IN THE COURT OF APPEALS OF IOWA

No. 8-813 / 07-1203
Filed November 13, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TYRONE TATE,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Karen A. Romano, Judge.

Defendant appeals his conviction, contending (1) his trial attorney was ineffective in failing to seek admission of a co-defendant's statements "under the hearsay exception for statements against interest" and (2) the district court abused its discretion in sentencing him. **CONVICTION AFFIRMED, SENTENCE VACATED IN PART AND REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney General, John P. Sarcone, County Attorney, and Stephanie Cox, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Vaitheswaran and Potterfield, JJ.

VAITHESWARAN, J.

Tyrone Tate appeals his judgment and sentence for conspiracy to deliver a controlled substance. *See* Iowa Code § 124.401(1)(c)(2)(b) (2005). He contends (1) his trial attorney was ineffective in failing to seek admission of a co-defendant's statements "under the hearsay exception for statements against interest" and (2) the district court abused its discretion in sentencing him.

I. Background Facts and Proceedings

Tate was an acquaintance of Isaac Kidd. Kidd came to Des Moines to build a network of cocaine buyers. On his arrival, he contacted Tate and asked to stay with him. A day after his arrival, Kidd crossed paths with a confidential informant for the Des Moines Police Department.

The confidential informant met Kidd at the apartment of a man named DiMayne Pickens. Tate was also present. The informant sampled some cocaine in the presence of Pickens, Kidd, and Tate and made a purchase of cocaine from Kidd.

The informant subsequently arranged to make a controlled drug buy. He contacted Pickens who, in turn, made a phone call to Tate's apartment. When Tate answered the phone, Pickens told him that the informant was looking for Kidd so he could purchase "a teener." According to Pickens, Tate responded, "cost $75, to bring him over."

Pickens and the informant arrived at Tate's apartment. Tate answered the door, invited them in, and watched as the informant handed Kidd money and received the drugs.

A few hours later, police officers executed a search warrant on the apartment in which Tate and Kidd were staying. They recovered crack cocaine, powder cocaine, and cash.

Tate and Kidd were arrested. A police detective conducted a recorded interview of Kidd, who maintained Tate was "not a factor" in the cocaine sales.

The State charged Tate with several drug-related offenses. At trial, defense counsel sought to admit the recording of Kidd's police interview under several exceptions to the hearsay rule. Concluding none of the exceptions applied, the district court excluded the recording.

A jury found Tate guilty of conspiracy to deliver a controlled substance and possession of a controlled substance with intent to deliver. The court merged the two counts, accepted Tate's stipulation that he was a second or subsequent offender and sentenced him to a prison term not exceeding twenty years. The court declined to determine whether Tate's sentence was to be served consecutively or concurrently with a prior sentence on which his parole was revoked. This appeal followed.

II. Ineffective-Assistance-of-Counsel Claim—Hearsay Exception

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 5.801(*c*). Hearsay evidence is generally inadmissible, subject to several exceptions. Iowa R. Evid. 5.804. Tate maintains Kidd's recorded interview was admissible under the exception for "declarations against interest." Iowa R. Evid. 5.804(*b*)(3). That exception provides:

> The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
> . . .
> (3) A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

Id. Tate's attorney did not raise this ground for admission at trial. The question before us, therefore, is whether he was ineffective in failing to do so. To prevail on an ineffective-assistance-of-counsel claim, Tate must show that counsel breached an essential duty and prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 698 (1984). Failure to make an argument regarding the admissibility of evidence can be seen as a breach of duty owed to a client. *See State v. Reynolds*, 746 N.W.2d 837, 845 (Iowa 2008) (finding counsel ineffective for not objecting to the admission of evidence that would have been considered hearsay). However, the argument must have been meritorious. *See State v. Ceaser*, 585 N.W.2d 192, 195 (Iowa 1998). On our de novo review of this ineffective-assistance-of-counsel claim, we are not convinced the argument has merit.

Under the declaration against interest exception to the hearsay rule, Tate had to show (1) the declarant's unavailability and (2) corroborating circumstances clearly indicating the trustworthiness of the statement. Iowa R. Evid. 5.804(*b*)(3); *State v. Traywick*, 468 N.W.2d 452, 454 (Iowa 1991). The State stipulated that Kidd was unavailable based on his intent to exercise his Fifth Amendment right

against self-incrimination. *See State v. Kellogg*, 385 N.W.2d 558, 560 (Iowa 1986). Therefore, the focus is on the last sentence of Rule 5.804(*b*)(3), which provides that that the statement "tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement."

