potential jurors, 5) object to certain witness testimony as unduly prejudicial, and 6) investigate potential defense witnesses or depose State witnesses. We affirm.

BACKGROUND. During routine patrol of rural Fremont County, a police officer noticed persons gathering in an open field owned by the Moyer family. Later in the shift, at approximately 2:00 a.m., the officer saw a truck at the field entrance and the defendant, Christopher Moyer, standing at a gate. The officer stopped to inquire about the truck and inform Moyer of the persons he saw earlier at the property. Upon approaching, the officer was overwhelmed by the smell of anhydrous ammonia. The officer discovered the anhydrous ammonia was leaking from a propane tank in the back of the truck. The officer secured Moyer and the driver of the truck, and called for assistance. A search warrant for Moyer's home and shed was issued. Items and precursors used for the manufacture of methamphetamine were recovered from the search.

In September 2003, Moyer was convicted of conspiracy to manufacture a controlled substance, possession with intent to deliver five grams or less of

methamphetamine, and four counts of possession of methamphetamine precursors. On direct appeal in December 2004, the convictions were affirmed but we remanded for resentencing. In March of 2006, Moyer filed a pro se application for postconviction relief. On August 15, 2006, court-appointed counsel filed an amended application for postconviction relief on Moyer's behalf. At the postconviction relief hearing, Moyer's trial attorney, Kenneth Whitacre, testified and the original transcript was submitted as an exhibit. The district court dismissed all claims, finding: 1) Moyer waived his right to challenge the amendment of the trial information because Whitacre advised Moyer of the option to seek a continuance at the time but Moyer rejected this option, 2) the remaining claims were waived because they were not raised on direct appeal, and 3) even if raised, the claims were without merit. Moyer appeals the dismissal of each claim.

ERROR PRESERVATION AND SCOPE OF REVIEW. The State contends Moyer's claims are waived because they were not raised on direct appeal. The Iowa Code no longer requires ineffective assistance of counsel claims to be raised on direct appeal. Iowa Code § 814.7(1) (2005). It states in part, "[t]he claim need not be raised on direct appeal from the criminal proceedings in order to preserve the claim for postconviction relief purposes." *Id.* This law went into effect on July 1, 2004. The State argues this Code section does not apply to Moyer's claims because his conviction was entered before the statute was enacted and "statutes controlling appeals are those that were in

effect at the time the judgment or order appealed from was rendered." *Wal-Mart Stores, Inc. v. Caselman*, 657 N.W.2d 493, 498 (Iowa 2003).

In *Hannan v. State*, 732 N.W.2d 45 (Iowa 2007), the court held the general rule regarding statutes controlling appeals does not apply to ineffective assistance of counsel claims under section 814.7. *Hannan*, 732 N.W.2d at 50-51. Rather, since the law is designed to remedy a procedural wrong, the statute evinces a legislative intent for the law to operate retroactively. *Id.* at 51. Therefore, section 814.7 applies retroactively to Moyer's claims. His ineffective assistance of counsel claims did not need to be preserved on direct appeal as a prerequisite to postconviction relief and we may consider Moyer's claims.

The scope of review of postconviction relief proceedings is typically for errors at law. *Rhiner v. State*, 703 N.W.2d 174, 175 (Iowa 2005). However, alleged constitutional violations, including ineffective assistance of counsel claims, are reviewed de novo. *Osborn v. State*, 573 N.W.2d 917, 920 (Iowa 1998). Under this review, we independently evaluate the issues considering the totality of the circumstances. *Id.*

INEFFECTIVE ASSISTANCE OF COUNSEL. Effective assistance of counsel is guaranteed by the Sixth Amendment of the United States Constitution and Article I, section 10 of the Iowa Constitution. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995). To prevail on an ineffective assistance of counsel claim, Moyer must prove both: (1) the attorney's "representation fell below an objective standard of reasonableness" and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687-688, 104 S. Ct. 2052,

2064, 80 L. Ed. 2d 674, 693 (1984). Moyer must prove both elements by a preponderance of the evidence. *Ledezma v. State*, 639 N.W.2d 134, 142 (Iowa 2001). "To prove the first prong, the defendant must overcome the presumption that counsel was competent and show that counsel's performance was not within the range of normal competency." *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994) (citing *Brewer v. State*, 444 N.W.2d 77, 83 (Iowa 1989)). Prejudice is proven when "counsel's failure worked to the defendant's actual and substantial disadvantage so that a reasonable possibility exists that but for counsel's error the trial result would have been different." *Buck*, 510 N.W.2d at 853. We dispose of the claim if it fails either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997). Within these guidelines, we consider each of Moyer's claims.

