IN THE COURT OF APPEALS OF IOWA

No. 6-126 / 94-1984

STATE OF IOWA,

Plaintiff-Appellee,

vs.

TERRY (NMN) McGEE,

Defendant-Appellant.

FILED
JUN 27 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

Defendant appeals his convictions and sentences for one count of possession with intent to deliver a controlled substance and one count of failure to affix a drug tax stamp. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Kevin Cmelik, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly A. Griffith, Assistant County Attorney, for appellee.

Considered by Habhab, P.J., and Cady and Huitink, JJ.

HABHAB, P.J.

Defendant Terry McGee appeals his convictions and sentences for one count of possession with intent to deliver a controlled substance and one count of failure to affix a drug tax stamp. He argues: 1) the trial court erred in using the term "dealer" in instructing the jury; 2) the trial court abused its discretion in allowing the State to inquire into a matter on recross-examination which was not raised during the redirect examination; 3) the trial court abused its discretion in not granting defendant a suspended sentence: and 4) trial counsel was ineffective in failing to investigate the availability of an exculpatory witness. We affirm with respect to the first three issues and preserve the fourth for postconviction proceedings.

I. Jury Instructions 17 and 18. Defendant was convicted of one count of possession with intent to deliver a controlled substance (crack cocaine) in violation of Iowa Code sections 124.401(1)(c) and 902.9(3) (1993), and one count of failure to affix a drug tax stamp in violation of sections 453B.12 and 902.9(4) (1993). Defendant argues the trial court erred when it instructed the jury regarding the latter charge. He contends it was error for the court in instructing the jury on the elements of the offense, to use the term "dealer" in Instructions 17[1] and 18[2] instead of the term

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[1] Instruction No. 17.

In order to convict the defendant, Terry McGee, of the crime of Failure to Affix a Drug Tax Stamp, the State must prove both of the following elements:

1. On or about the 1st day of February, 1994, the defendant was a dealer as defined in Instruction 18.

"defendant" as used in uniform Iowa Criminal Jury Instruction 2310.1.[3] He alleges

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2. The defendant possessed 10 or more dosage units of cocaine base without affixing the appropriate tax stamp.

If the State has proved both of these elements, the defendant is guilty of the crime of Failure to Affix a Drug Tax Stamp. If the State has failed to prove either of these elements, the defendant is not guilty.

[2] Instruction No. 18.

A "dealer" is any person who ships, transports, or imports into this state or acquires, purchases or possesses 10 or more dosage units.

A "taxable substance" means a controlled substance or a mixture of materials containing a controlled substance.

You are advised that the definitions in this instruction are applicable only to the charge of Failure to Affix a Drug Tax Stamp and should not be used in deciding the defendant's guilt or innocence on any other offense charged.

[3] Uniform Iowa Criminal Jury Instruction 2310.1

Drug Stamp Tax Violation - Elements. The State must prove each of the following elements of Drug Stamp Tax Violation.

1 On or about the _____ day of _____, 19____, the defendant knowingly [possessed] [distributed] [offered to sell] a taxable substance as defined in Instruction No ____.

2. Defendant [[shipped] [transported] [imported] into this state] [[acquired] [purchased] [possessed] [manufactured] [produced] in this state].

a. Seven or more grams of [a taxable substance, (name of substance)] [a mixture of marijuana and other taxable substances].

b. Forty-two and one-half grams or more of a substance consisting of or containing marijuana.

c. Ten or more dosage units of a taxable substance not sold by weight.

3. The taxable substance that defendant [possessed] [distributed] [offered to sell] did not have permanently affixed to it a stamp, label or other official indication of payment of the state tax imposed on the substance.

If the State has proved each of these elements, the defendant is guilty of violating the Iowa Drug Stamp Tax law. If the State has failed to prove one or more of the elements, the defendant is not guilty (and you will then consider the charge of _____, as explained in Instruction No. ____).

the use of the word "dealer" was pejorative and unduly influenced the jury with respect to the other charge of possession with intent to deliver.

The term "dealer" is specifically used and defined in Iowa's drug tax stamp laws. Iowa Code § 453B.1(3), .3, .12 (1993). Instruction 17 was consistent with section 453B.3[4] and instruction 18 was consistent with the definition of "dealer" set forth in section 453B.1(3).[5] Trial courts have broad discretion in the language that may be chosen to convey a particular idea to a jury. *Stringer v. State*, 522 N.W.2d 797, 800 (Iowa 1994). Unless the choice of words results in an incorrect statement of law or omits a matter essential for the jury's consideration, no error results. *Id.*

Instructions 17 and 18 encompassed the statutory elements of the offense and it was not erroneous to use the term "dealer" as used in the statutes. Instruction 18 instructed the jury not to use the drug tax stamp definition of the term "dealer" in determining guilt or innocence on the separate charge of possession with intent to deliver. A jury is presumed to have followed the court's instructions absent evidence to the contrary. *State v. McMullin*, 421 N.W.2d 517, 520 (Iowa 1988). The trial court did not err in utilizing the statutory term "dealer" in instructions 17 and 18.

