IN THE COURT OF APPEALS OF IOWA

No. 9-210 / 07-1840
Filed May 29, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JEFFREY RICHARD TEKIPPE,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Gregory A. Hulse, Judge.

A former prosecutor appeals his criminal convictions and sentences. **AFFIRMED**.

Judith O'Donohoe of Elwood, O'Donohoe, Braun & White, Charles City, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, Patricia Houlihan, Assistant Attorney General, and Mathew D. Wilber, County Attorney, for appellee.

Heard by Eisenhauer , P.J., and Doyle and Mansfield , JJ.

EISENHAUER, J.

On January 17, 2007, detective Wade went to the police department's property room to retrieve cocaine evidence for the testing necessary in the Schubert criminal case. The property room did not have the drugs because they had been checked out to assistant county attorney Jeffrey TeKippe on December 7, 2006. After TeKippe was notified the evidence was needed for testing, he eventually found it and returned it to the property room the next day. However, the evidence was not returned in the "Ziplock" brand bag in which it was seized.

In the search for the Schubert evidence, cocaine evidence from other cases was discovered in TeKippe's office and this evidence was returned to the property room later in January. Evidence that had been checked out in a green baggie was returned in a clear baggie. The State decided to retest the evidence returned by TeKippe. Upon retesting, the lab discovered the evidence had been altered.

Further investigation revealed TeKippe, starting in February 2005, had checked out cocaine evidence from the property room in seven cases and never returned the evidence. Two of the seven cases with missing evidence were never assigned to TeKippe to prosecute. TeKippe did not send the property room a memo stating he destroyed the cocaine.

After a jury trial, TeKippe was convicted on twelve counts: two counts of felonious misconduct in office, one count of possession of a controlled substance, and nine counts of varying degrees of theft. TeKippe appeals his

convictions and sentencing. We review for correction of errors at law. Iowa R. App. P. 6.4.

I. Misconduct in Office.

The State hired chemist Jerry Smith of Eastern Nebraska Forensic Lab to test alleged cocaine evidence in two criminal cases, Flores and Parra-Acosta. Smith explained the process he uses after testing: he puts a piece of tape or heat seals the evidence and writes his name, the date of testing, and identifying numbers on the tape or heat seal. In both cases, Smith confirmed the evidence was cocaine. In the Flores case, the cocaine evidence was in a clear baggie and a green baggie. After Smith's initial testing, TeKippe checked out the Flores and Parra-Acosta cocaine evidence from the property room and kept the evidence for several months. When the Flores evidence was returned to the property room, the powder was contained in two clear baggies.

The State resubmitted the evidence from both cases to Smith for retesting. Regarding the Flores evidence, Smith reported: "The first thing I noticed was the seal on the heat-sealed bag was broken. My name and the original testing date . . . [were] forged on a different part of the bag where it was heat-sealed." The other baggie had a knot tied in it and Smith's "name was not on this baggie." After retesting, Smith concluded, "a substance of flour or some kind of starch has been added to both items." Smith explained there was not starch in either bag at the time of the original testing.

Likewise, Smith concluded the Para-Acosta evidence had been altered. The heat seal Smith applied had been opened and "J. Smith" appeared on a

different heat seal. Smith testified he signs evidence "Smith," not "J. Smith." Further, the original cocaine tested had "no detected cut" in purity. Upon testing, Smith found the cocaine had been removed and replaced with "some type of starch substance."

TeKippe was convicted of two counts of misconduct in office, which has two elements: (1) TeKippe was a public officer or employee; and (2) TeKippe knowingly falsified a public record. On appeal, TeKippe makes two challenges to the second element, but finds no fault with the jury instruction defining public record:

> A "public record" is defined as a writing that is intended to serve as a memorial and evidence of something written, said or done by an officer or public agency. "Public Records include all records, documents, tape, or other information, stored or preserved in any medium, of or belonging to this state or any county or city.

TeKippe first argues the signed heat seal on a drug evidence bag and the drug evidence bag itself is not a public record of the law enforcement agency that maintains custodial responsibility for the evidence. *See* Iowa Code § 22.1(3) (2007). TeKippe claims the statutory definition does not encompass the "action of private citizen Jerry Smith sealing a bag of powdery substance with heat and applying evidence tape with his name on it" at the request of law enforcement. TeKippe asserts the State's position is illogical because, unless a statutory exception applies, criminal physical evidence would be open to public examination under Iowa Code section 22.2, which provides: "Every person shall have the right to examine and copy a public record and to publish or otherwise disseminate a public record or the information contained in a public record."