FAILURE TO OBJECT TO TRIAL INFORMATION AMENDMENT. Moyer first claims he was denied effective assistance of counsel when his trial attorney did not resist the amendment or seek a continuance after the State amended the trial information. The State gave notice to defense counsel of the amendment thirteen days before trial and filed the amendment nine days before trial. The amendment changed Count I from a manufacturing charge to a conspiracy to manufacture charge, and added witnesses.

We find trial counsel's response to the amendment was not deficient under these facts and the law. The Iowa Rules of Criminal Procedure permit amendment of information any time before or during the trial:

> The court may, on motion of the state, either before or during trial, order [amendment] so as to correct errors or omissions in matters of form or substance. Amendment is not allowed if substantial rights of the defendant are prejudiced by the

> amendment, or if a wholly new and different offense is charged.

Iowa R. Crim. P. 2.4(8)*(a)*. The Iowa Supreme Court has held that in a drug trafficking case, an amendment to a trial information that adds a conspiracy charge does not add a wholly new and different offense. *State v. Williams*, 305 N.W.2d 428, 430-31 (Iowa 1981). Instead, a conspiracy charge effectively "add[s] a new means of committing the same offense," and is permissible. *Id.* at 431. Moyer's substantial rights were not prejudiced by this amendment either. Moyer's trial attorney testified that the conspiracy charge was not a significant change in the State's theory, given the information in the original minutes of testimony. He also testified he did not plan to do additional discovery or investigation due to the amendment.

Counsel also did not perform deficiently by failing to challenge the addition of witnesses in the amendment. "Additional witnesses . . . may be presented by the prosecuting attorney if the prosecuting attorney has given the defendant's attorney . . . a minute of such witness's evidence . . . at least ten days before the commencement of the trial." Iowa R. Crim. P. 2.19(2). Defense counsel received notice of the amendment eleven days before trial. Ample time remained for counsel to adequately prepare a defense in response to the amendment. Counsel testified the amendment did not require additional discovery for the defense.

Furthermore, counsel testified that he discussed the option of seeking a continuance with Moyer and Moyer rejected the option, preferring no delay of the trial. A defendant cannot assert the right to a speedy trial and later complain in

order to attack a conviction. *See State v. Cennon*, 201 N.W.2d 715, 718 (Iowa 1972) (finding rules intended to prevent trial delays are designed "to provide a shield for the defendant, not a sword"). A defendant cannot instruct his attorney to prevent delay of trial and later fault him for following those instructions. Counsel's performance was not deficient when he followed Moyer's decision to proceed to trial without delay after advising Moyer of the option to seek a continuance.

FAILURE TO CHALLENGE INITIAL SEIZURE OF DEFENDANT AS ILLEGAL. Moyer contends his trial counsel was ineffective for failing to challenge his initial seizure as an unreasonable search and seizure under the Fourth Amendment of the United States Constitution. As the officer approached, he recognized Moyer at the gate of the Moyer family property. Moyer asserts that the officer's observation of a person on private property with the lawful right to be there provided no reasonable cause to believe a crime occurred. According to Moyer, this made the officer's initial stop and seizure of Moyer illegal. Moyer argues that evidence would have been suppressed if his trial counsel would have challenged his initial seizure.

"Trial counsel is not incompetent in failing to pursue a meritless issue." *State v. Ceaser*, 585 N.W.2d 192, 195 (Iowa 1998). Counsel had no reason to challenge the officer's initial stop and seizure of the defendant. An officer may stop "an individual or vehicle for investigatory purposes based on a reasonable suspicion, supported by specific and articulable facts, that a criminal act has occurred or is occurring." *State v. Kinkead*, 570 N.W.2d 97, 100 (Iowa 1997)

(citing *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968)). A hunch alone does not establish reasonable suspicion. *Kinkead*, 570 N.W.2d at 100. The test is "whether the facts available to the officer at the time of the stop would lead a reasonable person to believe that the action taken by the officer was appropriate." *Id.* (citing *Terry*, 392 U.S. at 21-22, 88 S. Ct. at 1880, 20 L. Ed. 2d at 906; *State v. Mitchell*, 498 N.W.2d 691, 693 (Iowa 1993)).

