IN THE COURT OF APPEALS OF IOWA

No. 9-478 / 08-1127
Filed August 6, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CLIFTON EDWARD SCOTT,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchinson, Judge.

Defendant appeals his conviction for conspiracy to deliver marijuana. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis D. Hendrickson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, John P. Sarcone, County Attorney, and Celene Gogerty, Assistant County Attorney, for appellee.

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

EISENHAUER, J.

Clifton Scott appeals from the judgment and sentence entered upon his conviction following a jury trial of one count of conspiracy to deliver marijuana while in control of a firearm.[1] Scott contends there is insufficient evidence to support his conspiracy conviction, specifically challenging the evidence supporting a conspiracy to sell over fifty kilograms of marijuana with firearm sentencing enhancement. Scott also claims his counsel was ineffective. We preserve Scott's ineffective assistance claims for possible postconviction relief proceedings and affirm his conviction.

I. Conspiracy.

We review Scott's insufficiency of evidence claims for errors at law. *State v. Rohm,* 609 N.W.2d 504, 509 (Iowa 2000). The jury's verdict is binding upon a reviewing court unless there is an absence of substantial evidence in the record to sustain it. *State v. Schrier*, 300 N.W.2d 305, 306 (Iowa 1981). Substantial evidence is evidence upon which a rational finder of fact could find a defendant guilty beyond a reasonable doubt. *Rohm*, 609 N.W.2d at 509. "When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record." *State v. Leckington*, 713 N.W.2d 208, 213 (Iowa 2006).

In order to be convicted, the State was required to prove beyond a reasonable doubt that Scott "agrees with another that they or one or more of

[1] Scott does not appeal the judgment and sentence entered upon his conviction of one count of possession of marijuana.

them will engage in conduct constituting the crime." Iowa Code § 706.1(1)(a) (2007). A conspiracy to deliver over fifty kilograms of marijuana is a class C felony. *Id*. § 124.401(1)(c)(5). Scott is not guilty of conspiracy if the only other person involved is an informant "acting at the behest of . . . agents of a law enforcement agency in an investigation of the criminal activity alleged *at the time of the formation of the conspiracy*." *Id*. § 706.1(4) (emphasis added).

When viewing the evidence in the light most favorable to the State, a rational trier of fact could have found that in 2007, Scott brought some marijuana to Randy Schmitz's residence in Jamestown, North Dakota, and they discussed Schmitz "selling pounds of marijuana." In August 2007, Schmitz drove to Scott's residence in Des Moines and paid Scott $870 for one pound of marijuana. Mike Fagan delivered this marijuana to Scott and Schmitz at Scott's residence. Scott told Schmitz that Fagan could provide marijuana anytime they needed it.

After Schmitz quickly sold the one pound in two weeks, he called Scott and drove to Des Moines in early September 2007 to get five pounds to sell in North Dakota. Scott and Schmitz planned to "do a lot more volume. It was going to be ten pounds after that every time" and they planned to sell ten pounds repeatedly.

During Schmitz's return to North Dakota with the five pounds of marijuana, he was stopped for speeding near Mason City and law enforcement discovered the drugs. Schmitz agreed to work with law enforcement. In a later taped conversation, Scott stated Schmitz would have a quarter of a million dollars,

which would be Schmitz's profit after selling about one hundred pounds of marijuana. Fifty kilograms converts to about 110 pounds.

The next transaction was a controlled buy for ten pounds in Des Moines on September 17. Scott's September 17 phone records show two successful calls each with Schmitz and Fagan in the morning followed by nine missed calls between Scott/Fagan. Scott met Schmitz at a hotel and Schmitz paid Scott $9,800 in $100 bills. Scott put the money in his socks and promised to deliver the ten pounds of marijuana the next day. After Scott accepted the money and left the hotel room, he was arrested. Fagan was arrested the same day. A search of Scott's home revealed a scale, small amounts of drugs, and a firearm.

We conclude substantial evidence supports the jury's verdict of a conspiracy. Iowa Code section 706.1(4) creates an exception only when an informant is acting with law enforcement agents "at the time of the formation of the conspiracy." *See United States v. Lively*, 803 F.2d 1124, 1126 (11th Cir. 1986) (holding exception inapplicable if jury finds the conspiracy was formed before informant arrested and then became informant). Here the meeting of the minds to enter jointly into a criminal enterprise occurred before Schmitz became an agent of law enforcement. The conspiracy started with the August agreement between Scott and Schmitz to move "pounds" of marijuana. Therefore, section 706.1(4) does not preclude Scott's conviction.

Further, when the evidence is viewed in the light most favorable to the State, the amounts actually delivered, when considered in conjunction with the amounts discussed as intended to be delivered (ten pounds

repeatedly/indefinitely), supports the conclusion the object of the conspiracy was to deliver over fifty kilograms of marijuana. "The conspiracy does not depend on the fulfillment of the agreement, only that there is an agreement." *State v. Ross*, 573 N.W.2d 906, 914 (Iowa 1998).

Finally, we assume error was preserved regarding the sentencing enhancement under Iowa Code section 124.401(1)(e), which provides for an enhanced sentence for certain drug offenses if the person is in the "immediate possession or control of a firearm while participating" in the crime. Because the firearm at issue was not located on Scott's person, this is an immediate-control case rather than an immediate-possession case. Immediate control of a firearm may be established by showing the defendant was in such close proximity to the weapon as to claim dominion over it. *State v. McDowell*, 622 N.W.2d 305, 307 (Iowa 2001).

During the search of Scott's home, law enforcement discovered a gun near Scott's bed. Scott admitted the gun had been in his room for "a couple weeks." The proximity to Scott's bed and the gun's location in Scott's bedroom supports the conclusion the firearm was under his immediate control. The immediate control of the firearm must occur while Scott was "participating" in the crime. Iowa Code § 124.401(1)(e); *see State v. Oetken*, 613 N.W.2d 679, 685 (Iowa 2000) (stating the State is not required to prove an affirmative act linking the weapon to the furtherance of the drug operation under Iowa's enhancement statute); *State v. Eickelberg*, 574 N.W.2d 1, 6 (Iowa 1997). A person participates in a crime beginning with the first act done toward the commission of the crime

and ending with the arrest. Iowa Code § 702.13. Thus, to support the enhancement there only had to be sufficient evidence from which a reasonable jury could find Scott had immediate control of the firearm at some point starting from the first act of the conspiracy until his arrest on September 17, 2007. We conclude there is substantial evidence in the record to support Scott's immediate control of a firearm while participating in the conspiracy to sell pounds of marijuana.

II. Ineffective Assistance of Counsel.

Scott argues his trial counsel was ineffective for not objecting to the State's firearm enhancement amendment at the close of all the evidence as a surprise amendment affecting his trial strategy. Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). We prefer to leave ineffective-assistance-of-counsel claims for postconviction relief proceedings to enable full development of the record and to afford trial counsel an opportunity to respond. *State v. Lopez,* 633 N.W.2d 774, 784 (Iowa 2001). "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). Because we find the record insufficient to address Scott's ineffective assistance/trial strategy issue on direct appeal, we reserve his claim for possible postconviction relief proceedings.

Accordingly, we affirm Scott's conviction and sentence and preserve his ineffective assistance of counsel claim.

AFFIRMED.