TeKippe asserts the confidential records exception for police officer's investigative reports does not apply. *See* Iowa Code § 22.7(5).

The State argues the combination of the alteration of containers (green baggie/clear baggie and Ziploc/non-Ziploc), the forging of the chemist's name, and the alteration of the heat seals constitutes the falsified public record. The State notes the signed heat seal was necessary to establish a chain of custody. Therefore, Smith's signature on the evidence constitutes a public record held for law enforcement purposes. *See State v. Piper*, 663 N.W.2d 894, 907 (Iowa 2003) (holding proof of a chain of custody is a foundational requirement for physical evidence). The State further claims the evidence falls under the exception creating confidentiality for "peace officers' investigative reports . . . if that information is part of an ongoing investigation." *See* Iowa Code § 22.7(5). Because the heat-sealed evidence is the subject/basis of an investigative report, the State asserts the confidentiality exception applies.

We believe the key language is information "of or belonging to" the State. This portion of section 22.1(3) was explained in *State v. Barnholtz*, 613 N.W.2d 218, 223 (Iowa 2000). The court stated "of" refers to a record "produced or originated from the government" while "belonging to" refers to records "that originate from other sources but are held by public officers in their official capacity." *Barnholtz*, 613 N.W.2d at 223 (quoting *City of Dubuque v. Dubuque Racing Ass'n*, 420 N.W.2d 450, 453 (Iowa 1988)). While the signed heat seal was not produced by the government, we conclude it qualifies as a record "belonging to" the government and is held by the State in its official capacity to

establish the necessary chain of custody. Further, this signed, heat-sealed evidence is confidential as part of a peace officer's investigative report in an ongoing investigation. *See* Iowa Code § 22.7(5). We find no error.

TeKippe's second challenge is there is not substantial evidence to support the conclusion he falsified the Flores and Para-Acosta evidence bags. TeKippe suggests others had access to the drugs while they were in his office and notes the handwriting analysis was inconclusive.

"We will uphold a verdict if substantial record evidence supports it." *State v. Webb*, 648 N.W.2d 72, 75 (Iowa 2002). We consider all the evidence and view the evidence in the light most favorable to the State. *Id*. at 76. We consider direct and circumstantial evidence to be equally probative. Iowa R. App. P. 6.14(6)(*p*). After reviewing the record with these principles in mind, we conclude there is substantial evidence to support the jury's verdict.

II. Knowing Possession of Cocaine.

During a consent search of TeKippe's home, seven baggies were recovered from a trash bag in his outdoor utility shed. Some baggies contained residue that "field-tested positive for cocaine." The State weighed the cocaine residue in two bags and found one bag contained .01 gram and the other bag contained .05 gram. The State's criminologist testified .06 grams would approximate the size of a small pea. TeKippe was convicted of possession of a controlled substance.

On appeal, TeKippe claims the evidence is insufficient to support his conviction because any possession was not done "knowingly" due to the small

amount of residue which lacked visibility and due to the absence of suspicious behavior on his part. We review this challenge to evidentiary sufficiency under the same standards detailed above.

First, the criminologist testified the residue was visible. Therefore, the jury could reasonably conclude the cocaine residue was visible. Second, the record contains numerous references to suspicious behavior by TeKippe. For example, the search of TeKippe's residence also yielded two scales, one in the kitchen trash and one in the dining room hutch. Both scales contained cocaine residue. Testimony established cocaine is sold by weight and digital scales are common. The jury learned TeKippe checked out cocaine evidence in seven cases and *never* returned the evidence. As discussed above, after TeKippe returned the evidence from the Flores and Para-Acosta cases, the State discovered opened heat seals, forged heat seals, and altered cocaine.

We find no error. The jury could reasonably find TeKippe, an experienced drug prosecutor, knew the baggies he admitted throwing in his trash contained cocaine. *See State v. Salkil*, 441 N.W.2d 386, 387-88 (Iowa Ct. App. 1989) (holding intent is frequently proved by circumstantial evidence using reasonable inference and deduction).

III. Theft.

A. Jury Instructions.

TeKippe alleges error in the court's theft jury instruction. Iowa Code section 714.1(2) defines theft by misappropriation and requires the property to be "property of another." The jury was instructed:

> The defendant had possession or control of cocaine evidence, which was the property of another (State of Iowa) . . . [and] intentionally misappropriated the property by using or disposing of it in a manner . . . inconsistent with the owner's rights.