The officer was on routine patrol and noticed a vehicle at the field entrance at two o'clock in the morning. The officer testified that the purpose of the stop was to ensure the driver was not having vehicle problems and to inform Moyer that a group of individuals were gathered in the field earlier in the evening. Moyer's testimony confirmed that the officer's motive was to inform him of potential trespassers. The officer's action was appropriate. Viewing a stopped car in the country at two o'clock in the morning gave the officer reasonable cause to believe a driver may need assistance. Seeing a group of persons using Moyer's property also supports a reasonable suspicion of trespass. The officer had reasonable cause to make an investigatory stop.

A warrant was not required for the officer's seizure of Moyer. "[S]earches and seizures conducted without a warrant are per se unreasonable" unless an exception applies." *State v. Nitcher*, 720 N.W.2d 547, 554 (Iowa 2006). In this instance, a warrant was not required under the probable cause coupled with exigent circumstances exception. "There is probable cause to conduct a search if, under the totality of the circumstances, 'a person of reasonable prudence would believe that evidence of a crime might be located on the premises to be

searched.'" *Id.* (quoting *State v. Davis*, 679 N.W.2d 651, 656 (Iowa 2004)). Exigent circumstances exist if there is "'danger of violence and injury to the officers or others; risk of the subject's escape; or the probability that, unless taken on the spot, evidence will be concealed or destroyed.'" *Nitcher*, 720 N.W.2d at 555 (quoting *State v. Holtz*, 300 N.W.2d 888, 893 (Iowa 1981)).

The officer had probable cause to conduct a warrantless search and seize Moyer. Detecting odors of methamphetamine precursors gives officers reason to believe that evidence of a crime may be located at the odor's source and justifies investigation of the smell. *See Nitcher*, 720 N.W.2d at 554 (finding probable cause for warrantless search of a home where smells of ether and anhydrous ammonia were emanating from the home and garage, persons denied odors and were anxious, and shuffling footsteps were heard inside the home); *State v. Simmons*, 714 N.W.2d 264, 272-73 (Iowa 2006) (finding probable cause to search apartment when officer smelled anhydrous ammonia outside apartment, had lab expert confirm the smell, and there were no household uses for anhydrous ammonia). Here, the officer testified "the smell was so strong it caught my breath." Although anhydrous ammonia is used in farming, there was no legitimate reason for the smell to be overwhelming at two o'clock in the morning, and to be emanating from the back of a truck rather than a sprayer. The officer knew an offense had been committed when he discovered the source of the leak was a propane tank, an illegal container for transporting anhydrous ammonia. This gave the officer probable cause to believe Moyer committed the offense and justified Moyer's seizure.

Exigent circumstances were also present to permit the warrantless search of Moyer. "When an exigency poses a threat of danger to others, officers can perform a limited search to remove the immediate risk." *Simmons*, 714 N.W.2d at 273 (citing *United States v. Walsh*, 299 F.3d 729, 734 (8th Cir. 2002)). Leaking anhydrous ammonia poses risks of fire and explosion and is a serious health threat to everyone nearby. *Simmons*, 714 N.W.2d at 273. Seizure of those at the scene is necessary so those exposed can be decontaminated and so any additional evidence of methamphetamine manufacture is not destroyed. *See Nitcher*, 720 N.W.2d at 555 (finding exigent circumstances present in meth lab setting to eliminate potential hazards and protect those exposed). Since the officer's initial stop and Moyer's seizure were valid, Moyer's counsel was not ineffective by failing to move to suppress evidence on these grounds.

FAILURE TO MOVE FOR MISTRIAL. Moyer next asserts his trial counsel was ineffective by failing to move for mistrial after a juror made an inappropriate comment. The actual comment was not on record, but the trial court made record of the event immediately after the occurrence:

> THE COURT: Let the record show these proceedings take place in chambers outside the presence of the jury and that the state appears by Ms. Danley. Defendant is present with his counsel, Mr. Whitacre. That upon completion of the jury selection process when the 12 remaining jurors – the 12 jurors had been selected to sit on this case, the Court was giving proposed jurors some instructions at which time Juror Mr. Richardson volunteered information that he felt that he was unfit to sit on this jury, that in conversation with the Court outside the hearing of the other members of the jury that Mr. Richardson indicated that he was familiar with the defendant's father, knew of some of the financial affairs of the family and stated his belief that he believed that the defendant was involved in the – in drugs is what his

> statement was. That Mr. Richardson did not disclose this during the jury selection process, that there are prospective jurors still present in the courtroom and Mr. Whitacre has moved to strike Mr. Richardson from the jury.