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[4] "A dealer shall not possess, distribute, or offer to sell a taxable substance unless the tax imposed under this chapter has been paid as evidenced by a stamp, label, or other official indicia permanently affixed to the taxable substance. . . ." Iowa Code § 453B.3 (1993).

[5] "'Dealer' means any person who ships, transports, or imports into this state or acquires, purchases, possesses, manufactures, or produces in this state any of the following: . . . ." Iowa Code § 453B.1(3) (1993).

II. Recross-Examination. Defendant argues the trial court erred in allowing the State to inquire into matters on recross-examination which were beyond the scope of the previous redirect examination. Specifically, he argues the State asked questions about how he obtained the funds to purchase his car, an issue not raised during the prior redirect-examination.

Iowa Rule of Evidence 611(b) provides:

> *Scope of cross-examination.* Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

While rule 611(b) does not specifically address the scope of recross-examination, it is generally proper to limit recross-examination to matters testified to upon redirect-examination. *See* 81 Am. Jur. 2d *Witnesses* § 851 (1992). The privilege of recross-examination as to matters not covered on redirect examination lies within the trial court's discretion. *Id.*

Ordinarily, the scope of cross-examination is within the trial court's discretion. We reverse only for an abuse of discretion, and then only if it appears prejudice resulted. *Avery v. Harms Implement Co.*, 270 N.W.2d 646, 649 (Iowa 1978). "[T]he State is privileged to cross-examine the defendant as to his previous history, his prior conduct, habits, and ways of living, as affecting his credibility, and for the purpose of impeaching him." *State v. Bittner*, 209 Iowa 109, 118, 227 N.W. 601, 605 (1929).

We find no abuse of discretion in allowing the State to inquire about the funds defendant used to acquire his car. Defendant concedes in his brief the State's questions were directed toward his credibility, and cross-examination on such matters is expressly allowed under rule 611(b). Even if the questioning did not bear directly on the issue of credibility, it was a relevant additional matter within the court's discretion to allow.

When stopped by the police officer, defendant had a vehicle which bore a temporary paper license, an indication it had been recently purchased. On cross-examination defendant had been extensively questioned about his sporadic work history and his hourly rate of pay. To the extent these questions bore on defendant's credibility and sources of income, they were proper subjects of recross-examination even though not raised during the redirect examination.

III. Sentencing. The trial court sentenced defendant to a term not to exceed ten years on the possession charge and five years on the drug tax stamp charge, with the sentences to be served concurrently. Defendant argues the trial court abused its discretion in sentencing him to prison rather than granting him a suspended sentence. He contends he should have been given a suspended sentence since he had no prior felony convictions.

A trial court has considerable discretion in sentencing. *State v. LeGrand*, 501 N.W.2d 59, 64 (Iowa App. 1993). "There is a strong presumption in favor of a sentence given by a trial court that is rebutted only by an affirmative showing of an

abuse of discretion." *Id.* The burden of showing an abuse of discretion is on the defendant. *Id.*

A review of the sentencing transcript reveals the court considered all of the relevant sentencing factors, including the needs of defendant. Of particular importance to the court's decision to sentence defendant to prison were his lack of direction in life and the type and quantity of the drug involved. Given this record, we find no abuse of discretion in the imposition of a prison sentence rather than a suspended sentence.

IV. Ineffective Assistance of Counsel. Defendant argues his trial counsel was ineffective for failing to make an investigation of a potentially exculpatory witness. Defendant testified some of the money found in his possession when arrested belonged to his uncle and he claims had his uncle been called to testify his testimony would have corroborated that of defendant and would have been exculpatory in nature.

Defendant acknowledges the record is insufficient to address this issue on direct appeal and requests this issue be preserved for a later postconviction relief action. Generally, claims of ineffective assistance of counsel are preserved for postconviction proceedings. *See State v. Mulder*, 313 N.W.2d 885, 890 (Iowa 1981), *cert. denied* 459 U.S. 841 (1982); *State v. Nebinger*, 412 N.W.2d 180, 191-92 (Iowa App. 1987). Preserving the matter for postconviction relief allows the facts to be developed and gives the allegedly ineffective attorney an opportunity to explain his

or her conduct, strategies, and tactical decisions. *See State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978).

The failure to investigate the availability of exculpatory evidence can constitute ineffective assistance. *See Origer v. State*, 495 N.W.2d 132, 135 (Iowa App. 1992). Trial counsel may have investigated the availability of defense witnesses and found none existed or their testimony was not exculpatory. We conclude the record is not sufficient to address this claim and preserve it for postconviction proceedings.

AFFIRMED.