TeKippe argues that while the State has possession or control after the seizure of the cocaine evidence, this is not the same as ownership. TeKippe claims theft is not chargeable because there is no "owner" of the seized evidence. Further, "the evidence did not address whether the State was the owner because it was stored in the property room compared to [TeKippe's] claim that he has possession as [a] prosecutor."

Iowa statutes do not provide a definition of "owner." *See* Iowa Code §§ 702.1-.23 (criminal law definitions), 714.1-.2 (theft). Absent a statutory definition or an established meaning in the law, we give words used by the legislature their ordinary and common meaning. *State v. Dohlman*, 725 N.W.2d 428, 431 (Iowa 2006). "Owner" means "one that has the legal or rightful title whether the possessor or not." Webster's Third New International Dictionary 1612 (unabr. ed. 2002). Here the State had "rightful" title because it seized the cocaine for criminal prosecution evidence under Iowa Code section 809.1 (seized property). The State held the seized cocaine evidence in the property room of the police department and TeKippe, as prosecutor, was required to check it out of the property room to possess it. While TeKippe could lawfully posses it as a prosecutor, he had no "rightful title." Rather, the "rightful title" of this evidence is the State. We find no error in the instruction.

TeKippe also alleges error in the jury instruction on value. Iowa values property for theft purposes by using "its highest value by any reasonable

standard at the time it is stolen." Iowa Code § 714.3. "Reasonable standard includes but is not limited to market value within the community, actual value, or replacement value." *Id.*

The jury was instructed: "Where a stolen item has no market value in lawful channels, reasonable standard may include the 'illegitimate' market value of the item, such as 'street value.'" TeKippe claims this instruction "directs the jury to find an extraordinarily high value" without accuracy, because "there is no widely accepted marketplace due to its illegal nature." Therefore, the phrase "market value within a community" applies only to property "legally capable of sale."

We disagree and find no error in the jury instruction. The plain language of the statute does not limit market value to only those items which can be legally sold. Cocaine has a market value within a community as evidenced by the narcotics enforcement agent's testimony, "on the street, the more you can buy, the cheaper you're going to get it." Additionally, cocaine's price varies with the relationship with the dealer and whether the dealer thinks "he's got a better quality of cocaine." Due to these variables, an ounce, or twenty-eight grams, could sell from a "low end of $800 and a high end of $1400," with the average being "somewhere around $1000 to $1200." The testimony established values for varying weights of cocaine by a reasonable standard, the illegal market value of cocaine within a community.

B. Sufficiency of the Evidence.

TeKippe makes numerous challenges to the sufficiency of the evidence, including: ownership of the seized samples, proof the stolen property was cocaine, chain of custody issues, and valuation of the stolen property. We assume error was preserved on all issues. We have considered all of TeKippe's arguments using the substantial evidence standards set forth above. Our review of the record reveals sufficient evidence to support the verdict.

IV. Ineffective Assistance of Counsel.

TeKippe argues his counsel was ineffective in not moving to sever the twelve counts of the trial information and also in failing to move for a new trial.

In order to prevail on his claims of ineffective assistance of counsel, TeKippe must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *See State v. Lane*, 726 N.W.2d 371, 393 (Iowa 2007). TeKippe's inability to prove either element is fatal. *See State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999). We evaluate the totality of the relevant circumstances in a de novo review. *Lane*, 726 N.W.2d at 392. We can resolve the issue on direct appeal when the record is adequate to determine TeKippe will be unable to establish one or both elements. *See State v. Reynolds*, 670 N.W.2d 405, 411 (Iowa 2003). Here the record is adequate to resolve TeKippe's appeal.

TeKippe argues counsel should have moved to sever due to the long time period involved for all the charges (February 11, 2005 to February 1, 2007) and due to the distinctly different nature of the claims: possession of a controlled substance, theft, and misconduct in office.

Motions to sever are discretionary with the district court and are governed by Iowa Rule of Criminal Procedure 2.6(1):

> *Multiple offenses.* Two or more indictable public offenses which arise from . . . two or more transactions or occurrences constituting parts of a common scheme or plan, when alleged and prosecuted contemporaneously, shall be alleged and prosecuted as separate counts in a single . . . information . . . unless, for good cause shown, the trial court in its discretion determines otherwise.