The juror was replaced and trial progressed. At the postconviction hearing, Whitacre testified that when the juror "volunteered information" court was adjourned. He first stated that the other jurors were not present at the time, but then stated, "Well, there could have been some, yes." Whitacre testified that he originally moved for a mistrial but then withdrew the motion when the court suggested replacing the unfit juror.

Moyer has not proved counsel failed an essential duty by withdrawing his motion for mistrial. Opting for an alternate juror rather than causing delay through mistrial is within the normal range of competent performance. "Improvident trial strategy, miscalculated tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective counsel." *Parsons v. Brewer*, 202 N.W.2d 49, 54 (Iowa 1972). Moreover, the trial court asked if replacing the juror was agreeable with Moyer and Moyer replied, "Yes." A defendant, "'as a general rule, will not be permitted to allege an error . . . in which he himself acquiesced, or which was committed or invited by him, or was the natural consequence of his own actions.'" *State v. Sage*, 162 N.W.2d 502, 504 (Iowa 1968) (quoting *State v. Rasmus*, 249 Iowa 1084, 1086, 90 N.W.2d 42, 43 (1958)). Counsel's performance was not deficient when Moyer approved of replacing the juror as an alternative to seeking a mistrial.

FAILURE TO REQUEST RECORD MADE OF VOIR DIRE. Moyer contends since the juror's comment was not on the record, appellate courts

cannot adequately review whether a new trial is required because of the juror misconduct. Moyer claims that if a formal record was made of voir dire, any potential prejudicial comments would be on the record for appeal. He claims his trial attorney was ineffective for not requesting voir dire to be put on record.

This claim must fail because Moyer has not proved that trial counsel breached an essential duty or caused prejudice through deficient performance in this regard. First, Moyer agrees the juror's comment was not made during voir dire. It was made after all jurors were selected and the judge was instructing them. Thus, a formal record of voir dire would not have aided an appellate court to determine whether the panel was tainted by the juror's comment. *See State v. Oetken*, 613 N.W.2d 679, 689 (Iowa 2000) (rejecting ineffective assistance of counsel claim based on failure to report voir dire to the record when defendant pointed to no authority requiring attorney to memorialize voir dire and defendant could not point to where specific error occurred during voir dire). Similarly, even if counsel had a duty to have record made of voir dire, Moyer cannot prove this failure caused prejudice. Since everyone acknowledges that the alleged comment was made after voir dire, there is no reasonable probability the outcome would be different if a record was made of voir dire.

FAILURE TO OBJECT TO DRUG INVESTIGATOR TESTIMONY. Moyer next claims trial counsel was ineffective in failing to object to certain witness testimony as unduly prejudicial. He argues testimony by a special agent with the division of narcotics enforcement and a criminalist from the division of criminal investigation regarding "the methamphetamine problem and all of its dangers"

was prejudicial. Both witnesses gathered or examined evidence in this case and testified about their findings and analysis.

We find counsel performed within the range of normal competence during the testimony of these witnesses. First, Whitacre did try to limit some of the testimony by objecting to the exhibits offered through the special agent as irrelevant and without foundation. Whitacre also objected to some questions as leading or calling for speculation. Second, the probative value of the testimony was not outweighed by any prejudice. "[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Iowa R. Evid. 5.403. Moyer did not point to any specific statements as prejudicial. In our de novo review of the record and the testimony of each witness, we found no unfairly prejudicial statements. Each witness's testimony related to their qualifications or their work on the case. When describing the evidence, the witnesses explained how the specific item can be used for the manufacture of methamphetamine. This was the extent of any general testimony about methamphetamine. The testimony was probative on whether Moyer used the items illegally for the manufacture of methamphetamine or whether the items were used for a lawful purpose. Moyer's counsel had no duty to object to testimony that was relevant and not unfairly prejudicial.

FAILURE TO INVESTIGATE POTENTIAL DEFENSE WITNESSES OR DEPOSE STATE WITNESSES. Moyer last contends he received ineffective

assistance of counsel because his trial counsel did not fulfill his duty to investigate to prepare a defense. Moyer argues counsel was ineffective by failing to consult with Moyer about the case, failing to depose State witnesses before trial, and failing to investigate potential witnesses for the defense. One witness listed by the State, Charles Douglas, was not called at trial by the prosecution or the defense. Douglas lived with Moyer and worked on the farm at the time of the offense. Evidence in the record suggests that Douglas may have some mental disability and may have a history of drug use and stealing anhydrous ammonia. Moyer argues that Douglas may have been a useful witness to the defense had trial counsel investigated and interviewed Douglas.