With respect to this requirement, Tate must preliminarily show that Kidd's statements during the interview exposed Kidd to criminal liability and exculpated him. *See State v. Hallum*, 585 N.W.2d 249, 254 (Iowa 1998), *vacated on other grounds by Hallum v. Iowa*, 527 U.S. 1001, 119 S. Ct. 2335, 144 L. Ed. 2d 233 (1999). Although Tate notes that each declaration within Kidd's recorded interview must be "individually self-inculpatory," he does not engage in a "fact-intensive inquiry" of the interview and "the circumstances surrounding the criminal activity involved." *Williamson v. United States*, 512 U.S. 594, 604, 114 S. Ct. 2431, 2437, 129 L. Ed. 2d. 437, 486 (1994). He simply argues that "Kidd's statements were clearly inculpatory as he took full responsibility for the crimes." On our de novo review of the record, including the compact disc recording of Kidd's interview, we find several statements that implicate Kidd in drug dealing and tend to exculpate Tate from drug dealing. Less clear is whether the statements exculpate Tate on the crime of conspiracy to deliver drugs. *See State v. Speicher*, 625 N.W.2d 738, 742 (Iowa 2001). ("A tacit understanding—one 'inherent in and inferred from the circumstances'—is sufficient to sustain a conspiracy conviction." (citation omitted)). We will assume without deciding that at least a portion of the interview exposes Kidd to criminal liability and exculpates

Tate on the charged crimes, including conspiracy to deliver a controlled substance.

We turn to whether "corroborating circumstances clearly indicate the trustworthiness of the statement." Iowa R. Evid. 5.804(b)(3). Tate focuses on the circumstances surrounding Kidd's interview, such as the fact the interview was recorded, the closeness in time between the arrest and the interview, and the absence of "duress, threat, or intimidation." He also notes that the interviewing detective characterized the information as "true and accurate" and Kidd was ultimately prosecuted "for his role in selling drugs." We agree with Tate that the factors surrounding the interview have been deemed relevant in assessing a statement's trustworthiness. *See State v. Martinez*, 621 N.W.2d 689, 693 (Iowa Ct. App. 2000). We also agree that those factors lend credence to Kidd's statements. With respect to the detective's characterization of the statements, the detective also stated he did not believe the portions relating to Tate's involvement. Those are the portions that concern us here. Finally, the fact that Kidd was ultimately prosecuted does not bear on the trustworthiness of his statements concerning Tate. In sum, certain of the factors cited by Tate support his assertion that Kidd's statements were trustworthy but others do not. These factors standing alone do not clearly indicate the trustworthiness of Kidd's statements concerning Tate's involvement.

What Tate does not focus on are the circumstances surrounding the crime. We agree with the State that those circumstances are also relevant in determining the trustworthiness of Kidd's exculpatory statements. *See State v. DeWitt*, 597 N.W.2d 809, 812 (Iowa 1999). Specifically, Tate's presence during

both drug transactions together with his transmittal of pricing information to Payne diminish the trustworthiness of Kidd's statements that Tate was not a factor in the charged crimes. Given these facts, we conclude trial counsel did not breach an essential duty in failing to argue that Kidd's recorded interview was admissible under the "declaration against interest" exception to the hearsay rule.

III. Sentencing Issue

Tate was on parole for another crime when he was arrested for the crimes that are the subject of this appeal. According to defense counsel, his parole was revoked, requiring him to serve the "15-year sentence" for that crime without eligibility for parole. Defense counsel asked the district court to run his sentence in the present case "concurrent to his parole revocation." The district court denied the request, stating:

> The Court is not going to make a determination regarding how this will run with your parole violation. I will leave that to the Department of Corrections to determine what to do with that parole violation. That's not the subject of this matter today.

The State concedes this was an abuse of discretion. *See* Iowa Code § 908.10[1]; *State v. Lee*, 561 N.W.2d 353, 354 (Iowa 1997) ("Where a court fails to exercise the discretion granted it by law because it erroneously believes it has no discretion, a remand for resentencing is required."). Accordingly, we partially

[1] That provision states in pertinent part:

> When a person is convicted and sentenced to incarceration in this state for a felony committed while on parole . . . the person's parole shall be deemed revoked as of the date of the commission of the new felony offense.
> . . .
> The new sentence of imprisonment for conviction of a felony shall be served consecutively with the term imposed for the parole violation, unless a concurrent term of imprisonment is ordered by the court.

vacate the sentence and remand to the district court for a determination of whether these sentences should be served concurrently or consecutively.

CONVICTION AFFIRMED, SENTENCE VACATED IN PART AND REMANDED FOR RESENTENCING.