A "common scheme or plan" is found when the transactions/occurrences are the "products of a single or continuing motive." *State v. Elston*, 735 N.W.2d 196, 198 (Iowa 2007). In *Elston*, the offenses occurred over a two-year time frame and the court did not err in failing to sever the nineteen counts. *Id*. at 199 n.1, 200. Intent and modus operandi are factors in determining whether a common scheme or plan exists. *Id*. at 199.

As in *Elston*, TeKippe's twelve offenses occurred over a two-year time frame, which is not unduly long under the specific facts of this case. TeKippe's intent to obtain cocaine is a continuing motive. TeKippe either falsified the heat-sealed cocaine evidence to cover up his thefts, possessed cocaine at his home, or stole cocaine evidence. TeKippe's access to the cocaine was due to his position as a drug prosecutor and he exploited his access by the modus operandi of checking out drug evidence from the property room. We conclude the charged offenses constitute "a common scheme or plan." Any motion to sever would not have been successful; therefore, counsel did not render ineffective assistance in failing to make such a motion. *See State v. Westeen*, 591 N.W.2d 203, 207 (Iowa 1999) (noting trial counsel is not ineffective for failing to raise a meritless issue).

Second, TeKippe claims counsel was ineffective in failing to move for a new trial to challenge the weight of the evidence under *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). TeKippe's alleges his successful grounds for a new trial include problems with the jury instructions and the State's failure to prove its case.

While trial courts have discretion in ruling on motions for new trial, the Iowa Supreme Court has cautioned courts "to exercise this discretion carefully and sparingly" because a failure to do so "would lessen the role of the jury as the principal trier of the facts and would enable the trial court to disregard at will the jury's verdict." *Ellis*, 578 N.W.2d at 659. Consequently, Iowa courts grant new trial motions only in exceptional cases and only where the evidence preponderates heavily against the verdict so that the court concludes a miscarriage of justice has resulted. *Id*. 658-59.

This is not the exceptional case where the evidence preponderates heavily against the verdict. Rather, the evidence against TeKippe, though circumstantial, was substantial. Any motion for new trial would not have been successful; therefore, counsel did not render ineffective assistance in failing to make such a motion. *See Westeen*, 591 N.W.2d at 207.

V. Sentencing.

TeKippe appeals his sentences of incarceration claiming resentencing is required because (1) the court did not make a "meaningful" sentencing record; and (2) he should have been granted a suspended sentence and probation as recommended in the presentence investigation report.

"Sentencing decisions of the district court are cloaked with a strong presumption in their favor." *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996). We review the court's sentencing decision for an abuse of discretion which "is found only when the sentencing court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Id*. Additionally, "a sentencing court need only explain its reasons for selecting the sentence imposed and need not explain its reasons for rejecting a particular sentencing option." *State v. Ayers*, 590 N.W.2d 25, 28 (Iowa 1999). Courts consider, but are not bound by the recommendations made in the presentence investigation report. *See State v. Taylor*, 490 N.W.2d 536, 539 (Iowa 1992).

In sentencing TeKippe, the court stated:

> In particular, I note that you have no prior record, and I note the impact that your behavior has had on your whole life and on . . . your family. . . . All these things weigh heavily. However, it is well-settled that the court owes a duty to the public as much as to the defendant in determining the proper sentence.
>
> Mr. TeKippe, you used your position of trust as an assistant county attorney as a vehicle to commit the crimes for which you have been found guilty. You have at least implied during the trial that there is no victim of your crimes. This court must disagree with that. Clearly the State is a victim. The criminal behavior you have exhibited threatens the integrity of the office that you held, the office whose name and primary purpose is to enforce the law.
>
> As the evidence has shown throughout these proceedings and particularly in the trial, your criminal actions have negatively impacted various law enforcement agencies in this state who worked directly with the Pottawattamie County Attorney's office. The nature of your offenses is serious. The consequences go way beyond you as an individual.
>
> Your denial of any responsibility for your criminal acts makes rehabilitation through community-based programs less likely at this time. Thus, the court has determined that this is not a case in which to defer judgment or sentence or to grant probation. To do so would unduly deprecate the seriousness of the offenses, would be unwarranted because of the need to protect the public from

> further criminal activity by you, and this court is convinced that you are in need of correctional assistance which can be most effectively provided by confinement at this time.

We conclude the district court made an appropriate sentencing record. Further, the court did not exercise its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable when it decided to impose a term of incarceration rather than a period of probation. TeKippe's sentence is, therefore, affirmed.

AFFIRMED.