Effective counsel "denotes conscientious, meaningful legal representation wherein the accused is advised of his rights and honest, learned and able counsel is accorded reasonable opportunity to perform his assigned task." *Parsons v. Brewer*, 202 N.W.2d 49, 54 (Iowa 1972). Counsel must "conduct a reasonable investigation or make reasonable decisions that make a particular investigation unnecessary." *Ledezma*, 626 N.W.2d at 145. Ineffective assistance of counsel is more likely to be found when counsel's conduct shows a lack of diligence rather than the exercise of judgment. *Id.* at 142. Courts have found the failure to interview key potential witnesses to be ineffective assistance of counsel. *See, e.g.*, *Thomas v. Lockhart*, 738 F.2d 304, 308 (8th Cir. 1984); *Ledezma*, 626 N.W.2d at 146. Obtaining depositions is not required for competent counsel performance, particularly if an informal interview is conducted so the risk of surprise testimony is eliminated. *See Kellogg v. State*, 288 N.W.2d

561, 563-64 (Iowa 1980) (finding no ineffective assistance rendered for failing to take depositions when they can be a "two-edged sword" and defense counsel had interviewed the State witnesses). The attorney's performance is judged by his primary theory of defense. *Schrier v. State*, 347 N.W.2d 657, 663 (Iowa 1984).

We find Moyer has overcome the strong presumption of his counsel's competence under the totality of the circumstances. The record shows Moyer made repeated complaints concerning Whitacre's conduct including that the attorney was inattentive to the case, failed to respond to Moyer's requests for information, and perhaps spent as little as twenty minutes with Moyer prior to trial. Whitacre testified at the postconviction hearing. Whitacre admitted he did not depose any State witnesses or informally interview any of them. Whitacre did not explain any trial strategy or defense that would eliminate the need to communicate with his client or eliminate the need to interview potential witnesses. We find this conduct shows a lack of diligence and falls below the normal range of competent performance for attorneys.

Although we find trial counsel's performance deficient, Moyer's claim must fail because he has failed to prove that Whitacre's conduct caused prejudice. The prejudice element is established by showing that absent counsel's errors, there is a reasonable probability that the outcome of the trial would be different. *State v. Tracy*, 482 N.W.2d 675, 680 (Iowa 1992). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698).

After carefully reviewing the record, we find the outcome was not likely to be different had counsel interviewed defense witnesses, communicated better with the defendant, and subpoenaed Charles Douglas to testify. The critical parts of the prosecution's case were contained in the minutes of testimony which counsel had received. Any information gleaned from interviews was unlikely to change the substance of their testimony pertaining to the elements of the crime. Furthermore, the State had substantial physical evidence that implicated Moyer. Moyer has not identified how more discussion about the case with Whitacre would create reasonable doubt as to the result. Moyer suggests that more investigation would have allowed the defense to present the theory that Douglas or another State witness, Ross Bell, conspired against Moyer and set him up. However, Moyer testified on his own behalf and suggested that Bell committed the crime. Even if Douglas testified and admitted to using methamphetamine or stealing anhydrous ammonia, this testimony would not exculpate Moyer. Nearly all of the evidence of manufacturing methamphetamine came from the shed. Since Moyer had possession and control over the shed, Moyer would still be in possession of the precursors even if Douglas admitted to being involved in the manufacture of methamphetamine. Since Moyer cannot prove his counsel's ineffective assistance caused prejudice, Moyer's claim fails.

CONCLUSION. We affirm the district court's dismissal of Moyer's application for postconviction relief. Under the circumstances, competent performance did not require counsel to 1) object to the State's amendment of trial information 2) challenge Moyer's initial seizure as unconstitutional, 3) move for a

mistrial after a juror expressed bias, 4) request a record be made during voir dire, or 5) object to certain witness testimony as unduly prejudicial. Counsel's lack of diligence in consulting with his client and in investigating potential defense witnesses was ineffective but this deficient conduct was not prejudicial in light of the evidence presented by the State.

AFFIRMED.

Eisenhauer, J. concurs. Zimmer, J., concurs specially.

ZIMMER, J. (concurs specially)

I concur in the majority opinion with one exception. I do not believe that Moyer established that his trial counsel's representation fell below an object standard of reasonableness in any respect.